The Validity of Washington's Antitakeover Act Under the Commerce and Supremacy Clauses

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In 1987, amid rumors that an entity controlled by T. Boone Pickens was acquiring stock of The Boeing Company and might seek control of the company, the Washington Legislature enacted a law designed to limit the hostile takeover of large corporations with substantial economic ties to the state ("the Washington Act" or "the Act").[1] The Act is a type of third generation antitakeover statute[2] known as a moratorium statute.[3] Unlike those antitakeover statutes that make all hostile takeovers less attractive by making either the total cost or the acquisition of control uncertain,[4] the Act temporarily

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The authors are grateful to Gregory S. Sergienko, Benna Ruth Solomon, and Evelyn Sroufe for their helpful suggestions and comments on an earlier draft of this article.

1. WASH. REV. CODE § 23A.50.010 (1987).

2. Recent state antitakeover statutes are referred to in generational terms because most were drafted in response to Supreme Court decisions as to the constitutionality of various forms of state regulation in this area. The so-called first generation statutes, which attempted to supplement the Williams Act, 15 U.S.C. §§ 78m(d), (e), 78n(d)-(f), by directly regulating tender offers, pre-date the Supreme Court's invalidation of Illinois' first generation statute in Edgar v. MITE Corp., 457 U.S. 624 (1982). The so-called second generation statutes were enacted in response to the *MITE* decision, and only indirectly regulate hostile corporate takeovers. The Court upheld Indiana's second generation statute in CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987). The third generation statutes, which were enacted after the *CTS* decision, also regulate hostile takeovers only indirectly.

3. Washington also has enacted a fair price antitakeover statute, *see infra* note 4, the constitutionality of which is not addressed in this article. *See* WASH. REV. CODE § 23A.08.425 (Supp. 1988).

4. A state can discourage all hostile takeovers of the corporations subject to its antitakeover provisions by a variety of forms of indirect regulation that make the potential acquisition less attractive. For example, fair price statutes require supermajority approval under certain circumstances of the merger of the target

restricts an acquiror's ability to mortgage or break up the acquired company for short term gain or to finance the acquisition debt.

Although the United States Supreme Court in 1987 upheld the constitutionality of Indiana's control share statute,[5] the constitutionality of the Washington Act has been questioned. The constitutional uncertainty results primarily from the Act's extraterritorial reach. Unlike the Indiana statute and most of the moratorium statutes enacted in other states,[6] the Washington Act prohibits transactions between some foreign corporations and their shareholders.[7]

This Article addresses the constitutionality of the Washington Act under the Commerce[8] and Supremacy Clauses[9] of the United States Constitution,[10] and concludes that despite its extension to a limited group of foreign corporations, the Act is indeed constitutional under both clauses.

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corporation and an interested shareholder. *See, e.g.*, WASH. REV. CODE § 23A.08.425 (1987); MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to -603 (1985). Similarly, some control share acquisition statutes condition the attachment of voting rights to a potential acquiror's shares on the approval of a majority of the disinterested shareholders. *See, e.g.*, IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Supp. 1988).

5. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

6. At the present time, at least ten states in addition to Washington have moratorium statutes, only one of which, Kentucky's, applies to foreign corporations. *See* DEL. CODE ANN. tit. 8, § 203 (Supp. 1988); GA. CODE ANN. § 14-2-1132 (1988); IND. CODE ANN. § 23-1-43-18 (Burns Supp. 1988); KY. REV. STAT. ANN. §§ 271B.12-200 to -230 (Michie/Bobbs-Merrill Supp. 1988); MO. ANN. STAT. § 351.459(2) (Vernon Supp. 1987); N.J. STAT. ANN. § 14A:10A-1 to -6 (West Supp. 1989); N.Y. BUS. CORP. LAW § 912 (McKinney Supp. 1989); 15 PA. CONS. STAT. § 2551-2556 (1988); WIS. STAT. ANN. § 180.726 (West Supp. 1988).

7. Indeed, it is only because of the Act's extraterritorial scope that The Boeing Company, a Delaware corporation, is subject to its terms.

8. U.S. CONST. art. I, § 8, cl. 3.

9. U.S. CONST. art. VI, cl. 2.

10. We do not address the Act's constitutionality under the Takings Clause, U.S. CONST. art. 1, § 10, and Contract Clause, U.S. CONST. amend. V, because in our view these clauses pose no serious threat to the Act. A Takings Clause challenge would most likely fail even if one assumes *arguendo* that the Act decreases the value of a target corporation's shares. The diminution of a property's market value as a consequence of the valid exercise of the police power does not constitute taking. *E.g.*, Bowles v. Willingham, 321 U.S. 503, 518 (1944); Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980). With respect to the Contract Clause, we note only that even those who argue that state antitakeover statutes violate the Contract Clause concede that under the existing case law intra-corporate relations are not treated as a series of private contracts. *See* Butler & Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611 (1988). Absent the threshold contract requirement, we need not reach the issue of whether the Washington Act in fact impairs obligations of any sort, contractual or otherwise.

I. THE TERMS OF THE WASHINGTON ACT

The Washington Act prohibits a target corporation subject to the Act's terms from engaging in "significant business transactions" with an "acquiring person" within five years of a shareholder's becoming such an "acquiring person" unless the transaction or the acquisition is approved in advance by a majority of the target corporation's board of directors.[11] The Act defines "acquiring person" as "a person or group of persons, other than the target corporation or a subsidiary of the target corporation, who beneficially owns ten percent or more of the outstanding voting shares of the target corporation."[12] "Significant business transaction" is defined to include: the merger or consolidation of the target or any subsidiary with the acquiring person or its affiliates; the disposition or encumbrance of more than five percent of the target corporation's assets, outstanding shares, earning power or net income; the termination of five percent or more of the target corporation's Washington employees; the issuance, transfer or redemption by the target corporation of shares, options, warrants, or rights to acquire shares of the target to the acquiring person on a non-pro rata basis (excluding involuntary redemptions); the adoption of a plan for the disposition of assets or the dissolution of the target proposed by or pursuant to an understanding with the acquiring person; the reclassification of securities to increase the proportionate share of the outstanding shares of a particular class of voting shares owned by the acquiring person; and the grant of nonproportional financial assistance to the acquiring person.[13]

Corporations defined as "target corporations" under the Act include domestic corporations with principal executive offices in Washington if either a majority of their employees (including the employees of their subsidiaries) are Washington residents or they and any of their subsidiaries employ more than one thousand state residents.[14] Foreign corporations doing business in Washington that have their principal executive offices in the state are also defined as target corporations if: 1) more than ten percent of their shareholders of record are

11. WASH. REV. CODE § 23A.50.040 (1987). Although the Act was passed in 1987, it was amended in 1988. References are to the codified version of the Act as amended.

