Wisconsin Takeover Legislation: Good Intentions Constitutionally Questionable

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I. INTRODUCTION

On September 4, 1987, Australian entrepreneur Alan Bond and Amber Acquisition Corporation made an unsolicited holiday weekend bid of $38 a share, or $1.2 billion, to purchase G. Heileman Brewing Company of LaCrosse, Wisconsin. In response to the tender offer, the governor of Wisconsin, supported by a coalition of local interests including mainline business and labor groups, offered Heileman special legislative assistance to stymie the takeover. On September 17, with little legislative resistance, the governor signed two bills into law.

Six days after the passage of Wisconsin’s anti-takeover laws, Bond and Heileman announced that they had signed a definitive merger agreement providing for the Bond Corporation to increase its offer from $38 to $40.75 a share, or $1.22 billion, for all outstanding shares of Heileman. Heileman’s board of directors unanimously approved the offer as amended and

1. See Reuters Bus. Report, Sept. 17, 1987. Alan Bond has substantial interests in mining, brewing and real estate in Australia and is considered to be one of that country’s richest individuals. Bond obtained world recognition in 1983 for his interest in yachting when he brought Australia the America’s Cup.

2. L.A. Times, Sept. 24, 1987, § 4, at 1, col. 2. Amber Acquisition Corporation is a subsidiary of Bond Corporation. Bond Corporation is an Australian holding company engaged in a wide variety of businesses, including brewing, television and radio broadcasting, property development management, and energy resource exploration and development. Bond Corporation first established a presence in the United States through its acquisition of Pittsburgh Brewing Corporation in April 1986.

3. Dun & Bradstreet Report, Dec. 31, 1986. Heileman Brewery was founded in 1853 by Gund and Gottlieb Heileman. Heileman is principally engaged in the manufacturing and sale of malt beverages (85%) through approximately 2100 independent wholesalers in all 50 states and Canada. Before its merger with Bond, it ranked fourth among United States brewers and sixth among world brewers.


determined that the terms of the amended offer and merger were fair to Heileman's shareholders. The Board then recommended that they accept the offer and tender their shares.8

Wisconsin's legislative response to the Heileman tender offer is not an isolated occurrence. Several states have enacted laws designed to prohibit takeovers within their jurisdictions.9 These laws are often passed with unusual speed and little opposition.

This Comment first provides a general overview of the takeover process and tender offers.10 It also discusses the existing federal law which is tailored to prevent the adverse effects of hostile takeovers.11 It then considers the states' historic role in the takeover process as well as the constitutionality of state requirements aimed at protecting local interests.12 Particular attention is given to the constitutionality of Wisconsin's new takeover legislation.13 This Comment concludes by noting that Wisconsin's new takeover statute, in its present form, is not likely to pass constitutional muster14 and that the focus of future efforts to regulate the takeover process is likely to shift to the federal arena and ultimately to the courts.15

II. HISTORY OF THE TAKEOVER PROCESS

Vast changes have occurred over the past twenty-five years in the market for corporate control. Prior to 1960, cash takeover bids were rare in the United States.16 Most corporate acquisitions were accomplished through mergers or sales where incumbent managements were willing partners.17 No state directly regulated tender offers prior to the passage of the Williams

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9. At least ten states have passed anti-takeover laws under circumstances similar to Wisconsin's. See Butler, Corporate — Specific Anti-takeover Statutes and the Market for Corporate Charters, 1988 Wis. L. Rev. 365, 375 n.34.
10. See infra notes 16-30 and accompanying text.
11. See infra notes 31-49 and accompanying text.
12. See infra notes 50-100 and accompanying text.
13. See infra notes 101-65 and accompanying text.
14. See infra notes 123-65 and accompanying text.
15. See infra notes 166-73 and accompanying text.
Act in 1968, and little legislative activity occurred at the state level for several years thereafter. However, when the period of corporate conglomeration began, it became common for corporations to be acquired without the approval or consent of management through tender offers. Today, although the total number of tender offers has declined, new financing techniques have permitted hostile takeovers of large corporations.

A. Examination of Tender Offers

A tender offer exists when the acquiring firm makes a direct public offer to a target firm's stockholders in an effort to purchase the voting shares. Tender offers can be made for all the outstanding shares of a corporation or for some specified number of outstanding shares which would result in a controlling interest. Such offers are frequently open for only a limited time — usually only a few days. In either event, tender offerors usually provide tendering shareholders with substantial premiums over the current market price. Studies have shown that stock price gains of target corporations in successful tender offers averaged thirty percent, while successful mergers averaged twenty percent. On the aggregate, shareholders have enjoyed a gain of $400 billion in the 1980s due to hostile takeovers and takeover threats.

A tender offer in a takeover bid is usually more attractive than a merger because it effectively bypasses incumbent management. Bidders recognize


22. Takeover attempts also involve exchange offers of securities. This is an important variation of the cash tender offer. The use of securities rather than cash in a takeover attempt requires registration of the securities offered under the Securities Act of 1934. This process involves some delay which is similar to the delay experienced as a result of the Williams Act.

23. See generally Group Discussion Paper, supra note 17, at 1. Typically, when there has been a cash tender offer for a given stock, the open market price for that stock may also increase dramatically. This may occur because the market anticipates that either a counter-offer above the tender offer will be forthcoming or that the new management will improve the performance of the corporation. Id.


25. Id. at 361.
that cooperation by incumbent management may be withheld if managers disapprove of the acquisition for any reason. Since a successful tender offer may result in ousting the incumbent management by the offeror, the incumbent management may expend a great amount of corporate time and money in an attempt to defeat the takeover. Since a merger without the support of incumbent management is impossible, a tender offer is the most reasonable alternative when there is a possibility that management will not be in favor of the acquisition.

