THREE GENERATIONS OF STATE ANTI-TAKEOVER STATUTES: THEIR LEGITIMACY IN RELATION TO THEIR EFFECTS ON INTERSTATE COMMERCE AND THE SUPREMACY CLAUSE

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I. INTRODUCTION

Hostile corporate takeovers have become prevalent in today's business environment. In response, numerous defensive tactics have been adopted by management. The names which have been given to these defense tactics are as colorful as some of the situations in which a takeover occurs. Common defenses include the "poison pill," which is designed to inflict significant loss on a potential acquirer; the "scorched earth" defense, whereby the target company's assets are liquidated; the "Pac Man" defense, in which the target company makes a tender offer for the bidder's stock; the "white knight" defense, in which a large portion of the company's shares are sold to a friendly party; the "crown jewel" defense, which involves selling the most attractive assets of the company to a friendly party; the "leg-up" defense, involving a grant of favorable options for purchase of treasury stock; and the "greenmail" defense, in which the target self-tenders for only the hostile bidder's shares.[1]

In recent years large corporations have succeeded in codifying some of these defensive strategies—occasionally within a matter of days.[2] Challenges to these statutes have abounded. This note will examine the constitutionality of some of these anti-takeover statutes.

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1. Note, *Recent Developments in the Use of the Poison Pill Antitakeover Defense: Limiting the Business Judgment Rule*, 31 ST. LOUIS U.L.J. 1083, 1083 n.2, 1083-84 n.4 (1987).

2. Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 SEC. REG. L.J. 332, 333 (1986). Examples provided include those statutes passed in Missouri, Hawaii, and New York. *Id.*

II. Court Case Analysis

A. *Edgar v. MITE Corp.*

In 1982 the Supreme Court took its first look at a state anti-takeover statute. In *Edgar v. MITE Corp.*[3] the Supreme Court struck down an Illinois anti-takeover statute. The court was split in its view of the legitimacy of the statute.[4] Justice White delivered the plurality opinion.[5]

The Illinois anti-takeover statute required parties attempting takeovers of target companies to register their offers with the secretary of state.[6] The statute defined "target company" as a corporation having the following characteristics: Illinois shareholders holding ten percent of the stock subject to the offer; a corporation organized under the laws of Illinois; and a corporation having its principal place of business in Illinois, or having ten percent of its stated capital and paid-in surplus in Illinois.[7]

The statute also gave the secretary of state the power to call a hearing during a twenty-day waiting period. The purpose of the hearing was to determine the fairness of a tender offer.[8] A hearing could also be convened if ten percent of the shareholders of the particular class subject to the offer requested it.[9] Once a hearing was held, the statute empowered the secretary to deny registration if he found that an offeror failed to provide full and fair disclosure to the offerees of all material information concerning the takeover, or if the takeover offer was inequitable or would work a fraud or deceit upon the offeree.[10]

In January of 1979 MITE initiated a cash tender offer for the outstanding shares of Chicago Rivet & Machine Company, an Illinois corporation; MITE complied with all federal reporting requirements but failed to comply with the Illinois Act.[11] Instead, MITE filed suit in the Northern District of Illinois seeking a declaratory judgment holding the Illinois Act unconstitutional.[12] The district court granted the request and issued a preliminary injunction prohibiting the secretary from enforcing the statute.[13] Following that ruling MITE published its tender offer in the *Wall Street Journal*.[14] At

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3. Edgar v. MITE Corp., 457 U.S. 624 (1982).
4. Justice White delivered the opinion, which was joined in its entirety by Chief Justice Burger. *Id.* at 625. Other parts of the opinion were joined by Justices Powell, Blackmun, Stevens, and O'Connor. *Id.* Justices Marshall, Brennan, and Rehnquist dissented. *Id.*
5. *Id.* at 626.
6. *Id.* at 626-27.
7. *Id.* at 627.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 627-28.
12. *Id.* at 628.
13. *Id.* at 629.
14. *Id.*

the same time Chicago Rivet & Machine offered to buy back forty percent of its stock for a price higher than that offered by MITE.[15] A few days later the district court entered a final judgment holding the Illinois Act unconstitutional.[16] The United States Court of Appeals for the Seventh Circuit agreed with the district court and the Supreme Court noted probable jurisdiction.[17]

As a result of the district court's decision, both parties agreed to withdraw their offers provided that MITE was given an opportunity to examine the books and records of Chicago Rivet & Machine.[18] After the examination period MITE would be required to make a final offer, which would not be opposed, or to withdraw entirely.[19] In the end MITE decided to withdraw.[20]

The first issue addressed by the Supreme Court was whether there was any controversy before the Court, since MITE had withdrawn its tender offer.[21] Seven of the justices felt that the case was not moot. The decision was based on concern over the impact a reversal of the lower court would have had upon MITE. The Court noted that if the Illinois Act was held constitutional, MITE would be exposed to potential civil and criminal liability for making its initial offer in violation of the Illinois law.[22]

Justices Marshall and Brennan did not accept that reasoning and believed that when the injunctions were issued by the district court, the effect was to absolve MITE from any potential civil or criminal liability.[23] These two justices thought that this reason alone was enough to dispose of the case.

The Supremacy Clause was then examined by the Court. The Court noted that Congress did not explicitly prohibit states from regulating takeovers, but left the determination of whether state laws would conflict with the federal law to the courts.[24] The Court identified three specific instances in which the Illinois Act conflicted with the goals or the purposes of federal law.

First, the Court reasoned that:

> by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions [under the Illinois Act] furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the

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15. *Id.* at 627-28, 629.
16. *Id.* at 629.
17. *Id.* at 630.
18. *Id.* at 629.
19. *Id.* at 629-30.
20. *Id.* at 630.
21. *Id.*
22. *Id.*
23. *Id.* at 663 (Marshall, J., dissenting).
24. *Id.* at 631.

stockholders who will not have an offer before them during this period.[25]

Thus, the twenty-business-day precommencement requirement upset the balance which Congress had hoped to achieve by enacting federal legislation in the area. During this period shareholders would have no knowledge of what was happening. Management, on the other hand, would be aware and would be able to take steps to thwart the attempted takeover. The Court believed the managerial advantage to be intolerable.