12. WASH. REV. CODE § 23A.50.020(1) (Supp. 1988).

13. WASH. REV. CODE § 23A.50.020(9) (Supp. 1988).

14. WASH. REV. CODE § 23A.50.020(13)(a) (Supp. 1988).

Washington residents, more than ten percent of their shares are owned by Washington residents, or one thousand or more of the shareholders of record reside in Washington; 2) a majority of their employees are Washington residents or they employ more than one thousand Washington residents; *and* 3) a majority of their tangible assets are located in Washington or they have more than fifty million dollars worth of tangible assets located in Washington.[15] All three factors must be present, which effectively limits the Act's coverage to domestic corporations based in Washington and a very few foreign corporations with a substantial Washington presence.

In enacting this legislation, the Washington Legislature found that hostile or unfriendly attempts to gain control of publicly held corporations can cause corporate management to dissipate a corporation's assets and energies to the detriment of the long-term interests of the shareholders and the economic health of the state.[16] It stated that the Act's purpose is

> to balance the substantial and legitimate interests of the state in corporations that employ a large number of citizens of the state and that have a substantial economic base in the state with: The interests of citizens of other states who own shares of such corporations; the interests of the state of incorporation of such corporations in regulating the internal affairs of corporations incorporated in that state; and the interests of promoting interstate commerce.[17]

II. THE WASHINGTON ACT'S CONSTITUTIONALITY UNDER THE COMMERCE CLAUSE

As with any state regulation affecting interstate economic activity, the Act's validity under the federal Constitution's Commerce Clause must be assessed. Under any of the several measures of the effect of state regulation on interstate commerce, and more particularly under the Supreme Court's recent Commerce Clause analysis of Indiana's antitakeover statute in *CTS Corp. v. Dynamics Corp. of America*,[18] the Act is constitutional.

Virtually from its inception, the Commerce Clause has been understood to prohibit unduly burdensome state action

15. WASH. REV. CODE § 23A.50.020(13)(b) (Supp. 1988).
16. WASH. REV. CODE § 23A.50.010(4) (Supp. 1988).
17. WASH. REV. CODE § 23A.50.010(7) (Supp. 1988).
18. 481 U.S. 69 (1987).

even in the absence of direct federal regulation of a commercial activity.[19] How much state regulation is permissible, and how the burden on interstate commerce should be evaluated, have proven to be intractable problems under this so-called "dormant" Commerce Clause.[20] Regardless of which of the Supreme Court's competing analyses are applied, two general principles must be considered in evaluating state laws under the dormant Commerce Clause. First, one must determine whether the state law discriminates against nonresidents in favor of residents of the regulating state.[21] Where legislation affects both residents and nonresidents, a political check exists which is absent when legislation is discriminatory.[22] Consequently, regardless of the analysis used, nondiscriminatory legislation is more likely to be upheld.[23] Second, even if the legislation is nondiscriminatory, one must measure the extent of the burden on interstate commerce.[24] This second step has taken a number of forms in the Supreme Court's Commerce Clause decisions[25] including inquiries into whether the state law poses a substantial risk of inconsistent regulation,[26] whether the burden placed upon interstate commerce is direct

19. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The question of the effect of direct federal regulation is considered in Section III, *infra*.

20. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-14, at 439-41 (2d ed. 1988).

21. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

22. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) ("Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' " (quoting South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 n.2 (1938))); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

23. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 676 (1981) (plurality); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938). *See also* 1 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW § 11.4, at 586 (1986) (stating that the Supreme Court "has consistently evinced a greater willingness to sustain state regulations which equally burden local residents").

24. Some inquiry beyond that for discrimination against out-of-state interests is necessary because of the myriad ways in which neutral state legislation could unduly hinder the functioning of interstate markets. Even Justice Scalia, whose dormant Commerce Clause analysis provides for a relatively limited judicial inquiry, looks beyond discrimination to determine the risk of multiple inconsistent regulations by the states. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94-95 (1987) (Scalia, J., concurring in part and in the judgment).

25. *See id.* at 87.

26. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

or indirect,[27] and whether the parochial interest furthered by the state law outweighs the burden on interstate commerce.[28] Regardless of its specific form, some version of this quantifying step occurs in virtually all of the Court's dormant Commerce Clause analyses.

We therefore first apply a discrimination analysis to the Washington Act and then apply the two more frequently used measures of the extent of a state law's burden on interstate commerce. We conclude our Commerce Clause discussion by addressing briefly the Act's consistency with the Clause's underlying non-protectionist goals.

A. *The Discrimination Analysis*

1. The Definition of Discrimination Under the Commerce Clause

Despite the frequent use of discrimination analyses in the Commerce Clause jurisprudence, the contours of the discrimination inquiry are unclear.[29] Although the Washington Act by its terms treats both residents and nonresidents of the state identically, this renders the Act nondiscriminatory for Commerce Clause purposes only if facial neutrality is sufficient.[30] Facially neutral state laws do not necessarily pass constitutional muster under the Supreme Court's equal protection analysis[31] if the application of the law is discriminatory.[32] Unless their respective functions justify the application of different standards as to what constitutes discrimination, facial

27. Primarily a nineteenth century mode of Commerce Clause analysis, *see, e.g.*, Smith v. Alabama, 124 U.S. 465, 482 (1888), the direct versus indirect distinction was used as recently as 1982 in Justice White's plurality opinion in Edgar v. MITE Corp., 457 U.S. 624, 641-43 (1982); *see also* Tyson Foods, Inc. v. McReynolds, 865 F.2d 99, 101 (6th Cir. 1989) (relying in part on *MITE*'s indirect burden analysis in concluding that Tennessee's antitakeover provisions violate the Commerce Clause).

