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Ivy B. Dodes

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THE DELAWARE TAKEOVER STATUTE: CONSTITUTIONALLY INFIRM EVEN UNDER THE MARKET PARTICIPANT EXCEPTION

I. INTRODUCTION

The vast majority of states have enacted anti-takeover statutes. A number of these statutes were enacted after the Supreme Court


Several of these statutes were specifically drafted to prevent hostile takeovers of local corporations. Letter from SEC Commissioner Charles C. Cox to Council of the Corporation Section of the Delaware Bar Association 1-2 (Dec. 10, 1987) (on file at Hofstra Law Review) (referring to North Carolina's protection of Burlington, Washington's protection of Boeing, Minnesota's protection of Dayton/Hudson, Massachusetts' protection of Gillette/Kanner-Parker, and Florida's protection of Harcourt, Brace, Jovanovich). Ohio's anti-takeover law, drafted to shield Federated Department Stores from hostile takeovers and to be applicable to corporations in other states but headquartered in Ohio, was recently held unconstitutional. Campeau Corp. v. Federated Dep't Stores, 679 F. Supp. 735 (S.D. Ohio 1988). The decision rested in part on the statute's adverse effect on interstate commerce resulting from the increased risk of inconsistent regulations. See id. at 738-39; see also infra note 118 (discussing this aspect of Commerce Clause analysis).

decision in *CTS Corp. v. Dynamics Corp. of America*, which upheld the constitutionality of the Indiana Control Share Acquisition Statute. Although a number of states which enacted post-CTS anti-takeover legislation followed the pattern of the Indiana statute, Delaware chose to implement legislation similar to the New York anti-takeover law.

This Note first examines the purposes and provisions of the Delaware Takeover Statute. It then proceeds with a Commerce Clause analysis, and concludes that the statute constitutes both a direct and an indirect burden on interstate commerce. The enabling approach is discussed as a less burdensome approach to state takeover legislation. After reviewing the propriety of the deference given the inter-


7. N.Y. Bus. Corp. Law § 912 (McKinney 1986); see infra notes 28-30 and accompanying text (comparing the New York and Delaware statutes). After careful review of Indiana's Control Share Acquisition Statute, the Delaware Bar Association Committee drafting Delaware’s anti-takeover legislation decided not to recommend a control share acquisition law because a number of committee members believed that although it was “designed to protect stockholders from certain takeovers, it would create the opposite effect by making it easy and inexpensive to put a company on the block to be sold.” Secretary of State, State of Delaware, *The Delaware Takeover Statute 5* (1988) (reprinting Members of the Council of the Corp. Law Section of the Del. Bar Ass'n, *The Delaware Takeover Statute: A Report to the Delaware General Assembly (1988)*) [hereinafter *Takeover Statute Report*].

8. See infra notes 15-50 and accompanying text.

9. See infra notes 51-97 and accompanying text.

10. See infra notes 98-114 and accompanying text.
nal affairs doctrine when articulated as the state interest in anti-
takeover legislation, the inquiry then proceeds in the context of the
market participant exception to Commerce Clause scrutiny, should
the state choose to avail itself of that doctrine in response to chal-
lenges to the law on dormant Commerce Clause grounds. That
analysis leads to the conclusion that Delaware's monopoly position in
the market for corporate charters precludes application of the mar-
ket participant exception.

II. THE DELAWARE TAKEOVER STATUTE

A. Purposes

In a carefully considered response to the United States Supreme
Court's decision in *CTS Corp. v. Dynamics Corp. of America*, a
subcommittee of the influential Delaware Corporation Law Section
of the Delaware Bar Association presented a draft of Corporation
Law section 203, entitled "Business Combinations with Interested
Stockholders," to the entire Corporation Section for comments. An
amended draft was subsequently approved on January 4, 1988, by
the full membership of the Section and the bill was approved by
both houses of the Delaware General Assembly on January 28, 1988,
and signed into law on February 2, 1988.

11. See infra notes 115-33 and accompanying text.
12. See infra notes 134-83 and accompanying text.
13. Although such an argument has not yet been asserted in this context, it has been
applied in analogous situations. See, e.g., South-Central Timber Dev., Inc. v. Wunnike, 467
U.S. 82 (1984); Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987); West-
er Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984), aff'd per curiam by an equally
14. See infra notes 152-83 and accompanying text.
16. See supra note 7, at 5-6. As a general matter, the Dela-
ware legislature defers to the expertise of the Corporation Section in matters of technical cor-
porate law. See *Delaware Bar Group Votes to Restrict Hostile Takeovers*, Sec. L. Daily
(BNA), Jan. 5, 1988, at 2; *Lawyers Set On Compromise Plan for Delaware Corporate Take-
over Law*, Associated Press, Dec. 23, 1987. Some critics of the law have argued that the legis-
lative process (which entails the corporate bar's drafting of the statute and "sending it down"
to the legislature) is suspect since the bar is dependent upon corporate managers for their
livelihood. See *Sontag, A Takeover Law Grows in Delaware*, Nat'l L.J., Apr. 11, 1988, at 1,
col. 1, 20, col. 1.
17. See supra note 7, at 5. Approximately 184,000 corpo-
rations are chartered in Delaware, *Joint Hearings of the House and Senate Judiciary Comms.
on House Substitute No. 1 to House Bill 396*, at 2 (Jan. 20-21, 1988) [hereinafter *Joint
Hearings*] (on file at Hofstra Law Review) (testimony of Delaware Secretary of State Michael
E. Harkins), including more than half of all Fortune 500 companies and 45% of corporations
listed on the New York Stock Exchange. See *Labaton, Delaware Takeover Curb Near*, N.Y.
Section 203 seeks to limit the ability of hostile bidders to obtain control of Delaware corporations. The articulated intent of the drafters was to "strike a balance between the benefits of an unfettered market for corporate shares and the well documented and judicially recognized need to limit abusive takeover tactics." A principal focus of the statute is the problem of takeover tactics which coerce shareholders into accepting inadequate consideration for their shares. The statute also aims at curbing leveraged financing and abusive transactions that result in the break-up of corporations; Governor Michael Castle has stated that by enacting Section 203, Delaware will be imposing a responsibility to the community on the takeover artist.

To the extent that the law is concerned with a responsibility to out-of-state interests, however, Delaware would appear to have no legitimate interest. While the state’s assumption of this responsibility may be a socially laudable, if not economically justifiable, policy,

Times, Jan. 29, 1988, at D1, col. 6. Given these statistics, when the Delaware legislature enacts a corporate statute, it has wide-reaching implications.

18. See TAKEOVER STATUTE REPORT, supra note 7, at 4.

19. Id.

20. The state has identified the existence of coercive takeovers, in which minority shareholders are squeezed out on unfavorable terms, as mandating shareholder protection. See id. at 6-7; DELAWARE MAY STAUNCH LEVERAGED TAKEOVERS, INV. DEALER’S DIG., Nov. 23, 1987, at 47; see also Answering Brief of Defendants Oberly and Harkins to Plaintiff’s Application for Preliminary Injunction at 17-19, Black & Decker Corp. v. American Standard Inc., 679 F. Supp. 1183 (D. Del. 1988) (No. 88-50) (outlining the purposes of the Delaware statute). Front-end loaded, two-tiered tender offers provide a good example. Under that type of proposal, the offeror offers to buy a majority of the target company’s outstanding stock for cash (the “front end”) and then “freezes out” the remaining minority in an exchange for “junk bonds” (the “back end”). See TAKEOVER STATUTE REPORT, supra note 7, at 6 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985)).

Significantly, however, there appears to have been only six third-party front-end loaded, two-tiered tender offers in all of 1987. See Letter from SEC Commissioner Charles C. Cox to Council of the Corporation Section of the Delaware Bar Ass’n 2 (Dec. 10, 1987) (on file at Hofstra Law Review) (arguing that the statute sweeps too broadly and should be limited to restricting two-tiered offers); see also Sontag, supra note 16, at 20, col. 1 (noting that takeover defenses such as poison pills have significantly decreased the number of two-tiered tender offers).


22. See supra note 21 and accompanying text.

23. Studies have revealed that takeovers, on average, result in an increase in the stock market’s valuation of both acquired and acquiring companies. See OFFICES OF THE CHIEF ECONOMIST, SEC, THE ECONOMICS OF ANY-OR-ALL, PARTIAL, AND TWO-TIER TENDER OF-

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it is a questionable goal in light of the fact that the "communities" Delaware seeks to protect are, for the most part, located outside the state—only three-tenths of one percent of United States stockholders reside in Delaware. Accordingly, the policy statements advanced by the Delaware legislature have been the subject of considerable academic debate, and raise significant constitutional issues relating to the Commerce and Supremacy Clauses of the United States Constitution. 


27. Id. art. VI, cl. 2. In addition to Commerce Clause challenges, various state takeover statutes have also been attacked on Supremacy Clause grounds. See, e.g., CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 78-86 (1987) (Indiana statute); Edgar v. MITE Corp., 457 U.S. 624, 630-40 (1982) (White, J., plurality opinion) (Illinois statute). Such claims have generally been grounded in the argument that the statute violates the Williams Act purpose of legislative neutrality between bidder and target management. See Piper v. Chris-Craft Indus., 430 U.S. 1, 30 (1977); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). Under current preemption doctrine, a state statute will be upheld if it does not affect this balance. CTS, 481 U.S. at 80-81.

