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The Constitutionality of the North Carolina Control Share Acquisition Act

In 1987, with the move of RJR Nabisco's headquarters out of North Carolina,[1] USAir's purchase of Winston-Salem-based Piedmont Airlines,[2] and the attempted takeover of Greensboro-based Burlington Industries,[3] North Carolina began to feel the effects of what has been labeled the "fourth major merger wave since the turn of the century."[4] The environment of hostile takeovers and corporate mergers has prompted statutory responses both at the federal and state level. In 1968, for example, in an effort to regulate corporate takeovers and to ensure fundamental fairness to the parties involved, Congress enacted the Williams Act.[5] States also responded to the increase in takeovers by enacting state takeover statutes.[6] Partly in response to the 1987 attempted takeover of Bur-

1. Raleigh News & Observer, Apr. 29, 1987, at 1A, col. 1.

2. Wall St. J., Nov. 5, 1987, at 14, col. 5.

3. Raleigh News & Observer, Apr. 29, 1987, at 1A, col. 1.

4. STAFF OF JOINT COMM. ON TAXATION, FEDERAL INCOME TAX ASPECTS OF HOSTILE TAKEOVERS AND OTHER CORPORATE MERGERS AND ACQUISITIONS, 99th Cong., 1st Sess. 2 (1985). Merger, used herein as a nontechnical term, means any acquisition or takeover of one corporation by another corporation or other person. *Id.* at 2 n.2.

5. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)). The Williams Act added §§ 13(d)-(e) and 14(d)-(f) to the Securities Exchange Act of 1934.

Section 13(d) focuses on open market and privately negotiated acquisitions of securities subject to the 1934 Act. Section 13(d) requires owners of five percent or more of any class of securities subject to the 1934 Act to file a schedule 13D with the SEC within 10 business days after reaching the five percent threshold. The schedule must contain information including the offeror's background and identity; the extent of the offeror's ownership in the company; financing arrangements for the acquisition; and if the offeror intends to take control of the target company, any future plans for the target such as liquidation, sale of assets, merger, or any change in the company's business. 15 U.S.C. § 78m(d)(1); 17 C.F.R. §§ 240.13d-1 to -101 (1987).

Section 14(d) focuses on "tender offers" for securities subject to the 1934 Act. In addition to the 13(d) filing, § 14(d) requires that an offeror who acquires more than five percent of any class of securities through a tender offer must file a statement similar to that required under § 13(d). Additional information must be provided, including disclosure of any past transactions with the target company, any antitrust or other legal conflicts relating to the tender offer, and other material information about the offeror. The offeror must provide relevant information disclosed under § 14(d) to shareholders of the target company. 15 U.S.C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 C.F.R. §§ 140.14d-3 to -100 (1987).

In addition to filing and disclosure requirements, the Williams Act contains provisions intended to protect shareholders of the target company. First, a tender offer must remain open for at least 20 business days. 17 C.F.R. § 240.14e-1(a) (1987). Second, tendering shareholders can withdraw their shares during the period the offer remains open. 15 U.S.C. § 78n(d)(5); 17 C.F.R. § 240.14d-7(a) (1987). Third, if the shares tendered within 10 days outnumber the offer, the offeror must purchase those shares on a pro rata basis from each tendering shareholder. 15 U.S.C. § 78n(d)(6); 17 C.F.R. § 240.14(d)(8) (1987). Fourth, if the offeror increases the offer price before the expiration of the offer, the offeror must pay the higher price to all tendering shareholders. 15 U.S.C. § 78n(d)(7). Fifth, § 14(e) contains an antifraud provision that prohibits fraud, deceit, and material misrepresentation, or omission by the offeror, target company, or any other person. *Id.* § 78n(e); 17 C.F.R. § 240.14e-1 to -3 (1987); CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1644 (1987); T. HAZEN, THE LAW OF SECURITIES REGULATION §§ 11.10-.15 (1985 & Supp. 1988).

6. For example, North Carolina in 1977 enacted its first takeover statute, the Tender Offer Disclosure Act. N.C. GEN. STAT. §§ 78B-1 to -11 (1985); *see* Comment, *The North Carolina Tender Offer Disclosure Act: Congenitally Defective?*, 14 WAKE FOREST L. REV. 1035 (1978); Note, *Securities Regulation: The Validity of North Carolina's Tender Offer Disclosure Act*, 19 WAKE FOREST L. REV. 267 (1983).

lington Industries, a Delaware corporation based in Greensboro, North Carolina, the North Carolina General Assembly passed two takeover statutes:[7] the North Carolina Control Share Acquisition Act[8] and the North Carolina Shareholder Protection Act[9]. If valid, these statutes will increase the difficulty of accomplishing hostile takeovers of North Carolina-based corporations.

This Note describes the scope and effect of the North Carolina Control Share Acquisition Act and analyzes the impact of the recent United States Supreme Court decision in *CTS v. Dynamics Corp. of America*,[10] which upheld the constitutionality of a comparable Indiana statute. It analyzes the constitutionality of the North Carolina Act and calls attention to two provisions of the Act: the friendly offer provision, which exempts management-approved acquisitions from the Act, and the Act's extraterritorial feature, which applies to certain foreign corporations doing business in North Carolina. In light of the *CTS* decision, this Note concludes that these two provisions are unconstitutional violations of the Williams Act and the commerce clause of the United States Constitution. The Note recommends solutions to the constitutional problems raised by these two provisions.[11]

The North Carolina Control Share Acquisition Act is a takeover statute based on a voting rights model: it does not directly prohibit the purchase of shares, but it gives shareholders the ability to deny voting rights of certain shares purchased by investors.[12] The Act also includes a share redemption feature that allows shareholders to redeem their shares at a fair value if an investor obtains a majority of voting power in corporate stock.[13]

As defined in the North Carolina Control Share Acquisition Act, an investor makes a "control share acquisition" whenever he purchases shares of an

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7. *See* Hazen, *Corporate Directors' Accountability: The Race to the Bottom—The Second Lap*, 66 N.C.L. REV. 171, 180 (1987); Raleigh News & Observer, Sept. 18, 1987, at 1A, col. 5 (Burlington reported paying at least $200,000 to North Carolina lobbyists to promote takeover legislation). One commentator noted:

> The only groups who are active in the enactment of second generation takeover statutes are business organizations and the bar. The statutes proceed through state legislatures at an extraordinarily rapid pace, with virtually unanimous bipartisan support, at the behest of the local business community and, most frequently, one concerned firm. This data supports what I term a putting-out-fires explanation of the enactment of takeover legislation, in which legislators simply react to a constituent's immediate concrete demands.

Romano, *The State Competition Debate In Corporate Law*, 8 CARDOZO L. REV. 709, 727 (1987).

8. North Carolina Control Share Acquisition Act, ch. 182, 1987 N.C. Adv. Legis. Serv. 48 (codified at N.C. GEN. STAT. §§ 55-90 to -98 (Cum. Supp. 1987)), ch. 773, § 12, 1987 N.C. Adv. Legis. Serv. 426 (codified at N.C. GEN. STAT. § 55-98.1 (Cum. Supp. 1987)).

9. North Carolina Shareholder Protection Act, ch. 88, 1987 N.C. Adv. Legis. Serv. 70 (codified at N.C. GEN. STAT. §§ 55-75 to -79 (Cum. Supp. 1987)), ch. 124, 1987 N.C. Adv. Legis. Serv. 1 (codified as amended at N.C. GEN. STAT. §§ 55-75, -79.1, -80 (Cum. Supp. 1987)). This Note focuses only on the North Carolina Control Share Acquisition Act. For a discussion of the North Carolina Shareholder Protection Act, see Note, *The North Carolina Shareholder Protection Act*, 66 N.C.L. REV. 1146 (1988).

10. 107 S. Ct. 1637 (1987).

11. This Note does not attempt to discuss the economic aspects of the statute.

12. *See* N.C. GEN. STAT. § 55-94 (Cum. Supp. 1987); *infra* notes 25-27 and accompanying text; Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 481-83 (1987).