Tender offers are generally made where target management holds a small ownership stake in the corporation. This phenomenon is due to the fact that limited managerial ownership implies a greater likelihood of management inefficiencies. Additionally, in this type of situation, management is unable to defeat a tender offer by simply withholding its shares. It is often the bidding firm’s sole intention to replace the incumbent management with a management team that is more efficient and responsive to stockholders’ goals and therefore, more likely to increase the net worth of the company.

Bidders also may find the corporation attractive for other legitimate reasons. For example, some companies seek to acquire other corporations through tender offers to increase the distribution of services and products. Other bidders may recognize that a corporation’s stock does not accurately reflect the true value of the corporation or notice that corporate profits are needlessly slipping. This type of corporation is particularly ripe for a hostile takeover.

While an incumbent management team would often like to disrupt the tender offer process, it may have an affirmative fiduciary duty to its share-

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26. See generally Baysinger & Butler, Antitakeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation, 71 VA. L. REV. 1257 (1985). A bidder may pay a premium over the market price for a given stock if it believes that the target’s management has not been operating efficiently. The bidder’s rationale is that the corporate assets are not being correctly utilized, and a more efficient management could earn a higher return on such assets. Those justifying takeovers on this basis see them as a desirable phenomenon which benefits both the bidder and the target’s stockholders. Id.

Those opposed to takeovers, particularly hostile takeovers, downplay possible managerial inefficiencies arising from the separation of ownership and control in the modern corporation. Instead, they argue that the tender offer process coerces stockholders and leads to substantial costs, both in the expenditure of managers’ time and from the dissipation of corporate assets. Id.


28. The corporation that acquired G. Heileman Company may have had an interest in expanding its distribution channels. Mr. Paul Shain, a beer industry analyst with Dain Bosworth, Inc., of Minneapolis, stated: “Beer is sold through wholesalers, distribution is highly unionized, and it’s not easy to break in with a new product.” N.Y. Times, Sept. 5, 1987, § 1, at 31, col. 3.
holders to refrain from opposing a tender offer. If shareholders are to realize a substantial premium for their shares from an accepted tender offer, corporate goals may require management to resist the temptation of spending valuable corporate assets in an effort to defeat the tender offer. In some cases, a proper exercise of management's authority should be directed toward expediting rather than opposing the bidder's offer. Nevertheless, the obvious and inherent conflict of interest between management and shareholders makes management assistance unlikely. Given this inherent conflict, federal and state governments have enacted legislation to regulate the takeover process.

B. Government Regulation of the Takeover Process

Over the last several decades, federal law has attempted to lay a suitable foundation to protect shareholders from the ill-effects of hostile takeovers. The emphasis of this federal legislation is to protect investors. This legislation forces bidders to provide more information during the tender offer process. As a result, these investors are able to make more intelligent and informed decisions relating to the disposition of their shares. The legislation did not assign special protection to the bidders or the target corporations.

In turn, as takeovers became more common, state politicians felt pressure to protect the interests of local enterprises. Labor organizations, businessmen, and incumbent management became vocal against "corporate raiders" taking over corporations without the consent of management. Because the states were saturated with anti-takeover bias, they responded by enacting their own takeover laws which covered cash and other kinds of tender offers.

States soon recognized two potential problems with their attempt to regulate the takeover process. First, state regulation of the takeover process

29. One commentator has stated that the single goal of shareholder wealth maximization is the clear benchmark against which management's performance may be assessed. See Eisenberg, Corporate Legitimacy, Conduct, and Governance — Two Models of the Corporation, 17 CREIGHTON L. REV. 1, 6 (1983).

30. For a discussion in favor of legislation which would force managers to be passive in the face of a takeover attempt, see Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 HARV. L. REV. 1161 (1981); see also Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 STAN. L. REV. 819 (1981).

31. For further discussion of federal legislation aimed at the protection of investors, see infra notes 33-49 and accompanying text.

32. For a discussion of state regulations relating to the takeover process, see infra notes 49-77 and accompanying text.
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often has a direct impact on commerce. Congress, not the state legislature, is empowered with the constitutional right to regulate commerce among the states. However, if Congress chooses not to directly regulate interstate commerce in this context, there is nothing in the commerce clause which explicitly prohibits states from doing so. Therefore, states may regulate the takeover process unless such regulation significantly interferes with the national economy.

Second, even if the state regulation does not significantly interfere with interstate commerce, a state takeover statute may be preempted if it conflicts with other federal regulations. Since state laws generally tilt the rules of tender offers in favor of target companies, such laws often conflict with the federal government's primary tool for regulating the takeover process, the Williams Act.

1. The Williams Act and Federal Regulation

The Williams Act is the major federal weapon against improper takeover. It was adopted in 1968 and is technically an amendment to Sections 13 and 14 of the Securities Exchange Act of 1934. The Williams Act serves as a congressional response to the growing use of cash tender offers as a means for achieving corporate takeovers.

The bill was created to remedy a gap in federal regulation created by the development of tender offers as a means of gaining corporate control. The Act's major provisions are its advance disclosure requirements and its anti-fraud provisions which were designed to give the target management

33. See U.S. CONST. art. I, § 8, cl. 1, 3. "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states . . . ." Id.
35. For a discussion of the preemption of state takeover regulations by the Williams Act, see infra notes 36-77 and accompanying text.
37. Congress added §§ 13(d)-(e) and 14(d)-(f) to the Securities Exchange Act of 1934.
39. The Williams Act's disclosure regulations require bidding firms to file reports which describe the acquirer's business plans and sources of financing. The law's minimum tender offer period provides that all offers must remain open for at least ten days, thus precluding the speedy
standing to sue for injunctive relief. The original proposal evolved over a two-year period in response to positions expressed by the Securities and Exchange Commission (SEC) and other interested parties from private industry and the New York Stock Exchange.