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

29. *See* Regan, *Siamese Essays*, 85 MICH. L. REV. 1864, 1869 (1987) (noting that neither the *CTS* majority nor Justice Scalia's concurrence define discrimination for Commerce Clause purposes).

30. Some courts have concluded that such facial neutrality is sufficient for Commerce Clause purposes. *See, e.g.*, Wilson v. Louisiana-Pacific Resources, Inc., 138 Cal. App. 3d 216, 225, 187 Cal. Rptr. 852, 858-59 (1982) (finding a corporate governance regulation nondiscriminatory because "it applies to covered foreign corporations the same rules which are applied to corporations domiciled within the state").

31. U.S. CONST. amends. V & XIV. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (fifth amendment's due process protection contains an equal protection component).

32. *E.g.*, Washington v. Davis, 426 U.S. 229, 241 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886).

neutrality can no more be sufficient for Commerce Clause purposes than it is for Equal Protection purposes. Because both clauses protect those who lack political recourse from being burdened disproportionately by state action, the Commerce Clause discrimination inquiry should be no less complete than that applied in the equal protection context. Thus, the Washington Act's discriminatory application to the several types of shareholders likely to be affected by its application must be assessed.

2. The Act's Potential for Discrimination Against Two Types of Shareholders

Because a target corporation's shareholders' interests are not necessarily aligned, we consider the potential for discrimination with respect to two groups of shareholders—"disinterested" shareholders who do not attain "acquiring person" status under the Act[33] and "interested" shareholders.

At least as applied to foreign corporations, target corporations subject to the Act must have a substantial number of in-state shareholders. Thus, any deleterious effects of the Act on disinterested shareholders will be borne by both in-state and out-of-state parties, and the Act is nondiscriminatory as applied to this class of shareholders.

The Act's effect on interested shareholders presents a more difficult problem because of the possibility that the interested shareholders are more likely to be out-of-state parties. Indeed, the enactment of the Washington Act in response to the Pickens group's activities arguably illustrates the point. This disproportionate effect hypothesis is set forth in an article[34] which describes the circumstances under which Connecticut's fair price antitakeover statute[35] was passed. The author asserts that state antitakeover legislation may result from the perceived or potential threat of a hostile takeover to a large corporation with a substantial in-state presence by an out-of-state acquiror.[36] Under the hypothesis, a politically powerful in-state target may be expected to seek legislative protection and face little opposition because the potential acquirors lack

33. WASH. REV. CODE § 23A.50.020(1) (Supp. 1988).

34. Romano, *infra* note 36.

35. CONN. GEN. STAT. ANN. §§ 33-374 (West 1987).

36. Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987).

in-state political power and the target shareholders are geographically diffused and in many cases lack a sufficient economic interest (absent collective shareholder action) to oppose the proposed legislation. Thus, the interested or potentially interested shareholders, subjected to the limits imposed by state antitakeover statutes, may disproportionately be out-of-state parties, and the political check that exists when legislation substantially affects in-state interests may be lacking.

The disproportionate effect hypothesis is flawed in at least two ways. First, discrimination analysis under the Commerce Clause does not mean that state legislatures must ignore threats to local interests. That concern is not necessarily improper discrimination in favor of local interests; it is an inevitable product of the federal system. The anti-discrimination prong of Commerce Clause analysis instead requires that the threat to local interests not be addressed only, or disproportionately, at the expense of nonresidents. Second, while the population and economic base of any state assure that the pool of potential acquiring parties is likely to be largely nonresident, that cannot itself be discrimination or a discriminatory impact. The Supreme Court noted in *CTS Corp. v. Dynamics Corp. of America*[37] that it is not the number in each classification that determines discrimination, but a difference in treatment.[38] The Washington statute does not discriminate between resident and non-resident acquiring parties.[39]

Under a proper view of discrimination analysis, the Washington Act is suspect only if its purpose is simply to benefit corporations incorporated or centered in Washington at the expense of acquiring parties from outside the state. The purposes of the Act, however, are stated not in terms of protecting the covered companies because they are in Washington but protecting the local economy against what is deemed to be a

37. 481 U.S. 69 (1987).

38. *Id.* at 88.

39. In any event, a disproportionate impact should not, standing alone, establish discrimination for Commerce Clause purposes. In a similar analysis of discrimination under the Equal Protection Clause, the Court has found that discriminatory impact alone will not generally rouse suspicion regarding legislative motivation. *See* Washington v. Davis, 426 U.S. 229, 242 (1976). Thus, even if the Washington Act had some disproportionate impact in practice, that fact would not necessarily suggest that the Act is discriminatory. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981) (upholding facially neutral statute even though the statute caused business to shift from a predominantly out-of-state industry to a predominanatly in-state industry).

harmful business practice. Unless it could be shown that the transactions prohibited under the Act are disfavored only because they are engaged in by nonresidents at the expense of residents, the Act should be treated as nondiscriminatory.

This approach comports with the discrimination analysis under the Equal Protection Clause.[40] Here, as there, courts have good reason to avoid direct examination of the motivations of the individual legislators.[41] Instead, they focus on the face of the statute, its stated purposes and such indirect tests as whether the statute's means do not fit well with its stated purposes, and instead fit much better with improper ends.[42]

The Washington Act fares well under this analysis. Its purposes are facially proper. While factually and philosophically debatable,[43] reasonable legislators could conclude that the types of transactions sought to be discouraged are economically and socially harmful. The Act is limited to a few foreign corporations most important to the local economic and social welfare, and it applies only to the most harmful post-acquisition activities. It does not preclude any acquisition at all, even if by non-residents.

