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The Continuing Validity of State Takeover Statutes—A Limited Third Generation

Congress passed the Williams Act¹ to protect investors confronted with a tender offer² and to provide both the offeror and target company with guidelines.³ States passed laws regulating takeovers to restrict them or fill perceived gaps and inadequacies in the federal regulations⁴ in an effort to protect resident shareholders and target corporations located within the state.⁵ While states have been regulating securities transactions for over one hundred years through Blue Sky Laws,⁶ state takeover statutes have been the subject of constitutional challenges under the federal commerce⁷ and supremacy clauses.⁸ The United States Supreme Court has recently granted certiorari in *CTS Corp. v. Dynamics Corp. of America*⁹ and is ready for the first time in five years to examine the constitutionality of state takeover legislation.

This note analyzes the constitutionality of state takeover statutes. Part I examines the Williams Act and initial attempts by states to regulate the tender offer process—the first generation takeover statutes. Part II considers the second generation of state takeover statutes and the Seventh Circuit's ruling in *CTS*. Part III presents the analysis courts should apply when ruling on the constitutionality of state takeover legislation. Part IV suggests how states may continue to regulate the tender offer process. Under the proper approach, states may play a limited role

1 The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d), (e), 78n(d)-(f) (1982)). The Williams Act is an amendment to the Securities and Exchange Act of 1934.

2 Federal "tender offer" legislation fails to define the term. Courts have formulated their own definition. See *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985) (the existence of a tender offer is determined by several factors). See also *Edgar v. MITE Corp.*, 457 U.S. 624, 626 n.1 (1982); *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47 (2d Cir. 1985). For a more encompassing definition, see *S-G Securities, Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114, 1126-27 (D. Mass. 1978) (a publicly announced intention to acquire a substantial block of a company's stock with the purpose of obtaining control and the subsequent rapid acquisition of large blocks of the stock constitutes a tender offer).

3 See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977). See also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (purpose of Williams Act is to ensure that shareholders confronted with a tender offer have adequate information regarding qualifications and intention of the bidder).

4 See Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 *FORDHAM L. REV.* 1, 17-19 (1976).

5 See *id.*

6 Comment, *The Resurrection of State Regulation of Cash Tender Offers: Cardiff Acquisitions, Inc. v. Hatch*, 34 *DE PAUL L. REV.* 1109, 1111 (1985). See *State v. Cushing*, 137 Me. 112, 15 A.2d 740 (1940). See also *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550, 559 (1917) (Court held that the purpose of Blue Sky Laws is to prevent fraud in the sale and disposition of securities sold or affected in the state and observed that such laws affect interstate commerce only incidentally because they touch the securities only after they were in the hands of resident dealers).

7 "Congress shall have the power to . . . regulate commerce . . . among the several states . . ." U.S. CONST. art. I, § 8, cl. 3.

8 "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; . . . anything in the Constitution or law of any state to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

9 794 F.2d 250 (7th Cir.), *cert. granted*, 107 S. Ct. 258 (1986).

in concurrently evaluating and enforcing tender offer disclosure requirements.

I. Federal and Initial State Regulation

The proxy contest¹⁰ is the traditional means of gaining control of a company. The tender offer became popular in the 1960s as a new means of gaining control.¹¹ The tender offer was faster, more efficient, less costly, and less regulated.¹² Congress responded in 1968 by passing the Williams Act. States followed and began enacting provisions which have become known as the first generation of state takeover legislation.

A. *The Williams Act*

Congress passed the Williams Act in response to tender offers which removed a substantial number of corporate control contests from the reach of existing disclosure requirements of federal securities law.¹³ The Act strives to protect investors while simultaneously maintaining a neutral balance between third parties and target management.¹⁴ The provisions regulate tender offers for, open market purchases of, and repurchases by the issuing corporation of securities which are registered under section 12 of the Securities Exchange Act of 1934 (34 Act company).¹⁵ The disclosure requirements are triggered in two circumstances. First, any person who acquires five percent or more of any class of equity securities of a 34 Act company must file a schedule with the Securities and Exchange Commission (SEC), the relevant exchange, and the issuer of the security within ten days after reaching the five percent ownership level.¹⁶ Second, the act makes it unlawful for any person to make a tender offer for more than five percent of the equity securities of a 34 Act company, unless the offeror at the time of the offer has filed a schedule with the SEC, including any solicitation materials prepared in connection with the offer.¹⁷

The disclosure requirements give the public and management business information and ensure that shareholders have enough information

10 Proxy contests typically occur when two or more parties seek shareholder proxies authorizing the solicitor to cast the shareholder's vote at the corporation's annual or quarterly meeting. Note, *The Tender Offer Regulation Battle Continues: Should States Regulate Only Local Companies?* 60 IND. L.J. 721, 721 n.1 (1985).

11 Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1133-34 (1974).

12 See *id.* at 1134.

13 *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22 (1977).

14 This policy of neutrality was reflected in the House Report: "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." H.R. REP. NO. 1711, 90th Cong., 2d Sess. 1 (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813. See also *Piper*, 430 U.S. at 2; S. REP. NO. 550, 90th Cong., 1st Sess., 113 CONG. REC. 24, 664 (1967) (Senator Williams explained "we have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids.").

15 Any security that trades on a national securities exchange must be registered pursuant to § 12(a) of the 1934 Act. 15 U.S.C. § 78l(a) (1982). Section 12(g)(1) of the 1934 Act requires registration of any company with over five million dollars in assets and over 500 shareholders of a class of equity securities. 17 C.F.R. § 240.12g-1 (1986).

16 15 U.S.C. § 78m(d)(1) (1982). See 17 C.F.R. § 240.13d-1(a) (1986).

17 15 U.S.C. § 78n(d)(1) (1982). See 17 C.F.R. § 240.14d-3(a) (1986).

to make an informed decision in a tender offer.¹⁸ The disclosure must specify the purchaser or offeror's background, identity, residence and citizenship, as well as the nature of the beneficial ownership.¹⁹ The information must reveal the sources and the amount of funds used or to be used to purchase the shares.²⁰ The purchaser or offeror must disclose the number of shares owned and any rights to acquire additional shares.²¹ If the intention is to acquire control, any plans for liquidating the issuer of the securities, selling its assets, merging it with another company, or making any other major business or structural changes must be specified.²² Any contract or agreement made concerning the acquisition or disposition of the firm's securities must be listed and described.²³ The SEC does not examine the merits of the proposed tender offer, but merely reviews the adequacy of the disclosures.²⁴ The SEC has the authority to order further disclosures to clarify or supplement the revealed information.²⁵

The Williams Act protects shareholders from the time pressures associated with tender offers. Tender offers must remain open for a minimum of twenty business days.²⁶ The offeror must give the shareholder the right to withdraw tendered shares within fifteen days after acceptance of the offer.²⁷ A shareholder may withdraw tendered shares if the offeror does not purchase the shares within sixty days from the date of the original tender offer.²⁸ In case of an oversubscription, the Act requires the offeror to purchase the shares tendered on a pro rata basis.²⁹ Thus, shareholders need not rush to tender their shares on a first come, first serve basis. The Williams Act requires that all tendering shareholders receive the same purchase price.³⁰ If the offering price changes during the course of the offer, shareholders who tendered early are treated the same as those who tender after the price change occurs. The Williams Act also contains a general antifraud provision,³¹ which courts have in-

18 See *Piper*, 430 U.S. at 35.

19 15 U.S.C. § 78m(d)(1)(a) (1982). See 17 C.F.R. § 240.13d-101 (item 2) (1986).

20 15 U.S.C. § 78m(d)(1)(b) (1982). See 17 C.F.R. § 240.13d-101 (item 3) (1986).

21 15 U.S.C. § 78m(d)(1)(d) (1982). See 17 C.F.R. § 240.13d-101 (item 5) (1986).

22 15 U.S.C. § 78m(d)(1)(c) (1982). See 17 C.F.R. § 240.13d-101 (item 4) (1986).

23 15 U.S.C. § 78m(d)(1)(e) (1982). See 17 C.F.R. § 240.13d-101 (item 6) (1986).

24 Note, *supra* note 10, at 723.

25 *Id.*

26 17 C.F.R. § 240.14(e)-1(a) (1986).

27 17 C.F.R. § 240.14d-7(a)(1) (1986).

28 15 U.S.C. § 78n(d)(5) (1982).

29 *Id.* § 78n(d)(6). See 17 C.F.R. § 240.14d-6 (1986). "If the tender offer is for less than all of the outstanding securities of a class of equity securities and the bidder is not obligated to purchase all of the securities tendered," the bidder must purchase from each investor in proportion to the amount of stock that individual shareholder owns. *Id.*

30 15 U.S.C. § 78n(d)(7) (1982). In 1986 the rules governing the Williams Act were expanded with the addition of the all-holders requirement and the best price provision which amended regulations §§ 240.13e-4(f)(8) and 14d-10(a). The all-holders requirement mandates that third parties make offers open to all-holders of the class sought. The best price provision provides that the price paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder.

