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CTS CORPORATION, APPELLANT V. DYNAMICS CORPORATION OF AMERICA, ET AL.

STATE OF INDIANA, APPELLANT V. DYNAMICS CORPORATION of AMERICA, ET AL.

No. 86-71 and 86-97

In the Supreme Court of the United States

October Term, 1986

On Appeals from the United States Court of Appeals for the Seventh Circuit

Brief for the Securities and Exchange Commission and the United States as Amici Curiae

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QUESTION PRESENTED

Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is unconstitutional under the Supremacy Clause or the Commerce Clause of the United States Constitution.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND THE UNITED STATES

These appeals present the question whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is constitutional as applied to "control share acquisitions" occurring in interstate commerce. The Securities and Exchange Commission and the United States submit this brief primarily to address the constitutionality of the Indiana statute under the Commerce Clause.

The Commission is responsible for the administration and enforcement of the federal securities laws, including the regulation of national securities exchanges and other securities markets and the regulation of tender offers in interstate commerce. See generally Securities Exchange Act of 1934, 15 U.S.C. (& Supp. III) 78a et seq. As the federal agency primarily responsible for regulating the national securities marketplace in the public interest and for the protection of investors, the Commission has a substantial interest in the question whether a state law regulating "control share acquisitions" unconstitutionally burdens the national securities marketplace, which is an important part of interstate commerce.

The United States has an interest in proper interpretation of the role of the Commerce Clause in our federal system. The United States has an interest in both the free flow of commerce among the states and proper consideration of the prerogatives of the states.

STATEMENT

1. Appellant CTS Corporation (CTS) is an Indiana corporation with its principal place of business and substantial assets in Indiana (CTS J.S. App. A5). The common stock of CTS is listed for trading on the New York Stock Exchange (ibid.). /1/ This case arises out of efforts of Dynamics Corporation of America (Dynamics), a publicly held corporation organized under the laws of New York, with its principal place of business in Connecticut, to acquire additional shares of stock in CTS by means of a tender offer (ibid.).

As of March 10, 1986, Dynamics was the beneficial owner of approximately 9.6% of the common stock of CTS, which was then selling at approximately $36 per share (CTS J.S. App. A1, A6, A13). On that date, Dynamics initiated a cash tender offer for another 1 million shares of CTS stock at $43 per share (id. at A1, A5). The addition of 1 million shares to the stock it already owned would give Dynamics a total of approximately 27.5% of the common stock of CTS (id. at A1). As required by the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. 78m(d)-(e) and 78n(d)-(f)), Dynamics and CTS made certain filings with the Commission in connection with this tender offer.

Also on March 10, Dynamics announced its intention to elect a full slate of nominees to the CTS board of directors at the annual shareholders meeting scheduled for the following month (CTS J.S. App. A31-A32; CTS Br. 2; Dynamics Mot. to Aff. 2). On the same day, Dynamics filed suit in the United States District Court for the Northern District of Illinois challenging CTS's proxy solicitations for the upcoming meeting (CTS J.S. App. A2). /2/ The issues raised in the initial complaint are not before this Court.

2. Several days before the commencement of Dynamics' tender offer, the Governor of Indiana had signed into law a revised Indiana Business Corporation Law (Ind. Code Ann. Sections 23-1-17-1 to 23-1-54-2 (Burns Supp. 1986)), which included the Control Share Acquisitions Chapter (id. Sections 23-1-42-1 to -11). /3/ Starting August 1, 1987, the new Business Corporation Law will apply to all Indiana corporations (Ind. Code Ann. Section 23-1-17-3(a)), but corporations will be allowed to amend their articles of incorporation or bylaws to opt out of the Control Share Chapter (id. Section 23-1-42-5). Before August 1, 1987, the statute is not automatically applicable but allows corporations to

opt into the new Business Corporation Law, including its Control Share Acquisitions Chapter, by resolution of the board of directors and without any shareholder action (id. Section 23-1-17-3(b)). On March 27, 1986, the CTS board of directors by resolution opted into the new statute as of April 1, 1986 (CTS J.S. App. A2, A33).

Pursuant to the new law, shares acquired in an "issuing public corporation" /4/ in excess of certain prescribed levels of voting power, termed "control shares," /5/ are stripped of all voting rights unless the shareholders of the corporation, in the manner described below, vote to restore voting power to the control shares (Ind. Code Ann. Sections 23-1-42-5, -9). The shareholders decide whether to restore voting power to the control shares either at the next special or annual meeting (id. Section 23-1-42-7(c)) or at a special meeting called at the request of the person who proposes to make or has made a control share acquisition. Management of the subject company must schedule a special shareholders meeting within 50 days after the acquiror (1) delivers an "acquiring person statement" setting forth specified information; (2) requests such a meeting; and (3) provides an undertaking to pay the expenses of the meeting. Id. Sections 23-1-42-6 and -7. If the acquiror does not submit an acquiring person statement, or if the control shares are not given voting rights by the shareholders, then after a specified period the acquiror's shares may be redeemed by the subject company, if its articles of incorporation or bylaws permit (id. Section 23-1-42-10).

In order for the control shares to get back their voting rights, the acquiror must prevail on two votes. /6/ Under Ind. Code Ann. Section 23-1-42-9(b)(1), there is a vote in which all shareholders of record are entitled to vote. /7/ Under Ind. Code Ann. Section 23-1-42-9(b)(2), there is a vote in which "interested shares" are disqualified from voting. /8/ The acquiror will prevail only if, in each vote, the grant of voting rights to the control shares is approved by a majority of the votes entitled to be cast. /9/

3. After the CTS board elected to be governed by the Control Share Acquisitions Chapter, Dynamics did not comply with the provisions of the Chapter but instead immediately amended its complaint in this action. Dynamics sought injunctive relief and a declaration that the Control Share Acquisitions Chapter was preempted by the Williams Act and imposed an unconstitutional burden on interstate commerce in violation of the Commerce Clause. CTS J.S. App. A2, A33-A34.

The district court entered an order on April 9, 1986, invalidating the Chapter as violative of the Supremacy Clause (CTS J.S. App. A87). In a second opinion, issued April 16, 1986, the district court ruled for Dynamics and against CTS on the additional ground that the statute impermissibly burdens interstate commerce (id. at A124, A139).