One of the major principles enunciated in the history of the Williams Act is Congress' intent that neither the bidder nor the target corporation's management have an undue advantage over the other in the solicitation process. The Act recognizes that the success or failure of the transactions regulated by it should ultimately be determined by the shareholders of the corporation whose shares are being sought. The fundamental purpose behind the Act is protection for the investor. The Act provides that investors receive more information about the inquirer and more time to decide whether or not to accept the tender.


In addition to disclosure requirements which protect all target shareholders, the Williams Act provides other benefits for target shareholders who elect to tender their stock. First, stockholders who accept the tender offer are given the right to withdraw their shares during the first seven days of the tender offer and at any time after 60 days from the commencement of the offer. Second, where the tender offer is for less than all outstanding shares and more than the requested number of shares are tendered, the Act requires that the tendered securities be taken up pro rata by the offeror during the first 10 days of the offer. Finally, the Act provides that if, during the course of the offer, the amount paid for the target shares is increased, all tendering shareholders are to receive the additional consideration even if they tendered their stock before the price increase was announced. 15 U.S.C. §§ 78n(d)(5) - (7) (1982).

40. But see Piper, 430 U.S. at 1 (recovery for damages under Williams Act doubtful).
41. See generally supra note 22 and accompanying text.
44. As a result of the Williams Act, the average cash tender premiums increased from 32 percent before the Act to nearly 53 percent after its passage. See Jarrell & Bradley, supra note 36, at 373.
45. It may be argued that disclosure provisions coupled with greater time for deliberations allow target shareholders to make relatively better decisions. Senator Williams explained the purpose of this Act:

Every effort has been made to avoid tipping the balance of regulation in favor of management or in favor of the offeror. The purpose of the bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case. This legislation will close a significant gap in investor protection under the Federal Securities Laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer.
As enacted, the Williams Act requires takeover bidders to file a statement with the SEC. This statement contains information relating to disclosure, and includes the "background and identity" of the offeror, the source and amount of funds or other considerations to be used in making the purchases and the extent of the offeror's holdings in the target corporation's business or corporate structure. A bill is currently pending in Congress which will, if passed, require bidders to provide even broader and more effective disclosure.

As a result of the traditional state and corporate interest in regulating the internal affairs of corporations, state legislatures and corporate management seemed destined to develop devices which would avoid or minimize the impact of the "ground rules of fair play" enunciated in the Williams Act. Since the stakes are sufficiently high in this type of situation, interested parties are encouraged to gain any kind of advantage. However, if any state statute frustrates the fulfillment of the free market approach of the Federal Act, the Williams Act should preempt that state law.

2. Pre-MITE State Regulation of the Takeover Process

After passage of the Williams Act, state legislators, quick to recognize how disruptive takeovers could be to their constituencies, rallied to protect their local industries from corporate raiders by promulgating takeover legislation. These "first generation" statutes represented a new and fundamentally different trend in state law.


46. 15 U.S.C. § 78m(d)(1) (1982). The Williams Act requires that the acquirer's information statement be sent to the issuer and to each exchange on which the stock is traded. This statement must also include information regarding the extent of stock ownership which the acquirer or any associate has the right to acquire. If the acquirer's purpose is to gain control over the issuer, any plans the acquirer may have to liquidate the issuer, sell its assets, merge it, or make any other major change in its business or structure. See CTS Corp. v. Dynamics Corp. of Am. and Trends in Takeover Regulation, 30 THE CORP. J. 10 (Autumn 1987).


A dramatic increase in the number of tender offers in 1975 led to a wave of such state takeover regulation.50 Eighteen states passed takeover laws in 1976 and 1977. By 1980, thirty-seven states had adopted some form of takeover law.51 These "first generation" statutes, enacted quicker than any other innovations of this type in recent history, dramatically changed the nature of the corporation code.52

Although first generation statutes paralleled certain basic elements of the Williams Act, they tended to be much more stringent.53 For example, every state with takeover regulation provided for a longer minimum period than that required by the Act. Many statutes also required a disclosure statement to be filed prior to public announcement of the tender offer, rather than at the time of the announcement, as required by the Act. These provided incumbent management with an unreasonable advantage by allowing more time to implement defensive tactics.54

The SEC battled state anti-takeover devices by promulgating regulations which either modified or eliminated the state statutes.55 The courts, relying on preemption and the commerce clause, also responded to the state anti-takeover statutes by systematically striking down state tender offer laws. As statutes were modified to pass judicial scrutiny, the regulatory scheme of tender offers became increasingly complex and courts were faced with the difficult task of striking a balance between federal and state regulations.


51. Many of these state statutes have been repealed since the MITE decision. See Warren, Developments in State Takeover Regulation: MITE and Its Aftermath, 40 BUS. LAW 671, 671-72 n.3 (1985); Note, Tender Offer Regulation, supra note 16, at 724-25 n.38; Note, The Unsung Death of State Takeover Statutes: Edgar v. MITE Corp., 24 B.C.L. REV. 1017 n.6 (1983).

52. See Romano, supra note 48, at 234.

53. For a comparison between Ohio's first generation takeover statute and the Williams Act, see Note, supra note 45, at 887 n.16.