31 15 U.S.C. § 78n(e) (1982). See 17 C.F.R. §§ 240.14e-1 to -3 (1986).

terpreted to require disclosure of material information known to the offeror even if disclosure was not otherwise required.³²

The Williams Act avoids lengthy delays that might discourage an offeror's chance for success.³³ The Act's legislative history reveals this policy and thus the Act does not impose burdens on a bidder prior to announcing an offer (precommencement requirements).³⁴ The critical date is the date a bidder first announces a tender offer.³⁵

B. *The First Generation of State Takeover Statutes*

Initial attempts by state legislatures to regulate tender offers after the passage of the Williams Act have been labelled the "first generation takeover statutes."³⁶ The ultimate goal of each state was the same—to create difficulties for tender offerors.³⁷ Various provisions, such as advance filing and burdensome disclosure requirements, gave directors an unreasonable advantage to resist a tender offer by giving them time to implement a defensive tactic and imposing additional costs and delay on bidders.³⁸ Lower courts began striking down state tender offer statutes on both preemption and commerce clause grounds.³⁹ The United States Supreme Court ruled on the constitutionality of state takeover legislation for the first time in *Edgar v. MITE Corp.*⁴⁰ The Court held the Illinois Business Takeover Act⁴¹ unconstitutional under the commerce clause.

32 See, e.g., *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247, 250 (9th Cir. 1973).

33 See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 637-38 (1982) (delay is the most potent weapon incumbent management has in tender offer fights). According to the SEC, delay enables a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer. Brief for SEC as Amicus Curiae at 10, n.8, *MITE*, 347 U.S. at 638 n.13.

34 Congress actually rejected a precommencement requirement three times before enacting the Williams Act in its present form. See 111 CONG. REC. 28, 257-59 (1965) (20-day requirement); S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967) (five-day requirement in 1967); *Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970) (30-day requirement).

35 17 C.F.R. § 240.14d-2(b)(1986). See *Kennecott Corp. v. Smith*, 637 F.2d 181, 182-83 (3d Cir. 1980). The federal policy underlying these requirements is to insure prompt dissemination of all material information after the first public announcement. The information is necessary because the announcement will precipitate significant market activity in the securities of the target company thus confronting public investors with an immediate need to make investment decisions. See *id.* at 182-83.

36 For a complete listing of those statutes, see Comment, *Unsung Death of State Takeover Statutes: Edgar v. MITE Corp.*, 24 B.C.L. REV. 1017, 1017 n.6 (1983).

37 See generally Note, *Second Generation State Takeover Legislation: Maryland Takes a New Track*, 83 MICH. L. REV. 433, 438-41 (1984).

38 See generally Easterbrook & Fischel, *The Proper Role of a Target Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

39 See, e.g., *Kennecott Corp.*, 637 F.2d 181 (New Jersey Corporation Takeover Bid Disclosure Law violates the supremacy clause); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania Takeover Disclosure Law violates the commerce and supremacy clauses); *Dart Indus., Inc., v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware Tender Offers Act violates the commerce and supremacy clauses).

40 457 U.S. 624 (1982). The case arose out of a hostile tender offer by MITE for all of the outstanding shares of Chicago Rivet and Machine Company, a publicly held Illinois corporation. *Id.*

41 ILL. REV. STAT. ch. 121-12, paras. 137.51-.70 (Supp. 1981) (repealed 1983).

The Illinois Act was a typical first generation state takeover statute. The Act, like other first generation statutes, had three main features. First, a precommencement notification provision required an offeror to notify the secretary of state twenty days before the offer became effective. During that time the statute precluded the offeror from giving shareholders information about the impending offer, but allowed target management to disseminate its own information to shareholders concerning the offer.⁴² Second, a hearing provision authorized the secretary of state to call a hearing at any time during the twenty-day waiting period to adjudicate the substantive fairness of the offer if he believed it was necessary to protect the shareholders of the target company.⁴³ The statute mandated a hearing if requested by a majority of the target company's outside directors or by Illinois stockholders owning ten percent of the class of securities subject to the offer.⁴⁴ Third, a disclosure and fairness test provided that if the secretary did not hold a hearing, the secretary must deny registration where he found the offeror defrauded the offerees or failed to provide full and fair disclosure to them of all material information concerning the offer.⁴⁵

Five justices, with Justice White writing for the majority, held that the statute placed an unconstitutional indirect burden on interstate commerce.⁴⁶ Justice White first noted that "not every exercise of state power with some impact on interstate commerce is invalid."⁴⁷ Justice White stated that under the balancing test of *Pike v. Bruce Church*,⁴⁸ 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."

The Court held that under the *Pike* test the local interest of shareholder protection asserted by the secretary of state did not outweigh the

42 ILL. REV. STAT. ch. 121-12, para. 137.54 A (Supp. 1981) (repealed 1983).

43 ILL. REV. STAT. ch. 121-12, para. 137.57 A (Supp. 1981) (repealed 1983).

44 *Id.*

45 ILL. REV. STAT. ch. 121-12, para. 137.57 E (Supp. 1981) (repealed 1983).

46 Chief Justice Burger and Justices Powell, Stevens, and O'Connor joined in Justice White's opinion concerning the unconstitutionality of the Illinois statute as an indirect burden on interstate commerce. 457 U.S. at 626. Only Chief Justice Burger and Justices Stevens and O'Connor joined Justice White in holding that the Act directly burdened interstate commerce. *Id.* Justices Brennan, Marshall and Rehnquist found that the Court lacked jurisdiction. *Id.* Only Chief Justice Burger and Justice Blackman joined Justice White in holding that the Williams Act preempted the Illinois Act. Justice White stated that the Illinois Act upset the balance between management and the bidder struck by Congress and thus was as obstacle to the accomplishment and full purposes and objectives of Congress. First, the twenty-day precommencement notification requirement furnished incumbent management with a powerful tool to combat tender offers—a preference which Congress sought to avoid. Second, the power vested in the secretary of state and incumbent management to request a hearing potentially afforded management a "powerful weapon to stymie indefinitely a takeover." *Id.* Third, the substantial fairness review of the offer by the secretary of state conflicted with the congressional intention that the autonomous investor should make the decision. Thus, Justice White concluded that the Williams Act preempted the Illinois Business Takeover Act. *Id.* at 634-40.

47 *Id.* at 640.

48 397 U.S. 137 (1970) (holding unconstitutional an order by a state official prohibiting a company from shipping its cantaloupes outside the State unless they were appropriately packed in containers in an approved manner).

burdens the Illinois Act imposed on interstate commerce.⁴⁹ Justice White stated that since Illinois has no legitimate interest in protecting nonresident shareholders, insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.⁵⁰ Justice White rejected the argument that the Illinois Act regulated the internal affairs of companies incorporated under Illinois law.⁵¹ He stated that the internal affairs doctrine does not apply in this context since tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company.⁵² Moreover, internal affairs regulation could not justify a statute that applied to corporations which were not incorporated in Illinois and have their principal place of business in other states.⁵³

II. The Second Generation

The Supreme Court's decision in *MITE*⁵⁴ confirmed the view of the vast majority of the lower courts at that time and marked the end of the first generation of takeover statutes.⁵⁵ In the aftermath of *MITE*, numerous lower courts invalidated similar first generation statutes.⁵⁶ More than twenty states have passed "second generation" takeover statutes in an attempt to find the room left open by *MITE* and to preserve their ability to regulate at least some aspects of takeovers.⁵⁷ These statutes fall into three groups: (1) control share acquisition; (2) fair price; and (3) registration and disclosure. *MITE* and its progeny have appeared to resolve some, but certainly not all, of the questions concerning the permissible bounds of state regulation of tender offers.⁵⁸

A. Control Share Acquisition Statutes

1. Description

Control share acquisition statutes typically require shareholders to vote on the voting rights to be given to shares acquired in a "control share acquisition" or require shareholders to vote in advance on whether

49 457 U.S. at 644.

50 *Id.*

51 *Id.* at 645.

52 *Id.*

53 *Id.* at 645-46.

54 See *supra* notes 40-53 and accompanying text.

55 See generally Comment, *supra* note 36.

56 See, e.g., *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (Oklahoma Take-Over Bid Act violates commerce clause); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Virginia Take-Over Bid Disclosure Act violates commerce clause); *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (Michigan Take-Over Offers Act violates commerce clause); *National City Lines v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri Takeover Bid Disclosure Act violates both commerce and supremacy clauses); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982) (Maryland Corporate Take-Over Laws violate commerce and supremacy clauses); *Esmark, Inc. v. Strode*, 639 S.W.2d 768 (Ky. 1982) (Kentucky Take-Over Bids Disclosure Act violates commerce clause). But see *Agency Rent-a-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982) (Massachusetts Takeover Act does not violate supremacy clause).