In an expedited appeal, the court of appeals affirmed both rulings of the district court (CTS J.S. App. A2, A28). /10/ The court noted the dual-vote feature of the Control Share Chapter, i.e., that "(a) decision in favor of awarding voting rights requires a majority both of all shares and of all 'disinterested' shares" and that, "(w)ithout these two majorities, the acquirer's shares remain nonvoting shares" (id. at A20). The court found it "fairly transparent" that the Chapter was drafted "to skirt judicial holdings that forbid states to delay tender offers beyond the period required by the Williams Act" (ibid.), because an acquiror who is not interested in acquiring nonvoting shares is in effect forced to await the shareholders meeting before accepting tendered shares. "So he must hold the tender offer open for 50 days, rather than the 28 days required (on average) by the SEC's regulations under the Williams Act. * * * And he can have no great confidence in being able to win the vote on voting rights, since he cannot vote his own shares." Ibid.

The court of appeals explored the legislative history of the Williams Act and the substantial body of precedent interpreting it to forbid state legislation that adds delay to tender offers or otherwise upsets the balance that Congress struck between target management and tender offeror (CTS J.S. App. A21-A23). Despite admitting "doubts" about that precedent (id. at A23, A24), the court felt bound to follow it in light of MITE Corp. v. Dixon, 633 F.2d 486, 490-499 (7th Cir. 1980), aff'd on other grounds sub nom. Edgar v. MITE Corp., 457 U.S. 624 (1982). /11/ The court found it a "straightforward" matter to apply that precedent to invalidate the Chapter, since both the delay imposed by the Control Share Chapter and its shareholder-vote provisions were inimical to tender offers (CTS J.S. App. A23).

In deciding the Commerce Clause issue, the court weighed the local benefits provided by the Control Share Chapter against the burden that it places on interstate commerce (CTS J.S. App. A24-A27). The court found a burden on interstate commerce because "we can assume that the vast majority of both (CTS's) shareholders and Dynamics' shareholders are nonresidents (of Indiana, and t)he statute gravely impairs Dynamics' ability to do business with any of CTS's shareholders" (id. at A25); because "the Indiana statute is calculated to impede transactions between residents of other states" (ibid.); and because "the efficiency with which (corporate assets) are employed * * * depends on the market for corporate control -- an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute" (id. at A26 (citing Edgar v. MITE Corp., 457 U.S. at 463 (opinion of the Court)). The court found no sufficient countervailing local benefit because "Indiana has no interest in protecting residents of Connecticut from being stampeded to tender their shares to Dynamics at $43" (CTS J.S. App. A25 (citing MITE, 457 U.S. at 642-643 (opinion of the Court))) and because residents of Indiana receive "trivial or even negative benefits" from the Control Share Chapter (CTS J.S. App. A25). The court rejected a claim that the "internal affairs" doctrine could save the statute, since "in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance" (id. at A27). Thus, the court held that the Control Share Chapter is invalid under the Commerce Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission and the United States believe that the judgment of the court of appeals should be affirmed. This brief argues for affirmance only on the ground that the Chapter violates the Commerce Clause for a more specific reason than the reasons offered by the court of appeals.

The United States believes that the Indiana Chapter is not preempted by the Williams Act. As stated by appellant CTS (Br. 16-17), there is no conflict between any provision of the Williams Act and any provision of the Indiana Chapter that makes it impossible to comply with both statutes. As also stated by appellant CTS (Br. 21-22), there is no preemptive federal statutory policy that the Indiana Chapter violates: the Williams Act was designed to favor neither the takeover bidder nor target management, see Piper v. Chris-Craft Industries, 430 U.S. 1, 29 (1977), but it does not prohibit states from adopting laws that operate to favor one side or the other, unless those laws conflict with the Williams Act or the Commission's regulations under that Act. Cf. ibid.

The Indiana Chapter does offend the Commerce Clause. It applies to "public" corporations, a category defined so as to consist, in substantial part, of corporations whose shares have been offered and sold in interstate commerce. CTS is such a corporation: its common stock is listed on the New York Stock Exchange. The central feature of the Indiana Chapter is an express restraint on certain transfers of the voting rights of such shares: the approval of "disinterested" shareholders is required before a willing seller may sell his voting rights to a willing purchaser in a transaction that meets the definition of "control share acquisition." As a practical matter, in all cases in which the buyer's objective is in fact "control," the Indiana Chapter makes that approval a precondition to the sale of the shares themselves.

A chartering state does not violate the Commerce Clause when it exercises its broad power to define, modify from time to time, and enforce the rights represented by shares of stock of the corporations it charters. In particular, a state may, in the exercise of its chartering function, require or permit voting rights to be distributed in a virtually limitless variety of ways: for example, a chartering state may provide (should it for some reason wish to do so) for a class of corporations in which no person may own more than 20% of the voting shares. A state performing its chartering functions does not offend the Commerce Clause, notwithstanding the obvious effects of the state's actions on the value and transferability of shares of the corporations it charters, because the chartering state is responsible for the very existence of the corporation and its shares, and it may define the latter as it wishes notwithstanding effects on their transferability.

Indiana has done something different. The Indiana Chapter does not define (or permit the corporate draftsman to define) voting rights in a manner (however common or uncommon) equally applicable to whoever holds or acquires shares. It is written as a restraint on the transferability of voting rights in certain transactions, and it could not be written in any other way without changing its meaning. Its effect is to tend to preserve whatever pattern of voting rights (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern.

The Indiana Chapter provides that whatever voting rights the corporate charter grants to shares, and whatever the pattern of ownership of those shares may now be, no share transaction in which the buyer crosses one of the three specified thresholds of share ownership will be effective to transfer voting rights without the consent of disinterested shareholders. For example, Shareholder A, who today owns 20.1% of the common stock of an Indiana corporation whose shares are listed on the New York Stock Exchange, may vote all of the shares, and may freely buy more (up to 33 1/3%, the next threshold); but no person B who today holds less than 20% of the shares can freely cross the 20% threshold and catch up with A, because the transfer of voting rights to B in a threshold-crossing transaction is prohibited unless approved in a shareholder vote that will not include B but will (unless A is an officer or a director-employee of the corporation) include A. It is impossible to state the rule that produces this result as a rule of general applicability to both A and B: the positions of A and B are separated by a burden, imposed by Indiana, on the transfer from third parties to B of the voting rights (and the shares that embody them) necessary to put B in the same position as A. Indiana is regulating not rights but transactions in interstate commerce.