13. N.C. GEN. STAT. § 55-95 (Cum. Supp. 1987); *see infra* notes 32-34 and accompanying text.

issuing corporation that would entitle him to voting power equal to or greater than one-fifth, one-third, or one-half of all voting power in the corporation.[14] The high threshold voting percentages ensure that the Act is triggered only when an investor acquires enough stock to enable him to effectuate a change in corporate control. Because a control share acquisition is defined solely in terms of the voting power that would be attributed to the control shares, the Act applies to virtually every type of stock purchase including tender offers, open market purchases, and privately negotiated purchases.[15]

The Act applies to both in-state and out-of-state "issuing public corporations," which are defined as meeting four statutory criteria:

"Issuing public corporation" means a corporation that:

a. Is incorporated under the laws of:
   (i) North Carolina and has substantial assets within North Carolina; or
   (ii) Any other state of the United States, and:
      (A) As of the end of each of its two most recent fiscal years and most recent fiscal quarter has more than forty percent (40%) of its fixed assets that are located in the United States located within North Carolina; and
      (B) More than forty percent (40%) of the persons employed by such corporation in the United States are residents of North Carolina;

b. Has 500 or more shareholders,

c. Has its principal place of business or principal office within North Carolina, and

d. Has either:
   (i) More than ten percent (10%) of its shareholders resident in North Carolina; or
   (ii) More than ten percent (10%) of its shares owned by North

14. N.C. GEN. STAT. § 55-90(b)(2), (b)(3) (Cum. Supp. 1987). For example, assume an investor owns no stock in North Carolina corporation X and he purchases 15% of corporation X's outstanding shares. The North Carolina Control Share Acquisition Act is not applicable to this purchase because no threshold has been broken. If the investor then purchases an additional 10% of stock, that purchase would bring his ownership total to 25%, breaking the one-fifth (20%) threshold set by the Act. The purchase of the additional 10% of stock is considered a control share acquisition and only that 10% stock is subject to the Act. Next assume the investor adds 5% to his existing 25% stock ownership. The 30% total does not break the next threshold of one-third (33%) and, therefore, the 5% purchase is not subject to the Act. If the investor's last purchase is 25%, his total ownership of 55% breaks the one-half (50%) threshold, thereby subjecting the last 25% purchase to the Act. Compare North Carolina Act's high threshold requirements for tender offers to the lower 5% threshold requirement of the Williams Act. *See* 15 U.S.C. § 78n(d)(1).

15. The Williams Act applies to the same type of stock purchases. *See supra* note 5. A tender offer is defined in the North Carolina Tender Offer Disclosure Act as:

> [A]n offer to purchase or invitation to tender, . . . made by an offeror, directly or indirectly, for such amount of any class of equity securities of a . . . company that, together with equity securities of such class owned beneficially or of record by the offeror and his associates at the time of the offer or invitation, will in the aggregate exceed five percent (5%) of the outstanding equity securities of such class.

N.C. GEN. STAT. § 78B-2(14) (1985).

Carolina residents.[16]

An issuing public corporation, whether domestic or foreign, by definition has a significant local business presence in the State and a substantial number of shareholders, some of whom are North Carolina residents. A significant and controversial aspect of the Act is its extraterritorial application to foreign corporations.[17]

Corporations otherwise covered by the Act can be exempted pursuant to two provisions. The first exemption allows a corporation's board of directors voluntarily to opt out of the Act.[18] The board of directors of "any corporation" existing on the effective date of the exemption section had ninety days to adopt bylaws that would opt the corporation out of the Act.[19] A corporation formed after the date of this exemption section is exempt if so stated in its initial articles of incorporation.[20]

The second exemption provision is a comity provision that only applies to foreign corporations.[21] A foreign corporation otherwise covered by the Act is automatically exempt when it would be subjected to inconsistent regulation.[22] This exemption provision attempts to reduce the risk of conflict between the law of two states whenever the foreign corporation's state of incorporation has a takeover law conflicting with the North Carolina Act.[23]

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16. N.C. GEN. STAT. § 55-90(b)(5) (Cum. Supp. 1987). Compare the scope of the North Carolina Act to the Williams Act, which applies to companies listed on a national exchange or which have 500 shareholders and over $5 million in assets. 15 U.S.C. 78*l*(a), (g)(1) (1982); 17 C.F.R. § 240.12g-1 (1987) (increasing asset requirement from $1 million to $5 million).

17. For a discussion of this extraterritorial feature of the Control Share Acquisition Act, see *infra* notes 128-71 and accompanying text. The other North Carolina takeover statute enacted in 1987, the Shareholder Protection Act, has a similar extraterritorial application. *See* N.C. GEN. STAT. § 55-75(b)(3a) (Cum. Supp. 1987).

18. N.C. GEN. STAT. § 55-98.1 (Cum. Supp. 1987).

19. *Id.* The exemption section was ratified three months after the rest of the Act. The 90-day opt out period ended on November 10, 1987. By using the phrase "any corporation," this section presumably applies to both domestic and foreign corporations covered by the Act.

20. *Id.* (This condition applies to any corporation formed after August 12, 1987). The first exemption section does not contain a provision either prohibiting or allowing a corporation's relationship to the Act to be altered once the board of directors makes its initial decision either to be covered by the Act or to opt out. However, it appears that a corporation initially opting out of the Act could opt back in by reincorporating and changing its articles of incorporation; similarly, a corporation that had not opted out could do so by reincorporating. If the intent of the North Carolina General Assembly was to allow a corporation only one chance either to opt out or to be covered by the Act, the language of the Act fails to promote this intent.

21. "In general, the principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

22. According to the statute,

> If any jurisdiction under the laws of which a foreign corporation is organized adopts any law containing provisions that are expressly inconsistent with the provisions of this Article as applicable to such foreign corporation, the provisions of this Article shall be inapplicable to such foreign corporation to the extent necessary to resolve such inconsistency.

N.C. GEN. STAT. § 55-96 (Cum. Supp. 1987). The requirement that another state's statute be "expressly inconsistent" raises the issue whether the absence of a conflicting law in the incorporating state due to the state's refusal to pass control share legislation could be seen as the incorporating state's expression that it does not believe its corporations should be subjected to such a takeover statute. If a state believes this, does the North Carolina Act require that state to pass a law expressing this belief before it becomes "expressly inconsistent" with the North Carolina Act?

23. *See* Sargent, *On The Validity of State Takeover Regulation: State Responses to* MITE *and*

When an investor makes a control share acquisition of corporate stock, the Act is designed to protect existing shareholders in two ways from the coercion that can accompany a change in the control of a corporation through stock ownership.[24] First, disinterested shareholders, as a group, have the power to decide whether voting rights will be accorded to control shares.[25] Voting rights do not accompany control shares unless a resolution to accord voting rights is "adopted by the affirmative vote of the holders of at least a majority of all the outstanding [disinterested] shares of the corporation."[26] The Act separates the transfer of the voting rights of a control share from the transfer of the share itself. Although the North Carolina Act does not prohibit the purchase of control shares, its effect is to condition acquisition of control of a corporation through the purchase of stock on approval of a majority of disinterested shareholders.[27]

Before shareholders determine the voting rights of control shares, they must be provided both with notice and information about the control share acquisition. The notice must include: (1) a copy of the investor's "acquiring person statement" setting forth information about the purchase,[28] (2) a statement by the corporation's board of directors of its position or recommendation on

Kidwell, 42 OHIO ST. L.J. 689, 726-27 (1981); *see also* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733, 754 (1979) ("If there is a conflict between the takeover law of the state of incorporation and that of any other state, both the commerce clause and full faith and credit seem to dictate that the law of the state of incorporation should control.").

24. *See CTS*, 107 S. Ct. at 1646 (citing *Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs*, Exchange Act Release No. 21,079 [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,637, at 86,916 (June 21, 1984)) (shareholders feel pressure to tender because if they do not and the offer is successful, nontendering shareholders assuredly will be forced to sell at a lower price, second step once offeror gains control); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 307-09 (1983) (same).

25. *See* N.C. GEN. STAT. § 55-94 (Cum. Supp. 1987). The right to decide the voting rights of control shares is not granted to anyone owning "interested shares." *Id.* § 55-94(b). An owner of interested shares is "[a]ny person who has acquired or proposes to acquire control shares[,] . . . [a]ny officer of the issuing public corporation[,] [or] [a]ny employee of the issuing public corporation who is also a director of the corporation." *Id.* § 55-90(b)(4)(a)-(c). This prohibition preserves the balance of power between management and offeror by not allowing either side to vote their own interests at the shareholder meeting. *See infra* notes 81-82 and accompanying text.

26. N.C. GEN. STAT. § 55-94(a), (b) (Cum. Supp. 1987). One criticism of basing control share voting rights on *majority* shareholder approval is that not all shareholders necessarily are protected. If 51% of disinterested shareholders deny voting rights to control shares and thereby halt a tender offer, the 49% minority who wanted to tender shares, probably at a premium, are denied that right. *See CTS*, 107 S. Ct. at 1654 (White, J., dissenting).

At each threshold, a new shareholder vote to determine voting rights of the newly acquired shares would be required. The voting rights previously accorded or denied control shares at lower threshold levels are not affected by a subsequent vote at a higher threshold level. *See* N.C. GEN. STAT. § 55-94 (Cum. Supp. 1987).

27. *See CTS*, 107 S. Ct. at 1641 (referring to identical provision in Indiana Control Share Acquisitions Chapter, IND. CODE ANN. § 23-1-42-9(b) (Burns Supp. 1987)).