Although an in-depth preemption analysis of the Delaware statute is beyond the scope of this Note, a cursory examination of the statute under Supremacy Clause scrutiny reveals that a preemption challenge to § 203 may have merit. In MITE, a plurality opinion identified as
Constitution.

B. Provisions

The Delaware statute is patterned after New York's anti-takeover law,28 which served as a model for a number of other states.29 Nevertheless, its provisions are not as onerous.30 In essence, the Delaware statute, which applies to all Delaware corporations,31 would prevent an "interested stockholder"32 from completing a "business

the determinative feature of the Illinois statute the manner in which it operated to favor management over offeror at the expense of shareholders. 457 U.S. at 635. Likewise, § 203 upsets the balance between target management and tender offeror which Congress intended to protect. In fact, § 203 is arguably more offensive than the Illinois statute invalidated in MITE, since the Illinois statute gave the power to pass on the fairness of a tender offer to a disinterested state official; under § 203, that authority lies with incumbent management. See infra note 76 and accompanying text. Moreover, the CTS court noted with approval the Indiana statute's expressed concern for protection of stockholders of Indiana corporations from coercive offers, consistent with the federal policy of investor protection, 481 U.S. at 81-83; Delaware's law is drafted primarily to protect incumbent management, in contravention of the interests of shareholders, see infra note 76 and accompanying text, in direct contravention of Congressional intent to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid," S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).


30. See Franklin, Drafting in Delaware: Bar Group Floats Controversial New Anti-Takeover Bill, N.Y.L.J., Dec. 3, 1987, at 5, col. 2. The New York statute requires a five-year ban on business combinations, N.Y. Bus. Corp. Law § 912(b) (McKinney 1986), as opposed to the three-year ban in § 203, Del. Code Ann. tit. 8, § 203(a) (Supp. 1988). In addition, the New York statute provides no exemptions for bidders who are able to acquire 85% of a corporation's stock. On the other hand, the New York statute incorporates a far more stringent jurisdictional nexus requirement. See N.Y. Bus. Corp. Law § 912(13)(A)-(B) (McKinney 1986) (defining a domestic corporation as one (A) organized under the laws of New York, with principal executive offices and significant business operations located in the state, and (B) with at least 10% of its voting stock held by New York residents).

31. In contrast to House bill H. 396, which was ultimately enacted by the General Assembly, the Delaware Senate's version of the legislation, S. 311, was cast in the "enabling approach," meaning that Delaware corporations would be able to choose to "opt-in" to the statute's protections. The enabling approach is discussed more fully infra notes 100-14 and accompanying text.

32. An "interested stockholder" includes "any person . . . that (i) is the owner of 15% or more of the outstanding voting stock of the corporation, or (ii) is an affiliate or associate of...
combination” with the corporation for a moratorium period of three years after the acquisition of fifteen percent of the corporation’s outstanding voting stock, unless one of three exemptions can be met.

First, the legislation will not apply if the bidder receives approval from the board of directors of the target corporation prior to becoming an interested stockholder. Thus, this exemption will only be meaningful if the takeover bid is not hostile.

Second, on or subsequent to the date that the person becomes an interested stockholder, the business combination can be approved by the board of directors and by a two-thirds vote of outstanding stock not owned by the interested stockholder. This exemption is largely spurious in that it forces the bidder to commit its funds in the slim hope that it can convince the remaining disinterested stockholders to approve the business combination by at least a two-thirds margin, and enables the target’s management to block the transaction by placing a block of stock in friendly hands.

Third, the statute exempts those business combinations between the corporation and an interested stockholder who acquired, in a single transaction, eighty-five percent of the target’s stock. SEC Com-
missioner Joseph A. Grundfest commented that the threshold level, originally set at ninety percent and subsequently lowered to eighty-five percent, was too high. He observed that the SEC could not cite any hostile takeover in which more than ninety percent of shares were tendered, nor would it ever be possible to attain the threshold amount in Fortune 500-type corporations, which, on average, have blocking coalitions of about fifteen percent. Consequently, the bidder would probably have to gain near-unanimous support from the remaining shareholders.

The legislation does allow a corporation to opt out of the statutory scheme by action of its board of directors, but the board must do so within ninety days of the statute's date of effectiveness. It also provides that a corporation may opt out by action of its stockholders in one of two ways: its original certificate of incorporation could contain a provision expressly electing not to be governed by the

attained. Id.


40. See id. at 2-4.

41. See Letter from SEC Commissioner Joseph A. Grundfest to David B. Brown, Esq. 7-8 (Dec. 10, 1987) (on file at Hofstra Law Review) (citing Memorandum from SEC Chief Economist Kenneth Lehn (Dec. 8, 1987)); see also Don't Mandate Antitakeover Protection, Grundfest Tells Delaware Legislators, Sec. L. Daily (BNA), Jan. 27, 1988, at 11, 14 (estimating that the 85% threshold would be impossible to attain in at least 30% of the largest U.S. corporations, since 5% of the shareholders are likely to be non-responsive and 10% of the shares are likely to be controlled by the incumbent board). In Shamrock Holdings, Inc. v. Polaroid Corp., 1989 Del. Ch. LEXIS 2, the Delaware Chancery Court refused to overturn Polaroid's employee stock ownership plan, even though the plan holds 14% of the company's stock, enough to make Shamrock's acquisition of 85% of Polaroid stock highly unlikely. Id.; see Adelson, Polaroid Stock Plan Upheld; Setback for Shamrock Seen, N.Y. Times, Jan. 7, 1989, at D1, col. 5.

42. DEL. CODE ANN. tit. 8, § 203(b)(2) (Supp. 1988). The legislation became effective upon the signature of Governor Michael Castle on February 2, 1988. Id. § 203 revisor's note. In Black & Decker Corp. v. American Standard Inc., 679 F. Supp. 1183 (D. Del. 1987), plaintiff offeror Black & Decker challenged § 203 as a violation of the Supremacy Clause, the Commerce Clause, and, as a result of its retroactive application, the Due Process and Equal Protection Clauses of the fourteenth amendment. Black & Decker alleged that application of § 203 would cause it irreparable damage due to the substantial impediment it imposed on the proposed business combination, the threat to Black & Decker's planned financing if the merger were not effectuated within 180 days, and the resultant confusion in the marketplace caused by concerns regarding the constitutionality of § 203. Id. at 1188. The district court, however, denied preliminary injunctive relief in light of the possibility that Black & Decker could gain control of the board and opt out of the statutory coverage within the ninety day window, thus eliminating the threat of irreparable harm. Id. at 1191. Since the court based its decision on the availability of the opt-out provision, it did not reach the constitutional issues. See Bidder Fails to Show Irreparable Harm If New Delaware Takeover Law Enforced, Sec. L. Daily (BNA), Feb. 25, 1988, at 1, 2.
statute, or its certificate of incorporation or bylaws may be amended to include such a provision. However, the effectiveness of such an amendment is delayed for twelve months following its adoption, and, furthermore, the amendment will not function to permit a business combination between the corporation and a bidder who became an interested stockholder on or prior to the date of the amendment.

As a result, the statute precludes even a majority of disinterested shareholders from adopting an amendment expressly opting out of the statutory coverage so as to facilitate a business combination opposed by the board. This occurs since the amendment is not effective for twelve months, and, in any case, is ineffective to permit the business combination between the corporation and the interested shareholder, that is, the combination which motivated the shareholders to adopt the amendment in the first instance. Tender offers are often made conditional on obtaining an amendment to the corporation’s bylaws to eliminate the applicability of a state anti-takeover statute. This is no longer possible under the Delaware statute. As enacted, the statute therefore leads to the inevitable result that eighty percent of America’s business capital is now insulated from hostile takeover activity.

III. COMMERCE CLAUSE ANALYSIS

The Commerce Clause grants to Congress the authority “to regulate commerce . . . among the several States . . . .” Thus, by negative implication, the Constitution limits the states’ authority to enact legislation which impedes the flow of interstate commerce.

44. Id. § 203(b)(3).
45. See id.
46. See id.
47. See id.
48. See id.
49. See id.
50. Labaton, supra note 17, at D1, col. 8.
51. U.S. Const. art. I, § 8, cl. 3.
When a state statute directly attempts to regulate interstate commerce, the Supreme Court has set forth a \textit{per se} rule of invalidity.\textsuperscript{53} In a challenge to the constitutionality of a state regulation which does not directly regulate interstate commerce but simply has an effect on commerce, the analysis proceeds with a balancing of the law's burden on interstate commerce in relation to its putative local benefits.\textsuperscript{54} Unless the burden imposed on interstate commerce promotes legitimate state interests and is not clearly excessive as compared to its putative state benefits, the law will be held unconstitutional.\textsuperscript{55} The balancing test also considers the existence of less burdensome methods of achieving the state's purpose.\textsuperscript{56}

There is recent authority, however, for the proposition that the Commerce Clause analysis does not require the \textit{Pike} balancing

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\textsuperscript{53} See \textit{Edgar v. MITE Corp.}, 457 U.S. 624, 640 (1982) (White, J., plurality opinion); \textit{Dean Milk v. City of Madison}, 340 U.S. 349, 354 (1951); see also \textit{South-Central Timber Dev., Inc. v. Wunn Nicke, 467 U.S. 82, 100 (1983)} (stating that a protectionist law which burdens interstate commerce "falls within rule of virtual \textit{per se} invalidity of laws that 'block the flow of interstate commerce at a State's borders.'" (quoting \textit{Philadelphia v. New Jersey}, 437 U.S. 617, 624 (1978))).