In Edgar v. MITE Corp., 457 U.S. 624, 643-644 (1982), the Court invalidated an Illinois statute that regulated interstate tender offers on the ground that the statute imposed a burden on interestate commerce for which (even as applied to Illinois corporations) there was no valid offsetting "legitimate local interest." In MITE, the Court rejected the two principal arguments offered by appellants in defense of the Indiana Chapter: the right of a chartering state to prescribe rules governing the internal affairs of the corporations it charters, and the right of a chartering state to protect the shareholders of such corporations. The Court said that the "internal affairs doctrine" is a "conflict of laws principle" of "little use to the State in (the tender offer) context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." Id. at 645. The Court also rejected the protection-of-shareholders argument on the ground that "the State has no legitimate interest in protecting nonresident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." Id. at 644.

The United States believes that the language with which the Court in MITE rejected those two arguments was too broad. Prescribing rules governing corporate "internal affairs" and protecting the rights of shareholders are both valid and important activities of a chartering state. A corporation's chartering state is responsible for, inter alia, defining and enforcing the rights of all shareholders, both resident and nonresident, against the corporation, its directors and officers, and each other. Carrying out these responsibilities is an entirely legitimate state function even though the state is necessarily projecting its law into interstate commerce whenever shares of a corporation it chartered are sold in the national marketplace.

Once it has defined the bundles of rights represented by shares and allowed the shares to enter interstate commerce, however, the chartering state does not have plenary power to define the circumstances under which the shares may be transferred. Such subsequent transfers, as this Court said in MITE, 457 U.S. at 645, "do not themselves implicate the internal affairs" of the corporation, and they therefore do not implicate the shareholder rights that the state is responsible for protecting.

Appellants seek to defend the Indiana Chapter on the ground that it merely deprives certain shares of voting rights under certain conditions and does not prohibit the transfer of anything. But as stated above the Indiana Chapter cannot be understood as a regulation of voting rights; it can only be coherently explained as a restraint on their transferability (and therefore on the transferability of the shares that embody them) in specified transactions. As the district court said, the Indiana Chapter "deprives the (control share) transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control acquisitions." CTS J.S. App. A79.

Appellants seek to distinguish MITE on the ground that the Illinois statute conferred power to block transactions on a state regulator, whereas the Indiana Chapter can be characterized as conferring a right on "disinterested" shareholders to participate in determining whether there will be an increase in the concentration of share ownership. We agree that this argument is not without substantial force. We nevertheless urge the Court to reject it on the ground that a state may not confer on shareholders a right that, inherently, is not a power to govern the corporation but a right to restrain interstate commerce.

ARGUMENT

THE INDIANA CONTROL SHARE ACQUISITIONS CHAPTER IS INVALID UNDER THE COMMERCE CLAUSE

INTRODUCTION

State regulation of takeovers and tender offers began with a Virginia statute passed in 1968. See L. Loss, Fundamentals of Securities Regulation 601 (1983). The impetus for the Virginia legislation and legislation that followed in other states was generally said to be "(f)ears that established local concerns might be taken over by outside interests which in turn would close down plants and leave local residents jobless." E. Aranow & H. Einhorn, Tender Offers for Corporate Control 153 (1973); accord L. Loss, supra, at 601. By 1977, a substantial majority of the states had enacted tender-offer legislation. See E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control 207 (1977); see also L. Loss, supra, at 601-602 & n.120; Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 510 (1979). After one of these "first-generation" state takeover statutes failed to pass constitutional muster in Edgar v. MITE Corp., 457 U.S. 624 (1982), /12/ courts applied the Court's reasoning to invalidate similar statutes. See cases cited in 1 M. Lipton & E. Steinberger, Takeovers & Freezeouts Section 5.02(4) (19841; L. Loss, Fundamentals of Securities Regulation 603 (1983 & Supp. 1986); Block, Barton & Roth, State Takeover Statutes: The "Second Generation", 13 Sec. Reg. L.J. 332, 337-339 (1986); Warren, Developments in State Takeover Regulation: MITE and its Aftermath, 40 Bus. Law. 671, 686-694 (1985).

Since MITE and the lower court decisions following it, several state legislatures have reconstructed their regulatory schemes in an attempt to regulate takeovers in ways that will survive constitutional scrutiny. /13/ A common theme of these statutes is that, instead of purporting to regulate takeover bidders' activities as such, they invoke the state's authority to regulate corporate structure and shareholders' rights. See L. Loss, supra, at 100 & n.129c (Supp. 1986). Some commentators still seek to defend these statutes on the ground that they serve a legitimate local interest in preventing emigration of corporations and their assets. See, e.g., Warren, supra, 40 Bus. Law. at 673 n.15; Newlin & Gilmer, The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids, 40 Bus. Law. 111, 111-112 (1984). Others, however, defend them on the ground that they are merely a legitimate extension of more traditional forms of state corporation law. See, e.g., Buxbaum, Federalism and Company Law, 82 Mich. L. Rev. 1163, 1175 (1984). Most courts that have ruled on the constitutionality of second-generation statutes have found them constitutionally infirm. /14/ This case presents this Court with its first opportunity to pass on the constitutionality of a second-generation statute designed to avoid some of the problems that the MITE Court found with the first-generation statutes.

A. The Indiana Chapter Can Only Be Understood As A Restraint On Transactions In Voting Rights And The Shares That Embody Them

The Indiana Control Share Acquisitions Chapter prevents a shareholder of an Indiana "issuing public corporation," who may be situated anywhere in the nation, from conveying his voting rights to a buyer, wherever situated, in a "control share acquisition," unless two shareholder votes approve the conveyance. The category "issuing public corporation" is defined so as to include virtually every Indiana corporation that has offered and sold shares in interstate commerce (including appellant CTS). Most "control share acquisitions" would take place in interstate commerce. The Indiana Chapter expressly restrains the transfer of voting rights in such transactions, and its obvious practical consequence is to restrain the transfer of the shares as well.