A second attack upon the Illinois Act also involved time delay. As noted, the Illinois Act allowed the secretary to call a hearing with respect to any tender offer, and the offer was not allowed to proceed until after the hearing was held.[26] The Illinois Act provided no deadline for completion of the hearing, and the time period required for a decision could be extended by the secretary without limitation.[27] Incumbent management, assuming that they met the ten percent stock ownership test, could also use the hearing provisions to delay the takeover.[28] The Court argued that, by giving the secretary the power to delay the tender offer process, the Illinois Act frustrated the purposes behind the federal law.[29]

When the Williams Act was first passed, Congress recognized that delay could seriously impede a tender offer, and specifically sought to avoid this occurrence.[30] A target company can gain a tremendous advantage by delay. At least ten possibilities for advantage have been suggested by the Securities and Exchange Commission. Options available to the target include:

1. Repurchase of its own securities;
2. Announcement of dividend increases or stock splits;
3. Issuance of additional shares of stock;
4. Acquisition of other companies to produce an antitrust violation should the offer succeed;
5. Arrangement of a defensive merger;
6. Creation of a restrictive loan agreement;
7. Filing of litigation to challenge the tender offer;
8. Abolition of cumulative voting;
9. Incorporating in a state with an anti-takeover law;
10. Negotiating lifetime employment contracts for incumbent management.[31]

To prevent situations which would tip the balance in favor of management, Congress rejected provisions which would impose time delays in the tender offer process. To this extent, the potential for delay provided by the hearing

25. *Id.* at 635.
26. *Id.* at 637.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 638 nn.13, 14.

process under the Illinois Act conflicted with the goals of the Williams Act.[32]

A final shortcoming of the Illinois Act was the provision allowing the secretary to rule on the fairness of a tender offer. The Act required the secretary to deny registration of a tender offer if it was determined that the offer failed to provide full and fair disclosure or had an inequitable effect.[33] This type of discretion and power again conflicted with the federal purpose of allowing investors to be free to make their own decisions with all relevant information.[34] The Court noted that the Act attempted to offer investor protection at the expense of investor autonomy, and was intolerable.[35]

While the plurality opinion was delivered by Justice White, the Supremacy Clause analysis was only accepted by Chief Justice Burger and Justices White and Blackmun.[36] Justice O'Connor agreed with the decision of the Court, but decided not to address the Supremacy Clause issue.[37] Justices Powell, Stevens, Marshall, Brennan, and Rehnquist specifically disagreed with the Supremacy Clause analysis. Thus, while the Court affirmed the lower courts' rulings concerning the unconstitutionality of the Illinois Act, it is unclear what position the Court was taking on the Supremacy Clause issue.

The Court's rationale was distinct on the Commerce Clause challenge. The Court began by restating the test created in *Pike v. Bruce Church, Inc.*, for evaluating state statutes which appear to affect interstate commerce:

> Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[38]

The Commerce Clause, therefore, allows for incidental regulation—but clearly prohibits direct regulation—of interstate commerce.[39] The Court determined that the Illinois Act violated the Commerce Clause in two ways. First, the Act directly regulated and prevented certain interstate tender offers which would generate interstate transactions.[40] Second, the burdens on interstate commerce imposed by the Act were excessive in relation to the local interests which the Act claimed to support.[41]

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32. *Id.* at 639.
33. *Id.*
34. *Id.*
35. *Id.* at 640.
36. *Id.* at 625.
37. *Id.* at 655 (O'Connor, J., concurring).
38. *Id.* at 640 (quoting Pike v. Blue Church, Inc., 397 U.S. 137, 142 (1970)).
39. *Id.*
40. *Id.*
41. *Id.*

The state has always had the power to regulate intrastate securities transactions. The rationale utilized by the Court in those situations was that those regulations involved transactions which occurred solely within the state imposing the regulation.[42] In those situations interstate commerce is unaffected. The Illinois Act, however, was quite a bit different from the allowed "blue-sky" laws. The Illinois Act directly regulated transactions which took place across state lines, and even regulated transactions which took place completely outside of Illinois.[43]

The Court noted that the Illinois law would:

> apply even if not a single [shareholder] were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois.[44]

Thus, the effect of the Illinois Act extended beyond the state's borders and was an illegitimate restraint on interstate commerce. The Commerce Clause precludes a state statute from regulating commerce which takes place wholly outside of the state's borders regardless of whether there is an effect on commerce within that state.[45]

The Court also held that the Act failed to withstand scrutiny under the *Pike* test, which demands that the burden imposed on commerce must not be excessive in relation to the local interests served by the statute.[46] Two local interests were said to justify the existence of the Illinois Act: protection of resident security holders,[47] and regulation of the internal affairs of companies which were incorporated under Illinois law.[48]

The Supreme Court rejected both of these purported interests. Illinois clearly had no legitimate interest in protecting nonresident shareholders, and to that extent there could be nothing to be weighed in balance to sustain the law.[49] Additionally, the Court questioned whether shareholder protection was really the goal of the statute, since a corporation which attempted to acquire its own shares was exempted from the statute.[50] The Court did not view shareholder protection as a significant goal of the statute, since the statute did not provide such protection in all attempted tender offers.[51]

42. *Id.* at 641.
43. *Id.*
44. *Id.* at 642.
45. *Id.* at 642-43.
46. *Id.* at 643.
47. *Id.*
48. *Id.* at 644.
49. *Id.*
50. *Id.*
51. *Id.*

The Court also dismissed the internal affairs argument. The Court reasoned that tender offers involve transfers of stock by shareholders to a third party and do not, by themselves, implicate the internal affairs of the target company.[52] Furthermore, the language of the Act applied to some corporations which were not incorporated in Illinois and even had their principal places of business in other states.[53] Illinois had no interest in regulating the internal affairs of foreign corporations.[54] Based on that reasoning the Court concluded that the burdens which were imposed on interstate commerce were not outweighed by any local interests.[55] Thus, the Act was invalid under the Commerce Clause.