54. The advance filing and burdensome disclosure requirements added costs on the bidder which tended to delay or halt a tender offer. See generally, Easterbrook & Fischel, supra note 30, at 1161.

3. The Impact of Edgar v. MITE Corp.\textsuperscript{56}

The supremacy clause of the Constitution provides Congress with the power to preempt state law.\textsuperscript{57} Preemption occurs when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.\textsuperscript{58} An equally critical question in any preemption analysis is whether Congress intended the federal regulation to supersede state law.\textsuperscript{59} There is no explicit indication that Congress intended the Act to completely preempt state law. Thus, in judging the validity of state takeover statutes, courts were left to determine if state laws were preempted by the Williams Act.

It is well recognized that the "sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer."\textsuperscript{60} A major aspect of the Act is to protect investors by favoring neither management nor the takeover bidder.\textsuperscript{61} The application of this neutral role has proven difficult for the courts.

The judicial response to first generation statutes produced varied results. Some courts declared the statutes invalid because they favored incumbent management at the expense of the bidder and thus defeated the neutral position established in the Williams Act. These courts held that the state statutes were preempted by this Act. Other courts held that the takeover statutes impaired the interstate market of corporate shares and thus violated the commerce clause. Some courts found both constitutional objec-

\textsuperscript{56} 457 U.S. 624 (1982).

\textsuperscript{57} The supremacy clause of the United States Constitution provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONSt. art. VI, cl. 2.

\textsuperscript{58} Hines v. Davidowitz, 312 U.S. 52 (1941). Preemption occurs in other instances when: 1) Congress expresses a clear intent to preempt state law when enacting a federal statute, \textit{see}, e.g., Jones v. Rath Packing Co., 430 U.S. 519, \textit{cert. denied}, 431 U.S. 925 (1977); 2) there is outright or actual conflict between federal and state law, \textit{see}, e.g., Free v. Bland, 369 U.S. 663 (1962); 3) compliance with both federal and state law is, in effect, physically impossible, \textit{see}, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, \textit{cert. denied}, 374 U.S. 858 (1963); 4) there is implicit in federal law a barrier to state regulation, \textit{see}, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); and 5) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, \textit{see}, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, \textit{rev'd}, 331 U.S. 247 (1947).


\textsuperscript{60} \textit{Piper}, 430 U.S. at 35.

\textsuperscript{61} See \textit{MITE}, 457 U.S. at 633.
tions. Still other courts upheld similar statutes. There were even instances where certain laws were found valid by one court and invalid by another. This area of law remained in a confused state until 1982.

In 1982, the Supreme Court sent a strong message to state lawmakers by striking down an Illinois tender offer statute which favored the target corporation over the bidder. In *Edgar v. MITE Corp.*, a divided court struck down a typical first generation state takeover statute, holding that it was preempted by the Williams Act and unduly burdened interstate commerce in violation of the commerce clause. The result of *MITE* was the invalidation of thirty-seven state takeover laws. Justice White, writing for the majority, stated that even though states may not regulate commerce directly, they may indirectly use their powers so long as the "putative local benefits" of the regulation do not outweigh the burden on interstate commerce.

Further, the Court found the Illinois statute blocked a "nationwide tender offer." Thus, shareholders were deprived of the opportunity to sell their shares at a premium and the reallocation of economic resources

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The Court noted that although states may not regulate interstate commerce directly, they may use their powers in ways that have an indirect burden on interstate commerce unless the burden imposed on interstate commerce exceeds the "putative local benefits" of the regulation. *Id.* at 646.


68. For a discussion of the commerce clause and its role in the takeover process, see *supra* notes 33-35 and accompanying text.

69. See *MITE*, 457 U.S. at 624; *see also* *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (Oklahoma statute); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Virginia statute); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (Michigan statute); *National City Lanes v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri statute). *But see* *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982) (Massachusetts statute upheld under supremacy clause challenge but remanded for assessment of commerce clause claim).

70. See *MITE*, 457 U.S. at 643-44.
was hindered.\(^7\) The *Mite* decision initially sounded the “death knell” of state authority in this area. However, resourceful legislators would only be temporarily derailed.

4. Post-*MITE* State Takeover Laws

The *MITE* holding conceded that Congress did not explicitly prohibit states from regulating takeovers. However, it did hold that such state legislation could not conflict with the Williams Act.\(^7\)\(^2\) Without the fear of absolute pre-emption, many states attempted to avoid the fate of the Illinois statute by amending their statutes so as to withstand constitutional attack.\(^7\)\(^3\) Some states tried new approaches in seeking to control tender offers. These

\(71.\) Id. at 644.

\(72.\) Id. at 631. The Court stated: “Congress did not explicitly prohibit States from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute . . . .” Id. In his concurring opinion, Justice Powell stated that he joined the majority since “its Commerce Clause reasoning leaves some room for state regulation of tender offers.” Id. at 646 (Powell, J., concurring).

However, there is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code Sec. 13.1-528 (1978), became effective March 5, 1968. The Williams Act was enacted several months later on July 19, 1968. See Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 690 n.7 (1981).


\(73.\) The holding in *MITE* appeared to do little in discouraging states from enacting anti-takeover statutes. Within the four years of the decision, new takeover laws were adopted in twenty-one states. Not surprisingly, a state’s adoption of a second generation statute is strongly correlated with its having had a first generation statute. See Romano, *supra* note 27, at 111. See generally Bainbridge, *State Takeover and Tender Offer Regulations Post-MITE: The Maryland, Ohio, and Pennsylvania Attempts*, 90 DICK. L. REV. 731 (1986); Garrity, *Addendum: Post-Mite State Takeover Statutes: Constitutional Issues and Recent Cases*, 42 BUS. LAW. 586 (1987); Pozen, *supra* note 72, at 89; Note, CTS Corp. v. Dynamics Corp. of America: *The Door Has Surprisingly Been Opened For Valid State Takeover Legislation*, 19 UNIV. OF TOLEDO L. REV. 683, 693 (1988).