Appellants contend that the Indiana Chapter merely defines voting rights in certain shares in certain situations, as the chartering state has plenary authority to do, and does not restrain interstate commerce except in the same incidental manner as many other state statutes defining shareholder rights. Although chartering states have broad authority to define shareholder voting rights, /15/ that is not what Indiana has done in this case. The Indiana Chapter expressly restrains the transfer of whatever voting rights to attach to shares of an Indiana "issuing public corporation," and it could not, without changing its meaning, be written in any other way.

The Indiana Chapter expressly restrains only the transfer of voting rights, but the obvious practical effect of the Control Share Chapter, in every case with which it is concerned, /16/ is to delay the sale of the shares themselves for up to 50 days, and bar it altogether unless the "disinterested" shareholders approve it. It is entirely incorrect to say that the Control Share Chapter "has utterly no effect on any shareholder's ability to sell his shares" (CTS Br. 39). As the district court said, "(b)y limiting the rights that a tender offeror (or, of course, any other acquiror) can purchase in a control (share) acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control (share) acquisition(s)" (CTS J.S. App. A79).

The Commerce Clause, of its own force, prohibits state-imposed restraints on transactions in interstate commerce in the absence of a substantial state interest served by the statute. At least since this Court's decision in Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851), it has been clear that the Commerce Clause /17/ not only authorizes "'Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force create(s) an area of trade free from interference by the States.'" Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-371 (1976) (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946)); accord Maine v. Taylor, No. 85-62 (June 23, 1986), slip op. 6. There is a strong constitutional bias against direct state regulation of interstate markets. Interstate markets are generally to be left unregulated except to the extent that Congress chooses to regulate them. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976) (dormant Commerce Clause protects "natural functioning of the interstate market" against state "prohibition or * * * burdensome regulation"). /18/

The Indiana Chapter is not saved by the fact that it expressly restrains only the transfer of voting rights and not the transfer of shares. Direct restraints obviously must be judged by the items they reach, not merely the items they name: a direct restraint on transfers of steering wheels directly restrains transfers of automobiles as well. Cf. Brown-Forman Distillers Corp. v. New York State Liquor Authority, No. 84-2030 (June 3, 1986), slip op. 9 ("(t)hat the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States"); Southern Pacific Co. v. Arizona, 325 U.S. 761, 775 (1945). /19/

Indiana has broad authority to define the rights represented by the shares of its corporations and to define such rights in ways that may affect the value of the shares or the ease with which they may be transferred. But the Indiana Chapter does not provide that all shares, or some class of shares, of some or all Indiana corporations shall be without voting rights. Instead, Indiana has declared that whatever voting rights the corporate articles and bylaws confer may not be transferred in a "control share acquisition" except under specified conditions. The meaning of the Indiana Chapter cannot be explained without reference to the transactions that it restrains, and its effect is not to provide a general rule applicable to whatever persons hold or acquire shares but to protect whatever pattern of voting power (and, consequently, share ownership) exists in a given corporation at a given time against transactions that would alter the pattern. When a share of stock defined under Indiana law to represent certain rights has lawfully entered the national marketplace in securities, Indiana may not, under the Commerce Clause, directly restrain its further transfer in the absence of a substantial state interest. /20/ The Indiana Chapter is such a direct restraint.

B. The Broad Power Of A Chartering State To Govern The Internal Affairs And Protect The Shareholders Of Its Corporations Does Not Save The Indiana Chapter

While some of this Court's opinions have suggested that "direct" regulation of interstate commerce is unconstitutional without further inquiry (see, e.g., Brown-Forman Distillers Corp. v. New York State Liquor Authority, No. 84-2030 (June 3, 1986), slip op. 5; MITE, 457 U.S. at 640 (plurality opinion); Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925)), the Court has in other cases suggested that the label "direct" does not always end the inquiry but instead exposes a statute to "more demanding scrutiny." Maine v. Taylor, No. 85-62 (June 23, 1986), slip op. 7. See Arkansas Electric Cooperative Cop. v. Arkansas Public Service Commission, 461 U.S. 375, 390 (1983). At bottom, "the critical consideration is the overall effect of the statute on both local and interstate activity" (Brown-Forman, slip op. 5 (citing Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440-441 (1978)). Just last Term, for example, in Maine v. Taylor, supra, the Court upheld a ban on fish importation that discriminates on its face against interstate commerce on the ground that importation posed "significant threats to Maine's unique and fragile fisheries" that could not be otherwise countered. Slip op. 9-10 (footnote omitted).

An older example of a permissible state restraint on commerce is state blue sky laws, which typically prohibit the sale of securities into the regulating state or to its residents except on specified conditions. These statutes have been upheld as valid measures to protect a state's residents against fraud and other evils in the sale of securities, notwithstanding what the Court saw as an incidental effect on interstate commerce. Hall v. Geiger-Jones Co., 242 U.S. 539, 554-556 (1917); Merrick v. N.W. Halsey & Co., 242 U.S. 568, 590 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 564-566 (1917). See MITE, 457 U.S. at 641 (plurality opinion); see also Loss, The Conflict of Laws and the Blue Sky Laws, 71 Harv. L. Rev. 209, 241-253 (1957). /21/

Appellants advance two reasons why the Control Share Chapter should be considered a legitimate form of state regulation. /22/ First, the State asserts a general interest in regulating the "internal affairs" or "corporate governance" of Indiana corporations, and CTS appears to agree (Indiana Br. 81-86; see CTS Br. 39-40 & n.19). Second, both appellants argue that "(t)he Chapter serves the legitimate State interest of protecting non-dominant shareholders in Indiana corporations by allowing them to vote on a fundamental change in the corporation -- its transformation from a company owned by scattered shareholders to one controlled by a single dominant shareholder" (CTS Br. 11; accord id. at 25, 37-38; Indiana Br. 88).