28. N.C. GEN. STAT. § 55-91 (Cum. Supp. 1987). The acquiring person statement must set forth the investor's identity, a provision that the statement is given pursuant to the Act, the number of shares of the issuing public corporation owned by investor, and the level of voting power that would accrue with the purchase of the shares. If an *offer* to make a control share acquisition has been made, as opposed to a completed control share purchase, the statement must also include terms of the acquisition and representations that acquisition will not be contrary to law and that the offeror has the financial capacity to make the acquisition. *Id.* These requirements are similar to those of the Williams Act. *See supra* note 5.

granting voting rights to the control shares,[29] and (3) a statement describing shareholder redemption rights if such rights exist.[30] The notice provision protects shareholders by providing them with information to make an informed decision while maintaining the balance of power between management and acquiror by giving each party a chance to state its position.[31]

The second protection afforded shareholders under the Act is a right of redemption provision. If the holders of control shares obtain a majority of all voting power, shareholders can require the issuing corporation to redeem shares at a fair value.[32] "Fair value" is measured as of the day prior to the date on which the shareholder vote accorded voting rights to control shares, but it is "a value not less than the highest price paid per share by the acquiring person in the control share acquisition."[33] The fair value measurement ensures that shareholders who exercise their redemption rights are not forced to sell at a price lower than the highest price paid by the acquiror, as is often the case in a tender offer.[34]

If many shareholders exercise their redemption right, a control share acquisition can be expensive and burdensome to the corporation and consequently to holders of control shares.[35] An investor contemplating ownership of a majority of shares might be deterred if shareholders holding a large number of shares reserve the right to redeem shares and the corporation does not have the financial strength to redeem shares at the highest price offered by the investor. Inasmuch as the redemption provision makes a control share acquistion more costly, it acts as a deterrent to the acquisition of a majority of shares and thus aids existing management in repelling unwanted control share acquisitions.[36]

Two other aspects of the redemption provision are worth noting. First, the redemption section applies when "*holders* of the control shares have a majority of all voting power. . . ."[37] By referring to "holders" in the plural, the statute implies that the redemption provision can be triggered when no single investor

29. N.C. GEN. STAT. § 55-93(2) (Cum. Supp. 1987).

30. *Id.* § 55-93(3); *see infra* notes 32-34 and accompanying text.

31. *See CTS*, 107 S. Ct. at 1646; Edgar v. MITE Corp., 457 U.S. 624 (1982) (invalidating corporate antitakeover statute that, *inter alia*, allows management to communicate to shareholders without giving offeror chance to communicate); *infra* notes 81-82 and accompanying text.

32. N.C. GEN. STAT. § 55-95(a), (b), (d) (Cum. Supp. 1987). Redemption rights are triggered if four criteria are met: (1) control shares are accorded voting rights; (2) holders of control shares have a majority of all voting power; (3) the shareholder, prior to or at a shareholder meeting to accord voting rights, provides written notice that he may exercise his right of redemption; and (4) the shareholder exercises his redemption right by written demand within 30 days after receipt of notice that the redemption right exists. *Id.* When holders of control shares have less than a majority of voting power, no redemption rights exist under the Act. *See id.* § 55-95(a).

33. *Id.* § 55-95(a), (e); *cf.* N.C. GEN. STAT. § 55-113 (1982) (fair value for dissenters' rights under North Carolina Business Corporation Act does not have to meet the stricter "highest price paid" standard).

34. *See supra* note 24.

35. The closer the acquisition approaches 100% of outstanding shares, the less of a problem this becomes.

36. *See infra* notes 50-56 and accompanying text (discussing benefit of redemption provision to management); *infra* notes 42-49 and accompanying text (discussing burden to acquiror).

37. N.C. GEN. STAT. § 55-95(a) (Cum. Supp. 1987) (emphasis added).

has a majority of voting power.[38] For example, redemption rights would accrue if three separate investors each own control shares equalling twenty percent of the voting power (each owns less than a majority). The three would be "holders" and their shares would be aggregated. Their control share total, as a group, would be a sixty percent majority and shareholders could exercise their redemption rights.

Second, the redemption provision applies to all shareholders "other than holders of control shares. . . ."[39] Therefore, two of the three groups defined as interested shareholders[40]—officers of the issuing corporation owning shares, and employees who are also directors and own shares—can exercise redemption rights as long as they do not own control shares. Although interested shareholders cannot participate in granting voting rights to control shares,[41] some interested shareholders can utilize the redemption provision.

The process established by the North Carolina Act designed to protect shareholders in a control share acquisition is to the detriment of the acquiror of control shares. Voting rights do not automatically accompany control shares,[42] and the right of redemption provision can make a control share acquisition economically unattractive.[43] The Act also imposes certain disclosure and waiting requirements on the acquiror before voting rights can be determined by shareholders.

When a person makes or offers to make a control share acquisition,[44] he *must* deliver an "acquiring person statement" to the issuing public corporation before shareholders determine the voting rights of the control shares.[45] Voting rights are then determined at the next annual or special shareholder meeting.[46] However, on delivery of the acquiring person statement, the investor can require the issuing corporation to call a special meeting of shareholders within fifty days to determine the voting rights of the control shares so long as the investor pays

38. The Act again refers to the plural, "persons," when it requires the corporation to provide notice of shareholder redemption rights after "control shares held by *persons* having a majority of all voting power . . . have been accorded voting rights. . . ." *Id.* § 55-95(c) (emphasis added).

39. *Id.* § 55-95(a).

40. *See id.* § 55-90(b)(4) (defining interested shareholders); *supra* note 25.

41. N.C. GEN. STAT. § 55-94(b) (Cum. Supp. 1987); *see supra* note 25 and accompanying text.

42. N.C. GEN. STAT. § 55-94(a) (Cum. Supp. 1987).

43. *See id.* § 55-95 (Cum. Supp. 1987); *supra* notes 35-36 and accompanying text.

44. "[S]hares acquired within any consecutive 90-day period or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition." N.C. GEN. STAT. § 55-90(b)(3)(f) (Cum. Supp. 1987). Notwithstanding the foregoing, the voting rights of shares previously owned by an investor are not affected by this Act.

45. N.C. GEN. STAT. § 55-91 (Cum. Supp. 1987). Section 55-91 states that the acquiring person "may at the person's election deliver an acquiring person statement to the issuing . . . corporation. . . ." Although this provision grants discretion to the acquiror, if the acquiror wants shareholders to determine the voting rights of his control shares, he *must* deliver the statement to meet the requirements of other sections of the Act. *See, e.g., id.* § 55-93(1) (requiring acquiring person statement to be sent to shareholders before shareholder meeting to determine voting rights); *see also supra* note 28 (explaining elements of acquiring person statement).

46. N.C. GEN. STAT. § 55-92(c) (Cum. Supp. 1987).

the costs of that meeting.[47]

The fundamental reason an investor makes a control share acquistion is to secure the voting rights of those shares.[48] If an investor makes a control share acquisition and the control shares are not accorded voting rights, the only options are to hold the nonvoting shares or immediately resell them. Either of these options is unattractive and costly to an investor. Therefore, unless an acquiror of control shares has great confidence that the shares will be accorded voting rights, a more prudent approach would be to make a conditional offer to purchase the control shares, conditioned on the shares receiving voting rights.[49] Without the confidence of shareholder approval, the Act effectively forces an investor to make a conditional tender offer for corporate control and deters him from making an open market purchase of control shares before voting rights are decided.

Although the Act is designed to protect shareholders from the coercive nature of control share acquisitions, there is evidence that the impetus for the takeover legislation was to protect incumbent management from hostile acquisitions.[50] Whenever a substantial change in corporate control via stock ownership occurs, existing management faces the risk of being ousted. Any provision of the North Carolina statute that hinders a takeover attempt, in the name of shareholder protection, protects incumbent management as well.[51] The Act potentially delays, deters, or prevents control share acquisitions by conditioning voting rights of control shares on majority shareholder approval,[52] by allowing management to delay fifty days before holding a shareholder meeting to determine voting rights,[53] and by forcing the corporation to redeem shares at a "fair value" if a majority of control shares are accorded voting rights.[54]

The Act's "friendly offer" exemption also protects incumbent management by exempting a control share acquisition from the Act if management is a party to the agreement.[55] This exemption directly benefits incumbent management

47. *Id.* § 55-92(a)-(b). See *infra* note 86 and accompanying text for a discussion of the 50-day requirement as it relates to the Williams Act.

The acquiring person can also require that the special meeting not be held sooner than 30 days after the request. N.C. GEN. STAT. § 55-92(d) (Cum. Supp. 1987). This ensures that the acquiror can comply with the Williams Act requirement that a tender offer be held open for at least 20 business days, if the control share acquisition falls under the scope of the Williams Act. *See* 17 CFR § 240.14e-1 (1987); *supra* note 5.

48. *See* Pinto, *supra* note 12, at 486.

49. *See CTS*, 107 S. Ct. at 1647; N.C. GEN. STAT. § 55-91 (Cum. Supp. 1987) (Act applies to bona fide written offers).

50. *See supra* note 7 and accompanying text.

51. *See* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 725 (1970); *see also* Edgar v. MITE Corp., 457 U.S. 629, 637-38 & nn.12-13 (1982) (showing various defensive measures management can take to hinder a takeover between time of offer and consummation of takeover).