The Washington Act, could, under some circumstances, be overinclusive in its application, for example, if it entailed the sale of an asset located elsewhere. The combined definitions of "target corporations" and "significant business transaction" make this unlikely. Moreover, this kind of overinclusiveness—protecting some other totality against the harmful transaction— does not suggest non-resident discrimination. Even if it did, the proper judicial remedy is to narrow the statute, not to invalidate it on its face.

B. The Quantification Analysis

1. The Risk of Inconsistent Regulation

The extraterritorial scope of the Washington Act creates a risk of inconsistent regulation of foreign corporations, and this

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40. *See, e.g.*, Griffin v. County School Board, 377 U.S. 218 (1964).

41. *See* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971). *But see* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1143-60 (1986) (favoring motive review of state action challenged under the dormant Commerce Clause).

42. *See infra* notes 46 & 56 and accompanying text.

43. *See* Note, *Second Generation State Takeover Statutes and Shareholder Wealth: An Empirical Study*, 97 YALE L.J. 1193, 1231 (1988) (concluding that shareholders are "generally harmed financially" by second generation antitakeover statutes).

risk is the greatest threat to the constitutionality of the Act under the Commerce Clause.

The majority opinion in *CTS* considered the risk that state efforts to regulate corporate takeovers could impose inconsistent regulations in violation of the Commerce Clause. The majority concluded that the Indiana control share statute posed no risk of inconsistent regulation because it applied only to Indiana's domestic corporations.[44] The majority noted further that no inconsistent regulation would occur so long as each state limits the regulation of corporate shareholders' voting rights to its domestic corporations.[45]

Although the Washington Act applies to foreign corporations, that dissimilarity does not necessarily doom the statute under *CTS*. *CTS* tells us only that the attributes of stock ownership may be determined by the state of incorporation; it does not state that a moratorium by other states on particular types of transactions that substantially affect those states would be unconstitutional. One must therefore look to the risk of inconsistent regulation posed by the particular terms of the Washington Act.

The risk of inconsistent regulation is generally sufficient to invalidate a state law only where an actual conflict with the law of another state exists. A mere potential or hypothetical conflict is not enough.[46] The only potential conflict between the Washington Act and the laws of other states would be the conflict between more and less permissive business regulations. The Act may prohibit certain transactions that other states, perhaps even the state of incorporation, would allow. But in this respect the Act is indistinguishable from state-imposed health and safety regulations that are routinely upheld even though they mandate different conduct by interstate businesses in different states. The fact that some states create more or less beneficial environments in which to conduct business does not violate the Commerce Clause.

State laws deemed unconstitutional because of inconsistent regulation have generally mandated inconsistent affirmative duties to act. For example, in *Southern Pacific Co. v. Ari-*

44. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88-89 (1987).

45. *Id.*

46. *See, e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960) (rejecting a Commerce Clause challenge where the plaintiff cited no regulation inconsistent with the challenged ordinance).

zona,[47] the Supreme Court found that an Arizona statute regulating train lengths unduly burdened interstate commerce because of a perceived inconsistency between the Arizona regulation and other states' regulations and because of the Arizona regulation's weakly articulated safety rationale. Similarly, in *Bibb v. Navajo Freight Lines, Inc.*,[48] the Court held that it was unconstitutional for Illinois to require that trucks traveling on Illinois roads use contoured mud flaps. Forty-five states allowed straight flaps and one state required them. Thus, the Court concluded that Illinois' imposition of inconsistent regulations on interstate commercial activity, coupled with the weakness of Illinois' safety argument, rendered the requirement unduly burdensome.[49] Moreover, the identified weakness in the safety rationales put forth in both *Southern Pacific* and *Bibb* suggests that the safety justifications were pretextual and the enacting states' motives protectionist.

State laws may violate the Commerce Clause on inconsistent regulation grounds even absent the imposition of inconsistent affirmative duties if the cumulative effect of several state laws would unduly burden interstate commerce.[50] The Washington Act's scope is sufficiently narrow to substantially limit the risk of this form of inconsistent regulation. The Act applies only to those foreign corporations doing business in Washington that have their principal executive offices in the state and that have a substantial shareholder and employee presence in Washington. In rejecting a Commerce Clause challenge, a recent California case cited the similarly narrow scope of a California cumulative voting statute that applied to certain

47. 325 U.S. 761 (1945).

48. 359 U.S. 520 (1959).

49. TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022 (W.D. Okla. 1987), also illustrates the point. In *TLX*, the court concluded that an extraterritorial voting rights statute, similar to the Indiana statute at issue in *CTS*, violated the Commerce Clause because it posed a risk of inconsistent regulation. The court focused on the risk of inconsistent affirmative duties to hold shareholder meetings to determine whether voting rights would attach to a potential acquiror's shares. *Id.* at 1030-31.

50. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-12, at 434 (2d ed. 1988):

> Even if nondiscriminatory and nonprotective when perceived in isolation, regulatory measures applied by several states to the same multi-state business may in the aggregate so operate against interstate commerce that, when viewed in combination, they exert a potent localizing bias by making commercial activities which are confined to a single state far less difficult and more profitable than more national enterprises.

Id.

foreign corporations.[51]

Generally, only one or two states will have sufficient ties to a corporation to be inclined to extend antitakeover provisions to the corporation. Although in some instances a state with substantial ties and the state of incorporation might impose different regulatory requirements on a given corporation, no inconsistent regulation would exist for Commerce Clause purposes unless the corporation could not comply with both requirements, or unless the combined effect of the regulations was unduly burdensome. For example, consider a Delaware corporation that qualifies as a "target corporation" under the Washington Act. The Washington[52] and Delaware[53] moratorium provisions both restrict certain types of transactions between the target corporation and an interested shareholder. The statutes differ, however, in that the Delaware law imposes a higher threshold as to when a shareholder becomes interested and prohibits fewer types of transactions. The Delaware law also provides several exceptions, such as supermajority shareholder approval, that do not appear in the Washington Act. Moreover, Washington's moratorium is imposed for five years, whereas Delaware's is imposed for only three years.