Chief Justice Burger and Justices White, Blackmun, Powell, Stevens, and O'Connor all agreed that the Illinois Act was invalid under the Commerce Clause. Only Justices Marshall, Brennan, and Rehnquist disagreed with this result.

B. *Post* MITE *Cases*

The initial interpretation of *MITE* was that the Court had in fact sounded a "death knell" to then-existing anti-takeover statutes.[56] Statutes which were in existence at the time of *MITE* were referred to as "first generation" statutes. Every first generation statute which was examined after *MITE* was held unconstitutional.[57] First generation statutes were generally based on the state's claim that it had the authority to regulate corporations and prevent certain tender offers. Those statutes generally required disclosure which was more extensive and detailed than that required by the Williams Act.[58] In addition, first generation statutes typically authorized the state securities commissioner to convene some type of hearing to determine the fairness of a tender offer.

As a result of *MITE*, numerous states attempted to pass new takeover statutes which would pass constitutional muster. Some states tried to work with the existing first generation statutes, but most adopted a different type of statute. These new statutes are referred to as "second generation" statutes. They involved the use of supermajority vote or formula price provisions.[59] They were intended to protect shareholders from the coercive as-

52. *Id.* at 645.

53. *Id.*

54. *Id.* at 646-47.

55. *Id.* at 646.

56. Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 Sec. Reg. L.J. 332 (1986).

57. *Id.* at 337 n.32. Anti-takeover statutes in Oklahoma, Virginia, Michigan, Missouri, Maryland, New Hampshire, Kentucky, and Massachusetts were invalidated. *Id.*

58. Voran & Ponns-Townley, *The Changing World of State Takeover Statutes (Part 1)*, 11 ALI-ABA Course Materials J. 116 (1986).

59. *Id.* at 127.

pects of takeover bids by requiring shareholder approval.[60] Since they offered minority shareholders redemption rights, the second generation statutes tended to regulate the back-end of the takeover process instead of the beginning stages of the bid.[61] Typically they imposed restrictions on transactions which would give the offeror a statutorily defined percentage of the total shares outstanding.[62]

Early cases suggested that the courts were going to accept the validity of the second generation statutes.[63] That expectation, however, has not been realized. Numerous second generation statutes have been held unconstitutional for essentially the reasons discussed in *MITE*. A brief examination of several of the post-*MITE* cases is in order.

The Virginia Take-Over-Bid Disclosure Act was declared unconstitutional in early 1983 by the Fourth Circuit Court of Appeals.[64] The Virginia statute was meant to apply to certain open market purchases.[65] The reporting requirements were very similar to those provided by the Williams Act. The court relied on the language contained in *MITE* but noted that, while the Virginia Act was limited to Virginia companies, it was not limited to transactions between Virginia residents.[66] The same two local interests which were discussed in *MITE* were relied upon to justify the burden on interstate commerce. But the court noted that, since the reporting requirements of the Virginia Act were similar to those provided by federal law, there was no additional benefit to the investor.[67] Likewise, the court stated that Virginia had no legitimate interest in protecting nonresident stockholders, and thus any burden imposed could not be justified by an asserted benefit.[68] The court believed that the Virginia Act burdened interstate commerce to a lesser extent than the statute rejected in *MITE*, but still felt compelled to hold the statute unconstitutional.[69]

The Oklahoma Take-Over Bid Act was also held to be unconstitutional under the Commerce Clause because it imposed an unreasonable restraint on interstate tender offers for corporate securities.[70] The Tenth Circuit Court of Appeals observed that the burdens and interests which had figured in the Supreme Court's analysis of the Illinois Act also applied to the Oklahoma Act, and that any differences between them amounted to "incon-

60. *Id.*

61. *Id.*

62. *Id.* at 128.

63. *See generally* Mulligan, *The Continuing Validity of State Takeover Statutes—A Limited Third Generation*, 62 Notre Dame L. Rev. 412, 417-27 (1987).

64. Telvest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983).

65. *Id.* at 577.

66. *Id.* at 580.

67. *Id.* at 581.

68. *Id.*

69. *Id.* at 582.

70. Mesa Petroleum Co. v. Cities Serv. Co., 715 F.2d 1423, 1425 (10th Cir. 1983).

sequential variants of degree."[71] In fact, it was possible for a company to be considered a "target company" under the Act without having a single shareholder who was a resident of Oklahoma.[72] The Act was held to be unconstitutional under the *MITE* analysis.[73]

MITE did not define the Supreme Court's position on the Supremacy Clause, since there was no majority opinion on that point. The majority of cases which have come down since *MITE* have not addressed the Supremacy Clause issue. There are, however, some subsequent state acts which have been held unconstitutional under the Commerce Clause. Both constitutional issues have been discussed by the Federal District Court for the District of Hawaii. The Hawaii Control Share Acquisition Statute, like most first and second generation statutes, was very similar to the Illinois Act.[74] The Hawaii statute was meant to apply to corporations which were incorporated in Hawaii, had their principal places of business in Hawaii, and had more than one hundred shareholders.[75] The same burden on interstate commerce existed, since there was no requirement that any of the shareholders be located in Hawaii.[76]

The Hawaii statute included a provision which allowed the state or incumbent management to require the offeror to disclose more information than was required by the Williams Act.[77] Also, in contravention of the Williams Act, the information had to be disclosed before the shares which raised the party over the minimum ownership levels were purchased.[78] While recognizing that these provisions were clearly in conflict with the Williams Act, the court declined to decide the case based on the Supremacy Clause, since it had already decided to hold the statute unconstitutional under the Commerce Clause.[79] This is one of the few post-*MITE* decisions which has recognized that the state statutes involve not only Commerce Clause problems, but also pre-emption and Supremacy Clause concerns.