52. *See* N.C. GEN. STAT. § 55-94 (Cum. Supp. 1987).

53. *See id.* § 55-92(b).

54. *See id.* § 55-95.

55. *Id.* § 55-90(b)(3)(e), (f). The Act does not apply when a control share acquisition occurs pursuant to (1) "a tender offer, merger or plan of consolidation . . . to which the issuing public corporation is a party," *id.* § 55-90(b)(3)(e), or (2) "the sale of [control] shares by the issuing public corporation," *id.* § 55-90(b)(3)(f).

because it allows management to choose a friendly purchaser, one who is pro-management, and insulates the transaction from the Act. Thus, shareholders are deprived of the power to decide voting rights of the control shares when management is party to an acquisition. If the Act is intended to protect shareholders, the friendly offer exemption contradicts that intention.[56]

As the evolution of state takeover statutes occurs, generally each generation becomes more sophisticated in avoiding the faults of earlier statutes. Generally, the first generation state takeover statutes provided state officials broad powers to require disclosure material additional to that required by the Williams Act and to determine the fairness of a tender offer; they often had an extraterritorial feature applying not only to corporations incorporated in-state, but also to out-of-state corporations; and they often extended the time periods prescribed by the Williams Act.[57] Most of these statutes were held unconstitutional as an unreasonable burden on interstate commerce in the United States Supreme Court decision of *Edgar v. MITE Corp.*[58]

After *MITE*, a second generation of state takeover statutes were enacted to avoid the problems of first generation statutes. Some of these state takeover statutes regulate tender offers either by requiring that all shareholders receive the same price for their shares or by giving shareholders the power to approve the acquisition of their shares or other acquisitions.[59] These types of takeover models "often [have] a direct impact on the acquisition of shares in a corporation through a tender offer."[60] Another type of state takeover statute differs from other statutes because it does not directly affect the acquisition of stock.[61] Instead, it allows tender offers to occur, "but severely limit[s] the offeror's rights in the corporation."[62]

In April 1987 the United States Supreme Court upheld the validity of Indiana's Control Share Acquisitions Chapter[63] in *CTS v. Dynamics Corp. of America*.[64] The Indiana Act is patterned after the third type of state takeover statute mentioned above and is characterized as a voting rights statute with a share redemption feature, similar to the North Carolina Control Share Acquisition Act.[65]

On March 5, 1986, Indiana enacted its Control Share Acquisitions Chap-

56. *See infra* notes 117-23 and accompanying text.

57. Pinto, *supra* note 12 at 474; *see supra* note 5.

58. *MITE*, 457 U.S. 624 (1982); *see also* Sargent, *supra* note 23, at 692-93 (discussing history of takeover statute cases up to *MITE*).

59. Pinto, *supra* note 12, at 474, 478-81.

60. Pinto, *supra* note 12, at 474; *see* Warren, *Developments in State Takeover Regulation:* MITE *and Its Aftermath*, 40 BUS. LAW. 671 (1985); Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3 (1985).

61. Pinto, *supra* note 12, at 474.

62. Pinto, *supra* note 12, at 481-82.

63. Indiana Control Share Acquisitions Chapter, Pub. L. No. 149-1986, § 26, 1986 Ind. Acts 1453 (codified at IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Supp. 1987)).

64. 107 S. Ct. 1637 (1987).

65. *See* IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Supp. 1987); *accord* N.C. GEN. STAT. §§ 55-90 to -98.1 (Cum. Supp. 1987).

ter.[66] A week later, Dynamics Corporation of America (Dynamics) announced a tender offer for a million shares of common stock in CTS Corporation (CTS), an Indiana corporation.[67] The acquisition would have increased Dynamics' ownership interest in CTS from less than ten percent to more than twenty-seven percent.[68] On March 27, 1986, the board of directors of CTS opted into the Indiana Act, thereby subjecting Dynamics' tender offer to the Act.[69]

Dynamics brought suit alleging that the Indiana Act was preempted by the federal Williams Act[70] and that the Act violated the commerce clause of the United States Constitution.[71] The district court ruled in favor of Dynamics on both issues[72] and the United States Court of Appeals for the Seventh Circuit affirmed.[73] The United States Supreme Court reversed the lower court's decision.[74] In a two-part analysis, the Court held that the Indiana Control Share Acquisitions Chapter was not preempted by the Williams Act[75] and that the Indiana Act did not violate the commerce clause.[76]

The Supreme Court, using the standard Williams Act preemption analysis, focused on whether the Indiana statute acted as an obstacle to effectuate the purpose of the Williams Act.[77] The *CTS* Court recognized that the primary purpose of the Williams Act was to protect shareholders from the coercive nature of some tender offers.[78] By allowing shareholders to decide as a group on the voting rights of control shares,[79] the Indiana Act was regarded as furthering a basic purpose of the Williams Act, which was to "place investors on an equal footing with the takeover bidder."[80]

66. Indiana Control Share Acquisitions Chapter, Pub. L. 149-1986, § 26, 1986 Ind. Acts 1453 (codified at IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Supp. 1987)).

67. *CTS*, 107 S. Ct. at 1642.

68. *Id.* Pursuant to the Indiana Act, Dynamics' acquisition would be considered a control share acquisition that broke the 20% threshold. The Indiana Act established three threshold requirements of 20%, 33.3% and 50%, identical to the North Carolina Act. *See* IND. CODE ANN. § 23-1-42-1 (Burns Supp. 1987); *accord* N.C. GEN. STAT. § 55-90(b)(2) (Cum. Supp. 1987); *see supra* note 14 and accompanying text.

69. *CTS*, 107 S. Ct. at 1642; *see* IND. CODE ANN. § 23-1-17-3(b) (Burns Supp. 1987) (providing an opt-in provision for Indiana corporations existing before statute enacted); N.C. GEN. STAT. § 55-98.1 (Cum. Supp. 1987) (similar opt-in provision).

70. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

71. The commerce clause provides, "The Congress shall have Power . . . to regulate Commerce . . . among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3.

72. Dynamics Corp. of Am. v. CTS Corp., 637 F. Supp. 389 (N.D. Ill.), *aff'd*, 794 F.2d 250 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987).

73. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987).

74. *CTS*, 107 S. Ct. at 1652.

75. *Id.* at 1648.

76. *Id.* at 1652.

77. *Id.* at 1644. The Williams Act would preempt the Indiana Act only if (1) Congress explicitly indicated an intent in the Williams Act to preempt state law, or (2) compliance with both the Williams Act and the Indiana Statute was a physical impossibility, or (3) the Indiana Act frustrated the purpose of the Williams Act. The first and second factors were summarily dismissed by the Court as not applicable to the Indiana Act. *Id*; *see* Sargent, *supra* note 23, at 703-04 (setting out standard sequence of Williams Act preemption analysis).

78. *CTS*, 107 S. Ct. at 1645-46; *see supra* notes 5, 24 and text accompanying note 34.

79. *See* IND. CODE ANN. § 23-1-42-7 (Burns Supp. 1987).

80. *CTS*, 107 S. Ct. at 1645-46 (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 30 (1977)); *see*

In passing the Williams Act, Congress also recognized that shareholder protection included preserving the neutrality between offeror and management. Congress was careful to avoid "tipping the balance of regulation either in favor of management or in favor of the [offeror]."[81] The *CTS* Court reasoned that the Indiana Act did not upset the balance of power between the two contending parties (offeror and management) in a tender offer.[82] Contrary to the Illinois Business Take-Over Act, which was struck down in *Edgar v. MITE Corp.*,[83] the Indiana Act maintained this balance: (1) it allowed both offeror and management to communicate with shareholders,[84] (2) it did not allow the state government to impose its views of fairness on the transaction,[85] and (3) the Act's maximum fifty-day period in which management was to hold a shareholder meeting to determine voting rights of control shares did not impose an indefinite or unreasonable delay on tender offers.[86] Thus, the Williams Act did not preempt the Indiana Act.[87]

The second part of the *CTS* analysis addressed whether the Indiana Act violated the commerce clause of the United States Constitution by interfering with the power of Congress "[t]o regulate Commerce . . . among the several States. . . ."[88] "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852),

Senate Report accompanying the Williams Act, S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967). *But see CTS*, 107 S. Ct. at 1654-55 (White, J., dissenting) (arguing majority erroneously equates protection of individual investors, the focus of the Williams Act, with protection of shareholders as a group; the Indiana Act protects majority shareholders but can prevent minority shareholders from selling stock at a premium).

81. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813.

82. *CTS*, 107 S. Ct. at 1645-48. The Court analyzed the Indiana Act in light of this purpose of the Williams Act even though it called this a broad interpretation of the Williams Act. *Id.*; *see* Sargent, *supra* note 23, at 713-19 (discussing two alternate views of the purpose of the Williams Act—solely investor protection, or investor protection combined with maintaining balance of power between offeror and management).