Despite these differences, a target corporation would be fully able to comply with both legislative schemes by refraining from engaging in the transactions prohibited by Washington during the more restrictive five-year period. The interested shareholders' inability to take advantage of the exceptions to the moratorium provided by Delaware law no more imposes inconsistent burdens for Commerce Clause purposes than if Washington imposed stricter waste disposal requirements than did Delaware.[54]

51. *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal. App. 3d 216, 226-27, 187 Cal. Rptr. 852, 860 (1982).

52. WASH. REV. CODE § 23A.50.010 (Supp. 1988).

53. DEL. CODE ANN. tit. 8, § 203 (Supp. 1988).

54. *But see* Hyde Park Partners L.P. v. Connolly, 839 F.2d 837, 844 (1st Cir. 1988) (stating in dictum that extraterritorial application of the antitakeover statute would not likely survive a Commerce Clause challenge because of the risk of inconsistent regulation); TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022 (W.D. Okla. 1987) (granting preliminary injunction against enforcement of an Oklahoma extraterritorial antitakeover statute). As we noted, *supra* at note 48, the statute at issue in *TLX*, unlike the Washington Act, posed the risk that inconsistent affirmative duties would be placed upon foreign corporations subject to the statute's limitations. Moreover, because the Washington Act requires a more substantial nexus between the state and the foreign corporations subject to the Act's terms than does the Oklahoma statute, *compare* WASH. REV. CODE § 23A.50.020 (13)(b) (Supp. 1988) *with* OKLA. STAT. tit. 18,

2. The Balancing of State and Federal Interests

In a substantial number of cases prior to *CTS*, the Supreme Court attempted to quantify the burden placed upon interstate commerce through a balancing test. In *Pike v. Bruce Church, Inc.*,[55] the Court formulated the inquiry as follows:

> Generally, 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. A statute may, however, be constitutionally suspect if the burden imposed on interstate commerce is clearly excessive in relation to the statute's putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. Moreover, the extent of the burden that will be tolerated will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[56]

In conducting this balancing test, the Court has considered such factors as whether the subject matter of the regulation is one of traditional state concern,[57] whether the means used to advance the state's objective is the least intrusive available,[58] and whether the benefits of the statute outweigh the burden on interstate commerce.[59] Because of the "infinite variety" of cases in which local regulation may affect interstate commerce,[60] the inquiry is necessarily fact intensive.[61] Moreover, its principal focus is the practical effect of the legislation, and the state law will be judged chiefly by its probable effects.[62]

The Washington Act withstands Commerce Clause scrutiny under this balancing test. That corporate governance and the regulation of the economic effects of comparable behavior

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§ 1148 (West Supp. 1989), the Washington Act poses a lesser threat of inconsistent regulation than did the Oklahoma statute.

55. 397 U.S. 137 (1970).

56. *Id.* at 142 (citations omitted).

57. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981).

58. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 146-47 (1986); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-55 (1951).

59. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-52 (1977).

60. Southern Pac. Co. v. Arizona, 325 U.S. 761, 768 (1945).

61. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (particularized inquiry focusing on financial impact of regulation on one interstate business).

62. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 37 (1980).

are areas of traditional state concern is not open to question.[63] The means employed by the Act to accomplish the law's goals are limited in a number of ways. The Act preserves the fiscal integrity of corporations with substantial ties to Washington by imposing temporal restrictions on a limited number of business transactions in order to deter the destructive breaking up of acquired corporations by corporate raiders. It does not discourage all hostile takeovers, nor does it regulate the tender offer process. It does not interfere with shareholders' voting rights, nor with takeovers deemed by the target's board to be in the corporation's best interest.

In addition, the benefits to Washington in enforcing the Act outweigh any incidental burden imposed by the Act on interstate commerce. Washington's interest in the Act is two-fold. First, the Act protects the state against the social and economic consequences of the dissipation of the assets of large corporations with substantial connections to the state. Second, it protects resident shareholders and employees. The "significant business transactions" limited by the Act dissipate assets because a shareholder seeking control may use the assets to finance a takeover, potentially resulting in a distress sale of assets, and because the takeover attempt itself diverts management's attention and corporate resources. Washington's purpose is thus not to protect in-state interests from interstate competition, which is the primary evil sought to be remedied by the Commerce Clause.[64] Instead, the Act preserves the financial resources of corporations critical to the state's economy so as to allow them to compete more effectively. The Act thus promotes rather than conflicts with the free trade values underlying the Commerce Clause. Further, because it regulates business transactions to prevent harm to in-state residents and employees, the Act is like any other non-exclusionary exercise of the state's police and regulatory power over business. It is thus analogous to the regulation of professional conduct,[65] the imposition of environmental and safety restrictions,[66] and the nondiscriminatory taxation of

63. *See* Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

64. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951).

65. *See* Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

66. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

businesses.[67]

Because of its preservationist goals, the Act is also analogous to state actions upheld in decisions dealing with the preservation of natural resources. State laws regulating natural resources violate the Commerce Clause principally when such laws are exclusionary rather than preservationist.[68] In *Cities Service Gas Co. v. Peerless Oil & Gas Co.*,[69] the Supreme Court upheld a Texas arrangement whereby a state commission fixed the minimum wellhead price for natural gas, noting that "[a] state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources."[70] It further noted that, although the federal interest was strong, there was no clear harm to that interest in the state regulation.[71] Similarly, Washington has a strong interest in preventing the dissipation of the assets of corporations with substantial ties to the state, and the Act neither conflicts with nor harms any federal interest.