57 See Block, Barton & Roth, *State Takeover Statutes: The Second Generation*, 13 SEC. REG. L.J. 332, 340 (1985).

58 *Id.*

a person can even make the acquisition. The statutes usually define a control share acquisition as one giving a purchaser at least twenty percent of the company's voting stock.⁵⁹ The statutes specifically apply to purchases of companies having their principal place of business or substantial assets in the state and a small percentage of resident shareholders. Typically, the directors are given fifty days to conduct the shareholder meeting which gives the board a greater delay period than the Williams Act provides for tender offers.⁶⁰ Presently eight states have control share statutes.⁶¹ Control share statutes have not fared well in the courts.⁶² Adopting the *MITE* analysis, lower courts have held that such statutes impermissibly burden interstate commerce or violate the supremacy clause.

2. Case Decisions

The court in *Icahn v. Blunt*⁶³ invalidated the Missouri second generation control share acquisition statute⁶⁴ as "an obstacle to the accomplishment of the full purposes of the Williams Act."⁶⁵ The court held that the statute directly conflicted with the disclosure and time requirements of the Williams Act. The statute's requirement that shareholder's approve the control share acquisition in advance of the acquisition made it unlikely that the offeror could commence the offer within the five days the Williams Act requires.⁶⁶ The requirement also conflicted with the Williams Act by taking the decision whether to buy or sell out of the hands of the individual shareholder and placing it in the hands of management and other shareholders.⁶⁷ The statute upset congressional efforts to protect the investor without favoring either the bidder or incumbent

59 See, e.g., IND. CODE § 23-1-42 (1986). See also MINN. STAT. ANN. § 302A.671 (West 1986); notes 80-86 *infra* and accompanying text.

60 Twenty business days, and 28 days total, is the maximum amount of time the Williams Act requires a tender offer to be kept open. 17 C.F.R. § 240.14e-1(a) (1986).

61 HAW. REV. STAT. §§ 416-171 to -172 (Supp. 1985); IND. CODE ANN. §§ 23-1-42-1 to -42-11 (Burns Supp. 1986); ME. REV. STAT. ANN. tit. 13-A, § 901 (Supp. 1986); MINN. STAT. ANN. § 302A.671 (West Supp. 1986); MO. ANN. STAT. § 351.407 (Vernon Supp. 1986); OHIO REV. CODE ANN. § 1701.831 (Baldwin 1985); PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1986); UTAH CODE ANN. § 16-10-76.5 (Supp. 1986).

62 See notes 63-102 *infra* and accompanying text. See also *Fleet Aerospace Corp. v. Holdermann*, 796 F.2d 135, 139 (6th Cir. 1986) (The court held that the Ohio Control Share statute "frustrates the objectives of the Williams Act and impermissibly tips the scales in favor of incumbent management by requiring a shareholder vote and by creating delay." The court also concluded that the statute constituted "[a] direct regulation upon, as well as an indirect burden on, interstate commerce that violated the Commerce Clause."); *Terry v. Yamashita*, 643 F. Supp. 161 (D. Haw. 1986) (The court held that Hawaii's control share statute impermissibly burdened interstate commerce, but did not reach the supremacy clause issue.).

63 612 F. Supp. 1400 (D.C. Mo. 1985). The court also held the statute constituted an impermissible direct burden on interstate commerce. *Id.* at 1414-18.

64 MO. REV. STAT. § 351.407 (1985).

65 612 F. Supp. at 1420.

66 *Id.* at 1419. A person seeking a control share acquisition by means of a tender offer must first announce an offer and submit it to the target company. MO. REV. STAT. § 462.407(2) (1985). The offeror could commence an offer directly to the shareholders only after receiving the approval of a supermajority of the shareholders. *Id.* § 351.407(3). The Williams Act requires the offeror to commence a tender offer within five days of announcing it. 17 C.F.R. § 240.14d-2 (1986).

67 612 F. Supp. at 1420.

management.⁶⁸

The district court in *APL Limited Partnership v. Van Dusen Air, Inc.*,⁶⁹ applied the *Pike* test to hold the Minnesota Control Share Acquisition Act⁷⁰ unconstitutional under the commerce clause. A person intending to make an acquisition of twenty percent had to file certain information with the company, and shareholders had to approve the acquisition beforehand. The statute applied to purchases of a corporation with fifty resident shareholders and its principal place of business or substantial assets in the state. The court held first, that since the statute was not restricted to Minnesota residents and since the state had no interest in protecting nonresident shareholders, there was nothing to be weighed in the balance against the burdens the statute imposed on interstate commerce.⁷¹ Second, although a state does have an interest in protecting its business climate, this justification is based on the questionable assumption that the acquiror will engage in activity that is detrimental to Minnesota's business climate.⁷² Third, the court deemed the internal affairs doctrine inapplicable because the Act regulated shareholders, not the corporation itself.⁷³ The court found that the Act placed substantial burdens⁷⁴ on interstate commerce which outweighed its speculative benefits.⁷⁵

The Supreme Court's grant of certiorari in *CTS Corp. v. Dynamics Corp.*⁷⁶ indicates that the Court is ready for the first time since *MITE* to

68 *Id.* The court held that the statute favored incumbent management because: (1) the statute did not apply to a qualifying corporation if the control share acquisition is approved by a majority of the directors in office before the first control share acquisition is made; (2) incumbent management sets the date for the shareholder vote up to 50 days after the purchaser requests the vote; (3) notice to shareholders of the meeting to vote on the proposed purchase shall be accompanied by a statement by management; and (4) the proposed control share acquisition cannot be made unless it is approved by two-thirds of the outstanding shares and two-thirds of the outstanding interested shares. By requiring two-thirds approval of all outstanding shares, all votes not cast operate as votes against the purchaser. *Id.*

69 622 F. Supp. 1216, 1220-24 (D.C. Minn. 1985), *appeal dismissed per stipulation* Fed. Sec. L. Rep. (CCH) ¶ 92,331 (Jan. 28, 1986). In *Gelco Corp. v. Conniston Partners*, 811 F.2d 414 (8th Cir. 1987) the court invalidated MINN. STAT. ANN. §§ 302A.011 (37)-(40), 302A.449(7), 302A.671 amended to require that the target corporation hold the shareholder vote within twenty days after the acquiring person statement is filed. Applying *Pike*, the court held that even amended, the statute imposed an impermissible indirect burden on interstate commerce. Moreover, because the Act deprived shareholders of the right to make independent decisions regarding offers to sell, it conflicts with the Williams Act and is thus preempted. The Eighth Circuit vacated the constitutional issues raised as moot because Conniston revoked its tender offer and expressed an intent not to proceed with a new offer.

70 MINN. STAT. ANN. §§ 302A.011 (37)-(40), 302A.449 (7), 302A.671 (West 1985).

71 622 F. Supp. at 1222-23.

72 *Id.* at 1223.

73 *Id.* "The acquisition of shares does not implicate the internal affairs of the target corporation. The use of that power once the shares have been acquired may well be a proper subject of state regulation, but this is not what the MCSAA regulates." *Id.*

74 *Id.* at 1224. The court found that the Act imposed substantial burdens on interstate commerce because: (1) it had the effect of restricting the right of nonresidents to purchase and sell stock of Minnesota corporations; (2) if the acquiror fails to obtain shareholder approval the acquiror will be removed from the market preventing shareholders from receiving a premium for their stock; (3) the statute had the effect of insulating target management by making control share acquisitions more difficult thereby reducing the incentive for incumbent management to perform well; and (4) the statute impeded the reallocation of economic resources. *Id.*

75 *Id.* at 1225.

76 794 F.2d 250 (7th Cir.), *cert. granted*, 107 S. Ct. 258 (1986).

examine the constitutionality of state takeover legislation. Although CTS concerns the validity of a control share statute, the whole second generation may be in jeopardy depending on how the court rules.