\textsuperscript{54} See \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.")

\textsuperscript{55} See \textit{Hyde Park Partners v. Connolly}, 839 F.2d 837, 844 (1st Cir. 1988). The First Circuit in \textit{Hyde Park} utilized the \textit{Pike} balancing test in invalidating Massachusetts' one-year prohibition on takeover bids. \textit{See id.} The court found that because the Massachusetts statute prohibited the interstate sale of stock, application of the balancing test was appropriate. \textit{Id.}

\textsuperscript{56} See, e.g., \textit{Dean Milk v. City of Madison}, 340 U.S. 349, 354 (1951) (striking down a city ordinance requiring that milk be processed within five miles of Madison as "an economic barrier protecting a major local industry against competition from without the State . . . [that] plainly discriminates against interstate commerce."). The \textit{Dean Milk} Court noted that the city could not legislate in this manner, "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonably nondiscriminatory alternatives . . . are available." \textit{Id.}; see also \textit{Hunt v. Washington State Apple Advertising Comm'n}, 432 U.S. 333, 353 (1977) (holding that the state must justify discrimination on interstate commerce by proving the unavailability of non-discriminatory alternatives to accomplish the state's purpose); Note, \textit{The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?}, 1985 \textit{Duke L.J.} 697, 699-704 (authored by Richard H. Seaman) (stating that in general, courts analyze Commerce Clause questions by looking at whether or not local objectives can be achieved by alternatives less burdensome on interstate commerce).
test. In fact, the CTS Court implicitly dismissed the test when analyzing state statutes which merely regulate "corporate governance." The court did, however, leave the door open for the continued use of the test where a state's purpose was to go beyond intrastate corporate governance. Since the purpose of the Delaware statute, by the legislature's own admission, was not to simply regulate intrastate corporations, the balancing test should apply.

Section 203 is seriously flawed under both prongs of the Commerce Clause analysis. First, operation of the statute imposes substantial direct burdens on interstate commerce. Second, the de minimus state purpose asserted as a justification for the legislation's indirect burden on interstate commerce does not rise to the level of legitimacy and will not counterbalance the significant resultant indirect burdens imposed on interstate commerce. Moreover, Delaware has not adopted the least restrictive means of achieving its goal.

A. Direct Burdens

A persuasive argument can be made that section 203 was enacted with a discriminatory purpose which directly impedes interstate commerce, thereby rendering the statute per se invalid. The
statute effectively precludes for a three-year period the completion of a business combination following a successful hostile tender offer,\(^6^4\) the effect of which would have been reincorporation in another state or the sale of corporate assets located in another state.\(^6^5\) By prohibiting migration to another state, the statute discriminates against other states which are as interested in raising revenues through corporate franchise fees as Delaware.\(^6^6\) Thus, the state’s attempt to control the movement of corporate charters is a classic example of constitutionally prohibited economic protectionist legislation that “overtly blocks the flow of interstate commerce at a State’s borders.”\(^6^7\) Moreover, by limiting the free transfer and alienation of corporate assets located outside Delaware, the statute directly impedes

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64. See supra notes 31-41 and accompanying text.


66. See id. at 37-38; see also infra note 73 and accompanying text (discussing Delaware’s concern with franchise fees and taxes as a motivation for the enactment of § 203); infra note 141 and accompanying text (discussing the importance to the state of revenues generated by its position as the dominant state of incorporation). Delaware Secretary of State Michael Harkins has indicated that the desire to keep corporations from leaving the state was a fundamental consideration in the debate over § 203. See Joint Hearings, supra note 17, at 6 (testimony of Delaware Secretary of State Michael E. Harkins) (posing the looming threat of corporate migration to the state of “actual corporate headquarters where there is already existing protection . . . . Delay [in enacting takeover legislation] could force some companies to look seriously at leaving.”).

67. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Relying on Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 580 (1986), for the proposition that a state may not force producers and consumers in other states to surrender any competitive advantage that they may possess, plaintiffs in Black & Decker argued that a state likewise cannot legislate so as to prevent another state from competing in the market for corporate charters by forbidding the movement of corporate charters from one state to another. Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 37-38, Black & Decker; accord First Amended Complaint at 46, CRTF Corp. v. Federated Dep’t Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988) (No. 88 Civ. 0487); see also Pinto, Takeover Statutes: The Dormant Commerce Clause and State Corporate Law, 41 U. MIAMI L. REV. 473, 503 (1987) (hypothesizing that a statute which prohibited a corporation from reincorporating in another state, as § 203 does, should be found to be a direct burden on interstate commerce); Comment, Beyond CTS: A Limited Defense of State Tender Offer Disclosure Requirements, 54 U. CHI. L. REV. 657, 675-77 (1987) (authored by Stephen Gietelman) (arguing that state legislation designed to foster continued corporate presence excessively burdens interstate commerce and is not a legitimate state interest). As a preliminary matter, plaintiffs in Black & Decker noted that “the movement of corporate citizens from one state to another is a significant aspect of interstate commerce. . . . no more subject to restraint by any particular State than is any other aspect of interstate commerce.” Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 36, Black & Decker Corp. v. American Standard Inc., 679 F. Supp. 1183 (D. Del. 1988) (No 88-50) (citation omitted).
the flow of products in interstate commerce.68

In addition, Congress has explicitly recognized that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation . . . in order to protect interstate commerce and to insure the maintenance of fair and honest markets . . . ."69 Accordingly, the SEC has argued that "any state regulatory scheme that impairs transactions in securities would seriously threaten the liquidity of the national securities markets and disrupt the federal 'common market' in securities, thereby vitiating the vital function served by those markets.70

B. Indirect Burdens

Section 203 also functions as an indirect burden on interstate commerce.71 Although state legislators expressed a desire to protect Delaware residents from abusive takeover tactics,72 they have also


Limitations on the free transferability of securities of corporations which are owned by shareholders nationwide diminish the efficiency, depth, and liquidity of the nation's securities markets . . . . I believe it is imprudent for states to use their authority over matters of internal governance as a means of regulating the interstate market for corporate control.


71. One litigant has argued that § 203 indirectly burdens interstate commerce by: (1) deterring those nation-wide tender offers which are unsupported by target management, not only to the target's Delaware shareholders, but also to shareholders in states and nations unconnected to Delaware; (2) preventing shareholders in Delaware and elsewhere from realizing an opportunity to sell their shares at a premium; (3) putting a halt to the generation of capital that would ordinarily flow into interstate commerce due to purchases and sales of securities of Delaware corporations; (4) encouraging less than optimal management performance in view of the removed threat of a takeover; and (5) exerting a general constraint upon a national securities market by interfering with transactions between willing buyers and sellers. See First Amended Complaint at 43-46, CRTF Corp. v. Federated Dep't Stores, Inc., 683 F. Supp. 422 (S.D.N.Y. 1988) (No. 88 Civ. 0487).

72. See supra notes 19-20 and accompanying text.
identified the revenues generated from corporate franchise taxes and fees as a prime motivation for enactment of the law. In reality, the statute does not speak to the protection of Delaware citizens. There is no requirement that any shareholders be Delaware residents. In fact, section 203 does not protect any shareholders since it leaves the

73. Secretary of State Michael Harkins argued strenuously in support of the bill due to his "responsibility for managing the Corporate Franchise Tax and Fees, which produce over 170 million dollars in revenue, representing 17% of total state income." See Joint Hearings, supra note 17, at 1 (testimony of Delaware Secretary of State Michael E. Harkins).

Moreover, Assistant Secretary of State Richard L. Templeton has stated, "We are concerned about losing the edge in the incorporation field . . . . I believe this proposal is something the legislature will view as not only good for Delaware and Delaware's corporate image, but necessary for Delaware and Delaware's corporate image." Humphrey, Lawyers Set On Compromise Plan for Delaware Corporate Takeover Law, Associated Press, Dec. 23, 1987.

One commentator has criticized the CTS decision as blindly accepting Indiana's goal of "shareholder protection" when in reality the legislature was more concerned about the state's tax base. See Langevoort, supra note 57, at 116-17.

As a further illustration of parochial motivation, Delaware's statute excepts from the definition of "interested stockholder" parties that owned shares in excess of the 15% cap as of, or acquired such shares in a tender offer commenced prior to, December 23, 1987. Del. Code Ann. tit. 8, § 203(c)(5) (Supp. 1988). The statute was drafted to apply retroactively so as to accommodate Texaco in its attempt to fend off a takeover attempt by Carl Icahn. See Labaton, supra note 21, at D4, col 2. It is well settled that retroactive application of a statute must be justified by a legitimate purpose furthered by rational means. See Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); J. SUTHERLAND, STATUTORY CONSTRUCTION § 41.02 (4th ed. 1973). Delaware's selection of the effective date does not rise to the level of legitimate purpose or rational means—bidders became subject to § 203 notwithstanding the general consensus that notice of the rules to be applied to individuals' conduct should be ascertainable in advance. Cf. Canisius College v. United States, 799 F.2d 18, 25 (2d Cir. 1986) (stating that a retroactive statute is harsh and oppressive if it abrogates vested rights); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976) (stating that retrospective legislation must meet the test of due process); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 690, 692 (1960) (stating that "retroactive legislation is suspect because of the principle that a person should be able to plan his conduct with reasonable certainty of legal consequences.").