The Michigan Take-Over Offers Act was examined just a short time after the decision in *MITE*. The Sixth Circuit Court of Appeals observed that the same time delay problems which existed in the Illinois statute also existed in the Michigan Act.[80] The court utilized the *Pike* balancing test to examine the purported benefits of the Michigan statute.[81] The court reasoned that, since the Michigan Act had essentially the same reporting re-

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71. *Id.* at 1429.
72. *Id.*
73. *Id.* at 1430.
74. Terry v. Yamashita, 643 F. Supp. 161, 163 (D. Haw. 1986).
75. *Id.*
76. *Id.* at 165.
77. *Id.* at 167.
78. *Id.*
79. *Id.* at 168.
80. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 565 (6th Cir. 1982).
81. *Id.* at 566.

quirements as the Williams Act, there was no local benefit to justify the burden which was placed on interstate commerce.[82] The Act was, therefore, held unconstitutional under the Commerce Clause.[83]

Michigan did not remove the statute from its books or pass a new statute. Consequently, several years later the same statute was again brought before the Sixth Circuit.[84] This time the court, in what appears to be a reversal of its previous position, held it constitutional.[85] The court recognized that it was bound by its prior decision,[86] but came to a different conclusion on a different set of facts.

The tender offer made in this case involved unregistered securities to which the reporting requirements of the Williams Act did not apply.[87] The Michigan Act had reporting requirements almost identical to those in the Williams Act, but the Michigan Act applied to a broader range of securities and included securities which did not meet the federal requirements.[88] The court examined the same local interests which were asserted in the prior case,[89] and found that the benefits conferred upon resident shareholders by the Michigan statute were significant since the disclosure requirements of the Williams Act were not applicable to the securities in question.[90] The court believed that the statute provided "for disclosure in the first instance rather than merely enhancing the foundation of federal disclosure mandates."[91] This benefit tipped the scales. Under the facts of the case, the statute was held not to violate the Commerce Clause.[92]

The Sixth Circuit, however, again found that the time delays contained in the Michigan Act were impermissible and in conflict with the goals of the Williams Act.[93] The court noted that a statute's regulatory scheme must operate within the confines of congressional intent as expressed in federal securities laws and regulations.[94] Rather than strike the statute down, the court held that the provisions of the statute which resulted in the time delays were preempted by the Williams Act.[95] This decision represents one of the few instances in which a previously unconstitutional takeover statute remained in existence and was later held to be partially valid.

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82. *Id.* at 567.
83. *Id.*
84. L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 201 (6th Cir. 1985).
85. *Id.* at 209.
86. *Id.* at 206.
87. *Id.* at 203.
88. *Id.* at 204.
89. *Id.* at 205.
90. *Id.* at 207.
91. *Id.*
92. *Id.*
93. *Id.* at 209.
94. *Id.*
95. *Id.*

Two generations of Missouri takeover statutes have been held unconstitutional. The Missouri Takeover Bid Disclosure Act was found to be unconstitutional by the Eighth Circuit Court of Appeals shortly after *MITE*.[96] The court could not discern any significant differences between the Illinois and Missouri Acts.[97] In examining the time delays contained in the Missouri Act, the court agreed with the plurality in *MITE* that the Williams Act through the Supremacy Clause preempted the Missouri Act.[98] Because the Act contained additional disclosure requirements which imposed additional burdens on commerce, the court also found that the Missouri Act violated the Commerce Clause.[99]

Because the Missouri legislature feared that a threatened takeover of TWA would result in an immediate loss of "jobs, public investments and certain property," an emergency provision was added to the Missouri Control Share Acquisition Statute.[100] The amendment applied to foreign corporations which had received benefits to physical facilities which were financed in part by the state and which had over 7,500 employees in Missouri.[101] The Missouri statute required that an offeror disclose certain information to the corporation and that the shareholders approve any acquisition.[102] Approval by two-thirds of all outstanding shares and two-thirds of all disinterested shareholders was required in the case of a proposed control share acquisition.[103]

The court found the second generation Missouri statute to be a direct regulation of interstate commerce, since it could apply to transactions between a non-Missouri purchaser and a non-Missouri seller of the shares of a non-Missouri corporation.[104] The court expressed concern over the potential effects of allowing the statute to stand: "If Missouri can so directly affect securities trading between non-residents on national exchanges, so too may other states. The interstate sale of securities on national and regional securities exchanges would be at the mercy of any state's parochial interests."[105] The court examined the asserted benefits of the statute, but found that they were insufficient to justify the burdens which were imposed on commerce.[106] The court also concluded that the statute violated the Supremacy Clause because the disclosure requirements and time delays in the statute con-

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96. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1122 (8th Cir. 1982).
97. *Id.* at 1128.
98. *Id.*
99. *Id.* at 1133.
100. Icahn v. Blunt, 612 F. Supp. 1400, 1406 (W.D. Mo. 1985).
101. *Id.* Counsel for defendants conceded at oral argument that TWA was the only corporation known to meet the requirements of the Missouri statute. *Id.* at 1406 n.2.
102. *Id.* at 1406.
103. *Id.* at 1407.
104. *Id.* at 1415.
105. *Id.*
106. *Id.* at 1417.

flicted with the goals of the Williams Act.[107] Thus, two generations of Missouri takeover statutes have been overturned for constitutional violations.

One of the early successes enjoyed by a second generation statute occurred in Minnesota. In early 1985 the Minnesota Corporate Take-Overs Act passed constitutional muster under both the Commerce and Supremacy Clauses.[108] The Eighth Circuit Court of Appeals relied upon the analysis provided by *MITE* in making a comparison between the Illinois statute and the Minnesota law.[109] Initially, the court noted that the Minnesota Act did not provide for a precommencement filing period.[110] Additionally, the Minnesota Act did not contain a provision, like the one in the Illinois Act, which required the commissioner to convene a hearing at the request of the target corporation.[111] Under the Minnesota Act there was no possibility for delay, since all of the action to be taken by the commissioner had to be completed prior to the expiration of the minimum offering period under federal law.[112] Also, the Minnesota Act applied only when at least twenty percent of the target's shareholders were Minnesota residents and the target had substantial assets in Minnesota.[113] Since this provision regulated interstate commerce only indirectly, the legitimate state interests justified the burden placed on interstate commerce.[114] The court rejected the Supremacy Clause analysis, but did note that some of the overly broad discretionary provisions in the Act were unconstitutional.[115] The effect of the court's decision was to hold the statute constitutional.