83. 457 U.S. 624 (1982).

84. *CTS*, 107 S. Ct. at 1646; *see* IND. CODE ANN. § 23-1-42-8(b) (Burns Supp. 1987); *accord* N.C. GEN. STAT. § 55-93 (Cum. Supp. 1987).

85. *CTS*, 107 S. Ct. at 1646; *see* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1987) (shareholders decide whether to allow voting rights, no state government involvement); *accord* N.C. GEN. STAT. § 55-94(b) (Cum. Supp. 1987).

86. *CTS*, 107 S. Ct. at 1646; *see* IND. CODE ANN. § 23-1-42-7(b) (Burns Supp. 1987); *accord* N.C. GEN. STAT. § 55-92(b) (Cum. Supp. 1987) (same 50-day provision). The 50-day provision did not conflict with the Williams Act's requirement that a tender offer be held open for a minimum period of 20 business days. *CTS*, 107 S. Ct. at 1647; *see* 17 C.F.R. § 240.14e-1 (1987). "The [Indiana] Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits." *CTS*, 107 S. Ct. at 1647. Even assuming the Indiana statute imposed some delay, the Court stated that the preemption test hinged on whether the delay was unreasonable. *Id.* (relying on plurality in *MITE*, 457 U.S. at 639). The 50-day delay was reasonable since it was within the Williams Act's 60-day maximum period established for tender offers to be held open before shareholders can withdraw their shares. *CTS*, 107 S. Ct. at 1647. *See* 15 U.S.C. § 78n(d)(5) (1982); *supra* note 5; *see also* Sargent, *supra* note 23, at 714-19 (discussing permissible scope of variation between state takeover statute time periods and Williams Act time periods).

87. Although the *CTS* Court did not mention it, the Indiana Act further preserved the balance of powers by prohibiting any interested party from participating in the decision to allow voting rights to control shares. *See* IND. CODE ANN. § 23-1-42-9(b) (Burns Supp. 1987); *accord* N.C. GEN. STAT. § 55-94(b) (Cum. Supp. 1987).

88. U.S. CONST. art. 1, § 8, cl. 3.

it has been clear that 'the Commerce Clause . . . even without implementing legislation by Congress is a limitation upon the power of the States.' "[89] However, the *CTS* Court recognized that some state regulations affecting interstate commerce do not violate the commerce clause,[90] and the Court applied this exception to the Indiana Act.

In its commerce clause analysis, the Court developed a three-part test and applied it to the Indiana statute.[91] The first two parts involved a "threshold" analysis[92] to determine whether the statute discriminated against interstate commerce and whether the statute subjected activities to inconsistent regulations.[93] In the third part, the *CTS* Court considered whether the burden on interstate commerce imposed by the statute outweighed the benefits to the State of Indiana.[94]

In the first part of its analysis, the Court noted that if the Indiana statute discriminated against interstate commerce, it would violate the commerce clause.[95] The Indiana Act did not discriminate against interstate commerce because the Act treated in-state and out-of-state offerors equally.[96] In the second part of its analysis, the *CTS* Court emphasized that the Indiana Act must not adversely affect interstate commerce by subjecting activities to inconsistent regulations.[97] The Court found no such violation because the Indiana Act only regulated the voting rights of Indiana corporations, which only Indiana had the right to regulate.[98]

89. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (quoting Freeman v. Hewitt, 329 U.S. 249, 252 (1946)).

90. *CTS*, 107 S. Ct. at 1648; *see also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980) (states "retain authority . . . to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected"); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978) (same); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 140 (1973) (same).

91. Since 1970 courts have traditionally used the balancing test established in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), to determine whether a statute violates the commerce clause. The Court in *Pike* held: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* Although the *CTS* Court did not explicitly refer to the *Pike* test, the Court incorporated the *Pike* factors in its commerce clause analysis. The *Pike* balancing test is appropriate for the commerce clause analysis of the extraterritorial feature of the North Carolina Control Share Acquisition Act. *See infra* notes 129-71 and accompanying text.

92. *CTS*, 107 S. Ct. at 1649.

93. *Id.* at 1648-49.

94. *Id.* at 1649-52. Justice Scalia, in his concurring opinion, recognized the Court's application of the *Pike* test and criticized the majority for using that aspect of the *Pike* balancing test that weighs the burden of the regulation against the benefits to the state. *Id.* at 1652-53 (Scalia, J., concurring).

95. *CTS*, 107 S. Ct. at 1648; *see, e.g.*, Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36-37 (1980) (using discrimination test); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (same); *accord Pike*, 397 U.S. at 142 (statute must regulate evenhandedly).

96. *CTS*, 107 S. Ct. at 1649. The Act imposed no greater burden on out-of-state offerors than on similarly situated Indiana offerors. *Id.* "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id.* (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978)).

97. *CTS*, 107 S. Ct. at 1649; *see, e.g.*, Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080, 2087 (1986) (applying inconsistent regulation test); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (same).

98. *CTS*, 107 S. Ct. at 1649. "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." *Id.*

Indiana's takeover statute regulated the process of according voting rights to control shares, an established function of state corporate governance.[99] A key to the holding was the Court's interpretation that the Indiana Act regulated state corporate governance, not the transaction of shares in the interstate market.[100] Thus, the Indiana Act avoided a problem faced by earlier takeover statutes that have been invalidated on commerce clause grounds because they directly regulated the transfer of shares in the interstate market.[101]

In the third part of its commerce clause analysis, the *CTS* Court balanced the burden on interstate commerce imposed by the statute against the benefit to the State.[102] Once the *CTS* Court defined the Indiana Act as regulating shareholder voting rights of Indiana corporations, a form of state corporate governance, it was relatively easy to find that the impact on interstate commerce would not overcome that strong state interest.[103] The Court reasoned that state corporate laws regulating corporate governance have an unavoidable impact on certain aspects of interstate commerce, and that the impact of the Indiana Act was no different than the impact of other state corporate laws.[104]

The internal affairs doctrine, a principle of conflict of laws, provided the basis for the Court's finding that the Indiana Act did not violate the commerce clause even though it affected out-of-state business and nonresidents.[105] The internal affairs doctrine recognizes that when the organic structure or internal administration of a corporation is affected, it is essential to the "beneficial free market system"[106] that only one state's law apply.[107] Because a corporation is a

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99. *CTS*, 107 S. Ct. at 1649. "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." *Id.*; *accord Pike*, 397 U.S. at 142 (statute must "effectuate a legitimate local public interest"); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971).

100. *CTS*, 107 S. Ct. at 1649. *But see id.* at 1655 (White, J., dissenting) (arguing Indiana Act regulates securities transactions in interstate market and such interference violates commerce clause); *see also* Sargent, *supra* note 23, at 722-27 (describing how treatment of state takeover laws as an exercise of state corporate law would survive commerce clause analysis, but treatment of state takeover laws as state securities regulations would fail commerce clause test).

101. *See* Edgar v. MITE Corp., 457 U.S. 624, 640-41 (1982).

102. *See CTS*, 107 S. Ct. at 1649-52; *accord Pike*, 397 U.S. at 142 (burden must not be excessive in relation to local benefits). *But see CTS*, 107 S. Ct. at 1652-53 (Scalia, J., concurring) (criticizing this aspect of the majority's opinion).

103. Although the Indiana Act only applied to Indiana corporations, its effect transcended state boundaries due to the national nature of corporate business and the existence of out-of-state shareholders in Indiana corporations.

104. *CTS*, 107 S. Ct. at 1650. *But see id.* at 1655 (White, J., dissenting) (arguing Indiana Act differs from other aspects of state corporate laws because Act is intended to prevent certain tender offers from ever occurring).

> The Court found further support for the validity of the Indiana Act because the Act only applied to Indiana corporations that had a "substantial number of shareholders in Indiana. Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting."

CTS, 107 S. Ct. at 1652 (citation omitted); *see* IND. CODE ANN. § 23-1-42-4(3) (Burns Supp. 1987) (Act requires either 10% resident shareholders, 10% shares owned by residents, or 10,000 resident shareholders).

105. *CTS*, 107 S. Ct. at 1649-51.

106. *Id.* at 1650.

107. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302 comment e, 304 (1971). This

creature of state law,[108] usually the law of the state of incorporation applies to a state's corporation regardless of where it does business.[109]

As long as residents and nonresidents had equal access to Indiana corporations and its stock, and because the Act avoided the risk of inconsistent regulation by limiting its application to Indiana corporations, the Court gave great weight to the established right of Indiana to define the characteristics of its corporations and corporate stock, and to protect the shareholders of its corporations.[110] Thus, Indiana's Control Share Acquisitions Chapter was upheld under the commerce clause analysis in *CTS*.[111]

The Indiana General Assembly developed a takeover statute that avoided the constitutional pitfalls that had plagued earlier statutes. The Williams Act did not preempt the Indiana Act because the Indiana Act furthered the purpose of shareholder protection and adequately maintained the balance of power between offerer and management. Further, the Indiana Act did not violate the commerce clause. First, the statute regulated evenhandedly because it did not discriminate between in-state and out-of-state offerors. Second, because the Act regulated state corporate governance of only Indiana corporations, there was no risk of inconsistent regulation of shareholder voting rights. Third, Indiana's strong interest in state corporate governance and shareholder protection, and the necessity that only one state's laws govern the internal affairs of a corporation was not outweighed by any burden on interstate commerce imposed by the Indiana statute for commerce clause purposes.