74. Delaware Secretary of State Michael Harkins has correctly identified the "citizens" to be protected by this legislation as the state's "corporate citizens," to whom he has pledged "the best corporate law, the best court system and the best service this country has to offer." Joint Hearings, supra note 17, at 1 (testimony of Delaware Secretary of State Michael E. Harkins).

75. Compare Del. Code Ann. tit. 8, § 203 (Supp. 1988) (requiring no jurisdictional nexus beyond mere in-state incorporation) with Ind. Code Ann. § 23-1-42-4(a) (West Supp. 1988) (applying the statute only to corporations with its principal place of business, principal office, or substantial assets in Indiana, and with more than 10% of its shareholders resident in Indiana, more than 10% or its shares held by Indiana residents, or 10,000 shareholders resident in Indiana). But cf. RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476, 487 (D. Del. 1988) (upholding § 203 under the rationale that the CTS Court's approval of the Indiana statute's triggering provisions, which require contacts greater than mere in-state incorporation, was not "constitutionally determinative").
ultimate decision on corporate control to management.\textsuperscript{76}

Moreover, the exemption of company self-tenders and management-led two-tiered tender offers and leveraged buy-outs may well belie the articulated statutory purpose,\textsuperscript{77} since coercive tender offer practices may be present in those types of bids as well.\textsuperscript{78} The Supreme Court expressly noted in \textit{Edgar v. MITE Corp.}\textsuperscript{79} that the exemption provided from the Illinois statute for a company's acquisition of its own shares did not further the state's purported interest in protecting shareholders.\textsuperscript{80}

As a result, the only legitimate purpose against which to balance the statute's burdens on interstate commerce may be the state's power to regulate state-chartered corporations.\textsuperscript{81} The \textit{CTS} decision specifically emphasized the rights of states to create corporations, delineate their powers, and designate the rights acquired upon purchase of their shares.\textsuperscript{82} The Court recognized that a state has a legitimate interest in furthering the stability of its corporations' relationships, as well as in protecting shareholder autonomy.\textsuperscript{83} To that end, Indiana's Control Share Acquisition Statute provides shareholders with an opportunity to jointly determine whether the takeover was in their best interests by requiring a vote of shareholders prior to the acquisition of control by the bidder.\textsuperscript{84} Furthermore, the statute

\textsuperscript{76} The New York City Comptroller, in his capacity as asset manager of more than $30 billion in pension funds (much of which is invested in stock of Delaware-chartered corporations), expressed opposition to the legislation, stating that "under our system of corporate democracy, all stockholders are entitled to evaluate proposed business combinations for themselves . . . . The legislation before you effectively removes that option." \textit{Joint Hearings, supra} note 17, at 2 (testimony of Deputy Counsel Steven A. Cohen, Office of the Comptroller of the City of New York). It is certainly questionable whether legislation which effectively disenfranchises shareholders advances the purported goal of shareholder protection from takeover abuses.


\textsuperscript{78} Id.

\textsuperscript{79} 457 U.S. 624 (1982) (White, J., plurality opinion).

\textsuperscript{80} See id. at 644.

\textsuperscript{81} In shifting the regulatory focus on takeovers from the initial step, i.e. the tender offer, to the second step, i.e. the business combination, the Delaware legislature, in all likelihood, intended to avoid classification of \S 203 as a securities regulation in order to heighten the ability of the statute to meet the \textit{Pike} balancing test as applied to indirect restraints on interstate commerce.

\textsuperscript{82} See \textit{CTS Corp. v. Dynamics Corp. of America}, 481 U.S. 69, 89-91 (1987).

\textsuperscript{83} Id. at 91.

\textsuperscript{84} Id. The Indiana statute, \textit{IND. CODE ANN.} \S 23-1-42-1 to -11 (West Supp. 1988), provides that the owner of control shares of corporations with requisite state connections acquires voting rights only by a collective resolution of the shareholders. \textit{Id.} \S 23-1-42-9. "Control shares" are defined as shares that, but for the operation of the statute, would bring the
applies exclusively to corporations chartered in Indiana with a substantial number of shareholders in Indiana. As the Court observed, each application of the Indiana Act would necessarily affect a large number of Indiana residents, and, as a result, the state had a legitimate interest in legislating for their protection.

The elements of Indiana's Act which support the state's role are not present with regard to section 203. First, the Delaware statute does not afford shareholders the opportunity to evaluate the desirability of a change in management, nor can it be said that a substantial number of Delaware residents will be affected by operation of the law. The Delaware statute rests solely on the state's role in fashioning rules of corporate governance. But if that role were enough to justify the resultant burdens on interstate commerce, the CTS Court's discussion of the material effect on Indiana residents and the promotion of investor autonomy would be superfluous. Further, given the board's ability to approve of a business combination or approve of the purchase of shares which render a person an interested stockholder, the role is rather lightly delegated to incumbent management. The Indiana statute is markedly different in that it grants shareholders the ability to collectively determine whether to confer voting rights upon an acquiring person and thereby approve the takeover.

In light of the beneficial effects of nationwide tender offers on interstate commerce, the state interest in regulating the internal

86. 481 U.S. at 93.
87. Id. But cf. Veere, Inc. v. Firestone Tire & Rubber Co., 685 F. Supp. 1027 (N.D. Ohio 1988) (upholding Ohio's Control Share Acquisition Act over Commerce Clause challenge, even though the statute has no provision limiting its effect to domestic corporations with a defined number of resident shareholders).
88. See supra note 76 and accompanying text.
89. See supra note 75 and accompanying text.
91. See supra note 84 and accompanying text (discussing the Indiana statute's requirement of a shareholder meeting to approve the tender).
92. In addition to the increase in shareholder wealth resulting from takeover activity, see supra notes 23, 25, hostile takeovers may have a positive effect on interstate commerce by acting as a brake on inefficient management. See Easterbrook & Fischel, The Proper Role of
affairs of state-chartered corporations may not be sufficient to out-
weigh the resultant burdens imposed by the statute. Like the New
York takeover statute upon which it was modeled, section 203 will
inevitably preclude tender offers involving an interested stockholder
that is unable to obtain board approval. In finding the burdens of

internal corporate affairs may not offset burdens it places on interstate commerce” by the
limitations it places on post-tender offer business combinations). But see BNS Inc. v. Koppers
Co., No. 88-130, slip op. (D. Del. Apr. 1, 1988). In BNS, § 203 withstood constitutional attack
on both Supremacy and Commerce Clause grounds. The district court, denying preliminary
injunctive relief to a hostile bidder, held that the statute is “probably” constitutional under
CTS. Id. at 35-36. In its Commerce Clause discussion, the court recognized the artful manner
in which the statute was drafted to bring it into compliance with valid state concerns, while
observing that the state’s articulated purpose may not entirely comport with its true motiva-
tion. Id. at 35-36 & 35 n.31. Notwithstanding Delaware’s fiscal concerns in enacting § 203,
the court upheld the statute as an exercise of state power at “the limits of constitutionality.”
Id. at 36. While the court noted that the Indiana Act applied only to Indiana corporations
with a substantial number of Indiana resident shareholders, it summarily dismissed the possi-
bility that the Delaware statute’s absence of nexus requirements (to shareholders or corporate
headquarters) would create either a potential for inconsistent regulations or a bar to Dela-
ware’s regulation of tender offers. Id. at 34.

94. N.Y. Bus. Corp. Law § 912 (McKinney 1986); see supra notes 28-30 and accompa-
nying text (comparing the New York and Delaware statutes).

95. See supra notes 31-50 and accompanying text. The New York law has in fact been
criticized as an endeavour to insulate the local economy from the effects of interstate tender
offers, thereby amounting to precisely the kind of economic protectionism the Commerce
Clause forbids. See Cole, S.E.C., in Filing, Challenges New York Takeover Law, N.Y. Times,
Mar. 10, 1988, at D4, col. 1; cf. Pinto & McGrath, Problems and Issues Raised in State’s New
Takeover Law, N.Y.L.J., Mar. 17, 1986, at 1, col. 3, 20, col. 6 (noting that the New
York statute “raises significant constitutional questions.”); Pinto, Constitutionality of New
of the five-year moratorium period raises serious constitutional questions); Note, The Constitu-
tionality of Second Generation Takeover Statutes, 73 Va. L. Rev. 203, 231-34 (1987) (au-
thored by James Pagano) (arguing that the New York law deters leveraged transactions with-
out economic proof that such deterrence is beneficial). The legislative history clearly indicates
that the statute was intended to protect the local economy. See, e.g., Memorandum of State
Executive Department, reprinted in 1985 N.Y. Laws 3184, 3189-90 (McKinney). Neverthe-
less, a recent Commerce and Supremacy Clause challenge to the New York statute was unsuc-
cessful. See Salant Acquisition Corp. v. Manhattan Indus., Inc., 682 F. Supp. 199 (S.D.N.Y.
1988). In denying preliminary injunctive relief to a tender offeror, the court in Salant found
that “[s]ummary disposition of significant and substantial constitutional questions is inap-
propriate.” Id. at 204. The court thus refused to enter into a “‘gratuitous discussion’” of the
statute’s constitutionality. Id. (quoting Black & Decker Corp. v. American Standard Inc., 679
F. Supp. 1183, 1194 (D. Del. 1988)).