The Supreme Court has consistently upheld the nondiscriminatory regulation of business conduct when the state's action could be justified by a rationale other than resident favoritism and the regulation had a minimal effect on interstate commerce. In rejecting a Commerce Clause challenge to a fee imposed by a state on a public utility, the Court stated in *Great Northern Railway v. Washington*[72] that "[t]he supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce . . . is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause."[73] In *Parker v. Brown*,[74] the Court upheld a California legislative scheme regulating the marketing of raisins in order to maintain and stabilize prices despite the scheme's substantial impact on interstate commerce (95% of the state's raisin production entered interstate commerce) and its potential conflict with the policies underlying the federal antitrust laws. Similarly, numerous cases have upheld nondiscriminatory state or local taxation of business conduct despite

67. *See* Mackay Tel. & Cable Co. v. City of Little Rock, 250 U.S. 94, 99 (1919).

68. *See, e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (invalidating requirement of in-state processing of locally caught fish).

69. 340 U.S. 179 (1950).

70. *Id.* at 187.

71. *Id.*

72. 300 U.S. 154 (1937).

73. *Id.* at 160 (footnote omitted).

74. 317 U.S. 341 (1943).

the obvious impact of such taxes on interstate commerce.[75]

The justification of the Indiana statute upheld by the Supreme Court in *CTS* was similar to that of the Washington Act—the protection of shareholders from what the state legislature perceived to be the harms incident to hostile takeovers.[76] The *CTS* majority opinion noted that by regulating the corporate governance of large corporations states necessarily affect interstate commerce incidentally, but that such regulation is "an accepted part of the business landscape."[77] Moreover, it rejected the argument that, because tender offers might actually benefit shareholders, the state had no interest in limiting them in order to protect shareholders. After noting the debate over the economic effect of tender offers, the Court stated that it was "not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.' "[78] Nor would the Court consider the likely effectiveness of the state legislation in achieving its goals.[79]

The Washington Act's extension to a limited group of foreign corporations does not alter the outcome of the *CTS* analysis. In holding Illinois' antitakeover statute unconstitutional in *Edgar v. MITE Corp.*,[80] the Supreme Court relied in part upon the fact that the statute would extend to transactions entirely between out-of-state buyers and sellers.[81] The limitation of the Washington Act's scope to corporations with a substantial number of Washington resident shareholders or employees reduces this concern. Moreover, the majority in *CTS* declined to apply the *Edgar v. MITE Corp.* analysis because the Indiana

75. *See, e.g.*, Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980) (upholding apportioned tax of New York corporation by Vermont). *See also* Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) (upholding California's method of taxing corporate taxpayer with foreign subsidiaries).

76. Whether the view that hostile takeovers are harmful to the disinterested shareholders is correct and whether such harm has been empirically demonstrated does not control the state laws' constitutionality. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring) ("a law can be both economic folly and constitutional").

77. *Id.* at 91. Although *CTS* concerned regulation by the chartering state, in the absence of the risk of inconsistent regulation (*see supra* note 43-53 and accompanying text) the extension of such regulation to a narrowly drawn class of foreign corporations should not change the outcome of the Commerce Clause inquiry.

78. *Id.* at 92 (quoting Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981), *cert. denied*, 469 U.S. 834 (1984) (Brennan, J., concurring in the judgment)).

79. Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 188 (1950).

80. 457 U.S. 624, 644 (1982).

81. The Illinois statute at issue purported to supplement the Williams Act, 15 U.S.C. §§ 78m(d), (e), 78n(d)-(f), by directly regulating the tender offer process.

statute being reviewed applied only to domestic corporations with a substantial number of shares held by Indiana residents: "every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting."[82] Although it extends to a limited class of foreign corporations, the same is true of the Washington Act.

The balancing of state and federal interests does not require that the state interest be weighed against the federal interest in unburdened commerce. Rather, the inquiry should address whether the state has a legitimate interest of sufficient import that any incidental effect on commerce should be accommodated. Thus, the federal side of the balance should focus on the extent of the hindrance of commerce rather than the relative importance of the policies underlying the Commerce Clause and the state regulation.

If the Washington Act burdens interstate commerce, it does so by making hostile takeovers of corporations subject to the Act's limitations less attractive if the potential acquiror would prefer to finance the acquisition over the short term with the target's assets. Similarly, the Indiana statute upheld in *CTS* was said to make acquisition of a subject corporation's shares less attractive because it made the attachment of voting rights to the acquiror's shares contingent upon the approval of a majority of the disinterested shareholders. The *CTS* majority noted that all states have enacted corporate governance laws that affect interstate commerce by influencing the desirability of certain corporate transactions.[83] It cited the examples of supermajority voting requirements for merger approvals and various "dissenters' rights" provisions.[84] Because of the states' interests in promoting stable corporate relationships and in protecting resident shareholders, corporate governance regulations survive despite their effect on interstate commerce.

Although the *CTS* majority refers to the state's interest in regulating corporations that it charters, its arguments apply with equal force to state regulations that extend to those foreign corporations with substantial ties to the regulating state. As the taxation and natural resource cases show, the even-handed regulation of foreign corporations doing business in a

82. *CTS*, 481 U.S. at 93.

83. *Id.* at 89-90.

84. *Id.*

state is permissible under the Commerce Clause. There is nothing peculiar to Washington's regulation of particular transactions that mandates a different analysis. Absent a contrary showing, the place of organization or chartering of a market participant is not relevant to the appraisal and accommodation of the competing demands of the state and national interests that the Commerce Clause inquiry is intended to achieve.

C. *The Act's Consistency With the Commerce Clause's Non-Protectionist Goals*

Although the Commerce Clause case law has a "plainly manipulable and at times anachronistically metaphysical character,"[85] the Clause's purpose provides a governing principle that both explains the jurisprudence and favors rejection of a Commerce Clause challenge to the Washington Act. Absent substantial interference with free trade or mere favoritism of residents over nonresidents, such as the protection of in-state producers from out-of-state competition,[86] the prevention of the flow of goods out of the state until the in-state demand has been satisfied,[87] or the requirement of in-state processing of natural resources,[88] state legislation should withstand dormant Commerce Clause scrutiny.[89] Thus, the "crucial inquiry" is whether the Act "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[90]

> "Protectionism" for Commerce Clause purposes refers to attempts by a state to place itself in economic isolation.[91] The concern with protectionism reflects "a central concern

85. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-14, at 440 (2d ed. 1988).

86. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

87. *See, e.g.*, H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949).

88. *See, e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

89. Federalism concerns also favor the exercise of judicial restraint in this context. The dormant Commerce Clause inquiry entails the review of state legislation in areas where Congress has chosen not to act. Although some have inferred from this that judicial review consequently should be especially vigorous, *see, e.g.*, Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 220-21 (1957), we conclude that when Congress has chosen not to regulate a given area of commerce the courts should not be quick to displace the states' regulatory scheme.

90. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). *See generally* THE FEDERALIST NOS. 41, 42 (Madison). *See also* Monaghan, *Forward: Constitutional Common Law: The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 10-17 (1975).

91. H.P. Hood & Sons, 336 U.S. at 537-38.

> of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[92]

However, the Washington Act is not protectionist or exclusionary in its purposes or in its effects. Its purposes are to promote the financial stability of corporations with substantial ties to the state and to protect the state's resident shareholders and employees. To the extent that the Act protects either subject corporations or shareholders, that protection is from predatory conduct in the marketplace, regardless of its geographic origin, and not from out-of-state competition with in-state companies, shareholders, or acquiring parties. By preserving corporate assets and protecting participants in the capital markets, the Act in fact promotes the free trade which the Commerce Clause was intended to protect.

III. THE WASHINGTON ACT'S CONSTITUTIONALITY UNDER THE SUPREMACY CLAUSE

The Supremacy Clause of the federal Constitution provides for federal preemption of state law under some circumstances.[93] Preemption occurs

> when Congress expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[94]

No federal statute exclusively regulates the transactions subject to the Washington Act, and compliance with both fed-

92. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). *See also* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 23, at § 4.3 (summarizing the history of the Commerce Clause).

93. U.S. CONST. art. VI, cl.2.

94. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986) (citations omitted).

eral and Washington law is possible. The only possible preemption rationale is that the Washington Act might hinder accomplishment of the objectives of the federal securities laws.[95] For example, other state antitakeover statutes have been challenged as conflicting with the federal Williams Act,[96] which regulates the tender offer process by (1) requiring an informational filing by offerors and (2) stating procedural rules that the offeror must follow.

In *CTS*, the Supreme Court addressed the preemptive effect of the Williams Act as applied to Indiana's control share statute.[97] The Indiana statute requires approval by noninterested shareholders before a person holding a control block of an Indiana corporation's shares will be entitled to voting rights. After analyzing both the Williams Act's regulatory scheme and Congress' goals in enacting it, the Court concluded that the Indiana law was not preempted by the Williams Act.[98]

Prior to *CTS*, a plurality of the Supreme Court in *Edgar v. MITE Corp.*,[99] and several lower courts,[100] had concluded that the Williams Act was meant to strike a balance in the battle between target management and a hostile tender offeror, and that state regulation must not upset that balance. The majority opinion in *CTS* focused, however, not on this balance of power, but on the Indiana statute's affording of protection to corporate shareholders from both the offeror and the incumbent management.[101] It concluded that this protection furthered a basic purpose of the Williams Act—to place investors and offerors on an equal footing in the tender offer process.[102]

The Washington Act is valid under *CTS*'s preemption analysis. Like the control share statute at issue in *CTS*, the Washington Act does not regulate or affect the tender offer process. It takes effect only after a successful tender offer and limits for five years "significant business transactions" between the target corporation and certain shareholders under certain cir-

95. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

96. 15 U.S.C. §§ 78m(d), (e), 78n(d)-(f) (1982 & Supp. 1987).

97. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 78-87 (1987).

98. *Id.* at 86-87.

99. 457 U.S. 624 (1982).

100. *See, e.g.*, Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 261 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 565-66 (6th Cir. 1982).

101. *CTS*, 481 U.S. at 80-82.

102. *Id.* at 82.

cumstances.[103] Thus, the Act is unrelated to the disclosure requirements, the timing of offers, or any other procedural aspect of the tender offer process regulated by the Williams Act.

That the Washington Act may make certain corporations with substantial connections to Washington less attractive to some potential tender offerors is not sufficient to show preemption. This impact is much like the possibility that the Indiana statute might delay some tender offers. The majority in *CTS* acknowledged that the practical effect of this requirement could be to condition acquisition of control on the approval of a majority of the noninterested shareholders, but nonetheless found this effect insufficient to require preemption.[104] As with a state's health and safety regulation of business conduct, the Washington Act might make a Washington-based business less attractive to a prospective purchaser, but that result does not favor a finding of federal preemption.[105] The Act's effect on the attractiveness of a potential takeover target implicates the policies underlying the Williams Act less than the myriad valid state corporate laws that affect the attractiveness of a company as an acquisition.[106] Thus, companies headquartered or incorporated in states with high tax rates, strict environmental laws, onerous employment or plant closing statutes and the like might be less attractive than they would otherwise be to an acquiror, but federal regulation of the interstate commerce in corporate acquisitions does not preempt such laws.

Likewise, the Supreme Court's plurality opinion in *Edgar v. MITE Corp.*[107] does not favor preemption of the Washington Act.[108] *MITE* held unconstitutional an Illinois antitakeover statute that included a twenty-day precommencement notifica-

103. *See supra* notes 11-15 and accompanying text.

104. *CTS*, 481 U.S. at 84.

105. The courts have historically upheld state police power regulation unless compliance with both state and federal law is not merely burdensome but impossible. *See, e.g.*, California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218 (1985) (state law must "inevitably" frustrate federal law).

106. *See, e.g.*, CAL. CORP. CODE § 708 (West Supp. 1987) (affording shareholders the right to cumulative voting).

107. 457 U.S. 624 (1982).