On March 10, 1986, Dynamics,⁷⁷ a New York corporation, commenced a tender offer of CTS. Dynamics intended to increase its stock holdings to 27.5 percent, oust current management, and elect its own candidates at the annual shareholders meeting scheduled for April 25, 1986.⁷⁸ In a defensive maneuver on March 27, the CTS directors elected to be governed by the new Indiana control share acquisition statute.⁷⁹

The Indiana statute provides that shares acquired in a control share acquisition⁸⁰ have voting rights only to the extent granted by shareholder resolution.⁸¹ The statute precludes the acquiror from voting its shares in this resolution.⁸² The directors must call a shareholder meeting to consider the voting rights if an acquiror delivers an "acquiring person statement" to the issuing public corporation providing information about his intentions and financial capacity and requests the directors to call the special meeting.⁸³ The statute precludes the board from calling the meeting any sooner than thirty days after receipt of the acquiring person's statement and allows management to delay the meeting up to fifty days after the request.⁸⁴ If the acquiror fails to file an acquiring person statement, or if the shares are not accorded full voting rights at the meeting, the corporation may redeem the shares at their fair value determined by management.⁸⁵ If the shares are accorded full voting rights and the acquiror attains a majority of voting power, the corporation may not redeem the shares.⁸⁶

CTS filed suit in Indiana state court seeking a declaratory judgment

77 794 F.2d at 251. Dynamics was the largest beneficial owner of common stock in CTS, owning approximately 9.7% of the corporation's outstanding shares. *Id.*

78 *Id.*

79 IND. CODE ANN. §§ 23-1-42-1 to -42-11 (West Supp. 1986). The statute was part of a series of amendments to the Indiana Business Corporation Law signed into law on March 4, 1986 and to become effective on August 1, 1987. The statute, however, permitted corporate boards to elect by resolution to be governed by the statute as of April 1, 1986. *Id.*

80 IND. CODE § 23-1-42-2(a) defines a "control share acquisition" as the acquisition by a person of "control shares." Shares acquired in a 90 day period are considered to have been acquired in the same acquisition. Section 23-1-42-1 defines control shares as at least 20% ownership of the voting power of an "issuing public corporation" which § 23-1-42-4(a) defines as a corporation having: 100 or more shareholders; its principal place of business, principal office or substantial assets in Indiana; and either more than 10% resident Indiana shareholders, more than 10% of its shares owned by Indiana residents, or 10,000 resident Indiana shareholders. *Id.* Since CTS did qualify as an issuing corporation within the statute, the Dynamics tender offer was a control share acquisition which triggered the Act's provisions. *Dynamics Corp. v. CTS Corp.*, 637 F. Supp. 389 (N.D. Ill. 1986).

81 IND. CODE § 23-1-42-9(b)(1) (1986).

82 *Id.* § 23-1-42-9(b)(2).

83 *Id.* § 23-1-42-6.

84 *Id.* § 23-1-42-7. The offeror will not accept the tendered shares until the stockholders meeting is held because if the offeror loses the vote on voting rights, it will end up with nonvoting shares and will not be able to control the corporation—the main purpose of most tender offers. 794 F.2d at 261.

85 IND. CODE § 23-1-42-10(a) (1986).

86 *Id.* § 23-1-42-10(b). If the voters resolution approving the acquisition passes, the other shareholders have dissenters rights which enable them to receive fair value for their shares. *Id.* § 23-1-42-11(a) to -11(c). Fair value for both sections means a value not less than the highest price paid per share by the acquiring person in the control share acquisition. *Id.* § 23-1-42-11(c).

that the statute was valid and enforceable. Dynamics filed in federal court seeking to enjoin CTS from attempting to enforce the statute on grounds that it violated the federal commerce and supremacy clauses.⁸⁷ The district court determined that the Indiana statute violated the supremacy clause because it favored target management and thus frustrated the Williams Act's policy of neutrality.⁸⁸ The district court also invalidated the Indiana statute under the commerce clause.⁸⁹ The court found that the statute burdens interstate commerce because it applies to certain foreign corporations and it deters tender offers by limiting the voting rights a tender offeror can purchase in a control acquisition.⁹⁰

The Court of Appeals for the Seventh Circuit affirmed the district court's holding that the Indiana statute violated the supremacy clause.⁹¹ Judge Posner, writing for the court, stated that the weight of precedent dictated that the Williams Act strikes a balance between target management and tender offeror that the states may not upset—which indicates its preemptive intent.⁹² He stated that assuming, as previous courts have, that the Williams Act represents a congressional determination that twenty business days (twenty-eight days total) is enough time to force a tender offer to be kept open, the Indiana statute's delay upsets the bal-

87 794 F.2d at 251. A pendent state law claim in the complaint sought to enjoin a poison pill plan on the grounds that CTS management breached its fiduciary duties under state law. The Seventh Circuit held that the district court properly enjoined the poison pill plan. The poison pill issue is severable from the constitutional issues and is beyond the scope of this note. 751 F.2d at 251. For an analysis of defensive tactics, see Note, *Target Directors' Fiduciary Duties: An Initial Reasonableness Burden*, 61 NOTRE DAME L. REV. 722 (1986).

88 637 F. Supp. at 399. The court found that the fifty-day option to hold the shareholder meeting, enabled incumbent management to delay the tender offer well beyond the twenty business-day (twenty-eight days total) limit of the Williams Act. *Id.* at 397. The district court rejected CTS's argument that the statute put the vote to noninterested shareholders rather than the target company's board of directors. *Id.* at 398. The court noted that the statute gave management the power to control the time and execution of the special shareholders meeting. *Id.* The court noted that in *MITE* the Supreme Court indicated that state laws which build delays into the tender offer process themselves conflict with federal law. *Id.* (citing 457 U.S. at 637-38). The court also stated that the Indiana statute does not wholly exclude interested parties from voting. *Id.* The district court rejected CTS's argument that the Indiana statute no more conflicts with the Williams Act than do state laws regulating voting rights such as laws requiring supermajority votes for fundamental corporate changes which also have a deterrent effect on tender offers. *Id.* at 398-99. The court found that by limiting the voting rights an acquiror can purchase, the statute in operation blocks the transaction as effectively as a direct prohibition on control share acquisitions and is thus in direct conflict with the Williams Act. *Id.* at 398.

89 *Id.* at 403.

90 *Id.* The court stated that an issuing company need only have substantial assets in Indiana and ten thousand resident shareholders to fall within the statute. See IND. CODE ANN. § 23-1-42-4(a) (West Supp. 1986). Thus, the Act is not limited to Indiana corporations, but applies to foreign corporations which have up to 90% of their shares owned by non-Indiana residents. The court determined that like the statute struck down in *MITE*, the Indiana statute applies to commerce taking place entirely outside the state's borders. 637 F. Supp. 403. The state's interest in regulating internal corporations and protecting local shareholders could not justify the statute's direct regulation on the transfer of power and application to non-Indiana residents. *Id.* at 402. After discussing the *Pike* test applied in *MITE*, the court concluded that "the substantial interference with interstate commerce created by the [Indiana Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.* at 406.

91 794 F.2d at 250.

92 *Id.* at 262. Posner referred to *National City Lines, Inc., v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982), and *Martin-Marrietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565-66 (6th Cir. 1982). See *CTS*, 794 F.2d at 261. He also cited *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 6 (1985), and *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 29 (1977). See *CTS*, 794 F.2d at 262.

ance by allowing the target management to force an acquiror to hold a tender offer open for fifty days.⁹³ Judge Posner conceded that, in contrast to the statute invalidated in *MITE*, the Indiana statute presents less of conflict with the neutral policy of the Williams Act.⁹⁴ However, he stated: "The Indiana statute is a lethal dose; the fact that the Illinois statute may have been two or three lethal doses has no practical significance. Very few tender offers could run the gauntlet which Indiana has set up."⁹⁵

Judge Posner contended that if the Indiana statute violates the supremacy clause it would seem "doubly academic" to evaluate it under the commerce clause. Because of "lingering doubt" that the Williams Act was intended to limit state takeover statutes, he stated that such an analysis was still necessary.⁹⁶ He wrote that the commerce clause "is all a matter of balancing the benefit to the state's residents against the burden to out-of-staters."⁹⁷ Citing *Pike*, he found that the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. He explained that the Act gravely impairs Dynamics, a nonresident, from transacting business with CTS's nonresident shareholders for the sake of trivial or even negative benefits to Indiana residents.⁹⁸

The Seventh Circuit rejected the internal affairs doctrine.⁹⁹ The court distinguished the Indiana statute from general regulations of internal corporate governance having an incidental effect on interstate commerce.¹⁰⁰ The court found that the Indiana statute has a direct, intended, and substantial effect on the interstate market for securities and corporate control.¹⁰¹ Classifying the statute as a voting rights regulation does not insulate it from review under the commerce clause.¹⁰²

B. Fair Price Statutes

The Williams Act governs tender offers and was not intended or

93 *Id.* at 263. See *supra* notes 26 & 60 and accompanying text.

94 *Id.* at 262. Posner noted that "whereas the Illinois statute both imposed precommencement delay and allowed the secretary of state to terminate the offer, the Indiana statute imposes slightly greater delay but subjects the offeror to the tenderer's mercies of a vote of disinterested shareholders." *Id.*

95 *Id.*

96 *Id.* at 262-63.

97 *Id.* at 263.