A study of the New York statute by the Federal Trade Commission (FTC) disclosed that
the challenged Illinois statute excessive in relation to the local benefits, the plurality in MITE expressed particular concern for the potential loss of such benefits. In fact, the SEC has argued that section 203 restraints interstate commerce "far in excess of what is required to promote any legitimate state interest."

C. Availability of Less Burdensome Alternatives

Even where the state has articulated a legitimate local interest to justify the resultant burdens on interstate commerce, the Supreme Court has held that the regulation will not be upheld when the interest "could be promoted as well with a lesser impact on interstate activities." Given the availability of the Indiana-type control share acquisition statute upheld in CTS, section 203 would seem to fail this aspect of the Pike balancing test.

Furthermore, the Delaware legislature could have cured present section 203's constitutional infirmities by casting the statute in the "enabling approach." The enabling approach requires shareholder approval as a precondition to fundamental changes in corporate gov-

enactment of the law resulted in a $1.2 billion loss to shareholders, representing approximately a 1% decrease in company value. Bandow, supra note 23, at F2, col. 6.

New Jersey has also recently enacted an anti-takeover statute which provides for a five-year moratorium on mergers, recapitalizations, or sales of assets by any person obtaining more than 10% of the corporation's stock, in the absence of board approval. N.J. STAT. ANN. § 14-A:10-4 (Supp. 1988). A study of the effects of the New Jersey statute also reveals a substantial negative effect (approximately 11.5%) on the value of New Jersey corporations. See Bandow, supra note 23, at F2, col. 6. Similarly, an SEC study demonstrated that Ohio companies lost 3.2% on average after the enactment of anti-takeover legislation, OHIO REV. CODE ANN. §§ 1701.83-85 (Anderson 1985 & Supp. 1987). Bandow, supra note 23, at F2, col. 6.

97. See Robb, Delaware Takeover Law Challenged in S.E.C. Brief, N.Y. Times, Apr. 30, 1988, at 49, col. 1, col. 2 (reporting on the SEC's filing of an amicus brief which argued that § 203 violates the Commerce Clause). Moreover, one commentator has noted that the cost of anti-takeover legislation will be borne largely by out-of-state entities with no voice in the political process. See Romano, supra note 35, at 140.
98. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); see also Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977) (holding that "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."); Langevoort, supra note 57, at 108 (suggesting that whenever review of a corporate law relates directly to a shift in corporate control which is potentially motivated by a protectionist purpose, the law must be the least restrictive means of implementing the legislative goal).
100. Significantly, the provisions of the Delaware Senate's bill, S. 311, tracked the provisions of the House bill, H. 396, except that it was cast in the enabling approach. See supra note 31.
ernance. Based on the principle of freedom to contract, enabling statutes support the theory that corporate law should generally not preclude private parties from structuring their business affairs as they choose.

The enabling approach is more consistent with the principles of corporate governance that have emerged in Delaware\(^{101}\) which have contributed to its position as the nation's overwhelming choice for corporate domicile.\(^{102}\) The state legislature chose the enabling approach, for example, in allowing corporations to reduce director liability for breaches of the duty of care by obtaining the approval of a majority of the corporation's shareholders.\(^{103}\) Likewise, implementation of anti-takeover legislation by a corporation should require the concurrence of a majority of the shareholders since it materially alters the factors upon which shareholders relied when they invested in the corporation.\(^{104}\)

Moreover, adoption of enabling legislation would have substantiated the state's argument that it is legislating with regard to the internal corporate affairs of its corporations as creatures of the state and within the purview of state regulation\(^{105}\) by requiring shareholder approval of the protections afforded by the statute, much the same as for other defensive measures.

The use of the enabling model would also have alleviated the state's concern regarding potential loss of revenues to states which had previously enacted anti-takeover legislation. In order for a Delaware corporation to leave the state and reincorporate elsewhere, the corporation must obtain the vote of a majority of its shareholders.\(^{106}\) If a company's shareholders would not vote to opt into the Delaware statute, they would certainly not vote to reincorporate in a jurisdi-

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102. See infra notes 141-51 and accompanying text (discussing Delaware's dominant position in the market for corporate charters).


104. See Joint Hearings, supra note 17, at 9-10 (statement of SEC Commissioner Joseph A. Grundfest).


tion with even more onerous anti-takeover legislation.\textsuperscript{107}

To be sure, Delaware corporations that desire takeover protections such as those provided by section 203 already have the statutory power to obtain them by appropriate charter amendments.\textsuperscript{108} Indeed, the state maintains its competitive edge in the corporate charter market in large part by permitting private “contracting” around the statutory scheme through amendment of the corporate bylaws or charter. Most sections of the corporate code are triggered only to the extent that the corporation’s charter or bylaws fail to provide otherwise.\textsuperscript{109}

An enabling approach version of section 203 would also be less susceptible to constitutional attack than the statute as presently constituted, since the existence of the shareholder option may provide evidence that the legislation amounts to a less restrictive means of achieving the state’s legitimate purpose than mandatory legislation—the shareholder decision is not limited (to a yes or no vote) to opt in to state-created anti-takeover provisions, but rather permits a wide range of corporate choices.\textsuperscript{110} In fact, some commentators have suggested that the Commerce Clause could be interpreted to invalidate statutes that do not allow opting in or opting out.\textsuperscript{111} Although section 203 does contain certain opt-out provisions,\textsuperscript{112} a close examination reveals that those provisions are crafted so as to be rendered meaningless in terms of shareholder choice.\textsuperscript{113} In addition, enabling legislation may remove the presence of state action required in a constitutional challenge.\textsuperscript{114}


\textsuperscript{108} See Del. Code Ann. tit. 8, § 242 (1983) (specifying the types of charter amendments which may be enacted by Delaware corporations and the procedure for their enactment); see also Romano, supra note 35, at 113 (suggesting that the continued availability of lawful defensive measures may make anti-takeover legislation unnecessary).

\textsuperscript{109} See Macey & Miller, supra note 107, at 484; Romano, supra note 35, at 112.


\textsuperscript{111} See, e.g., id. at 773-74.

\textsuperscript{112} See Del. Code Ann. tit. 8, § 203(b)(1) (Supp. 1988) (opt-out provision in original certificate of incorporation); id. § 203(b)(3) (opt-out amendment to certificate of incorporation or bylaws).

\textsuperscript{113} See supra notes 42-46 and accompanying text.

\textsuperscript{114} See Coffee, supra note 110, at 774 n.39 (concluding that private action taken by shareholders pursuant to enabling legislation is exempt from constitutional scrutiny under the
Thus, it appears that enabling legislation which permits corporations to approve charter amendments to protect themselves against takeovers is the optimal approach in terms of shareholder autonomy and constitutional validity.

D. The Internal Affairs Doctrine

There is recent authority for the proposition that the Commerce Clause analysis of a state statute regulating internal corporate governance does not require application of the *Pike* balancing test.\(^{115}\) Under the internal affairs doctrine, the state of incorporation retains sole regulatory authority over the internal affairs of domestic corporations.\(^{116}\) By prescribing the use of one state's laws for matters involving relationships between and among shareholders, creditors, and the corporation and its officers and directors, all of whom are not confined to one area of the nation, the doctrine serves to foster convenience and the predictability of legal results,\(^{117}\) and facilitates interstate commerce by removing the burdens imposed by multistate regulation.\(^{118}\)

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\(^{115}\) See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring); *Regan*, supra note 57, at 1866-68; *see also CTS*, 481 U.S. at 88-90; *McDermott Inc. v. Lewis*, 531 A.2d 206, 217 & n.12 (Del. 1987).

\(^{116}\) See generally Buxbaum, supra note 114, at 43-47 (tracing the history of constitutional issues surrounding the internal affairs doctrine); Kozyris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1 (comprehensively discussing the internal affairs doctrine and other choice of law issues with respect to corporate takeover struggles); Pinto, supra note 67, at 489-92 (discussing the development of the internal affairs doctrine).

\(^{117}\) *Restatement (Second) of Conflict of Laws* § 302 comment b (1971).