Ohio was the first state to pass anti-takeover legislation designed to avoid the problems found in *MITE*. Ohio’s Control Share Acquisition Act is conceptually and essentially the same as the Indiana Control Share Acquisition Act found constitutional in *CTS Corp.*. Ohio’s Act, not surprisingly, was challenged on the same basis as was the Indiana Act that same summer. However, the Ohio Act was struck down on the same grounds the Seventh Circuit used to strike down the Indiana Act. For a discussion of the Court’s holding in *CTS Corp.*, see *infra* notes 83-95 and accompanying text.
post-\textit{MITE} statutes are generally referred to as "second generation" takeover statutes.\textsuperscript{74}

Second generation takeover statutes have attempted to circumvent the commerce clause problems identified in the \textit{MITE} decision by being less burdensome on interstate commerce. These statutes are generally applicable only to corporations which are domestically incorporated or have a substantial number of assets or shareholders in the state.\textsuperscript{75}

Unlike the pre-\textit{MITE} statutes, these statutes focus on the traditional state concerns relating to the relationship between the target of the takeover and the state. The internal affairs of the corporation and rights of shareholders became more important than the tender process itself.\textsuperscript{76} Using the internal affairs doctrine,\textsuperscript{77} legislators sought to protect their citizens against adverse impact on state economics and regulate the internal affairs of their

\textsuperscript{74} First generation statutes generally give state officials broad power in requiring additional disclosure beyond that required by the Williams Act. Second generation statutes can be distinguished in that they usually attempt to provide that all shareholders receive equivalent payments, or require that a shareholder vote upon acquisition of a certain percentage of shares to authorize either the purchase of their shares or other acquisitions. See Pinto, \textit{supra} note 71, at 473; Sargent, \textit{supra} note 72, at 3; see also Warren, \textit{supra} note 72, at 671.

\textsuperscript{75} For example, the second generation takeover statute enacted by Indiana is limited to corporations incorporated in Indiana and having at least ten percent of the shareholders and its principal place of business, principal office, or substantial assets within the state of Indiana. See \textsc{Ind. Code Ann.} § 23-1-42-4(a) (Burns Supp. 1987); \textsc{Md. Corps. & Ass'ns Code Ann.} §§ 1-102(a), 3-601 to -603 (1985 & Supp. 1988) (statute applies to every Maryland corporation); \textsc{N.Y. Bus. Corp. Law} § 912(a)(13) (McKinney 1987) (statute limited to corporations organized under New York law and having significant business operations, their principal executive offices and at least ten percent of voting stock beneficially owned by New York residents).

\textsuperscript{76} The internal affairs doctrine is a conflict of laws principle that generally applies the law of the state of incorporation to matters that involve the relationship among shareholders, managers, and directors of a corporation. Section 302(2) of the Restatement (Second) of Conflict of Laws states the following:

\begin{quote}
The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.
\end{quote}


The only areas where federal law actively regulates the internal affairs of corporations are the proxy statement requirements, which are designed to facilitate intelligent voting decisions. See, \textit{e.g.}, 17 C.F.R. § 140.41a-3 (1985).

corporations. At least thirty-two states have enacted some variation of the second generation statute in an effort to protect domestic corporations.

III. THE CONSTITUTIONALITY OF SECOND GENERATION TAKEOVER STATUTES

Second generation takeover statutes differ with respect to their design and effect. Most second generation statutes are fashioned to shield management from undesired takeovers and are generally categorized into two types. The first type seeks to enlarge shareholder voting rights regarding matters which affect the corporation (shareholder enhancers). The second type strengthens the position of incumbent management (management enhancers). The Supreme Court recently upheld the constitutionality of a shareholder enhancer statute, but has not addressed the constitutionality of a management enhancer statute.

A. Shareholder Enhancer Statutes

1. Characteristics of Shareholder Enhancer Statutes

Shareholder enhancer statutes assist shareholders in the takeover process. An example is the control share acquisition statute ("CSA"). CSA statutes condition voting rights of "control shares" upon majority approval of the target company's disinterested shareholders. Control shares are those which bring the offeror's voting power in an issuing corporation to or above certain threshold levels. Most CSA statutes define control shares as those which give an offeror at least twenty percent of the target company's voting stock. Shareholders then have the benefit of deciding whether or not the control shares will have their rights restored.

In addition to enhancing the shareholder's position, CSA statutes also benefit management by providing a longer waiting period which may defeat a tender offer. Currently, sixteen states have enacted some form of the CSA statute. The United States Supreme Court recently addressed the consti-

tutionality of Indiana's CSA statute in *CTS Corp. v. Dynamics Corp. of America*.\(^8\)

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

The *CTS Corp.* decision marked a turnabout from the ruling in *MITE* and put bidders on the defensive.\(^8\)\(^3\) In a six to three decision, the Court upheld an Indiana statute which benefited stockholders.\(^8\)\(^4\) Despite the benefits accruing to stockholders, some commentators have criticized the Court's holding in *CTS Corp.*\(^8\)\(^5\)

In its decision, the Court determined that the Indiana Act was constitutionally sound under the commerce clause analysis for several reasons. First, the Court found that nothing in the Indiana Act imposed a greater burden on out-of-state offerors than on a similarly situated Indiana offeror.\(^8\)\(^6\) Second, the Court determined that the statute did not create an impermissible risk of inconsistent regulation by different states.\(^8\)\(^7\) The defendant's argument that the statute was unconstitutional because it would limit the number of successful tender offers was flatly rejected by the Court.\(^8\)\(^8\) Rather, the Court found that the statute provided only regulatory

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\(^8\)\(^3\) Id.