Even though the statute was held constitutional, Minnesota amended the Minnesota Business Corporation Act by adopting the Minnesota Control Share Acquisition Act.[116] The Minnesota Control Share Acquisition Act was created to serve two purposes. First, it was meant to provide shareholders with information about the future plans of persons seeking to acquire over twenty percent of the voting stock of a corporation.[117] Second, the Act created a means by which shareholders could block the acquisition through a shareholders' vote.[118] In analyzing the local interests which were offered to justify this statute, the Federal District Court for the District of Minnesota clarified an important point. "The Commerce Clause, as interpreted by the

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107. *Id.* at 1419.
108. Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984).
109. *Id.* at 909.
110. *Id.* at 910.
111. *Id.*
112. *Id.*
113. *Id.* at 911.
114. *Id.*
115. *Id.* at 914.
116. APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216, 1218 (D. Minn. 1985).
117. *Id.*
118. *Id.*

Supreme Court, requires a court to balance *benefits* against burdens; not *interests* against burdens."[119] This appears to be the first time that a court has focused on the distinction between the interests offered and the actual benefits which accrue to those interests. The court indicated that its constitutional duty was to determine whether the benefits desired by the state could actually flow from the statute; only those benefits which were not speculative could be placed in the scale to be balanced against the burden on interstate commerce.[120] The conclusion reached by the court was that, since most of the information provided by the Minnesota Act was duplicative of that required by the Williams Act, no "local benefits" arose from the application of the statute.[121] Consequently, the court could not find any benefit to outweigh the burden which the act placed on interstate commerce.[122] Thus, the statute was held to be a violation of the Commerce Clause.[123]

Action to change the Minnesota Act was suggested. However, no changes were made, and the statute came before the court again in 1987. After a finding by the district court that the statute violated both the Commerce Clause and the Supremacy Clause, the Eighth Circuit Court of Appeals had to decide how to resolve the issue.[124] As it happened, by the time the case had reached the appellate stages, the tender offer had been withdrawn.[125] This fact led the court to the conclusion that the constitutional issues raised by the appeal were moot.[126] The court even vacated the district court decision on the constitutionality of the statute.[127] The court justified this action by referring to the fact that the Supreme Court had just scheduled argument on a case which might offer help in resolving the issues the next time they came before the court.[128]

C. *CTS Corp. v. Dynamics Corp. of America*

In early 1987 the Supreme Court again examined a state takeover statute. This time, however, the Court upheld the constitutionality of the statute. In *CTS Corp. v. Dynamics Corp. of America*, Indiana's takeover statute was at issue. The United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals both held that the Indiana

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119. *Id.* at 1221.
120. *Id.*
121. *Id.* at 1222.
122. *Id.* at 1225.
123. *Id.*
124. Gelco Corp. v. Coniston Partners, 811 F.2d 414 (8th Cir. 1987).
125. *Id.* at 421.
126. *Id.*
127. *Id.*
128. *Id.*

statute was preempted by the Williams Act.[129] The decision by those courts was consistent with *Edgar v. MITE Corp.* and most of the other cases which had followed. The Supreme Court granted certiorari to reexamine the constitutional issues concerning state takeover legislation.[130]

The Indiana statute differed from the Illinois Act which the Supreme Court had previously struck down. The Indiana Act, entitled the Indiana Business Corporation Law, was signed into law on March 4, 1986, to become effective on August 1, 1987.[131] Before the effective date, any Indiana corporation could opt into the Act by resolution of its board of directors.[132] The Act was specifically intended to apply only to businesses which were incorporated in Indiana.[133] The law was meant to apply to situations in which one person or entity acquired enough voting power to attain one of three ownership levels: 20%, 33 ⅓%, or 50%.[134] Such an entity was not automatically entitled to the voting rights which went with its stock.[135] Voting rights were only given to the extent that a majority of the shareholders approved a resolution granting those rights.[136] This resolution was to be offered at the next regularly scheduled shareholders meeting or at a specially scheduled meeting.[137] The acquiror was entitled to request such a shareholders meeting, which was to be held within fifty days, but only if it agreed to pay the expenses of holding such a meeting.[138] Other provisions of the Indiana Act indicated what would happen to the stock if the shareholders did not approve voting rights. Those provisions were not crucial in this case.

In early March of 1986, Dynamics Corporation of America owned 9.6% of the common stock of CTS Corporation. Several days after the new act went into effect, Dynamics announced a tender offer to purchase another million shares of CTS stock and bring its total ownership interest to 27.5%. On April 9 the district court granted a motion to Dynamics to prevent CTS from using the Indiana Act to block the stock purchase by Dynamics.[139] The district court held that the Indiana Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests."[140] In a later order the district court also held that the Indiana Act violated the Commerce Clause by placing on interstate commerce an impermissible indirect burden which

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129. CTS Corp. v. Dynamics Corp. of America 107 S. Ct. 1637, 1637 (1987).
130. CTS Corp. v. Dynamics Corp. of America *cert. granted*, 476 U.S. ___ (1986).
131. CTS Corp. v. Dynamics Corp. of America 107 S. Ct. at 1641.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1642.
138. *Id.*
139. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 390 (N.D. Ill. 1986).
140. *Id.* at 399.

was not outweighed by local benefits.[141]

The district court decision was appealed, and in late April of 1986, the Seventh Circuit affirmed.[142] The Supreme Court noted probable jurisdiction under 28 U.S.C. section 1254(2) and reversed the decision of the lower courts.