\(^{118}\) *See Horowitz, The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806, 814 (1971); *Pinto*, supra note 67, at 490-92; *see also Buxbaum*, supra note 114, at 53-54 (discussing the burdens associated with multiple state regulation of corporate affairs). The Supreme Court has consistently held that statutes which give rise to an inconsistent scheme of regulations violate the Commerce Clause. *See, e.g.*, Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 582-84 (1986) (holding that a New York statute preventing a distiller from changing its out-of-state prices for the relevant month after they were posted in New York was a direct regulation of interstate commerce in violation of the Commerce Clause); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (holding that an Illinois regulation requiring that trucks be equipped with a certain type of mud flap illegal in 45 other states unduly burdens interstate commerce); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89 (1987) (noting that a statute may...
The Delaware Supreme Court has in fact held that the Commerce, Due Process, and Full Faith and Credit Clauses require application of the doctrine. Indeed, in its opinion in *CTS*, the United States Supreme Court quotes the *Restatement (Second) of Conflict of Laws* for the proposition that the law of the state of incorporation "should 'determine the right of a shareholder to participate in the administration of the affairs of the corporation.'" It should be noted, however, that the Indiana statute upheld in *CTS* requires, in addition to incorporation in Indiana, that the corporation have its principal place of business or substantial assets within Indiana, and either (1) more than ten percent of its shares held by Indiana residents or (2) ten thousand shareholders who are residents of Indiana. Justice Powell, comparing the Indiana statute to the Illinois statute declared unconstitutional in *MITE*, specifically noted that "the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana." Accordingly, the broad approval given the internal affairs doctrine is dubious when extended to Delaware's law given its total absence of a

119. See McDermott Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987).
121. *Id.* at 89 (quoting *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 304 (1971)).
123. See Edgar v. *MITE Corp.*, 457 U.S. 624 (1982) (White, J., plurality opinion). The Court in *MITE* specifically held that under the Commerce Clause a state "has no interest in regulating the internal affairs of foreign corporations." *Id.* at 645-46.
requisite nexus with the state.126

Moreover, limitations on the doctrine arise when its underlying considerations are outweighed by a significant interest asserted by a state other than the state of incorporation.126 As a result, many state takeover statutory schemes have incorporated a "significant contacts" principle requiring significant relationship with the state in order to trigger application of the statute.127 Such nexus requirements serve to buttress the rationale for application of the doctrine.

Section 203, however, requires nothing more in the way of state contacts than the mere formality of incorporation in the state. The potential therefore exists for the legitimate assertion of multiple competing state interests, with each state arguing that its law is more appropriate than that of the state of incorporation.128 Statutes

125. See supra note 75 and accompanying text (discussing the lack of jurisdictional requirements in § 203).

126. See Restatement (Second) of Conflict of Laws § 302(2) (1971) (stating that "[t]he local law of the state of incorporation will be applied . . . except . . . where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied."); see also id. § 309 comment c (providing that the law of a state other than the state of incorporation is "most likely to be applied . . . where the corporation does all, or nearly all, of its business and has most of its shareholders in this other state and has little contact, apart from the fact of its incorporation, with the state of incorporation."); Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 263 (2d Cir. 1984) (stating that some of the factors to be considered in determining the single state law to be applied include: where business is conducted, where the principal office is located, where records are kept, where the trustees meet, and what proportion of the shareholders reside in the state); cf. Kozyris, supra note 116, at 75 (describing the limited utility of Norlin except to the extent that it upholds application of the law of the state of incorporation but leaves open the possibility of application of New York law where there are substantial New York corporate contacts). But see McDermott Inc. v. Lewis, 531 A.2d 206, 217 (Del. 1987) (stating that "a court or state which attempts to displace the internal affairs doctrine carries a heavy burden to justify its action.").

127. Such requirements typically include, for example, substantial corporate assets, principal place of business, and/or significant number of resident shareholders located within the state. See, e.g., N.Y. Bus. Corp. Law § 912(a)(13) (McKinney 1986) (applying the statute to "resident domestic corporations," which are defined as those corporations which are incorporated in New York with their principle executive offices and significant business operations located in New York and at least 10% of their voting stock owned by New York residents).

128. See Buxbaum, supra note 114, at 34 (predicting that interstate conflicts will arise from the competing claims of the state of incorporation and the "home states"). The decision in CTS, which recognized a role for the states without clarifying the extent to which a state may assert jurisdiction over companies which are not organized under their laws, has itself been criticized as opening the door to a "crazy quilt" of state statutes which purport to govern the acquisition of one corporation. See The Battle Over Tender Offer Reform: From the States and the Courts to Congress, 20 Sec. Reg. & L. Rep. (BNA) 69 (Jan. 15, 1988) [hereinafter Tender Offer Reform] (reporting that the rush of the states to enact post-CTS legislation threatens to create an inconsistent pattern of overlapping regulation which would be detrimen-
such as section 203 which threaten to result in an intolerable maze of inconsistent state regulation have consistently been struck down by the Supreme Court as an impermissible burden on interstate commerce.\textsuperscript{129}

The potential for conflict is further exacerbated by the decision in \textit{CTS}, which specifically approved of a role for the states in the regulation of corporate takeovers without clarifying the extent to which a state may assert jurisdiction over companies which are not organized under their laws.\textsuperscript{130} In an effort to assert their own sovereignty and protect resident shareholders, states will enact their own takeover legislation with jurisdictional requirements reaching beyond the state of incorporation,\textsuperscript{131} thereby creating an overlapping of applicable anti-takeover regulations.\textsuperscript{132} The greater the number of resident shareholders and other local interests asserted by a state other than the state of incorporation, the less likely its law will be deemed subordinate to that of the state of incorporation.\textsuperscript{133}

\textsuperscript{129} See supra note 118.
\textsuperscript{130} See supra note 128.
\textsuperscript{131} See supra note 1 (listing state anti-takeover statutes already enacted).
\textsuperscript{132} See supra note 128 and accompanying text.
\textsuperscript{133} See Buxbaum, supra note 114, at 54. Alternatively, recognition of Delaware's status and its effective monopoly in the corporate charter market may lead states to press for preemption of state takeover statutes through federal legislation setting minimum corporate governance standards for takeovers. See Tender Offer Reform, supra note 128, at 71. In fact, some commentators have predicted that Delaware's enactment of a statute that extends beyond what is permissible under \textit{CTS} could act as a catalyst for Congressional action in the takeover area, preempting the states which have enacted such laws. See Delaware Takeover Law Has Preliminary Approval, Reuters, Dec. 22, 1987; see also SEC One Share/One Vote Decision May Spark Takeover Reform, Rinaldo Says, 20 Sec. Reg. & L. Rep. (BNA) 251 (Feb. 19, 1988) (discussing a number of pending takeover reform bills, some of which contain provisions for federal preemption of states' ability to circumscribe or prevent hostile takeovers). SEC Chairman David Ruder has argued that the SEC should be given authority to preempt state takeover statutes. See Sontag, Takeovers Are on the Rise Again, Nat'l L.J., Feb. 1, 1988, at 1, col. 4, 8, col. 4.

The long-standing Congressional reluctance to enact takeover legislation and preempt state statutes is based upon the well-settled notion that corporations are creatures of state law and subject to state regulation. See, e.g., Burks v. Lasker, 441 U.S. 471, 478 (1979) (holding that federal courts should apply state law in suits involving directors' discretion, even if the cause of action is based on a federal statute); Santa Fe Indus. v. Green, 430 U.S. 462, 470 (1977) (noting that "[a]bsent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities . . . ."); Cort v. Ash, 422 U.S. 66, 84 (1975) (stating that "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.").
IV. The Market Participant Exception to the Dormant Commerce Clause

When a state acts in a proprietary manner, the "market participant" doctrine exempts the challenged regulation from the limitations imposed by the Commerce Clause. Accordingly, the Supreme Court has upheld state statutes which would be invalid under the Commerce Clause but for the state's participation in the market. The exception has been extended to any form of "state proprietary action." Thus, a state may engage in a clearly protectionist measure which "directly impedes free private trade in the national marketplace" if its actions take the form of market participation, since the Court has interpreted the Commerce Clause as placing no limitations on "the ability of the States to operate freely in the free market." The market participant doctrine will not apply, however, when state legislation falls within the recognized exceptions which have been judicially engrafted onto the doctrine. First, the doctrine is inapposite when a state has a monopoly over the activity sought. Second, the state may not utilize its participation in one market to


135. See, e.g., White, 460 U.S. at 207 (contracting for construction of government project); Reeves, 447 U.S. at 440 (sale of cement); Alexandria Scrap, 426 U.S. at 809-10 (recycling of automobile wrecks). But cf. Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986) (state not functioning simply as a private purchaser when it forbids the purchase of products from repeat offenders of the National Labor Relations Act); South-Central Timber Dev., Inc. v. Wunicke, 467 U.S. 82 (1984) (holding that a state may not impose laws which result in a substantial regulatory effect merely because it wields economic power); Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052 (9th Cir. 1987) (city not functioning as market participant when setting franchise fees for easements under its monopoly control), cert. denied, 108 S. Ct. 2901 (1988); Western Oil & Gas Ass'n v. Cory, 726 F.2d 1340 (9th Cir. 1984) (state not accorded market participant status when negotiating franchise fee agreement with party which had no choice but to seek easement over state-owned land due to permanent location of facilities), aff'd per curiam by an equally divided court, 471 U.S. 81 (1985).

136. Reeves, 447 U.S. at 429; Alexandria Scrap, 426 U.S. at 794.

137. White, 460 U.S. at 223 (Blackmun, J., dissenting in part); see also Note, supra note 56, at 705-32 (discussing the market participant doctrine's focus on the form of state action rather than its effect or intent).