A chartering state does have a legitimate and substantial interest in governing the "internal affairs" of its corporations, including the rights of shareholders vis-a-vis the corporation itself, its directors and officers, and fellow shareholders. And having defined the rights of shareholders, a chartering state has an important and legitimate interest in protecting those rights with respect to all shareholders, resident and nonresident alike. A nonresident who buys shares in an Indiana corporation accepts that state's definition of his rights and buys that state's protection. See generally Buxbaum, Federalism and Company Law, 82 Mich. L. Rev. 1163, 1167 (1984); Levmore, supra, 69 Va. L. Rev. at 624. /23/

A chartering state's governance of the internal affairs of its corporations, including its definition of the rights of shareholders, obviously affects interstate commerce. Indeed, whenever the corporation then sells shares in interstate commerce, the chartering state may be said to be projecting its law beyond its borders. /24/ Accordingly, much of corporation law properly comes within an exception to the principle that a state may not "project its legislation into" other states (Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935); Brown-Forman, slip op. 8-9), for the very placement of a security into interstate commerce is a projection of legislation into the home states of those who choose to buy the security. /25/

Moreover, the "internal affairs" of a corporation, including the rights of shareholders, of course comprise many matters that may bear on transactions in its shares. A few states have imposed on insiders a state-law fiduciary duty to the corporation or its shareholders not to sell or buy shares on the basis of undisclosed "inside information." /26/ Controlling shareholders have a duty, at least in some states, not to sell control to a buyer who could be expected to loot the corporation. /27/ And of course "internal affairs" also include the roles played by directors, shareholders, and others in approving or disapproving transactions between the corporation itself and other persons, including merger and acquisition transactions to which the corporation is a party. /28/

The question in this case is whether the Indiana Chapter does constitute regulation of "internal affairs." In MITE, the Court said that stock transactions between corporate shareholders and third parties do not "themselves" come under the heading "internal affairs." See MITE, 457 U.S. at 645 (opinion of the Court) ("Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."). /29/ Illinois could not, the Court held, treat interstate commerce in shares of a public corporation as an internal matter and impose restraints on transactions between shareholders and third parties in the national securities marketplace. But, it is argued, the Illinois statute at issue in MITE was concededly a restraint on a class of interstate transactions -- tender offers -- whereas the Indiana Chapter, while it refers to a class of transactions (control share acquisition) does not purport to bar transactions in shares but only to govern voting rights (normally an internal matter) in light of them. The Indiana Act cannot, however, be understood as an act merely defining voting rights. It is written as a restraint on the transferability of voting rights in specified transactions, and it could not be written in any other way without changing its meaning. Since the restraint on the transfer of voting rights is a restraint on the transfer of shares, the Indiana Chapter, like the Illinois Act, restrains "transfers of stock by stockholders to a third party."

Indiana argues that, by conferring the right to block the transfer on the shareholders themselves, rather than a state official, it has created a scheme that is valid notwithstanding MITE. To put the argument in what we think is its strongest form, Indiana says that what it has done is to confer on all shareholders the right to participate in deciding whether the corporation in which they have invested goes from having (to use the current case an an example) a 9.6% shareholder to having a 27.5% shareholder. This argument is not without force, particularly since Indiana is quite correct that other shareholders may have a genuine interest in that transaction. /30/

We think the Court should nevertheless reject this argument, on the ground that a state may not give shareholders of a public corporation the right to preserve the present pattern of share ownership against the operation of interstate commerce. An Indiana corporation whose shares are traded in the national securities marketplace remains a creature of Indiana law: many of its important attributes are determined by state law and are subject to modification by the state. But one of its important attributes, the identity of its shareowners and the size of their holdings, is (by virtue of the interstate sale of shares that Indiana allowed in the first place) a function of interstate commerce. An Indiana "public" corporation has, virtually by definition, raised capital by selling shares into the national securities marketplace. Raising capital in that manner is possible in part because that national marketplace enables shareowners to resell, and generally to trade in securities, in transactions determined by market forces, subject only to such regulation as Congress chooses to impose. Protecting that national market from intrusive state regulation is close to the heart of what the Commerce Clause is about.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it rests on the ground that the Control Share Chapter is invalid under the Commerce Clause.

Respectfully submitted.

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/1/ The common stock of CTS is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78l(b) (CTS J.S. App. A5).

/2/ In its complaint, Dynamics sought to enjoin CTS's proxy solicitations as violative of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), and the Commission's rules thereunder (CTS J.S. App. A29-A30).

/3/ The new law was signed on March 4, 1986. Hereafter, all citations to the Business Corporation Law and its Control Share Acquisitions Chapter will be to the version appearing in the 1986 Cumulative Supplement to Burns Indiana Statutes Annotated, Code Edition. The Control Share Acquisitions Chapter is reprinted in CTS J.S. App. A167-A188.

/4/ An "issuing public corporation" is defined as an Indiana corporation that has (1) 100 or more shareholders; (2) its principal place of business, its principal office, or substantial assets in Indiana; and (3) more than 10% of its shareholders resident in Indiana, or more than 10% of its shares owned by Indiana residents, or more than 10,000 of its shareholders resident in Indiana. Ind. Code Ann. Sections 23-1-20-5, 23-1-42-4(a).

/5/ A "control share acquisition" is an acquisition of shares that causes the acquiror to cross the 20%, 33 1/3%, or 50% threshold of voting power in an issuing public corporation. Ind. Code Ann. Sections 23-1-42-1, -2(a). "Control shares" are those acquired in such a transaction and any other shares acquired within 90 days or pursuant to a plan to make a control share acquisition. Id. Sections 23-1-42-1, -2(b). Dynamics' proposed acquisition would have crossed the 20% threshold. Certain acquisitions, such as acquisitions pursuant to the laws of descent and distribution, are excepted from the definition of "control share acquisition." Id. Section 23-1-42-2(d) and (e). Acquisitions pursuant to an agreement of merger or plan of share exchange to which the corporation is a party are also excepted from the definition. Id. Section 23-1-42-2(d)(5).

/6/ This appears to be the reasonable construction of the statute. The State, however, argues (Indiana Br. 29 n.*) that the new law requires two votes only "if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a)," relating to changes in the capital structure of the company.

/7/ Section 23-1-42-9(b)(1) provides:

> To be approved under this section, the resolution must be approved by: * * * Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a) * * * .