98 *Id.* See *supra* notes 80 & 90 discussing the requirements for the control share statute to apply. Posner assumed that the vast majority of CTS's and Dynamics' shareholders were nonresidents. 794 F.2d at 263. He stated that Indiana has no interest in protecting residents of Connecticut from being stampeded to tender their shares to Dynamics. *Id.* (citing *MITE*, 457 U.S. at 642-43). He found that the only beneficiaries were the officers and directors of CTS who may even be nonresidents. He also found no evidence that a takeover by Dynamics might reduce the value of CTS or lead to a shift of assets or employment from Indiana. See *id.* at 264.

99 *Id.* Posner stated that the state is justified in implementing laws which would make it more difficult to acquire an Indiana corporation. *Id.* Posner referred to a statute requiring cumulative voting for the board which impedes the acquiror's attempt to oust the board in one strike. *Id.*

100 *Id.*

101 *Id.* Posner distinguished the Minnesota statute upheld in *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984), because there "the court was persuaded that the effect in discouraging takeovers through delay would be slight." *Id.* For a discussion of *Cardiff Acquisitions*, see *infra* notes 135-47 and accompanying text.

102 794 F.2d at 264.

designed to regulate other transactions, such as the second-step merger of a front-end loaded, two-tiered tender offer.¹⁰³ Many courts and commentators regard the stampede effect of such takeovers as highly coercive to the target shareholders and unfair to those shareholders who do not tender their shares in the initial bid.¹⁰⁴ Since the Williams Act protects only those investors who elect to tender their shares in the front-end tender offer, states have designed fair price statutes to curb the coercive nature of two-tiered bids.¹⁰⁵ The intent of these statutes is to ensure that shareholders who do not tender their shares in the first-step tender offer do not receive a lower price in the freeze-out transaction.¹⁰⁶

Fair price statutes shift the focus from securities regulation to corporate law and attempt to regulate the takeover process through regulation of the internal affairs of corporations organized under the laws of the state.¹⁰⁷ Maryland¹⁰⁸ and Pennsylvania¹⁰⁹ have enacted typical second generation fair price statutes. The Maryland statute requires a successful tender offeror intending a second-step consolidation to either obtain supermajority approval (eighty percent) from all shareholders or pay a fair price¹¹⁰ to shareholders who are forced to sell in the business combination.¹¹¹ The Pennsylvania statute contains similar supermajority and fair price provisions.¹¹² Presently thirteen states have adopted fair price statutes.¹¹³ No courts have ruled on the constitutionality of these statutes.¹¹⁴

103 Note, *Second Step Transactions in Two-Tiered Takeovers: The Case for State Regulation*, 19 GA. L. REV. 343, 344 (1985). Two-tiered bids are accomplished in two separate steps. In the first step, or front-end bid, the bidder makes a tender offer sufficient to establish a majority interest so the bidder can merge the target into the bidder. Target shareholders who fail to tender their shares in the front-end bid are thereby eliminated in the second-step "freeze-out merger." While the front-end bid is made at a premium over the current market value of the target shares, it is generally below liquidation value, the freeze-out price is lower, and the consideration is often in the form of debt or equity securities of the bidder rather than cash. *Id.*

104 *Id.* at 351.

105 *Id.* at 350-51.

106 See Note, *supra* note 37, at 443.

107 See Sargent, *Do the Second Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3, 5 (1985).

108 MD. CORP. & ASS'NS CODE ANN. §§ 3-601 to -603 (Supp. 1986).

109 PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1986).

110 MD. CORP & ASS'NS CODE ANN. § 3-603(b) (1985).

Fair price is typically defined as the highest of (a) the highest price paid by the bidder at any time within a certain time (e.g. two years) before the freeze-out transaction is announced; (b) the highest price paid by the bidder in the transaction in which the bidder became an interested shareholder; (c) the price on the date the bidder became an interested shareholder; and (d) the price on the date the freeze-out transaction is announced.

Hanks, *State Takeover Laws: The Second Generation*, Nat'l L. J., Nov. 3, 1986, at 34, col. 3.

111 *Id.*

112 PA. STAT. ANN. tit. 15, § 1409.1 (Purdon Supp. 1986).

113 CONN. GEN. STAT. ANN. §§ 33-374a to -374c (West Supp. 1986); GA. CODE ANN. §§ 14-2-232 to -234 (Supp. 1986); ILL. ANN. STAT. ch. 32, para. 7.85 (Smith-Hurd Supp. 1986); KY. REV. STAT. ANN. §§ 271 A.396 to -398 (Baldwin Supp. 1986); LA. REV. STAT. ANN. §§ 12:132 to -134 (West Supp. 1986); MICH. COMP. LAWS ANN. §§ 450.1775 to -1784 (West Supp. 1985); MISS. CODE ANN. §§ 79-25-1 to -7 (Supp. 1985); VA. CODE ANN. §§ 13.1-725 to -728 (1985 Repl. Vol.); WASH. REV. CODE ANN. § 23A.08.425 (Supp. 1986); WIS. STAT. ANN. § 180.725 (West Supp. 1986).

114 In *Dart Group Corp. v. Safeway Stores, Inc.*, No. HAR 86-2187, slip op. at 200-02 (D. Md. filed July 19, 1986) Dart attacked the constitutionality of the Maryland Fair Price statute in the initial phase of its tender offer for the stock of Safeway Stores in July 1986, but the litigation became moot when the parties negotiated a friendly takeover.

C. *Registration and Disclosure Laws*

1. Description

Five states have passed second generation registration and disclosure statutes.¹¹⁵ The most recent enactment of the second generation registration and disclosure laws is chapter fifteen of the Idaho Corporations Code.¹¹⁶ The statute illustrates the second generation approach; the legislature specifically revised an existing statute to avoid the constitutional pitfalls of *MITE*.¹¹⁷ The statute applies to corporations with publicly traded securities which have: (1) at least ten percent of the securities owned by Idaho residents;¹¹⁸ (2) assets with a value in excess of ten million dollars located in Idaho;¹¹⁹ (3) a monthly payroll in Idaho in excess of twenty-five thousand dollars;¹²⁰ and (4) corporate or operational headquarters in Idaho.¹²¹ Chapter fifteen only applies to purchases of securities from Idaho residents.¹²²

The statute requires any person making a tender offer for more than ten percent of any class of a stock of a company subject to the statute to first register and file certain information with the state and target company. The disclosure requirements are similar to the Williams Act.¹²³ The Idaho statute, however, requires additional information concerning the economic impact the proposed tender offer will have on the state.¹²⁴ The statute provides that the offer becomes effective when the offeror files a registration statement with the director of the Idaho Department of Finance.¹²⁵ The director can summarily suspend the offer within three days of filing if the registration statement does not contain all the required information concerning the takeover.¹²⁶ The director must conduct a hearing within ten calendar days of the suspension and must render a decision to permanently suspend an offer within three calendar days after the hearing has been completed,¹²⁷ but not more than sixteen calendar days after the suspension.¹²⁸ The director can permanently sus-

115 HAW. REV. STAT. §§ 417E-1 to -11 (Supp. 1985); IDAHO CODE §§ 30-1501 to -1514 (Supp. 1985); MINN. STAT. ANN. §§ 80B.01 to -.13 (West Supp. 1986); NEB. REV. STAT. §§ 21-2418 to -2430 (1983); TENN. CODE ANN. §§ 48-5-101 to -114 (Supp. 1986).

116 IDAHO CODE §§ 30-1501 to -1514 (Supp. 1986).

117 The Fifth Circuit invalidated Idaho's first generation takeover statute (IDAHO CODE §§ 30-1501 to -1513 (Supp. 1978)) in *Great W. United Corp. v. Kidwell*, 439 F. Supp. 429 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). The Supreme Court reversed on grounds of improper venue. The statute was a typical first generation model which included: (1) a sixty-day precommencement filing requirement; (2) a hearing provision with an even longer potential period for delay; (3) a disclosure provision more extensive than what the Williams Act required; and (4) a provision granting target management the power to call the hearing.

118 IDAHO CODE § 30-1502-9(a) (Supp. 1986).

119 *Id.* § 30-1502-9(b).

120 *Id.* § 30-1502-9(c).

121 *Id.* § 30-1502-9(d).

122 *Id.* § 30-1502-(6). "Offeree means the beneficial owner residing in Idaho, of equity securities which an offeror offers to acquire in connection with a takeover offer." *Id.*

123 See *supra* notes 18-25 and accompanying text.

124 IDAHO CODE § 30-1503(5)(C).

125 *Id.* § 30-1503(1).

126 *Id.* § 30-1503(3).

127 *Id.* § 30-1503(4).

128 *Id.* The entire process, thus must be completed within 19 calendar days which is within the 20

pend an offer upon determining that the registration does not satisfy the statute.¹²⁹ Unlike the "substantial fairness" provisions struck down in other jurisdictions, the Idaho director does not have the discretion to suspend an offer because he believes it is substantively unfair or inequitable.