\(^8\)\(^4\) IND. CODE ANN. § 23-1-42-1 through 23-1-42-11 (Michie Supp. 1986). The Indiana law provides that an acquirer of 20 percent, 33 1/3 percent, or 50 percent of an Indiana company's shares must win approval of a majority of the outstanding shares and a majority of the disinterested outstanding shares before it can exercise the voting rights of the control stake. Thus, the mere acquisition of "control shares" does not ensure voting control.

If the acquirer requests a meeting to vote on the control share acquisition, the acquirer must bear the expense of the meeting. The meeting must be held within 50 days if the acquirer files an acquiring person statement, requests the meeting and agrees to pay the expenses. If voting rights are not approved by the shareholders, the company may redeem the acquirer's shares at market value. If the acquirer does not file an acquiring person statement, the company may redeem the shares 60 days after the control share acquisition.

The law applies only to businesses that: (1) are incorporated in Indiana with more than 100 shareholders; (2) have either their principal place of business, their principal offices or substantial assets in Indiana; and (3) have either more than ten percent of their total shareholders in Indiana, more than ten percent of their shares held by Indiana residents or 10,000 shareholders residing in Indiana. See Pamepinto & Heard, *New State Regulation of Corporate Takeovers*, Nat'l L.J., Sept. 21, 1987, at 26, col. 4.

\(^8\)\(^5\) See generally Langevoort, *supra* note 19, at 96.

\(^8\)\(^6\) *CTS Corp.*, 481 U.S. at 88.

\(^8\)\(^7\) Id. at 89.

\(^8\)\(^8\) Id. at 95.
procedures which were designed for the protection of the corporation’s shareholders. The statute did not prohibit any entity, either resident or nonresident, from offering to purchase, purchasing shares in Indiana corporations, or from attempting to thereby gain control.99

Justice Powell, writing for the majority,90 stated that the Court was not bound by the reasoning in MITE.91 On this basis, the CTS Corp. Court held that the Indiana law did not create a conflict with either the commerce clause or the Williams Act.92 The Court construed the Act to provide only limited protections to target shareholders as it no longer appeared to be willing to use the Act as a comprehensive statement on tender offers.93

At least with respect to shareholder enhancer statutes, the CTS Corp. holding appears to mark the Court’s abandonment of the protected status of takeovers under federal law. This decision is viewed as a sweeping affirmation of states’ rights in this area. Today, there exists a relatively hospitable legal environment which allows unfettered state anti-takeover legislation. Thirteen states have either adopted or proposed anti-takeover statutes modeled after the Indiana law and assuredly the number will increase in the future.94 States are once again becoming active in the regulatory process affecting takeover bids.95

B. Management Enhancer Statutes

Some state statutes have been enacted which significantly enhance management’s position in the takeover process. These statutes are referred to as

89. Id.
90. Id. Justice Powell’s majority opinion was joined by Chief Justice Rehnquist, Justices Brennan, Marshall, and O’Connor. Id.
91. Id. Justice Powell stated:
   As the plurality opinion in MITE did not represent the views of a majority of the Court, we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by Justice White in MITE.
   Id. at 80. (footnote omitted).
92. Id. at 82-86.
93. Id. The majority opinion held that the Indiana law conflicted with neither the language nor the purpose of the Williams Act. The Court stated that “[i]t is entirely possible for entities to comply with both the Williams Act and the Indiana Act.” Id. at 79. Thus, the state statute “can be preempted only if it frustrates the purposes of the federal law.” Id.
“business combination statutes.” 96 This statutory model originated in New York and is significantly different from other schemes because it does not restrict the bidder’s ability to acquire and use shares. 97 Under this statutory model, if a shareholder acquires a certain percentage of stock in a corporation, that shareholder must receive director approval before it seeks a business combination or purchases additional shares. 98 Although “business combinations” referred to in these statutes are generally defined broadly, business combinations often involve transactions in which certain shareholders attempt to completely control the corporation or attempt to use corporate assets to finance its acquisition through leverage.

The disturbing aspect of business combination statutes is that corporate boards have the right to unilaterally block hostile takeovers. Critics point out that business combination statutes act as a vehicle which allows management to entrench itself in their corporate positions, thus becoming virtually immune from the threat of takeover. 99 This is particularly troublesome in light of the traditional roles of management and shareholders in the corporate scheme. Such a position deprives investors of beneficial restructurings or changes in control and encourages management self-dealing.

Supporters of management enhancer statutes claim that the statutes should be shielded from constitutional scrutiny because they deal with the “internal affairs” of the corporation. 100 These supporters further assert that such statutes ensure management’s right to remain in their positions to run the corporation in the most efficient fashion. They therefore provide shareholders with the benefit of the full economic potential from their investment. These business combination statutes have yet to be tested in the United States Supreme Court.

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98. Under New York law, a bidder is required to obtain board approval when owning 20% of the voting stock. See N.Y. Bus. Corp. Law § 912(a)(10).