The North Carolina General Assembly, in passing the North Carolina Control Share Acquisition Act had the opportunity to improve upon earlier state takeover statutes and to rely on the *CTS* decision upholding the validity of Indiana's takeover statute. In fact, within one month after the *CTS* decision, the North Carolina General Assembly enacted the North Carolina Control Share

rationale stems from the necessity that a corporation, its management, and shareholders can make decisions based on "certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied." *Id.* § 302 comment e.

108. An early Supreme Court decision explored the peculiar nature of a corporation:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also* Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law.").

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302 comment e, 304 (1971).

110. *CTS*, 107 S. Ct. at 1652. The Court was not persuaded by Dynamics' argument that the Indiana Act was unconstitutional because it would burden interstate commerce by limiting the number of successful tender offers. The Court stated that, first, there was little evidence such a result would occurs, and second, that such a result would not affect the Court's commerce clause analysis:

> [T]his Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. . . . Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.

Id.; *see* Pinto, *supra* note 12, at 492-94.

111. *CTS*, 107 S. Ct. at 1652.

Acquisition Act.[112]

The North Carolina Act follows the Indiana model of a voting rights statute with a share redemption feature. However, the North Carolina Act deviates from the Indiana Act in two significant ways that subjects the North Carolina Act to constitutional attacks. First, the North Carolina Act contains a "friendly offer exemption" not found in the Indiana Act.[113] Such a provision is subject to a Williams Act preemption analysis. Second, the two Acts differ in their application to foreign corporations: the North Carolina Act applies to in-state *and* out-of-state corporations, whereas the Indiana Act applies only to Indiana corporations.[114] This extraterritorial application to foreign corporations is susceptible to a commerce clause attack. After the *CTS* decision, the major constitutional questions regarding the North Carolina Act are the validity of its friendly offer exemption provision and its extraterritorial reach.

Like the Indiana Act, the North Carolina Act furthers the Williams Act's purpose of shareholder protection by requiring approval by a majority of disinterested shareholders before voting rights are accorded control shares.[115] Also like the Indiana Act, the North Carolina Act does not upset the balance of power between offeror and management insofar as it (1) allows each to communicate with shareholders, (2) does not allow the State to impose its views on the fairness of the transaction, (3) does not impose an indefinite or unreasonable delay on a tender offer, and (4) does not allow an interested party to participate in the decision to accord voting rights to control shares.[116]

However, it is questionable whether the Act's friendly offer exemption, a provision not found in the Indiana Act,[117] furthers the purpose of the Williams Act. The friendly offer provision of the North Carolina Act exempts any management approved control share acquisition.[118] Thus, shareholders have no input when management is party to a control share acquisition. Various courts and commentators have maintained that such a provision is pro-management, discriminatory and unconstitutional because it violates the purpose of the Williams Act to protect shareholders while preserving a balance of power between offeror and management.[119] For example, in *National City Lines Inc. v. LLC*

112. North Carolina Control Share Acquisition Act, ch. 182, 1987 N.C. Adv. Legis. Serv. 48 (codified at N.C. GEN. STAT. §§ 55-90 to -98 (Cum. Supp. 1987)), ch. 773, § 12, 1987 N.C. Adv. Legis. Serv. 426 (codified at N.C. GEN. STAT. § 55-98.1 (Cum. Supp. 1987)).

113. N.C. GEN. STAT. § 55-90(b)(3)(e)-(f) (Cum. Supp. 1987).

114. *Compare* N.C. GEN. STAT. § 55-90(b)(5) (Cum. Supp. 1987) (Act applies to certain foreign corporations doing business in North Carolina) *with* IND. CODE ANN. §§ 23-1-42-4, 23-1-20-5 (Burns Supp. 1987) (Act only applies to Indiana corporations). *See supra* text accompanying note 16.

115. *See CTS*, 107 S. Ct. at 1645-46; N.C. GEN. STAT. § 55-94 (Cum. Supp. 1987); *accord* IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1987).

116. *See supra* notes 81-87 and accompanying text.

117. The Indiana Act does exempt control share acquisitions made pursuant to a merger or plan of share exchange if management is a party to the acquisition; however, such mergers or share exchanges are contingent upon shareholder approval. *See* IND. CODE ANN. §§ 23-1-42-2(d)(5); -1-40 (Burns Supp. 1987).

118. *See* N.C. GEN. STAT. §§ 55-90(b)(3)(e)-(f) (Cum. Supp. 1987).

119. *See, e.g.*, National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1133 (8th Cir. 1982); Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1278 (5th Cir. 1978), *rev'd on other grounds*

Corp.,[120] the court held that the friendly offer provision of the Missouri Takeover Bid Disclosure Act, along with other provisions of the Act, was discriminatory and "disrupt[ed] the neutrality essential to the proper operation of the market approach of protecting investors utilized by the Williams Act."[121]

Another problem with a friendly offer exemption provision is that it does not promote the purpose of the Williams Act of protecting investors by giving them the power to accept or reject a tender offer after full disclosure.[122] Instead it reserves that power in management and it is not clear that management will always vigorously promote shareholder interests in a tender offer situation.[123] Facing a hostile tender offer that could be financially beneficial to shareholders but harmful to incumbent management regarding employment, management could approve a friendly control share acquisition to thwart the takeover attempt and preserve its jobs, to the detriment of shareholders and offeror. Thus, the North Carolina Act's friendly offer exemption is subject to a Williams Act preemption attack because it upsets the neutrality between contending parties by giving incumbent management more power to fight off an offeror's takeover attempt without regard to shareholder protection.

Applying the commerce clause analysis used in *CTS*, the North Carolina Act must first meet the two-part "threshold" analysis by not discriminating against interstate commerce and by not subjecting the process of determining voting rights of control shares to inconsistent regulation.[124] Under the third part of the analysis, the burden on interstate commerce must not be excessive in relation to the local benefits to North Carolina.[125]

Like the Indiana Act, the North Carolina Act does not discriminate against interstate commerce because it makes no distinction between in-state and out-of-state investors seeking a control share acquisition.[126] The next issue is whether the North Carolina Act subjects activities to inconsistent regulations. That part of the Act which applies only to North Carolina corporations will not violate the commerce clause.[127] The lingering and more difficult question relates to the extraterritorial reach of the Act.[128]

Extraterritorial features, common among first generation takeover statutes, contributed to the Supreme Court's finding that such provisions are unconstitu-

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sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); Icahn v. Blunt, 612 F. Supp. 1400, 1417, 1420 (W.D. Mo. 1985); Sargent, *supra* note 23, at 698, 716-19; Sommer, *The Ohio Takeover Act: What Is It?*, 21 CASE W. RES. L. REV. 681, 694 (1970).

120. 687 F.2d 1122 (8th Cir. 1982).

121. *Id.* at 1132-33.

122. *Kidwell*, 577 F.2d at 1278-79.

123. Sommer, *supra* note 119, at 694. *But see* Sargent, *supra* note 23, at 718-19 (pointing out that the fiduciary duty by management to shareholders may deter management from abusing its discretion in taking defensive measures to hostile takeover attempts).

124. *See CTS*, 107 S. Ct. at 1648-49; *supra* notes 91-93 and accompanying text.

125. *See CTS*, 107 S. Ct. at 1649-52; *supra* notes 91-94 and accompanying text.

126. *See* N.C. GEN. STAT. § 55-90(b)(2) (Cum. Supp. 1987) (Act makes no reference to residence of acquiror, but is only concerned with the amount of shares acquired); *supra* notes 95-96 and accompanying text.

127. *See CTS*, 107 S. Ct. at 1649.