The Supreme Court's analysis in *CTS* was similar to the analysis used in *Edgar v. MITE Corp.* It is interesting to note, however, that the Court made it clear from the outset that, since the opinion in *MITE* was only a plurality, the Supreme Court was not bound by any of the reasoning which was contained within that opinion.[143] The Court then retreated a bit from that bold statement by indicating that, even if the reasoning used in Justice White's plurality opinion in *MITE* was applied, the Indiana Act would nevertheless pass muster under the broad interpretation given to the Williams Act.[144]

The Court reiterated much of the language which had previously been used to justify the existence of the Williams Act. The Court also noted that, since it was clearly possible to comply with both the Indiana Act and the Williams Act, the state statute could be preempted only if it frustrated the purposes of the federal law.[145] The Court found that the goals of the Illinois statute analyzed in *MITE* and those of the Indiana Act were quite different. While the purpose of the Illinois Act was to protect management against offerors to the detriment of individual shareholders, the Court reasoned that the Indiana Act had as its primary goal the protection of independent shareholders against both management and offerors.[146] As a result, the effect of the Indiana Act was to further the basic purpose of the Williams Act: to place investors on an equal footing with the takeover bidder.[147]

The Court listed four reasons for concluding that the Indiana Act avoided the problems presented by the Illinois Act. First, the Indiana Act did not give either management or the offeror an advantage in communicating with shareholders about the impending offer.[148] Second, there was no indefinite time delay imposed on tender offers.[149] Third, the Act did nothing to prohibit an offeror from proceeding with his offer on the earliest day permitted under the federal act.[150] Fourth, nothing in the Indiana statute allowed the state to express its views on the fairness of a tender offer.[151] The

141. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 406 (N.D. Ill. 1986).
142. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986).
143. CTS Corp. v. Dynamics Corp. of America 107 S. Ct. 1637, 1645 (1987).
144. *Id.*
145. *Id.* at 1644.
146. *Id.* at 1645.
147. *Id.* at 1645-46.
148. *Id.* at 1646.
149. *Id.*
150. *Id.*
151. *Id.*

Indiana statute allowed shareholders to collectively evaluate the fairness of the offer without interference from the state.[152]

The Court expressed some concern about time delay. The court of appeals had surmised that the practical effect of the Indiana Act was to impose a delay of fifty days until the shareholder meeting was held.[153] If this were true, there would be a conflict with the twenty-business-day period which was established under the Williams Act. As previously noted, numerous courts have relied on the time delay argument to hold that the federal purpose has been thwarted or that serious injury to the offeror resulted from a time delay.

The Supreme Court concluded that the Indiana statute did not impose a time delay. The Court held that, if an offeror was faced with a situation in which it did not believe that it would receive shareholder approval at the subsequent meeting, it could make a conditional tender offer which only became valid if the shares did in fact receive voting rights.[154] This device allowed an offeror to make a tender offer under the Indiana statute and still fall within the twenty-day guideline of the Williams Act.

While the Supreme Court concluded that no time delay was imposed by the Indiana statute, the Court stated that even if the fifty-day time delay argument made by Dynamics were accepted, there would still be no federal preemption. The Court argued that *MITE* advocated only that an offeror should "be free to go forward without *unreasonable* delay."[155] The Illinois statute had been held invalid because it provided means for indefinite delay on the part of the incumbent management and the state. Under the Indiana Act the longest delay which could result would be the fifty days allowed for a shareholder meeting to be held to determine if voting rights were to be granted.[156] Assuming that all fifty days were used, an offeror would still have enough time to carry out its offer and fall within the sixty-day maximum period which exists under federal law.[157] Thus, the test becomes not whether there is *any* delay under the state law, but whether or not the delay is *unreasonable*.

The Court also noted the impact which would result from adoption of a "no delay" standard. A variety of state corporate laws which had not been previously challenged on constitutional grounds would now be held invalid.[158] Provisions such as staggered director's terms and cumulative voting would be found unconstitutional, since they delay the effect of takeovers by

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152. *Id.*
153. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986).
154. CTS Corp. v. Dynamics Corp. of America 107 S. Ct. 1637, 1647 (1987).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* Examples given in the text include Model Business Corporation Act ¶ 37 and Revised Model Business Corporation Act ¶ 8.06. *Id.* Most states have adopted these provisions in their statutes. *Id.* at 1648.

allowing current management to remain in office for some time.[159] Therefore, the proper inquiry is whether the state law frustrates the objectives of the federal act by imposing unreasonable delays on tender offers. The Indiana Act did not impose unreasonable delay, and thus it was not preempted by federal law.

The court of appeals also held that the Indiana Act violated the Commerce Clause of the Constitution. It is well established that the Commerce Clause prohibits the states from "taking certain actions respecting interstate commerce even absent congressional action."[160] Recent cases decided by the Supreme Court concluded that statutes which adversely affect interstate commerce by subjecting certain activities to inconsistent regulations are invalid.[161] In reversing the lower courts, the Supreme Court noted that there was nothing in the Indiana Act which was inconsistent with the regulations of other states. The Court observed that "so long as each State regulates voting rights in the corporation it has created, each corporation will be subject to the state law of only one state."[162] Under these circumstances there is no risk of inconsistent regulation.

The Court appeared to examine this statute from a perspective different from the one it had adopted in *MITE*. Previously, takeover statutes had been evaluated with respect to their impact on the shareholders or the offerors. Courts had held such statutes unconstitutional because of burdens placed on offerors or because of differential treatment given to shareholders. Justice Powell seemed to characterize the Indiana statute as a regulation on corporate governance.[163] The Court noted that:

> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.[164]

It was the Court's conclusion that the Indiana Act was actually intended to reflect those concerns by ensuring that shareholders received crucial information and providing them with an opportunity to approve or disapprove of potential changes in structure or management. The state's involvement appeared to be appropriate to the state's role as an overseer of corporate governance.[165] The Court supported this reasoning by suggesting that since there is always the possibility of coercion in some takeover bids, additional

159. *Id.* at 1647-48.
160. *Id.* at 1648.
161. *Id.* at 1649.
162. *Id.*
163. *Id.* at 1650.
164. *Id.* at 1650-51.
165. *Id.* at 1651.

justification exists to allow the state to promote the autonomy of the independent shareholders.[166]

In *CTS* the offeror, Dynamics, opposed this reasoning on the ground that *MITE* held that the state has "no legitimate interest in protecting the nonresident shareholders."[167] In response the Court again emphasized its shift in focus from the shareholder to the corporation. The Court agreed that Indiana had no interest in protecting "nonresident shareholders *of nonresident corporations*."[168] However, the Indiana Act plainly applied only to corporations which were incorporated in Indiana.[169] This was one of the important differences between the Indiana and Illinois Acts. Indiana had an undisputed substantial interest in preventing the corporate form from becoming a shield for unfair business dealings.[170] The Court appeared to suggest that the indirect burden which was placed on interstate commerce by the Act was more than outweighed by the state interests. The Court also emphasized that the Indiana Act did not prohibit any entity from attempting to gain control. Instead, the Act merely provided regulatory procedures designed for the protection of the corporations' shareholders.[171]

In his concurring opinion Justice Scalia agreed with this argument and noted that "as long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause."[172]

The Court concluded its analysis with an interesting observation. It reasoned that what is traded in takeover situations is not simply shares of stock but the corporation itself, and the corporation's existence and all of its attributes are derived from state law.[173] This lends further support to the Court's characterization of the Act as a corporate regulation statute.