The provisions of chapter fifteen covering fraudulent and deceptive practices, preclude a controlling stockholder from selling any stock to the offeror at a price greater than that paid to the other stockholders during the offer.¹³⁰ The statute prohibits any offer that is not substantially equivalent as to both resident and nonresident stockholders.¹³¹ Chapter fifteen also provides for criminal penalties,¹³² civil liabilities,¹³³ and remedies that go beyond those provided by the Williams Act.¹³⁴

2. Case Decisions

The most significant judicial ruling on a second generation registration and disclosure statute is *Cardiff Acquisitions, Inc. v. Hatch*¹³⁵ where the Eighth Circuit upheld the constitutionality of the Minnesota Corporate Takeover Act.¹³⁶ The court narrowly construed the statute and found that it was substantially consistent with the Williams Act, it did not impermissibly burden interstate commerce, and it protected legitimate state interests.¹³⁷

In its commerce clause analysis the court distinguished the Minnesota Act from the Illinois statute in *MITE*, finding none of the provisions of the Illinois Act which the Supreme Court indicated were significant burdens on interstate commerce. First, the Act did not impose a filing period prior to the offer becoming effective.¹³⁸ Second, the Act precluded the target directors as well as the offeror from disseminating information while an offer is suspended.¹³⁹ Third, the Act did not cause delay because it mandated completion of the whole hearing process within nineteen calendar days.¹⁴⁰ Fourth, the Minnesota statute did not allow the state to deny registration if it found that the offer was inequitable.¹⁴¹ Fifth, the Minnesota statute applies only when at least twenty percent of the target's shareholders are Minnesota residents and the target

business-day minimum offering period specified by the Williams Act. 17 C.F.R. § 240.14e-1(a) (1986).

129 IDAHO CODE § 30-1503(4). This suspension is subject to the right of the offeror to correct disclosure and other deficiencies identified by the director and to reinstitute the takeover. *Id.*

130 *Id.* § 30-1505(2).

131 *Id.* § 30-1506(1).

132 *Id.* § 30-1510.

133 *Id.* § 30-1511.

134 *Id.* § 30-1510(4). An offeror who acquires shares in violation of the statute is denied shareholder rights for one year after acquisition of the stock. *Id.*

135 751 F.2d 906 (8th Cir. 1984).

136 MINN. STAT. ANN. §§ 80B.01 to .13 (West Supp. 1984).

137 751 F.2d at 909.

138 MINN. STAT. ANN. § 80B.05(4).

139 751 F.2d at 910.

140 *Id.* The SEC requires a bidder to hold an offer open for a minimum of twenty business days. 17 C.F.R. § 240.14e-1(a) (1986).

141 751 F.2d at 914. The court stated that the commissioner was authorized to review the disclosure so long as it was limited to sufficiency.

has substantial assets in the state, and the suspension only applies to Minnesota residents.¹⁴² The court noted that in providing for simultaneous enforcement of federal disclosure requirements the statute benefited local investors without imposing a significant or excessive burden on offerors.¹⁴³ The court also stated that the statute's additional disclosure requirements concerning the economic impact that the tender offer would have on the state aided the shareholders in deciding whether to sell their stock.¹⁴⁴

While the court found certain provisions of the statute unconstitutional,¹⁴⁵ the statute itself passed muster under the supremacy clause. The court stated that *MITE* did not control the preemption issue since the majority there only agreed on the commerce clause challenge.¹⁴⁶ The court concluded that the Williams Act did not preempt the Minnesota statute because its provisions were not "incompatible" with the Williams Act.¹⁴⁷

The Sixth Circuit in *L.P. Acquisition Co. v. Tyson*,¹⁴⁸ held that the disclosure portion of Michigan's takeover statute, at least insofar as it regulates tender offers for unregistered securities, did not violate the commerce clause.¹⁴⁹ The statute required a five-percent offeror to file a registration statement with virtually identical disclosure provisions as the Williams Act.¹⁵⁰ The target was not a 34 Act company and thus the Williams Act did not apply to the offeror.¹⁵¹ The court, applying the *Pike* balancing test, determined that the state's legitimate interest in protecting resident shareholders outweighed the statute's extraterritorial effect.¹⁵² The Michigan disclosure requirements provided substantial benefits to resident shareholders because the Williams Act's disclosure

142 *Id.* Cardiff contended that the Minnesota Act burdened interstate commerce because it imposed disclosure requirements beyond those of the Williams Act, it increased the existence, enforcement and cost of launching the offer, and a suspension in Minnesota may discredit the tender offer nationwide. Cardiff also argued that alleged protections to local investors are illusory because most of the disclosures required by the Minnesota Act are already required by the Williams Act and the additional disclosures serve no valid purpose. *Id.*

143 *Id.*

144 *Id.* at 912.

145 *Id.* at 913. The court held that two provisions of the statute that authorized the commissioner to prescribe additional disclosure requirements were "unconstitutionally vague and open ended." See MINN. STAT. ANN. §§ 80B.03(2), (6). The court noted that the provisions may require the disclosure of irrelevant or confusing data and may require judgmental data the commissioner has no authority to require. 751 F.2d at 914.

146 *Id.* at 913. The court found that the statute sought to protect unique and legitimate interests of Minnesota shareholders and the commissioner must only decide if sufficient information has been disclosed as required. *Id.* at 914.

147 *Id.* at 913.

148 772 F.2d 201 (6th Cir. 1985). The court struck down provisions of the Michigan Take-Over Offers Act as preempted by the Williams Act, but upheld the provisions under the commerce clause. See MICH. COMP. LAWS ANN. §§ 451.901 to .917 (West Supp. 1986).

149 772 F.2d at 201. With respect to regulations of transactions involving registered securities the Michigan Take-Over Offers Act was declared unconstitutional in *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982).

150 *Id.* at 204.

151 *Id.* The court also noted that only 50% of the target's shareholders were Michigan residents. *Id.* at 203.

152 *Id.* at 205.

requirements did not apply.¹⁵³

III. Constitutional Analysis of State Takeover Statutes

A. *Clarifying the Role of States in Takeover Regulation*

The United States Supreme Court by granting certiorari in *CTS* may have recognized that lower courts need guidance in deciding the constitutionality of state tender offer regulation. The *Cardiff Acquisitions* decision, which the Seventh Circuit distinguished in *CTS*, suggests that states may continue to regulate the tender offer process. The controversy in the federal courts on the validity of the second generation statutes requires the Supreme Court to clarify the roles of federal and state governments in regulating corporate acquisitions. In addition to ruling on the control share acquisition statute at issue in *CTS*, the Supreme Court should offer guidance on the continuing validity of fair price and modified disclosure statutes.

B. *Commerce Clause Analysis*

The Supreme Court, in its *CTS* ruling, should follow *MITE* and apply the *Pike* test to determine if a state's takeover statute violates the commerce clause. The *Pike* analysis provides that "[d]irect regulation of interstate commerce by the states is prohibited."¹⁵⁴ But a state statute which incidentally regulates interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹⁵⁵ In *APL Limited Partnership v. Van Dusen Air, Inc.*,¹⁵⁶ the court properly applied the *Pike* test to rule that the substantial burdens which the Minnesota statute imposed on interstate commerce outweighed the local benefits of shareholder protection and regulation of internal affairs.¹⁵⁷ The court held that since states have no interest in protecting nonresidents and the statute burdened interstate commerce, there were no local benefits arising from the statute to weigh in the balance.¹⁵⁸ Similarly in *CTS*, the Seventh Circuit held that the Indiana statute, by depriving the acquiror of the property interest (voting rights) he purchased in the stock, imposed a burden on interstate commerce which was "clearly excessive in relation to the putative local benefits."¹⁵⁹

C. *Supremacy Clause Analysis*

The Supreme Court should adopt the *CTS* supremacy clause analysis. The *CTS* decision is in accord with the majority of the courts since *MITE* which have held that state laws which unfairly advantage incumbent management in the context of a battle for corporate control conflict with the Williams Act and are thus invalid.

¹⁵³ *Id.* at 206.

¹⁵⁴ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

¹⁵⁵ *Id.*

¹⁵⁶ 622 F. Supp. 1216. See *supra* notes 69-75 and accompanying text.

¹⁵⁷ *Id.* at 1220-25.

¹⁵⁸ *Id.* at 1223.

¹⁵⁹ 794 F.2d at 263. See *supra* notes 96-102 and accompanying text.