128. *See* N.C. GEN. STAT. § 55-90(b)(5)(a)(ii) (Cum. Supp. 1987).

tional under a commerce clause analysis.[129] To be valid, the extraterritorial feature of the North Carolina Act must not violate the commerce clause under the test set out in *Pike v. Bruce Church, Inc.*[130] and implicitly utilized in *CTS*.[131] Finally, if the extraterritorial provision does not subject the determination of control share voting rights to inconsistent regulation, it will be valid if it effectuates a legitimate local interest and the burden on interstate commerce is not excessive in relation to the state benefit.[132]

A critical issue for the commerce clause analysis is whether the internal affairs doctrine, relied on in *CTS*,[133] establishes a legitimate local interest for the North Carolina Act to reach foreign corporations. The proposition that the internal affairs doctrine establishes a legitimate local interest in North Carolina has little or no application to foreign corporations covered by the North Carolina Act. The internal affairs doctrine states that when the organic structure or internal administration of a corporation is at issue, only one state's law governs.[134] Usually, the applicable law is that of the state of incorporation.[135] The inapplicability of the internal affairs doctrine to foreign corporations in North Carolina is damaging to the extraterritorial analysis because the internal affairs doctrine provided a foundational principle in the *CTS* analysis to assure the Court that the Indiana Act would not subject corporate governance of shareholder voting rights to inconsistent regulation.[136]

However, an exception to the rule that the laws of the incorporating state should govern the internal affairs of its corporations has been recognized when a corporation is considered a psuedo-foreign corporation. A pseudo-foreign corporation is characterized as being incorporated in one state but conducting most, if not all, of its business and having its principal place of business in another state, called the host state.[137] In this situation, the legislative jurisdiction of the host state can regulate the internal affairs of pseudo-foreign corporations when there is a strong host state interest and no applicable laws of the incorporating state exist.[138]

129. *See* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

130. 397 U.S. 137, 142 (1970); *see supra* note 91.

131. *See supra* note 91.

132. *Pike*, 397 U.S. at 142; *CTS*, 107 S. Ct. at 1649.

133. *See supra* notes 105-09 and accompanying text.

134. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302 comment e, 304 (1971); *see supra* notes 106-07 and accompanying text.

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302 comment e, 304 (1971); *see supra* notes 108-09 and accompanying text.

136. *CTS*, 107 S. Ct. at 1649.

137. *See* Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV., 433, 437-39 (1968).

138. *See* Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Gaillard v. Field, 381 F.2d 25 (10th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959); Belk v. Belk's Dep't Store of Columbia, S.C., Inc., 250 N.C. 99, 108 S.E.2d 131 (1959).

For a general discussion of the psuedo-foreign corporation analysis, see Kaplan, *supra* note 137; Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955); Note, *Pseudo-Foreign Corporations and the "Internal Affairs" Rule*, 1960 DUKE L.J. 477; Sargent, *supra* note 23, at 724-27; Shipman, *supra* note 51, at 752, 755.

The North Carolina Act acknowledges the pseudo-foreign exception to the internal affairs doctrine in two provisions. Regarding resident corporations, the application of the Act is limited to those North Carolina corporations that have "substantial assets" within the State.[139] Concerning foreign corporations coming under the scope of the Act, the Act's comity provision exempts a foreign corporation when the laws of the state of its incorporation are "expressly inconsistent" with the North Carolina Act.[140]

However, the North Carolina Act's aggressive extraterritorial reach encompasses more than pseudo-foreign corporations. For example, the Act applies to a foreign corporation with forty percent of its fixed United States assets located in North Carolina and its principal place of business or principal office in North Carolina.[141] This more lenient standard contradicts the purpose of the internal affairs doctrine by inviting uncertainty, unpredictability, and conflicting results in deciding what law applies to certain foreign corporations doing business in North Carolina.[142]

For example, assume State *X* has not enacted a Control Share Acquisition Act and State *Y* has enacted such an Act which is different from North Carolina's, but which also has a similar extraterritorial feature. A conflict between State *X*, State *Y*, and North Carolina would arise in a control share acquisition of stock when a target corporation is incorporated and has ten percent of its domestic assets in State *X*, fifty percent of its domestic assets in State *Y*, and forty percent of its domestic assets, forty percent of its employees, ten percent of its shareholders or shares, and principal office in North Carolina. In this scenario, all three states might have a claim that their corporate law applies.[143] The extraterritorial feature of the North Carolina Act creates a potential for subjecting the determination of voting rights of a foreign corporation's shares to inconsistent regulations, thereby violating the commerce clause.[144]

In the absence of the internal affairs doctrine, and assuming the doctrine does not invalidate the extraterritorial reach of the North Carolina Act, a legitimate local interest to support the extraterritorial feature of the Act still must be found to satisfy the commerce clause analysis. In addition to the internal affairs doctrine, two other state interests have been advanced to support state takeover

139. N.C. GEN. STAT. § 55-90(b)(5)(a)(i) (Cum. Supp. 1987). "Substantial assets" is not defined in the Act.

140. *Id.* § 55-96; *see supra* notes 21-22.

141. N.C. GEN. STAT. § 55-90(b)(5) (Cum. Supp. 1987).

142. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 302 comment e, 304 comment c (1971); *supra* note 107 and accompanying text.

143. A more extreme problem with the Act's reach would occur if a foreign corporation had 60% of its assets in its state of incorporation and the remaining 40% in North Carolina, and the other requirements of the North Carolina Act were met concerning employees, shareholders and principal place of business. In this situation, in the absence of conflicting state laws, the North Carolina Act requires North Carolina law to apply to a control share acquisition even though a majority of the foreign corporation's assets are located in its state of incorporation. *See* N.C. GEN. STAT. § 55-90(b)(5) (Cum. Supp. 1987).

144. *See CTS*, 107 S. Ct. at 1649.

statutes: shareholder protection and protection of the local economy.[145]

The North Carolina Act is designed to protect shareholders from coercive tender offers by allowing shareholders to decide voting rights of control shares, and by providing a redemption provision that allows shareholders to obtain a fair value for their stock.[146] A state has an indisputable interest in protecting *resident* shareholders.[147] Furthermore, under the internal affairs doctrine, a state also has the obligation to protect nonresident shareholders of its state corporations.[148] Thus, shareholder protection does establish a legitimate local interest. However, a state has "no interest in protecting nonresident shareholders *of nonresident corporations*."[149] Therefore, regarding the extraterritorial reach of the North Carolina Act, the constitutional issue arises whether the burden of protecting *resident* shareholders of foreign corporations doing business in North Carolina is excessive in relation to its local benefits.[150]

The problem with the extraterritorial feature of the North Carolina Act is that it applies not only to North Carolina shareholders of foreign corporations, but also to nonresident shareholders. The Act applies to a foreign corporation that has "[m]ore than ten percent (10%) of its shareholders resident in North Carolina; or [m]ore than ten percent (10%) of its shares owned by North Carolina residents."[151] Contrary to state blue-sky laws, which have withstood commerce clause challenges because they regulate only intrastate securities transactions involving resident shareholders,[152] the North Carolina Act applies when ninety percent of a foreign corporation's shareholders are nonresident.[153]

When weighing the burden on interstate commerce against the local benefit of resident shareholder protection, a problem exists with a state takeover statute that applies to a foreign corporation with a high percentage of nonresident shareholders. "[T]o the extent the [takeover statute] burdens interstate commerce there are no 'local benefits' that arise from the statute's application to nonresident shareholders."[154] Thus, the North Carolina Act's application to foreign corporations when up to ninety percent of shareholders or shares are out-of-state is problematic when weighing the burden on all shareholders against the benefit of protecting only ten percent of that total.

The Indiana Act analyzed in *CTS* had resident shareholder requirements

145. *See* Pinto, *supra* note 12, at 488; Comment, *The North Carolina Tender Offer Disclosure Act: Congenitally Defective?*, 14 WAKE FOREST L. REV. 1035, 1054-60 (1978).

146. *See supra* notes 25-26, 32-34 and accompanying text.

147. *See CTS*, 107 S. Ct. at 1652; Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

148. Sargent, *supra* note 23, at 724.

149. *CTS*, 107 S. Ct. at 1651.

150. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

151. N.C. GEN. STAT. § 55-90(b)(5)(d) (Cum. Supp. 1987).

152. *See, e.g.*, Travelers' Health Ass'n v. Virginia, 339 U.S. 643 (1950); Merrick v. Halsey & Co., 242 U.S. 568 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539, 557-58 (1917); Icahn v. Blunt, 612 F. Supp. 1400, 1415 (W.D. Mo. 1985); State *ex rel.* Smith v. Fidelity & Deposit Co., 191 N.C. 643, 132 S.E. 792 (1926).

153. *See* N.C. GEN. STAT. § 55-90(b)(5)(d) (Cum. Supp. 1987).

154. APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216, 1222 (D. Minn. 1985) (citing Edgar v. MITE Corp., 457 U.S. 623, 644 (1982)).

similar to the North Carolina Act.[155] However, unlike the North Carolina Act, the Indiana Act only applied to resident corporations.[156] The limited application to Indiana corporations was critical to the *CTS* Court both in terms of its internal affairs analysis and its shareholder protection argument. In addition, the Court treated the Indiana Act's protection of Indiana shareholders as supplemental to the core internal affairs analysis.[157] There is no indication in the *CTS* decision that solely a ten percent resident shareholder requirement would be sufficient to establish a legitimate local interest for a commerce clause analysis in the absence of the internal affairs argument.