/8/ "Interested shares" are defined in Ind. Code Ann. Section 23-1-42-3 as shares owned by the acquiror, any officer of the issuing public corporation, or any employee of the issuing public corporation who is also a director. Shares held by directors who are not employees are not "interested shares" and may be voted in both votes. The requirement of a double victory poses a special problem for the acquiror: if it seeks to offset management-controlled shares in the "all-share" vote by buying tendered shares, these shares (which presumably would have been likely to vote in favor of the acquiror) will not be counted in the "disinterested share" vote.

/9/ In corporations with more than one class of stock, the approval must be given by a majority of the votes entitled to be cast in each "voting group," as defined in Ind. Code Ann. Section 23-1-20-28. In the present case, because CTS has only one class of voting stock, there would be only one "voting group" for purposes of each of the two required votes.

/10/ After the ruling of the court of appeals, Dynamics acquired tendered shares, increasing its ownership position in CTS to more than 27%. Dynamics Corp. of America v. CTS Corp., 635 F. Supp. 1174, 1178 (N.D. Ill. 1986).

/11/ Justice White's opinion in MITE reached the Williams Act issue and agreed with the Seventh Circuit (457 U.S. at 630-640), but that portion of the opinion was joined by only three Justices. The other two Justices who addressed the issue disagreed (id. at 646-647 (opinion of Powell, J.); id. at 655 (opinion of Stevens, J.)). See note 12, infra.

/12/ In MITE, this Court held the Illinois Business Take-over Act unconstitutional on Commerce Clause grounds. The Illinois Act required a tender offeror to notify the Secretary of State of Illinois 20 business days before commencement of a tender offer. The Secretary of State was empowered to convene a hearing, and the tender offer could not proceed until that hearing was completed. One function of the hearing was to permit the Secretary to review the substantive fairness of the tender offer; if an offer was found "unfair," it could be permanently blocked.

The Court's Commerce Clause opinion, written by Justice White, had two branches. One branch stands as the opinion of the Court, joined by five Justices (Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor). It held that the Illinois Act was invalid under the Commerce Clause because it placed a substantial burden on interstate commerce that outweighed any local benefits. 457 U.S. at

643-646.

In the other Commerce Clause branch of the opinion, joined by only four Justices (Chief Justice Burger and Justices White, Stevens, and O'Connor), the plurality concluded that the statute regulated interstate transactions taking place wholly outside of Illinois. Thus, the statute constituted a "direct" restraint on interstate commerce and was void even without an inquiry into the state interests involved. 457 U.S. at 641-643.

Three Justices (Chief Justice Burger and Justices White and Blackmun) found that the Illinois Act was invalid under the Supremacy Clause. 457 U.S. at 630-640. Two Justices (Justices Powell and Stevens) declined to join that holding. Three Justices (Justices Brennan, Marshall, and Rehnquist) believed that the case was moot and did not discuss the merits. Id. at 655-667. Justice Powell agreed that the case was moot but nevertheless joined the part of Justice White's opinion that constituted the opinion of the Court. Id. at 646-647.

/13/ For a detailed discussion of these "second-generation" statutes, see 1 M. Lipton & E. Steinberger, supra, Sections 5.02-5.07; L. Loss, supra, at 99-101 (Supp. 1986); Block, Barton & Roth, supra, 13 Sec. Reg. L.J. at 339-354; Warren, supra, 40 Bus. Law. at 694-700; Sargent, Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?, 8 Corp. L. Rev. 3, 5-6, 8-12 (1985).

/14/ See Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986), appeal pending sub nom. Ohio v. Fleet Aerospace, No. 86-344; Gelco Corp. v. Coniston Partners, Civ. No. 3-86-847 (D. Minn. Nov. 10, 1986); Terry v. Yamashita, (Current) Fed. Sec. L. Rep. (CCH) Paragraph 92,845 (D. Hawaii June 13, 1986); APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), vacated as moot, No. 85-5285 (8th Cir. Nov. 26, 1985); Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Mo. 1985).

/15/ A chartering state may define, create, and limit corporate voting rights in ways that affect the attractiveness of shares without triggering any question under the Commerce Clause. The Commerce Clause does not require a state to define in any particular way the bundle of rights that will be put into interstate commerce as corporate shares. To the contrary, a corporation is a mere "'creature() of state law'" (Burks v. Lasker, 441 U.S. 471, 478 (1979) (citations omitted)), and a share of stock has no inherent rights except those that state law and the relevant corporate documents give it. The district court's statement (CTS J.S. App. A79) that "(v)oting rights * * * (must be) an integral part of the ownership interest purchased along with a stock certificate" was quite wrong to the extent it means that a state may not, for example, authorize nonvoting or restricted-vote stock.

/16/ There can, of course, be share purchases that meet the definition of "control share acquisition" where the buyer is not interested in voting rights and thus will not be deterred by the shareholder approval provisions of the Chapter. But see Ind. Code Ann. Section 23-1-42-10. The Chapter, however, is by its very terms aimed at transactions whose objective is "control." The fact that it also has an incidental impact on some transactions where the buyer is not seeking control does not alter the analysis.

/17/ Congress is empowered, under the Commerce Clause of the Constitution, "(t)o regulate Commerce with foreign Nations, and among the several States." Art. I, Section 8, Cl. 3. As the Court explained in Hughes v. Oklahoma, 441 U.S. 322- 325-326 (1979),

> (t)he few simple words of the Commerce Clause * * * reflected a central concern 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.

See Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 92 (1984); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949); see also Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 434-435 (1982).

/18/ The force of these Commerce Clause principles is not, as CTS asserts (CTS Br. 35), limited to situations in which a state has discriminated against interstate commerce or has imposed burdens on interstate commerce that may be duplicative of or inconsistent with burdens placed by other states. The argument that the Commerce Clause reaches only discriminatory state action was rejected in Freeman v. Hewit, 329 U.S. at 252, 254, and the argument that state action must pose a risk of multiple and inconsistent burdens was rejected in id. at 256-257. In that same case, the Court made clear that the Commerce Clause applies to the sale of shares of stock, even though shares of stock are only intangible property (id. at 258-259). On the other hand, as we suggest below, regulation by the state of incorporation of the sale of shares of stock (which was not at issue in Freeman v. Hewit) cannot be subjected to the same Commerce Clause analysis as state regulation of sales of tangible goods. As this Court has strongly indicated in a related context, the state as creator of the corporation has powers over the movement of its stock that it would not have over the movement of tangible goods. See State Tax Commission v. Aldrich, 316 U.S. 174, 180 (1942) (upholding against Due Process Clause challenge Utah tax on transfer at death of shares of stock in Utah corporation).