The opinion in *CTS* was written by Justice White; it was distinguished from *MITE* by the fact that it was a majority opinion. Justice Scalia filed a concurring opinion but agreed with all of the conclusions of the majority.

Justices White, Blackmun, and Stevens dissented on the preemption issue.[174] The dissenters' position was that, when the majority held that the Act protected shareholders as a group, it also assumed that protection was provided to individual shareholders.[175] The dissent noted that the real purpose of the Williams Act is to provide protection for *individual* investors and to permit them to decide whether it is in their best interests to sell their

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1651-52.
171. *Id.* at 1652.
172. *Id.* at 1653 (Scalia, J., concurring).
173. *Id.* at 1652.
174. *Id.* at 1653 (White, J., dissenting).
175. *Id.* at 1654 (White, J., dissenting).

stock.[176] Thus, the effect of the Act is to prevent some minority shareholders in certain circumstances from selling their stock to a willing tender offeror.[177]

D. *Post-CTS Developments*

Clearly, *CTS* offers hope and guidance to the state wishing to pass legislation dealing with the growing problem of corporate takeovers. Several different types of statutes began to emerge after *CTS* as at least ten states adopted takeover statutes. Several of the statutes are similar to the Indiana Control Share Acquisition Statute. Other states declined to follow the guidance provided by the Supreme Court and decided to adopt a different type of statute. This new breed of statute is referred to as the "third generation" of anti-takeover statutes or "freeze-out" statutes.

Three states have chosen this new type of statute which focuses on a different phase of the takeover process. The basic concept behind the statute is to preclude an acquiror from participating in any corporate decision-making or voting for a certain period of time, subject to approval by either the board or disinterested shareholders. For example, New York's statute imposes a five-year freeze-out on an individual who makes a twenty percent acquisition.[178] In addition, the acquiror must obtain a majority vote of disinterested shares before it can work with the target corporation in some type of business combinations.[179] As drafted, the New York statute applies only to businesses which are incorporated in New York, have significant operations and principal offices in New York, and have at least ten percent of their voting stock owned by New York residents.[180] The New Jersey statute is very similar to the New York statute, but it applies when there is a ten percent acquisition.[181] To date there has been no constitutional challenge to the New York and New Jersey statutes.[182]

The most recent state to pass a takeover statute is Delaware. Since that state has always been a leader in the development of corporate law, the impact of its statute will be examined by many. In determining what type of statute to pass, the Delaware legislature decided not to utilize a statute similar to the Indiana Act because there were many uncertainties regarding the operation and effect of such legislation despite the approval given by the Supreme Court in *CTS*.[183] Instead, Delaware adopted a statute which pro-

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176. *Id.* (White, J., dissenting).

177. *Id.* at 1655 (White, J., dissenting).

178. Veasey, Finkelstein & Shaughnessy, *Delaware Adopts New Takeover Statute*, 8 The Business Lawyer Update, Jan./Feb. 1988, p. 3.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 1.

183. *Id.* at 2.

vides that when a person acquires fifteen percent or more of a corporation's voting stock, he may not engage in any transactions with the corporation unless the board approves the transaction.[184] The Delaware statute, though similar to those of New York and New Jersey, does have one major difference. The only contact with Delaware required by the Delaware statute is that the target company must have incorporated in that state.[185]

Whether the Delaware statute would survive a constitutional challenge is not clear at this point. Given the fact that many corporations register in Delaware even though they do most of their business in other states, many attempted takeovers could be subject to the provisions of the Delaware statute. Because there appear to be instances in which the statute would regulate a takeover which involved no Delaware shareholders, it seems that the statute could be challenged as an impermissible direct regulation of interstate commerce.

III. Considerations in Evaluating State Takeover Statutes

The starting point in examining state statutes is comparison with the federal law. Congress originally passed the Williams Act in 1968 in response to the increased use of cash tender offers in corporate acquisitions.[186] Before passage of the Williams Act, disclosure requirements found in federal securities laws failed to cover a large number of tender offers.[187]

The Williams Act contains several requirements. First, any person who acquires five percent or more of any class of covered securities must file a schedule with the Securities and Exchange Commission and the issuer of the stock within ten days after passing the five percent ownership level.[188] Any solicitation materials prepared in connection with the offer must also be included in the required statement.[189] The information provided in the statement must reveal the sources and amount of money to be used in purchasing the shares.[190] Additionally, the offeror must disclose the number of shares owned and any plans or rights to acquire additional shares.[191] Any tender offer must remain open for a minimum of twenty business days and the offeror must give a shareholder the right to withdraw any tendered shares within fifteen days of accepting an offer.[192]

Many theories have been offered to explain why the Williams Act was adopted in its present form. It was clear that Congress intended to protect

184. *Id.* at 3.
185. *Id.*
186. Edgar v. MITE Corp., 457 U.S. 624, 632 (1982).
187. 15 U.S.C. § 78m(d)(1) (1982). *See also* 17 C.F.R. § 240.13d-1(a) (1986).
188. 15 U.S.C. § 78n(d)(1) (1982). *See also* 17 C.F.R. § 240.14d-3(a) (1986).
189. 15 U.S.C. § 78m(d)(1)(b) (1982).
190. 15 U.S.C. § 78m(d)(1)(d) (1982).
191. 17 C.F.R. § 240.14(e)-1(a) (1986); 17 C.F.R. § 240.14d-7(a)(1) (1986).
192. Icahn v. Blunt, 612 F. Supp. 1400, 1418 (W.D. Mo. 1985).