139. See infra notes 152-78 and accompanying text (discussing the monopoly exception to the market participant doctrine).
exert leverage on transactions in other markets.\textsuperscript{140}

A. Delaware as Vendor of a Uniquely Appealing Legal Environment

Delaware’s concept of a corporation law that is consistent in its application of developed principles yet responsive to changing concerns and receptive to innovative legislation has become a valuable commodity.\textsuperscript{141} Delaware’s judges, legislators, and corporate attorneys possess a high degree of sophistication unmatched by their counterparts in other states.\textsuperscript{142} This pool of knowledge translates into an assurance that Delaware will be able to develop legal principles to deal with complex issues as they arise.\textsuperscript{143} Moreover, Delaware’s corporate law is relatively free from political pressures in the state legislature,\textsuperscript{144} since the state constitution requires a two-thirds vote to change corporate laws.\textsuperscript{145}

\textsuperscript{140} See infra notes 179-83 and accompanying text (discussing the lingering string exception to the market participant doctrine).
\textsuperscript{141} The chartering business constitutes Delaware’s second largest source of revenue, see Bandow, supra note 23, at F2, col. 4, generating almost 17% of the state’s revenues, see Joint Hearings, supra note 17, at 1 (testimony of Delaware Secretary of State Michael E. Harkins). Forty-three percent of New York Stock Exchange companies are incorporated in Delaware. See Macey & Miller, supra note 107, at 478 (citing N.Y.S.E. Guide (CCH) §§ 701.3-799 (Jan. 31, 1986)). New York is second with less than eight percent. Id. The money extracted by Delaware for incorporation, as reflected in the franchise fees, is higher than the amount charged by almost any other state. Id. at 492 n.86 (comparing franchise fees charged by other states and determining Delaware’s to be relatively high); see also Romano, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 J.L. Econ. & Organization 225, 255-58 (1985) (comparing the fees in Delaware with those in other states). Despite the elevated costs, the state is able to maintain its dominant position, see Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 668-70 (1974) (discussing Delaware’s primacy in the corporate charter market), because of the unique product it offers to corporate management. See infra notes 142-51 and accompanying text.

Recognizing Delaware’s position as the preferred state of incorporation, a bipartisan California state senate Commission on Corporate Governance urged federal preemption of state anti-takeover statutes after determining that it would be futile for California to enact its own statute. See State Developments, 20 Sec. Reg. & L. Rep. (BNA) 78 (Jan. 15, 1988).

\textsuperscript{142} See Macey & Miller, supra note 107, at 471.
\textsuperscript{143} Id. at 489. Commentators have observed that Delaware’s dominance in the chartering market is due in part to the nature of its substantive corporate law principles. One example is Delaware’s leadership in developing the “enabling approach,” which allows companies to amend their charter or bylaws to contract around the statutory scheme. See id. at 484 (citing Easterbrook, supra note 25, at 549); see also supra notes 100-14 and accompanying text (discussing the enabling approach with respect to anti-takeover legislation).

\textsuperscript{144} See Macey & Miller, supra note 107, at 490.
\textsuperscript{145} Del. Const. art. IX, § 1. Stability is further provided by various Delaware Supreme Court procedures which make dissenting opinions more costly and time-intensive. See Macey & Miller, supra note 107, at 489 n.74. For example, a dissent automatically triggers a
Another unique aspect of Delaware's product is the priority accorded corporate management in the political process. This is due in part to the fact that the assets and business operations of most Delaware-chartered corporations are located in other states, leaving the legislature relatively free from the political influence of a multitude of interest groups such as labor unions, environmental protection groups, and local communities.

Perhaps the most significant explanation of Delaware's dominant position in the market for corporate charters is the likelihood that it will remain desirable to corporate management in the future. This stability and predictability is invaluable in long-term corporate planning and the calculation of risk factors. Stability is further

146. A number of commentators have opined that Delaware's "preeminent position as a corporate domicile," see Letter from SEC Commissioner Joseph A. Grundfest to David Brown, Esq. 8 (Dec. 10, 1987) (on file at Hofstra Law Review), has been attained by winning the "race to the bottom," in which states support management interests to the detriment of stockholders and other corporate interest groups. See, e.g., Cary, supra note 141, at 663. The term "race to the bottom" was coined by Justice Brandeis in his dissent in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 (1933). Professors Macey & Miller extrapolate from this theory the idea that in the competition for corporate charters, states are concerned only with the interests of management, who make the decision as to where to incorporate based upon the existence of specific rules which may be desirable to them. See Macey & Miller, supra note 107, at 471. As a result, states will adopt rules to protect incumbent managers against the threat of hostile takeovers, even though such rules may encourage corporate inefficiency. Id. For additional commentary on the "race to the bottom," see R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976); Folk, Corporate Statutes: 1959-1966, 1966 DukE L.J. 875; Jennings, Federalization of Corporation Law: Part Way or All the Way, 31 BUS. LAW. 991 (1976); Kaplan, Fiduciary Responsibility in the Management of the Corporation, 31 BUS. LAW. 883 (1976).

On the other hand, another school of thought suggests that the impetus to obtain income from corporate charters has led Delaware to adopt a scheme that promotes efficient corporate decision-making which ultimately benefits shareholders by increasing the wealth of Delaware corporations. See R. Posner, Economic Analysis of Law 390-92 (3d ed. 1986); R. Winter, Government and the Corporation 28-42 (1978); Fischel, supra note 101, at 919-20. Those who posit this theory believe that the present system of state competition leads to efficient state laws and should not be preempted by federal regulation. See Macey & Miller, supra note 107, at 470; Romano, supra note 141, at 265-73.

Not surprisingly, Delaware lawmakers are sensitive to criticism that local economic interests have colored Delaware's approach to corporate law. Corporation Law Council Chairman A. Gilchrist Sparks, III has stated that since Delaware's proposed anti-takeover law was less restrictive than the laws of at least seven other states, including New York, Delaware could not be accused of racing them to the bottom. Delaware Bar Group Votes to Restrict Hostile Takeovers, See. L. Daily (BNA), Jan. 5, 1988.

147. See Coffee, supra note 110, at 763; Macey & Miller, supra note 107, at 490.
148. See Macey & Miller, supra note 107, at 484 (1987); Romano, The State Competition Debate in Corporate Law, 8 Cardozo L. Rev. 709, 723 (1987); Romano, supra note 141,
bolstered by the high transaction costs involved in changing corporate domiciles.\(^{149}\)

Thus, as a vendor of corporate charters to consumers of substantive corporate law, Delaware functions as a market participant in the same manner as if it was engaged in the sale of any other commodity to purchasers in the marketplace. In fact, Delaware actively seeks to lure corporations into the state by advertising the benefits of its corporate environment.\(^{150}\) Many corporations do in fact reincorporate in Delaware just prior to engaging in complex corporate transactions such as public offerings, new merger and acquisition programs, and takeover defenses.\(^{151}\)

B. The Monopoly Exception to the Market Participant Doctrine

In *South-Central Timber Development, Inc. v. Wunnicke*,\(^{152}\) the Supreme Court recognized that the market participant exception does not extend to commodities over which the state as market participant has a monopoly, since in such a case the distinction between market participant and market regulator blurs.\(^{153}\) Justice White’s plurality opinion noted the presence of three elements of the Alaska statute at issue which offended the Commerce Clause: (1) restraint on foreign commerce; (2) a natural resource; and (3) restrictions on resale.\(^{154}\) The presence of these elements contributed to Alaska’s inability to attain market participant status.\(^{155}\)

Section 203 similarly contains resale restrictions\(^{156}\) and restrains foreign commerce.\(^{157}\) Furthermore, the legal and political environment which exists in Delaware\(^{158}\) is indigenous to the state in the

\(^{149}\) Macey & Miller, *supra* note 107, at 488.

\(^{150}\) See, e.g., Secretary of State, State of Delaware, The Delaware Takeover Statute (1988) (introductory statement of Delaware Secretary of State Michael E. Harkins) (announcing that “[o]nce again, Delaware has proven that business and government can work together as partners. Just recently we have added to our list of impressive reasons to incorporate in Delaware—takeover reform.”).

\(^{151}\) See Romano, *supra* note 141, at 256-73.

\(^{152}\) 467 U.S. 82 (1984) (plurality opinion).

\(^{153}\) Id. at 96.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) See *supra* notes 31-50 and accompanying text (discussing § 203’s prohibition of second-step business combinations where none of the three exemptions are satisfied).

\(^{157}\) See *supra* notes 64-70, 92-97 and accompanying text (discussing § 203’s burdens on commerce).