/19/ The Court has repeatedly stated that "(t)he principal focus of inquiry (under the Commerce Clause) must be the practical operation of the (state) statute, since the validity of state laws must be judged chiefly in terms of their probable effects." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 37 (1980); see Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). This is not to say that every statute with an impact on a shareholder's ability to sell his shares is unconstitutional, or even requires any particular Commerce Clause scrutiny. But where a statute directly restrains the transfer of voting rights and the obvious practical effect of that bar is to restrain transfers of shares as well, the statute must be judged by its practical as well as its literal effects.

/20/ This point does not depend on an assessment of the impact of the Control Share Chapter on economic efficiency. In MITE (457 U.S. at 643-644), the Court observed that economic efficiency is poorly served by regulation that impedes takeovers. In the present case, the court of appeals (CTS J.S. App. A25) ruled that the Indiana statute is vulnerable to economic attack on the same grounds as the Illinois statute struck down in MITE. Cf. R. Winter, Government and the Corporation 42-44 (1978) (although economic efficiency is generally best served by allowing states broad latitude to enact corporation legislation, including even legislation that seems in isolation to run counter to the interests of efficiency, antitakeover legislation is an exception to that general rule). On the other hand, there are economic arguments that might be thought to support the Indiana legislation from an efficiency standpoint (see Indiana Br. 91-97, 100-101). The Constitution does not dictate that states, when acting within their proper spheres, act in accordance with any particular theory of economic efficiency, or that they pursue economic efficiency at all. The question in this case is whether the State of Indiana has acted within a proper sphere.

/21/ While blue sky laws plainly affect interstate commerce, they differ from statutes like the Indiana Chapter in that they seek to protect state residents from a palpable harm to them from transactions with them that take place within the enacting state. One commentator points out that, "(u)nlike blue-sky laws, * * * which cover only intrastate transactions, takeover statutes reach tender offers, wherever made, if the target corporation, not the transaction, has certain contacts with the state." Kozyris, Corporate Wars and Choice of Law, 1985 Duke L.J. 1, 36 (footnote omitted); see Oldham, Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multistate Contacts, 5 Del. J. Corp. L. 181, 242 (1980) (state tender-offer statutes, which "purpose to govern offers made to shareholders regardless where domiciled," are "obviously more expansive than normal blue sky laws, which are limited to offers made to shareholders who reside in the state").

Contrary to CTS's contention (Br. 11-12, 34, 47), it is the blue sky cases rather than this case that resemble Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding Maryland's prohibition of ownership of retail service stations by gasoline producers and refiners). Like the law upheld in Exxon and unlike the Control Share Chapter in this case, blue sky laws regulate transactions that occur in the regulating state, and their interstate repercussions, although they indisputably exist, are indirect. This case, unlike Exxon and the blue sky cases, involves out-of-state transactions.

/22/ The state alone suggests a third interest, a "strong interest in the welfare of employees of Indiana corporations with headquarters, factories or other operations in the State"; it argues that shareholders accordingly should be able to block a control share acquisition on the basis of "possible removal (of the corporation or its assets) from the State" (Indiana Br. 89-90). This asserted interest requires no extended discussion. If the dormant Commerce Clause means anything at all, it means that a state may not justify legislation on the ground that an impairment of commerce is necessary to prevent economic forces from moving resources out of that state and into another. See Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563, 623-624 & n.240 (1983); Sargent, Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?, 8 Corp. L. Rev. 3, 31 (1985); Note, Securities Laws and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 528 (1979).

/23/ In particular, in the absence of congressional action, it is a task for the state to define and enforce the fiduciary obligations of directors, officers, and controlling shareholders in connection with a tender offer. See Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985); cf. Santa Fe Industries v. Green, 430 U.S. 462 (1977); see also Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981). See generally Burks v. Lasker, 441 U.S. 471 (1979). The Commerce Clause plainly does not require a state to enact legislation (or interpret its common law or legislation) to force corporate management to exercise its fiduciary duties in any particular way, a point the court of appeals made in a later chapter of this case. Dynamics Corp. of America v. CTS Corp., 805 F.2d 705, 718 (7th Cir. 1986); see also CTS J.S. App. A10 (validity of "poison pills" is "a matter committed to the authority of the states"). The dormant Commerce Clause is a reservation to Congress of the exclusive right to legislate in certain ways affecting interstate commerce; it is not a command to states to legislate or adjudicate in any particular way.

/24/ The traditional state-law provisions that appellants claim are threatened by the decision below all clearly relate to internal affairs and are clearly constitutional notwithstanding the fact that they are projected beyond the state's borders whenever the corporation sells shares in interstate commerce. For example, "the scheduling and voting methods for electing directors" and "restrictions on freeze-outs or back-end mergers that may injure minority shareholders" (CTS Br. 49) relate, respectively, to corporate governance and to merger transactions to which the corporation itself is a party. These are legitimate matters of state regulation notwithstanding effects on the attractiveness of shares and consequent effects on transactions in those shares in interstate commerce. Similarly, a state statute that authorizes cumulative voting or staggered terms for directors of corporations incorporated in that state relates directly to corporate governance and raises no question under the Commerce Clause merely because it may make the shares more or less attractive.

/25/ Indeed, the application of a single state's law to the rights associated with a share of stock, wherever situated, contributes to the free flow of commerce in shares of stock. See MITE, 457 U.S. at 645 (opinion of the Court) (noting that "internal affairs doctrine," as a conflict-of-laws principle, fosters certainty in corporate relationships). This Court has observed that,

> as a general matter, the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.

First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983); see also Cort v. Ash, 422 U.S. 66 (1975).