100. See supra note 77 and accompanying text.
IV. WISCONSIN'S "BUSINESS COMBINATION" ANTI-TAKEOVER STATUTE

The legislative intent behind Wisconsin's anti-takeover statute was to promote the welfare of ongoing business operations, shareholders, employees, customers, suppliers and local communities.101 The statute is modeled after the New York takeover statute102 which has been followed by several other states.103 Although the Heileman takeover was the focal point in passing this legislation, the law applies to all "resident domestic corporations" of Wisconsin.104

The anti-takeover statute has the effect of deterring virtually all tender offers for Wisconsin companies. In cases of attempted merger between an offeror and a Wisconsin corporation, the merger is prohibited for a period of three years with a single exception. That exception requires the board of directors of the target company to approve the transaction in advance of the acquisition of ten percent of the company's shares. Assuming no entrenchment bias, the anti-takeover statute assigns incumbent management the ability to be an insurmountable obstacle.

A. Provisions of Wisconsin's Takeover Statute — Wisconsin Statute § 180.726

Wisconsin's anti-takeover statute creates an absolute bar against certain "business combinations" involving "resident domestic corporations" for a period of three years from the interested stockholder's stock acquisition date.105 The business combination is only possible if the incumbent board of directors approves the transaction prior to the date on which the interested stockholder acquires ten percent or more of the corporation's stock. The shareholders are not provided the opportunity to decide if a tender offer may proceed when the tender offer contemplates a subsequent business combination with the offeror. Thus, this "standstill provision" operates to disenfranchise shareholders who are presented with opportunities through a tender offer which have not been approved by the incumbent directors. Management is left with the unilateral authority to reject or accept the offer irrespective of shareholder's wishes.

102. See supra note 98 and accompanying text.
105. Id. at § 180.726(2).
The statute broadly defines a "resident domestic corporation" as a dom-
estic corporation which satisfies any of the following:
a) Its principal executive offices are located in this state; b) It has
significant business operations located in this state; c) More than ten
percent of the holders of record of its shares are residents of this
state; d) More than 10% of its shares are held of record by residents
of this state.\(^\text{106}\)

The definition of "business combination" is equally broad in the Wis-
consin statute. An interested stockholder is defined in the Act as a person
who owns or controls ten percent or more of the voting power of a resident
domestic corporation.\(^\text{107}\) The Act generally defines six situations which af-
flect the corporation and involve interested shareholders.

First, the law covers merger or consolidation of a resident domestic cor-
poration or a subsidiary, with an interested stockholder or an associate of
the interested stockholder.\(^\text{108}\) Second, it applies in situations where the dis-
position of assets represents five percent or more of the earning power or
income of a resident domestic corporation, or a subsidiary, to an interested
shareholder or an affiliate or associate of the interested stockholder.\(^\text{109}\)

Third, the law applies to the issuance or transfer of stock by a resident
domestic corporation under certain circumstances.\(^\text{110}\) Fourth, the law ap-
plies to plans which liquidate or dissolve the resident domestic corporation
involving an interested stockholder or an affiliate or associate.\(^\text{111}\) Fifth, it
applies to certain transactions which increase ownership of the outstanding
stock by the interested stockholder.\(^\text{112}\) Finally, the law applies where the
interested stockholder or its affiliate or associate benefits from certain types
of financial assistance or tax benefits provided by or through the resident
corporation.\(^\text{113}\)

After expiration of the three-year statutory period, the interested share-
holder may engage in a business combination with the corporation only if
certain conditions are met.\(^\text{114}\) First, the board of directors of the resident
domestic corporation must give prior approval. Second, the majority of the
holders of the domestic corporation’s voting stock, excluding stock benefici-
ally owned by the interested stockholder, must approve the business com-

\(^{106}\) Id. at § 180.726(1)(1)(a-d).
\(^{107}\) Id. at § 180.726(1)(j).
\(^{108}\) Id. at § 180.726(1)(e)(1)(a)-(b).
\(^{110}\) Id. at § 180.726(1)(e)(2)(a)-(c).
\(^{111}\) Id. at § 180.726(1)(e)(3)(a)-(b).
\(^{112}\) Id. at § 180.726(1)(e)(4).
\(^{113}\) Id. at § 180.726(1)(e)(5)(a)-(d).
\(^{114}\) Id. at § 180.726(1)(e)(6).
bination. Third, the corporation’s stockholders, other than the interested
stockholder, are entitled to receive a minimum price per share. However,
the consideration paid to stockholders must be in cash or in the same form
that the interested stockholder used to acquire its shares.115

Unless the articles of incorporation provide otherwise, the Wisconsin
takeover statute does not apply to a business combination in a number of
circumstances.116 For example, the statute does not apply if the corpora-
tion does not have voting stock registered or traded on a national exchange
or registered under federal securities laws.117 Additionally, it also does not
apply if the interested stockholder acquired ten percent of the voting stock
in the resident domestic corporation before September 10, 1987, and had
not subsequently increased its shares of voting power in any amount not
approved by the board of directors before the additional voting power was
acquired.118

The law provides that, without the approval of a majority of stockhold-
ers, no premiums can be paid to anyone holding over three percent of the
stock over the past two years if the corporation is attempting to acquire five
percent or more of the stock during the takeover offer.119 In addition, ma-
ajority approval is needed before the board may transfer or sell ten percent
or more of the company’s assets. However, that figure may be exceeded if
the corporation has at least three independent directors and the majority of
those directors vote to exceed that limit.120