Judge Posner referred to the supremacy clause analysis applied in *National City Lines, Inc. v. LLC Corp.*,¹⁶⁰ in which the Eight Circuit held that the Williams Act preempted Missouri's first generation takeover statute.¹⁶¹ The *National City Lines* court stated that in determining whether a state law is preempted the first inquiry is whether Congress, pursuant to its power to regulate commerce,¹⁶² has expressly or implicitly prohibited state regulation of the particular case.¹⁶³ The court noted that Congress has not chosen to expressly or implicitly bar states from regulating tender offers.¹⁶⁴ But the court stated that congressional enactments which do not expressly exclude state legislation in the field nevertheless override state laws with which they conflict.¹⁶⁵ Thus, the court in *National City Lines* concluded that the issue then is "whether under the circumstances of this particular case, the [state's takeover act] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Williams Act."¹⁶⁶ As Posner stated in *CTS*, most courts agree that the Williams Act has some preemptive intent in that it "strikes a balance between target management and the tender offeror which may not be upset by state regulation."¹⁶⁷ The *CTS* decision reinforces the view that the Williams Act does not preempt all state regulation of tender offers. Judge Posner expressed his "lingering doubt" whether the Williams Act was intended to preempt all state takeover statutes.¹⁶⁸ Posner stated:

[O]f course it is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations, but this leap was taken by the Supreme Court in *MITE* and by every court to consider the question since.¹⁶⁹

In *MITE*¹⁷⁰ only three justices found that the provisions of the Illinois Business Takeover statute were preempted. Justice Stevens, refus-

160 687 F.2d 1122, 1128-33 (8th Cir. 1982). See also *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565-66 (6th Cir. 1982).

161 Mo. REV. STAT. §§ 409.500 to .565 (1979).

162 U.S. CONST. art. 1, § 8.

163 687 F.2d at 1128. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

164 687 F.2d 1122 (citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 182 (1979)).

165 687 F.2d at 1128-29 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 141). See U.S. CONST. art. 1, § 8.

166 687 F.2d at 1129. See also *Michigan Canners & Freezers Assoc. Inc., v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 478 (1984) ("Because the Michigan Act authorizes producer associations to engage in conduct that the federal act forbids it stands as an obstacle to the full purposes and objectives of Congress."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("Preemption should be judged on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law."); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 221 (1983) ("It is well established that a state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

167 794 F.2d at 261.

168 *Id.* at 263.

169 *Id.* at 262.

170 457 U.S. 624.

ing to join the preemption analysis, stated that he was not persuaded that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state tender offer legislation.¹⁷¹ Similarly, Justice Powell did not join the preemption analysis, stating that the Court's commerce clause reasoning leaves some room for state regulation¹⁷² and that states have legitimate interests in regulating tender offers.¹⁷³ *MITE* thus cannot stand for a broad preemption principle under which courts must invalidate any state regulation of tender offers.

IV. A Limited Third Generation

A. *Control Share Statutes*

The Supreme Court should affirm the Seventh Circuit's holding in *CTS* that control share acquisition statutes are unconstitutional as an impermissible burden on interstate commerce or as preempted by the Williams Act. The *CTS* holding is consistent with the case law emanating from the courts on control share acquisition statutes. A state takeover statute that limits the voting rights a person can acquire or regulates stock transactions between nonresident shareholders and a nonresident purchaser impermissibly burdens interstate commerce. The Seventh Circuit, applying *Pike*, correctly held that because a state has no interest in protecting nonresident shareholders and corporations, the burdens which such a statute imposes on interstate commerce outweigh any purported state interests in protecting shareholders, or in regulating the internal affairs of corporations.¹⁷⁴ Statutes that delay the tender offer process beyond the time limits specified by the Williams Act deter tender offers and tip the scales in favor of target management. These statutes are an obstacle to the Williams Act's policy of neutrality between bidders and incumbent management.

B. *Fair Price Statutes*

Under the *Pike* test, courts should find that fair price statutes violate the commerce clause. The burdens which fair price statutes impose on interstate commerce are excessive in relation to their purported local benefits.¹⁷⁵ Fair price statutes excessively burden interstate commerce by discouraging hostile interstate takeovers both in purpose and effect.¹⁷⁶ Because the required supermajority votes are so difficult to ob-

171 *Id.* at 655.

172 *Id.* at 646-47.

173 *Id.* at 646. Justice Powell stated when corporate headquarters are transferred out of a city and state, the locality suffers significantly; financial and leadership contributions to cultural, community, charitable, and educational life tend to diminish. *Id.*

174 794 F.2d at 263.

175 397 U.S. at 142.

176 See Sargent, *supra* note 107, at 32. Other benefits at least partially derived from fair price statutes are that they: (1) allow nontendering shareholders an opportunity to vote on changes in corporate control; (2) reduce hostile takeovers thereby allowing managers to engage in long range planning; and (3) allow management a freer hand to consider defensive tactics which allows them to bargain on behalf of shareholders. *Id.*

tain and fair price provisions significantly increase the cost of two-step takeovers, the statutes not only hinder consolidation of ownership in the freeze-out transaction, but also inevitably discourage takeovers themselves.¹⁷⁷ In effect, fair price statutes amount to a direct prohibition on a bidder seeking one hundred percent ownership, because a bidder will not normally initiate a tender offer that is excessively costly or practically impossible to consummate the freeze-out merger.¹⁷⁸ The fact that fair price statutes impact on takeovers results from the second-step merger regulation rather than direct regulation of tender offers is constitutionally insignificant.¹⁷⁹ Fair price statutes have an effect on interstate commerce as great as the first generation statutes invalidated by *MITE*,¹⁸⁰ and greater than the control share acquisition statutes struck down in *CTS* and other cases.

The local benefits do not outweigh the burdens on interstate commerce. The only nexus to the state most fair price statutes require is that the target corporation be incorporated in that state.¹⁸¹ The typical fair price statute applies to all shareholders, both resident and nonresident.¹⁸² Under the *Pike* analysis a state has no interest in protecting nonresidents. Fair price statutes appear to protect shareholders from the coercive nature of two-tiered takeovers, but it does not outweigh the deterrent effect on takeovers. While an attempt to deter hostile takeovers reflects a concern for local jobs and not target management per se, such parochialism remains exactly what the commerce clause was designed to prevent.¹⁸³

Courts should apply the *National City Lines* preemption test adopted in *CTS* to find that fair price statutes are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Williams Act."¹⁸⁴ While fair price statutes regulate only the second-step transaction and do not actually prevent compliance with any procedural or disclosure requirements or alter time limits of the Williams Act,¹⁸⁵ the deterrent effect of fair price statutes conflicts with the Williams Act's policy of neutrality.¹⁸⁶ Additionally, under both the Pennsylvania and Maryland statutes the target board of directors may determine the applicability of the statute to individual transactions.¹⁸⁷ The apparent purpose of these provisions is to permit negotiated transactions without subjecting them to the supermajority vote or fair price provisions.¹⁸⁸ Nothing in the Williams Act supports a preference for negotiated takeovers at the expense of contested takeovers. This intention

177 Hanks, *supra* note 110. See also Note, *supra* note 103, at 352; Note, *supra* note 37, at 456.

178 Hanks, *supra* note 110, at 34, col. 4.

179 *Id.* at 35, col. 1.

180 Sargent, *supra* note 107, at 13.

181 Hanks, *supra* note 110, at 34, col. 4.

182 *Id.* at 35, col. 1.

183 Sargent, *supra* note 107, at 31.

184 687 F.2d at 1129.

185 See Note, *supra* note 103, at 351.

186 See Hanks, *supra* note 110, at 34, col. 4.

187 Sargent, *supra* note 107, at 12.

188 See Hanks, *supra* note 110, at 34, col. 4.

is an obstacle to the congressional policy that contested takeovers should neither be encouraged nor discouraged.¹⁸⁹

C. *Registration and Disclosure Statutes*

Unlike control share acquisition and fair price statutes, courts should find state registration and disclosure laws constitutional. Judge Posner in *CTS* recognized that states still have a role to play in regulating corporate takeovers when he distinguished *Cardiff Acquisitions*.¹⁹⁰ Presently five states have adopted corporate takeover legislation based on the Minnesota statute upheld in *Cardiff Acquisitions*.¹⁹¹ States must eliminate the precommencement notification and substantive review provisions found in the first generation statutes held unconstitutional.¹⁹² State agencies must conduct hearings in a timely fashion and restrict them to consideration of full disclosure.¹⁹³

The Idaho statute¹⁹⁴ does not violate the commerce clause because it avoids the burden on interstate commerce which concerned Justice White in *MITE* and the federal courts that have considered the validity of takeover statutes.¹⁹⁵ By limiting the application of chapter fifteen to Idaho residents, the Idaho legislature has minimized the constitutional problems caused by the extraterritorial effects of other state takeover statutes. The Idaho statute will indirectly burden interstate commerce when the target company has substantial numbers of Idaho shareholders.¹⁹⁶ However, in contrast to control share acquisition and fair price statutes which in operation amount to a direct prohibition on interstate tender offers, the extraterritorial effect of second generation disclosure statutes is minimal.