/26/ See Polin v. Conductron Corp., 552 F.2d 797, 810-811 (8th Cir.) (Delaware law), cert. denied, 434 U.S. 857 (1977); Thomas v. Roblin Industries, 520 F.2d 1393, 1397 (3d Cir. 1975) (Delaware law); Davidge v. White, 377 F. Supp. 1084, 1089 (S.D.N.Y. 1974) (Delaware law); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969); see also Dirks v. SEC, 463 U.S. 646, 672 (1983) (Blackmun, J., dissenting). But see Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978) (Indiana law); Schein v. Chasen, 313 So. 2d 739, 746 (Fla. 1975). See generally Note, Common Law Corporate Recovery for Trading on Non-Public Information, 74 Colum. L. Rev. 269 (1974).

/27/ See, e.g., Doleman v. Meiji Mutual Life Insurance Co., 727 F.2d 1480, 1483-1484 (9th Cir. 1984); McDaniel v. Painter, 418 F.2d 545, 547-548 (10th Cir. 1969); Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940); Ritchie v. McGrath, 1 Kan. App. 2d 481, 486-488, 571 P.2d 17, 22 (1977); Gerdes v. Reynolds, 28 N.Y.S.2d 622, 652 (Sup. Ct. 1941); Thompson v. Hambrick, 508 S.W.2d 949, 953 (Tex. Civ. App. 1974), writ ref'd n.r.e.; Glass v. Glass, 228 Va. 39, 47-48, 321 S.E.2d 69, 74 (1984). The chartering state can, of course, prohibit looting, and these cases impose liability on a shareholder who has abetted the looter. Cf. Perlman v. Feldmann, 219 F.2d 173, 179 (2d Cir. 1955) (Swan, J., dissenting) (knowledge or reasonable suspicion that buyer will loot the corporation "will terminate the dominant shareholder's privilege to sell and will create a duty not to transfer the power of management to such purchaser. The duty seems to me to resemble the obligation which everyone is under not to assist another to commit a tort rather than the obligation of a fiduciary.").

/28/ Mergers and other "fundamental changes" that generally require shareholder approval are changes in the very structure of the corporation, and are accordingly an "internal" matter of legitimate interest to the state under the internal affairs doctrine. See Fleet Aerospace Corp. v. Holderman, 637 F. Supp. 742, 746 (S.D. Ohio), aff'd, 796 F.2d 135 (6th Cir. 1986), appeal pending sub nom. Ohio v. Fleet Aerospace, No. 86-344; Gelco Corp. v. Coniston Partners, Civ. No. 3-86-847 (D. Minn. Nov. 10, 1986). As one commentator has noted, "acquisitions of stock under a tender offer do not in themselves alter the corporate structure, procedures, and relationships, nor do they necessarily lead to a structural change; the acquirer may be content with control at the shareholder level. Furthermore, the tender offeror need not be a shareholder and the accepting offeree ceases to be one." Kozyris, supra note 21, 1985 Duke L.J. at 36-37 (footnote omitted). Any changes that an offeror making a control share acquisition does seek to make in the structure of the corporation are matters of internal affairs, and the state can require that shareholder approval be sought. See Ind. Code Ann. Sections 23-1-40-3, 23-1-41-2, 23-1-45-2.

/29/ Accord Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978), rev'd on venue grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979); see also Restatement (Second) of Conflicts of Laws Section 302 comment e, at 310 (1971) (citing the transfer of stock as an example of matters that are not within the scope of "internal affairs regulation"); E. Aranow, H. Einhorn & G. Berlstein, supra, at 230; Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 Fordham L. Rev. 1, 17 (1976) (footnote omitted) ("(A) multistate tender offer has nothing to do with internal corporate procedures. Although transfer of control is the goal * * * it is accomplished in a tender offer without reference to the legal attributes of the domestic corporation. Hence, regardless of purpose, state regulation of an offer aimed at a domestic target is arguably unjustifiable, at least under the 'internal affairs' doctrine.").

/30/ Shareholders may, of course, also benefit from transactions meeting the definition of "control share acquisition," and the procedures Indiana has required may deter bidders from entering into transactions that shareholders would favor. There has been a lively debate about whether measures that make takeover bids harder to accomplish harm shareholders in all cases. See, e.g., Easterbrook & Fischel, Auctions and Sunk Costs in Tender Offers, 35 Stan. L. Rev. 1 (1982); Easterbrook & Fischel, Corporate Control Transactions, 91 Yale L.J. 698 (1982); Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981); Manne, Mergers and the Market for Corporate Control, 73 J. Pol. Econ. 110 (1965); Ruback, Assessing Competition in the Market for Corporate Acquisitions, 11 J. Fin. Econ. 141 (1985) (all critical of defensive tactics); Bebchuk, The Case for Facilitating Tender Offers, 95 Harv. L. Rev. 1028 (1982); Bebchuk, The Case for Facilitating Competing Tender Offers: A Reply and Extension, 35 Stan. L. Rev. 23 (1982) (some defensive tactics that lead to "auctions" are desirable, although author is generally in agreement with Easterbrook/Fischel objections to defensive tactics); Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819 (1981); Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 Stan. L. Rev. 51 (1982) (same); Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377 (1986) (some properly regulated defensive stock repurchases promote shareholder welfare); Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249 (1983) (arguing that both improper defensive tactics and coercive takeover tactics require legislative correction); Carney, Shareholder Coordination Costs, Shark Repellents, and Takeout Mergers: The Case Against Fiduciary Duties, 1983 Am. B. Found. Res. J. 341 (arguing that tender offers are often used by raiders to expropriate the wealth of target shareholders); Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101 (1979); Lipton, Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel, 55 N.Y.U. L. Rev. 1231 (1980); Lipton, Takeover Bids in the Target's Boardroom: An Update After One Year, 36 Bus. Law. 1017 (1981) (same). It has also been suggested that state antitakeover measures are more likely to have been enacted in order to protect incumbent management than to protect shareholders. See, e.g., Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Studies 251, 268 (1977); Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Rev. 213, 238-240 (1977); Loss, Foreword to Symposium, Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach, 21 Case W.

Res. L. Rev. 605, 609, 611 (1970). The court of appeals in this case engaged in second-guessing of the Indiana legislature on these issues. We think that was not the appropriate course, and that this Court's decision should not rest on a substitution of its judgment for that of the State of Indiana on where the best interests of shareholders lie.