108. As the majority opinion in *CTS* explains, Justice White's plurality opinion in *MITE* was joined by only two other justices in its treatment of the preemption issue. *CTS*, 481 U.S. at 81. Consequently, that opinion "cannot stand for a broad preemption principle under which any state regulation of tender offers would have to be

tion requirement for tender offers, a hearing provision with no time deadline, and a fairness provision allowing a state official to enjoin tender offers he or she deemed to be substantively unfair. The plurality found that the precommencement notice and hearing requirements conflicted with the Williams Act by permitting management-created delays of tender offers. It also concluded that, in contravention of the Williams Act, the fairness assessment displaced the investors' decision-making powers. The Washington Act, however, does not tamper with the notification or any other procedural requirement of the Williams Act. Its only possible effect on tender offers is its potential for making them less attractive on the merits to certain potential acquirors. Thus, the *MITE* plurality opinion presents no bar to rejecting a Williams Act preemption argument.

Preemption of state law is not to be presumed lightly.[109] Moreover, the interstitial nature of federal law must be considered in the preemption analysis. Professor Gunther's preemption discussion states that federal legislation on the whole

> has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as is necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.[110]

When it enacted the Williams Act, Congress can be presumed to have been aware that it was regulating in an area of long-standing state dominance. If it had meant to preempt all state law with even indirect effects on tender offers, it would presumably have done so explicitly.[111] Instead, it chose to regulate the disclosure of information by the offeror and the procedural aspects of the offer. The Supreme Court has recognized a strong presumption against implied preemption of historic state regulation, particularly where Congress has acted

invalidated." Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1036 (1st Cir. 1982) (upholding the Massachusetts antitakeover statute after *MITE*).

109. New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973); Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d at 1038.

110. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW § 344 (1980) (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM § 435 (1953)).

111. *See CTS*, 481 U.S. at 86.

after the states and without expressly limiting the states' efforts.[112]

Moreover, the federal securities laws expressly preserve state regulation of corporate behavior.[113] The courts are justifiably hesitant to find implied preemption where Congress has explicitly allowed both federal and state regulation.[114] When dual regulation has been explicitly allowed, there is no preemption absent Congress' "clear and manifest purpose."[115] Neither logic nor precedent support the conclusion that Congress intended the Williams Act to preempt the type of economic and public welfare regulation contained in the Washington Act.[116]

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112. California v. ARC Am. Corp., 109 S.Ct. 1661, 1665 (1989); Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1353 (1988); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963).

113. *E.g.*, 15 U.S.C. § 78bb(a) (Supp. V 1987).

114. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986).

115. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. at 1353.

116. Another aspect of the Washington Act—the prohibition, under certain circumstances, of the discharge of five percent or more of a covered corporation's employees—might be preempted by the federal Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1381 (1982 & Supp. V 1987), or the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157-58 (1982). However, both of these federal acts only provide procedural frameworks in which labor and management operate and neither, outside of ERISA's treatment of pension plans, regulates substantive conduct.

Congress has not occupied the entire field of labor legislation, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985), and the preemptive effect of federal labor law turns on the extent to which Congress has implicitly limited the permissible scope of state regulation of the labor-management relationship. New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 527 (1979). Thus, the purpose and scope of the federal legislation is again the starting point for the preemption analysis.

ERISA regulates employee benefit and pension plans. Its function in the area of benefits is largely procedural; it does not mandate that employers provide any particular benefits. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983). In enacting ERISA, Congress intended to promote the interests of employees and their beneficiaries in benefit plans. *Id.* at 90. The Supreme Court recently upheld the constitutionality of a state law analogous to the Washington Act because it was designed to protect employees from the economic consequences of certain business decisions. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). *Fort Halifax* concerned a Maine statute that imposed a one-time severance pay requirement on employers in the event of a plant closing. The Court found that the statute neither established nor required the employer to maintain an employee welfare "plan" as contemplated by ERISA, and that the state statute consequently was not preempted. The Washington Act's employment provision also does not establish or require the maintenance of an employee benefit plan. Like the Maine statute, it merely regulates employer conduct. Thus, ERISA does not preempt the Act's employment provision.

The NLRA provides "a framework for self-organization and collective bargaining." Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 751

IV. CONCLUSION

Despite its extraterritorial reach, the Washington Act withstands both the discrimination and quantification inquiries of the Supreme Court's Commerce Clause analysis. The Act's stated purposes and probable effects are nondiscriminatory. Even if potential acquiring parties are disproportionally nonresident, such disproportionality would not, standing alone, warrant a finding that the Act is unconstitutional. Further, the Act poses neither a risk of inconsistent affirmative duties nor a risk of unduly burdensome conflicting regulations. Perhaps most importantly, the Act's purpose is consistent with the Commerce Clause's underlying free trade values.

The Washington Act should also withstand a Supremacy Clause challenge. The Act neither attempts to regulate in an area fully preempted by Congress, nor threatens to hinder the accomplishment of the objectives of any federal legislative or regulatory scheme. Like the Indiana statute upheld by the Supreme Court in *CTS*, the Act does no more than potentially make some acquisitions less attractive. Such an effect is insufficient to render the Act preempted by the Williams Act or any other federal laws governing the securities markets.

(1985). Like ERISA, the NLRA does not substantively regulate the relationship between the employer and employee. It is "concerned primarily with establishing an equitable process and determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Id.* at 753.

Under both *Fort Halifax* and *Metropolitan Life*, a state may create and alter the substantive rights of employees, in effect establishing a base line from which collective bargaining over a matter may be conducted, without conflicting with the NLRA. In *Metropolitan Life*, the Court allowed a state to establish minimum health insurance benefits. In *Fort Halifax*, it allowed a state to impose a minimum amount of severance pay in the event of a plant closure. The Act's employment provision similarly provides a base line from which collective bargaining may be conducted. The provision is thus analytically indistinguishable from those at issue in *Metropolitan Life* and *Fort Halifax*. Because Washington does not attempt to regulate the bargaining process itself, but merely exercises its police power by imposing certain minimum requirements on some employers, the NLRA does not preempt the Act's employment provision.