The *Cardiff Acquisitions* court held that whatever effect dual registration would have on interstate transactions will be outweighed by the additional protection conferred on resident shareholders by simultaneous enforcement of state and federal disclosure requirements.¹⁹⁷ In *L.P. Acquisition*, the court recognized that states have a strong interest in regulating tender offers where federal security laws do not apply.¹⁹⁸ States should have a similar interest in concurrently regulating tender offers to which federal laws apply where the federal agency empowered to enforce

189 *Id.*

190 794 F.2d at 264 (citing *Cardiff v. Hatch*, 751 F.2d 906 (8th Cir. 1984)).

191 See *supra* note 115.

192 See, e.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd sub. nom.*, *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). But see *Agency Rent-a-Car, Inc. v. Connolly*, 686 F.2d 1029, 1038 (1st Cir. 1982) (Massachusetts Statute not preempted).

193 See Cane & Taussig, *Hawaii's 1985 Corporate Take-over Legislation: Is It Constitutional?*, 8 HAW. L. REV. 391, 414 (1985).

194 IDAHO CODE §§ 30-1501 to -1514 (Supp. 1986). See *supra* notes 116-34 and accompanying text.

195 See generally *MITE*, 457 U.S. 624; *supra* notes 40-54 and accompanying text.

196 In *Cardiff Acquisitions*, Cardiff argued that the similar Minnesota statute burdened interstate commerce because of the cost and effort of complying with both state and federal disclosure requirements. 751 F.2d at 911.

197 *Id.* at 912.

198 772 F.2d 201. See *supra* notes 148-53 and accompanying text.

them does not have sufficient resources to achieve the task. State disclosure statutes like Idaho's are consistent with *L.P. Acquisition*. A state may establish a hearing scheme to evaluate the adequacy of an offeror's disclosures as long as the scheme does not conflict with federal laws and regulations.¹⁹⁹ Because the Idaho Corporate Takeover statute stays within the confines of the Williams Act disclosure requirements, *L.P. Acquisition* properly validates the second generation approach of concurrent regulation. Courts should apply the *National City Lines* test to determine whether the Williams Act preempts second generation registration and disclosure statutes such as Idaho's. The Idaho statute does not stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in passing the Williams Act."

First generation statutes which mandated far more information than the Williams Act requires or which delayed the tender offer process obstructed congressional intent. Target management could use such provisions as effective weapons to fight off a bidder.²⁰⁰ The more detailed the state's regulations and the more disclosure required, the greater the opportunity target management has to delay the offer and structure a defense.²⁰¹ Such excessive regulations cut against the federal policy of neutrality and "tip the scales" in favor of management.²⁰² However, since second generation disclosure laws such as Idaho's impose no extra delay and closely parallel Williams Act requirements, courts should not hold that the statutes frustrate congressional intent. The Idaho Director of Finance can require hearings but the statute dictates that the agency must conduct them in a timely fashion and restrict its evaluation to full disclosure. Since the disclosure mandated is largely the same as that required by the Williams Act, the statute's requirements do not have a significant impact on the battle between the offeror and target company. Moreover, since Idaho has eliminated procedures which delay commencement of the offer, the statute does not place management in a protected or preferred position, and is thus consistent with the Williams Act's policy of neutrality.

D. *The Need for Dual Regulation*

Some commentators argue that since the Williams Act currently provides shareholders with adequate protection in tender offers, any state regulation that did not violate the supremacy clause would merely be redundant.²⁰³ Another view is that because shareholders hold stock primarily for investment purposes, any additional state disclosure requirements may accomplish more harm than good by confusing share-

199 772 F.2d at 209. "We do not hold that a state might never establish a hearing scheme to inquire into the adequacy of an offeror's disclosures. However, whatever scheme a state devises must operate within the confines of congressional intent expressed through the federal securities laws and regulations." *Id.*

200 See Note, *supra* note 10, at 731.

201 See *supra* note 32.

202 See *supra* note 14.

203 See Note, *State Takeover and Tender Offer Regulations Post MITE: The Maryland, Ohio and Pennsylvania Attempts*, 90 DICK. L. REV. 731, 774 (1986). See generally Note, *supra* note 103.

holders.²⁰⁴ Although disclosure statutes such as Idaho's add little substantively to the protections already provided by federal law, the statutes add an enforcement dimension that may not be available at the federal level. The overburdened SEC has stated that because of budgetary restraints its resources are inadequate to review the myriad of Williams Act disclosure filings and to investigate potential violations.²⁰⁵ The SEC has had to retreat from many of its routine functions in the area of takeovers and acquisitions.²⁰⁶ As a result the SEC has had to rely increasingly on state agencies to enforce securities regulations in most takeover disputes.²⁰⁷ Thus, the Idaho Department of Finance, by filling the gap where the SEC has retreated in enforcement of disclosure laws, will play a significant role in effectuating the investor protection policies of the Williams Act.²⁰⁸ In *Cardiff Acquisitions* the court noted that this is particularly significant considering that the SEC lacks the resources to police the thousands of schedule 13(d) reports and amendments filed each year.²⁰⁹ The court added: "The state on the other hand apparently has the resources to carefully examine the reports to ensure that they do in fact disclose the information required by the state statute and regulations."²¹⁰

State regulatory agencies such as the Idaho Department of Finance will generally exhibit more interest in those state takeover offers that impact on the state economy. State security regulation agencies are closer to the facts and generally proceed more efficiently than the SEC with the enforcement of takeover regulations in their states.²¹¹ In Idaho, and in other states drafting new takeover statutes based on the *Cardiff Acquisitions* model, this system of dual regulation, along with added penalty provisions, should strengthen enforcement efforts and help ensure full disclosure for resident shareholders without infringing on congressional intent.

V. Conclusion

The Supreme Court should affirm the Seventh Circuit's decision in *CTS* and hold that state control share acquisition statutes are unconstitutional under both the commerce and supremacy clauses. Because of the confusion in the federal courts regarding the proper role of the states in

204 See Comment, *supra* note 6, at 1126.

205 See, e.g., *Gearhart Indus. Inc. v. Smith Int'l Inc.*, 741 F.2d 707 (5th Cir. 1984). In an amicus brief, the SEC noted that it does not have the resources to police the truthfulness of the myriad of schedule 13(d) filings made each year.

206 See Cane & Taussig, *supra* note 193, at 416 (quoting Ingersoll, *Inundated Agency: Busy SEC Must Let Many Cases, Filings, Go Uninvestigated*, Wall St. J., Dec. 16, 1985, at 1, col. 1.).

207 *Id.*

208 Former SEC Chairman Cohen emphasized this orientation in his testimony before the Senate: "The principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare . . . the investor is lost somewhere in the shuffle, this is our concern and our only concern." *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 2-4 (1967) (quoted in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977)).

209 751 F.2d at 912.

210 *Id.*

211 Cane & Taussig, *supra* note 193, at 416.

the regulation of corporate takeovers, the Court should take the opportunity to offer guidance on fair price and disclosure statutes.

Courts should invalidate fair price statutes but uphold registration and disclosure laws such as Idaho's. Since registration and disclosure statutes will only pass muster if they do not substantially deviate from the requirements of the Williams Act, the overall effect of the Idaho approach will be a substantial decrease in independent state regulation of takeovers.

While limited second generation disclosure statutes add little to substantive protections already provided by the Williams Act, they will provide for concurrent regulation of tender offers at the state and federal levels and further the congressional intent of investor protection. Dual enforcement will enable the SEC to effectively discharge its statutory responsibilities at a time when the current takeover frenzy is severely testing the federal agency's regulatory authority.

Howard F. Mulligan

Addendum

On April 21, 1987 the United States Supreme Court reversed the Seventh Circuit's decision in CTS and upheld Indiana's control share acquisition statute (6-3). The Court deviated from the decisions emanating from the circuits over the past four years in holding that the statute does not impermissibly interfere with interstate corporate transactions nor conflict with Federal Securities Law. Justice Powell writing for the majority stated that the statute was "within the state's authority to regulate domestic corporations" and has a "limited" effect on interstate commerce. The Court held that the statute does not prevent or unduly delay tender offers, but "only provides regulatory procedures designed for the protection of the corporation's shareholders."

In dissent, Justice White who was joined by Justices Blackmun and Stevens, wrote that the Indiana statute will "predictably foreclose completely some tender offers" and amounts to the kind of state "economic protectionism" burdening interstate commerce that the Constitution was designed to prevent. Moreover, Justice White stated that the statute "undermines the policy of the Williams Act by effectively preventing minority shareholders from acting in their own best interests by selling their stock."

In the wake of the Supreme Court's decision in CTS, a number of states probably will draft control share statutes based on the Indiana model. Because the CTS decision is limited to the control share statutes, the controversy concerning the states' role in takeover regulation is not resolved. Courts should apply the analysis suggested in this note when ruling on second generation fair price and disclosure statutes.