\(^{158}\) See *supra* notes 141-49 and accompanying text.
nature of a natural resource.\textsuperscript{159} Although other states can model their corporate codes to track that of Delaware,\textsuperscript{160} it is unreasonable to hypothesize that other states could match Delaware’s expertise.\textsuperscript{161} Delaware thus enjoys an effective monopoly in the sale of corporate charters, and it may not utilize the leverage of access to its “uniquely progressive legal environment” for the purpose of ordering private relationships between and among non-resident shareholders and non-resident offerors of non-resident corporations (although chartered in-state) to further parochial economic protectionist state interests.\textsuperscript{162}

A recent line of cases which denied market participant status in connection with state and city franchise fee agreements is instructive for the Delaware corporate charter market participant analysis. In \textit{Western Oil & Gas Association v. Cory},\textsuperscript{163} the Ninth Circuit denied market participant status to the State of California in its attempt to impose a fee for the transporation of crude oil from offshore oil rigs over state-owned tidal and submerged lands.\textsuperscript{164} The court noted that

\textsuperscript{159} Professor Romano has observed that Delaware possesses certain attributes which explain its market share: (1) the high proportion of franchise tax revenue guarantees continued legislative responsiveness in light of the unavailability of a viable substitute for revenues; (2) the constitutional supermajority provision for amending the corporation code; and (3) the state’s investment in legal precedents, judicial expertise in corporate law, and facilitation of corporate filings. \textit{See} Romano, supra note 148, at 720-25; \textit{see also} Macey & Miller, supra note 107, at 487 (arguing that Delaware’s primacy in the corporate charter market is derived from the pro-management stance of its substantive corporate law, which entices management to choose to incorporate in the state); \textit{cf.} Coffee, supra note 110, at 762 (explaining Delaware’s prominence in the charter market as a function of interest group politics, rather than pure revenue-seeking behavior).


\textsuperscript{161} \textit{See} Coffee, supra note 110, at 765 (observing that “[o]ne cannot manufacture precedents, because they require both time and an existing supply of litigants.”). Nevada has attempted to capture some of Delaware’s market by adopting both the Delaware corporate statutes and the common law, but that effort has been largely unsuccessful. \textit{See} Cary, supra note 141, at 665.

\textsuperscript{162} \textit{Cf.} Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052, 1058-61 (9th Cir. 1987), \textit{cert. denied}, 108 S. Ct. 2901 (1988), discussed infra notes 167-74 and accompanying text; Western Oil & Gas Ass’n v. Cory, 726 F.2d 1340, 1343 (9th Cir. 1984), \textit{aff’d per curiam by an equally divided court}, 471 U.S. 81 (1985); Varat, \textit{State “Citizenship” and Interstate Equality}, 48 U. Chi. L. Rev. 487, 564 (1981) (arguing that when a state gets its economic leverage from having the only available resource, it should be precluded from using that leverage to accomplish indirectly what it may not regulate directly).

\textsuperscript{163} 726 F.2d 1340 (9th Cir. 1984), \textit{aff’d}, 471 U.S. 81 (1985).

\textsuperscript{164} 726 F.2d at 1343.
the state commission had a "complete monopoly" in the sale of easements on those lands, reaching its decision notwithstanding the availability of alternatives to pipeline routes over state lands.

In Shell Oil Co. v. City of Santa Monica, the city had negotiated a franchise fee agreement with Shell Oil Company for the construction of an oil pipeline. When the original agreement expired and a new agreement could not be reached, Shell sought a declaratory judgment that the city's proposed fee would be unconstitutional as an impermissible burden on interstate commerce. The Ninth Circuit noted that Santa Monica was not in as strong a monopoly position as the State of California in Cory, but nonetheless found the city's market participant position unavailing. In a footnote, the court recognized franchising as a traditional governmental function and further acknowledged that the market participant doctrine is based upon considerations of state sovereignty. Despite these doctrinal underpinnings, the court held that "Santa Monica has not engaged in 'marketplace conduct' within the meaning of the market participant exception and that the city's action with respect to transportation corridors is 'the kind of action with which the Commerce Clause is concerned.'" As a result, the court held that the franchising agreement was not immune from Commerce Clause scrutiny, citing Wunnicke for the proposition that "a state may

165. Id.
166. Id. As the Ninth Circuit noted:

Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs' facilities does not permit them to "shop around". There is no other competitor to which they can go for the rental of the required strip of California coastline. The California State Lands Commission has a complete monopoly over the sites used by the oil companies. . . . This control over the channels of interstate commerce permits the state to erect substantial impediments to the free flow of commerce.

168. 830 F.2d at 1054.
169. Id. at 1055.
170. Id. at 1057.
171. Id. at 1058 n.5.
172. Id. (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805 (1975)). The Shell Oil court specifically recognized the significance of state control over the transportation of goods in interstate commerce, stating that "restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce." Id. at 1057 (citing Regan, supra note 52, at 1184). Similarly, the national interest in an efficient interstate market for corporate charters should trigger Commerce Clause scrutiny.
173. Id.
not impose requirements with 'a substantial regulatory effect outside of that particular market' merely because it can use its economic power to impose a requirement upon someone with whom it is in contractual privity.' \(^{174}\)

Similarly, the market participant exception is not available to shield section 203 from Commerce Clause attack. The lure of the only available tidelands\(^{175}\) or easements,\(^{176}\) or, for that matter, the only available "progressive corporate environment,"\(^{177}\) may not authorize a state to accomplish indirectly through its unequal bargaining power what the Constitution forbids it to accomplish directly.\(^{178}\)

C. The Lingering String Exception to the Market Participant Doctrine

In order to rationally limit a state's ability to invoke the market participant doctrine to legitimize the imposition of burdens on interstate commerce, the Supreme Court in \(Wunnicke\) required that any burden must be limited to the market in which the state is participating.\(^{179}\) This requirement thus entails an analysis of the resultant burden and the acceptable parameters of the market in which the state is participating.

Through its participation in the corporate charter market, Delaware has sought to extend its control far beyond the sale transaction itself. In contrast to a sale in the ordinary commercial context, in which the seller has no control over the manner in which the product is used after the sale is complete,\(^{180}\) a Delaware corporation will now be subject to the downstream regulatory provisions of section 203.\(^{181}\) That is to say, the payment of franchise fees by a Delaware corporation in exchange for a corporate charter does not end the transaction. Instead, the three-year freeze on business combinations with interested stockholders following a fifteen percent threshold acquisition

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174. Id. (quoting \(Wunnicke\), 467 U.S. at 97).

175. See \(Cory\), 726 F.2d at 1340.

176. See \(Shell Oil\), 830 F.2d at 1052.

177. See supra notes 141-49 (discussing Delaware's unique political and legal environment).

178. \(Varat\), supra note 162, at 564.

179. \(South-Central Timber Dev., Inc. v. Wunnicke\), 467 U.S. 82, 97 (1984) (White, J., plurality opinion) (reasoning that "[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further.").

180. See id. at 96.

181. This assumes, of course, that the corporation has not made use of § 203's opt-out procedure, described supra notes 42-46 and accompanying text.
will continue to apply, burdening the interstate market for corporate control.\textsuperscript{182}

Such a use of the state’s leverage in one market to exert a regulatory effect on another market is precisely the type of case that the “lingering string” restriction of \textit{Wunnicke} was designed to prevent. Thus, the market participant doctrine will not apply to cure section 203’s constitutional infirmity.\textsuperscript{183}

\textbf{CONCLUSION}

This Note has addressed the potential utility of the market participant doctrine in a challenge to the Delaware Takeover Statute and has concluded that Delaware’s monopoly position in the market for corporate charters precludes application of the doctrine.\textsuperscript{184} Accordingly, the statute should be subject to the prohibitions of the dormant Commerce Clause.\textsuperscript{185}

Since section 203’s prohibition on reincorporation in another state following a successful tender offer and its limitation on the free transfer and alienation of corporate assets discriminates against other states and directly burdens interstate commerce, the statute should be deemed \textit{per se} invalid.\textsuperscript{186}

If a court further scrutinizes the statute as an indirect burden on interstate commerce, the underlying purpose of the legislation should be closely examined notwithstanding the \textit{CTS} Court’s validation of the extraterritorial nature of state corporate law as a necessary corollary of the internal affairs doctrine.\textsuperscript{187} The court should then proceed to balance the statute’s burdens on interstate commerce against its local benefits. Since the statute adversely affects the efficient functioning of the national securities market in excess of its \textit{de minimus} local benefits, the statute should be held unconstitutional.\textsuperscript{188} Moreover, the state has not adopted the least restrictive

\textsuperscript{182.} In other words, although corporate management may have chosen to “purchase” a Delaware charter, shareholders, as owners of the company, are not free to alienate their shares as they please. They are “obligated to deal with a stranger to the contract after completion of the sale.” \textit{Wunnicke}, 467 U.S. at 96.

\textsuperscript{183.} \textit{Cf.} Pinto, supra note 67, at 503 & n.157 (1987) (citing \textit{Wunnicke} as support for the proposition that the market participant exception is limited and does not entitle a state to enact any legislation it desires that regulates the internal corporate governance of corporations chartered in the state).

\textsuperscript{184.} \textit{See supra} notes 134-83 and accompanying text.

\textsuperscript{185.} \textit{See supra} notes 51-133 and accompanying text.

\textsuperscript{186.} \textit{See supra} notes 64-70 and accompanying text.

\textsuperscript{187.} \textit{See supra} notes 115-33 and accompanying text.

\textsuperscript{188.} \textit{See supra} notes 71-97 and accompanying text.
means of achieving its purpose—the enabling approach to anti-takeover legislation would have enhanced shareholder autonomy and lessened the statute's susceptibility to constitutional attack.¹⁸⁹

Ivy B. Dodes

¹⁸⁹. See supra notes 98-114 and accompanying text.