Further, the *Pike* balancing test states that when balancing the burden against the local benefit, it is appropriate to consider whether the local interest could be protected with a "lesser impact on interstate activities."[158] The protection of North Carolina shareholders in foreign corporations could be accomplished with less of a burden on nonresident shareholders by increasing the required resident shareholder percentage or by limiting the Act's application only to resident shareholders.[159]

The second goal of the North Carolina Act that might serve as a legitimate state interest to justify the Act's extraterritorial facet is the protection of North Carolina's economy from the disruptive aspects of a corporate takeover or control share acquisition. A state clearly has an interest in enacting laws that enhance its business climate.[160] However, at least one court has held that it "has the constitutional duty to determine whether State-desired benefits can, in fact, result from [a Control Share Acquisition Act] and only those [benefits] which are not 'speculative' may be placed in the scale to be balanced against the burden on interstate commerce."[161] When protection of the local economy is proposed as the state interest effectuated, courts have required a sufficient link between that interest and the effect of the statute.[162]

155. *See* IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1987) (requiring either 10% resident shareholders, 10% shares owned by residents, or 10,000 resident shareholders).

156. *CTS,* 107 S. Ct. at 1651. This distinction is significant in light of the *CTS* Court's statement, "We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.* But [the Indiana] Act applies only to corporations incorporated in Indiana." *Id.*

157. *Id.* at 1651-52. One commentator questioned the relevancy of a resident shareholder requirement.

> Query . . . whether the requirement of some fixed amount of stockholding in the state makes any sense. From a practical standpoint, the use of street names and nominee accounts makes the ascertainment of beneficial stock ownership difficult. From a theoretical standpoint, in-state stock ownership may be irrelevant. That is, if state takeover laws are a form of traditional state corporate law, their protections should and can extend to all stockholders wherever located.

Sargent, *supra* note 23, at 725 n.220 (citation omitted).

158. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *accord Van Dusen,* 622 F. Supp. at 1222.

159. For example, Minnesota's Take-Over Act, held valid against a commerce clause attack, limited its application to takeovers if 20% of the shareholders were Minnesota residents and, more importantly, any suspension of a tender offer applied only to Minnesota resident shareholders. In this way, the statute was narrowly applied to protect Minnesota shareholders only, and did not affect nonresident shareholders. Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 911 (8th Cir. 1984).

160. APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216, 1223 (D. Minn. 1985).

161. *Id.* at 1221; *accord* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).

162. *See* Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1286 (5th Cir. 1978), *rev'd on*

State takeover statutes generally have not created a sufficient nexus between their purpose and the state interest in protecting the local economy. Litigants have attacked the "protection of the local economy" rationale on various grounds. First, courts have not been willing to find that a takeover or control share acquisition will necessarily harm the local economy.[163] Second, the justification for burdening interstate commerce by interfering with a tender offer is undermined when, for example, a takeover statute places no future requirements on incumbent or new management to protect the local economy by keeping the corporation in-state, keeping employment at a certain level, or restricting a corporation from leaving the state.[164] The North Carolina Act imposes no such restrictions and it is questionable whether such measures would be valid under the commerce clause.[165]

Third, the existence of the friendly offer provision in the North Carolina Act weakens the argument that the statute protects the local economy. A friendly offer provision exempts from the statute any management-approved acquisition.[166] Such an exception does not necessarily protect the local economy because the exception exists without regard to the effect that a friendly acquisition would have on a state's economic interests.[167] The existence of a friendly offer exemption which removes the decisionmaking power from shareholders has also been criticized as undermining the argument that a takeover statute protects shareholders.[168]

Fourth, the disclosure provision of the North Carolina Act does not require the acquiring person to reveal his future plans for the corporation in his acquiring person statement.[169] In the absence of this information, shareholders deciding whether to accord voting rights to control shares are less able to determine the impact of the acquisition on the local economy.

Fifth, the North Carolina Act is triggered when only ten percent of the shares or shareholders reside in the State.[170] It is tenuous to presume that the Act effectively protects the local economy if only ten percent of the shareholders determining voting rights of control shares have an interest in the local economy. The ninety percent nonresident shareholders will have no loyalty to the

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other grounds sub nom. Leory v. Great Western United Corp., 443 U.S. 173 (1979); *Van Dusen*, 622 F. Supp. at 1223; Icahn v. Blunt 612 F. Supp. 1400, 1417 (W.D. Mo. 1985).

163. *See, e.g., MITE*, 457 U.S. at 633; *Kidwell*, 577 F.2d at 1286.; *Van Dusen*, 622 F. Supp. at 1223.

164. *See Van Dusen*, 622 F. Supp. at 1223; *Icahn*, 612 F. Supp. at 1417.

165. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 531-32 (1949) (state's refusal to license additional milk receiving facility in order to limit purchases of out-of-state milk violates commerce clause); Boehm, *supra* note 23, at 744.

166. *See, e.g.*, N.C. GEN. STAT. § 55-90(b)(3)(e)-(f) (Cum. Supp. 1987).

167. *Icahn*, 612 F. Supp. at 1417.

168. Edgar v. MITE Corp, 457 U.S. 624, 644 (1982); *see supra* notes 117-23 and accompanying text.

169. N.C. GEN. STAT. § 55-91 (Cum. Supp. 1987); *see supra* notes 28-30 and accompanying text. This factor is important only when a transaction falls within the scope of the North Carolina Act but outside the scope of the Williams Act, because the Williams Act requires disclosure of future plans in a takeover. *See supra* notes 5, 16.

170. N.C. GEN. STAT. § 55-90(b)(5)(d).

State and will vote based on economics; moreover, it is not clear that in-state shareholders would not do the same.[171]

In summary, to the extent that the extraterritorial reach of the North Carolina Control Share Acquisition Act encompasses more than pseudo-foreign corporations, it is not valid under the commerce clause analysis. First, the internal affairs doctrine—an essential element of the *CTS* decision upholding the validity of the Indiana Control Share Acquisition Chapter—will not support the extraterritorial feature of the North Carolina Act. Because the extraterritorial reach of the Act in some circumstances will subject corporations to inconsistent regulations, it will likely violate the commerce clause of the Constitution.

Second, the shareholder protection rationale establishes a legitimate local interest; however, the Act's overreaching application to foreign shareholders, who could account for ninety percent of a corporation's shareholders, causes a burden that is excessive in relation to its benefits. Third, the protection of the local economy rationale establishes only a weak local interest, especially because the North Carolina Act does not effectively promote this purpose.

To conclude, the North Carolina General Assembly, in passing a more agressive Control Share Acquisition Act than the Indiana Act upheld in *CTS*, has exposed the North Carolina Act to constitutional attack. The Act's friendly offer exemption provision contradicts the purpose of the Williams Act, and the Act's extraterritorial reach fails the commerce clause analysis. However, this does not sound the death knell for the North Carolina Control Share Acquisition Act. With the Court's decision in *CTS* validating the Indiana Control Share Acquisitions Chapter, the North Carolina General Assembly can be confident that its Act is also valid to the extent it follows the Indiana Act.[172] The flaw of the friendly offer exemption can be corrected in one of two ways. First, the provision can be omitted altogether. Second, the provision can be amended to require some shareholder participation in a management approved control share acquisition as found in the Indiana Act.

The problems raised by the extraterritorial reach of the North Carolina Act can also be corrected in one of two ways. First, the safer and more prudent approach would be to eliminate the extraterritorial application altogether, thereby bringing the scope of the North Carolina Act fully within the Indiana Act upheld in *CTS*. This would be a responsible approach to takeover legislation that avoids any conflict of laws issues.

Second, a more aggressive approach, and one that that is less likely to succeed against a commerce clause attack, would be to retain an extraterritorial provision but create a tighter nexus between the foreign corporation and North Carolina. This could be accomplished by limiting the Act's application to foreign corporations that more resemble pseudo-foreign corporations. Clearly, the

171. *See Kidwell*, 577 F.2d at 1286; APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216, 1223 n.6 (D. Minn. 1985).

172. The North Carolina Act contains a severability clause, which allows any provision or clause held invalid to be severed from the Act without affecting the remainder of the Act. *See* N.C. GEN. STAT. § 55-97 (Cum. Supp. 1987).

forty percent asset requirement in the North Carolina Act needs to be raised at least to fifty percent to ensure that North Carolina would have a more significant *economic* interest than any other state.[173] Increasing the resident shareholder requirement and limiting the Act's protections to resident shareholders are two other possible steps that would attempt to avoid a commerce clause attack. Finally, the interest in protecting of the local economy could be promoted more effectively by requiring acquirors of control shares to disclose to shareholders their future plans for the company, and by eliminating the friendly offer provision that exempts a control share acquisition from the Act when management is a party to the transaction. However, in light of prior case history and the internal affairs rationale, even these measures would not adequately overcome a commerce clause attack against the North Carolina Control Share Acquisition Act.

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173. *See* Wilson v. Louisiana-Pacific Resources, Inc., 138 Cal. App. 3d 216, 226-27, 187 Cal. Rptr. 852, 860 (1982); Western Air Lines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961); Shipman, *supra* note 51, at 755. However, this proposal would not necessarily defeat the internal affairs argument that the foreign corporation's state of incorporation could use to enforce the application of its own law.