shareholders by requiring disclosure of pertinent information when persons attempted to obtain control of a corporation.[193] This did not mean that Congress intended to favor the shareholder. On the contrary: "neutrality" in contests for control was an important characteristic of the legislative approach adopted in the Williams Act. Congress intended to withhold from both management and the purchaser any undue advantage which could frustrate the investor's exercise of an informed choice.[194] This policy was also expressed in the legislative history of the Act when Senator Williams indicated that Congress had taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bid.[195] The disclosure requirements give management and the public business information and ensure that shareholders have enough information to make an informed decision on a tender offer.[196] Thus, the congressional policy was one of "evenhandedness" which would permit the investor to make an independent but informed decision on whether or not to sell his stock.[197]

While considering the Williams Act, Congress specifically refused to amend or repeal another important provision of the Securities and Exchange Act of 1934. Section 28(a) of the Act provides that "[n]othing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of *any State* over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder."[198] Congress' refusal to alter this section has consistently been interpreted to mean that Congress did not intend to prohibit states from regulating takeovers; instead it relied on the courts to ensure that state statutes were consistent with the Williams Act.[199]

Once the purposes of the Williams Act are known, it becomes possible to determine what features of state acts will be found to be in conflict with it. As noted above, if a conflict is found, the statute will be held to violate the Supremacy Clause and will be preempted by the Williams Act.

The first problem created by many statutes is that of time delay. Congress specifically recognized that when there is a time delay built into a takeover statute, the delay will usually favor management, since it gives management an opportunity to prepare defenses.[200] The Williams Act avoids lengthy delays which might reduce an offeror's chance of success, and it does

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193. *Id.*

194. Edgar v. MITE Corp., 457 U.S. 624, 633 (1982) (quoting 113 Cong. Rec. 24664 (1967)).

195. Mulligan, *The Continuing Validity of State Takeover Statutes—A Limited Third Generation*, 62 Notre Dame L. Rev. 412, 413-14 (1987).

196. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 567 (6th Cir. 1982).

197. Edgar v. MITE Corp., 457 U.S. 624, 631 (1982).

198. *Id.* (emphasis added).

199. *Id.* at 639.

200. Mulligan, *The Continuing Validity of State Takeover Statutes—A Limited Third Generation*, 62 Notre Dame L. Rev. 412, 415 (1987).

not impose on an offeror any burdens which must be assumed prior to the announcement of the offer.[201] Thus, any state statutes which require any form of precommencement notifications or provide a means by which incumbent management can delay the takeover process will be held to be in conflict with the Williams Act. The critical date in the takeover process is the date the offeror first announces the tender offer. States must remain out of the process until that point has been reached.

The next area of potential conflict involves the information which must be provided to shareholders and management. Congress has indicated that the purpose behind the information requirement is to provide shareholders with information which they need to make an informed choice. The informational requirements contained in the Williams Act serve that goal. Many state statutes duplicate the requirements contained in the federal act. State requirements which go beyond those of the Williams Act will be closely examined. If it appears that a requirement will tip the balance in favor of incumbent management, courts should find a conflict with the Williams Act. Only that information which assists the shareholders and preserves the balance struck by federal law should be allowed.

Another area of concern centers on the powers which state statutes provide to their respective secretaries of state. Again, powers which allow the secretary to tip the balance must be preempted. Thus, statutes which allow the secretary to request additional information concerning the offeror or the attempted takeover will be in conflict with the federal goals. Likewise, statutes which allow a secretary to invalidate a takeover offer deemed to be unfair will not be upheld by the courts, since they deprive the shareholders of the power to make their own informed decisions based on the information provided to them.

The Williams Act did an excellent job of establishing a federal policy relating to takeovers. Initial requirements were also established to help carry out that policy. At the same time the Act left power to the states to create further legislation as long as the declared purposes of the Act were not frustrated.

A separate concern raised by state takeover statutes involves their effects on interstate commerce. As noted earlier, direct regulation of interstate commerce by the states is forbidden. Indirect regulation will be tolerated to the extent that the state interests or the benefits of the statute outweigh the burden which is placed on interstate commerce. Thus, the starting point is an examination of the asserted state interests. Typically, states assert that they have an interest in protecting resident shareholders, and an interest in regulating the internal affairs of corporations which are registered in the state.

Both asserted interests are recognized and accepted by courts. The im-

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201. *Id.*

portant question is whether or not those interests will be involved in every conceivable takeover which falls within the state statute. A state which tries to regulate a takeover attempt involving no resident shareholders and a corporation which does no business in the state cannot be said to have any legitimate state interest. If no state interest or benefit can be found, there is nothing to counterbalance the burden placed on commerce. In that situation a statute violates the Commerce Clause. Therefore, state statutes need to be clear in indicating the situations in which the statute applies. This will usually be done by referring to a corporation's state of incorporation or the location of significant corporate assets or the corporation's place of business. An alternative would be to extend coverage of the statute to a corporation only if a certain percentage of its shareholders were residents of the state. As long as local interests are involved, courts are willing to tolerate some burden on interstate commerce. To date only two interests have been suggested by states. There appears to be nothing which would prohibit a state from identifying some other state interest to justify its takeover regulations.

IV. Conclusion

On two separate occasions the Supreme Court has analyzed the issue of state takeover statutes. As a result of the Court's decisions, states have made a variety of changes in their laws to try to bring them into harmony with the views of the court. The process has not been easy and it is probably not completed. Three generations of statutes have existed and there still does not seem to be a clear indication of the best way to deal with the issue. The states have a measure of authority to deal with the takeover problem. The important questions are how this problem can be handled and how conflicts with the Williams Act and the Commerce Clause can be avoided. Once those questions are resolved, states should have little difficulty in creating procedures to regulate the takeover process from start to finish.

Gregg M. Fishbein