Wisconsin’s anti-takeover statute has the intended and actual effect of
preventing the successful consummation of business transactions including,
but not limited to, tender offers. The term “business combination” is so
broadly defined that it precludes more than just mergers or consolidations
with an interested stockholder. The statute precludes liquidation, recapital-
ization, sale, lease, exchange, mortgage or pledge of ten percent or more of
the resident domestic corporation’s assets to or with the interested stock-
holder. Further, the statute precludes the receipt of any financial assistance
or benefit, tax credit or tax advantage, except in proportion to any benefit or
advantage received by other shareholders.121

The Wisconsin anti-takeover statute effectively precludes the necessary
business transactions critical to the success of tender offers for control of a

115. Id. at § 180.726(3)(c)2.
116. Id. at § 180.726(5).
117. Id. at § 180.726(5)(a).
118. Id. at § 180.726(5)(d).
119. Id. at § 180.725(5)(a).
120. Id. at § 180.725(5)(b)2.
121. Id. at § 180.726(1)(e).
Wisconsin corporation. In its present form, all tender offers which are not approved by incumbent management of resident domestic corporations will be defeated. The practical impact of this law is that shareholders will be deprived of the opportunity to tender their shares in a hostile takeover attempt. This is true no matter how high the premium offered. In its present form, the statute does not have a provision allowing shareholders to "opt out" of or avoid the prohibitions imposed by the statute. Instead, the statute vests in the incumbent directors, who are themselves ongoing contenders in a contest for corporate control, the power to determine whether shareholders should be given the opportunity to consider the merits of a tender offer.

Wisconsin's statute abrogates to management the fundamental right of shareholders to determine for themselves whether to sell their shares pursuant to a tender offer. It should come as little surprise to the drafters of this legislation that the statute, if challenged, will be held unconstitutional in its present form.\textsuperscript{122}

\textbf{B. The Constitutionality of Wisconsin's Takeover Statute}

The Wisconsin takeover statute, as written, is unconstitutional because it is preempted by the Williams Act and interferes with interstate commerce. Unless the Wisconsin statute is modified, it is not likely to receive the favorable treatment enjoyed by the Indiana statute in \textit{CTS Corp.}. The statute will fail because it removes from the shareholders the ability to make their own investment decisions in direct violation of the intent of the Williams Act.

1. Wisconsin's Takeover Statute Preempted by the Williams Act

The supremacy clause of the United States Constitution provides Congress with the power to pre-empt state law.\textsuperscript{123} Even in the absence of express Congressional intent to pre-empt state law,\textsuperscript{124} a state statute will be preempted where it conflicts with federal law. A conflict between federal and state law can be found where the state law "stands as an obstacle to the

\textsuperscript{122} In RTE Corp. v. Mark IV Indus., Inc., a federal district court reviewed Wisconsin's anti-takeover statute and held that the legislation frustrated the shareholder welfare purpose of the Williams Act and was pre-empted. Unpublished Memorandum Decision and Order, No. 88-C-378 (E.D. Wis. May 6, 1988). However, the district court later vacated its decision after the case was settled. \textit{See} \textit{Fed. Sec. L. Rep. (CCH)} \textsuperscript{123} 93,789 (E.D. Wis. June 22, 1988).

\textsuperscript{123} \textit{See supra} notes 57-59 and accompanying text.

\textsuperscript{124} For an example of Congress' intent to pre-empt state law, see \textit{Rice v. Santa Fe Elevator Corp.}, 331 U.S. 218, 236 (1947). Examples of statutes that include an express pre-emption provision are cited in \textit{Cipollone v. Liggett Group, Inc.}, 789 F.2d 181, 185-86 n.5 (3rd Cir. 1986).
accomplishment and execution of the full purposes and objectives of Congress.”¹²⁵ In such cases, state regulation in a particular area is not wholly superseded, but only “to the extent that it actually conflicts with federal law.”¹²⁶

There is no question that when Congress constructed the comprehensive federal legislation regulating tender offers, it intended to protect investors.¹²⁷ Clearly, a major goal of the Williams Act is protection of investors through neutral treatment of management and the takeover bidder.¹²⁸ The Williams Act intended to leave the determination of the success or failure of the transactions the Act regulates to the informed and free investment judgment of the shareholders of the corporation. Since a state law will be preempted by the Williams Act if it frustrates the purpose of Congress, the critical issue is whether an actual conflict exists between federal and state law.

Wisconsin’s business combination statute is exceedingly pro-management. This is true despite the fact that it imposes severe restrictions on post-tender offer transactions which have not been approved by incumbent management. In most takeover bids, post-tender offer transactions are crucial to a successful takeover by tender offer, thus the statute delivers to incumbent management the power to block various business combinations for three years without shareholder consideration. The Wisconsin legislation vests all power in management and leaves nothing for shareholders. This clearly upsets the neutral balance between target management and the tender offeror and should be the basis for pre-emption.

Also, the three year “freezeout” period given to management is clearly unreasonable. Unlike the Indiana Act in CTS Corp.,¹²⁹ shareholders cannot relieve the bidder of the disabilities of the statute to facilitate an attractive offer. Wisconsin’s freezeout period is similar in effect to a provision found unconstitutional in MITE.¹³⁰ This aspect of the Wisconsin legislation alone may also merit pre-emption.


¹²⁷. See supra note 45 and accompanying text.

¹²⁸. MITE, 457 U.S. at 633; see also supra note 43 and accompanying text.

¹²⁹. See supra notes 84-86 and accompanying text.

¹³⁰. MITE, 457 U.S. at 637. In MITE, the plurality criticized a feature of the Illinois statute which provided for a hearing on the tender offer but set no deadlines. The Court recognized that
The Wisconsin statute inexcusably fails to incorporate provisions which would require target management to justify the basis of their opposition to a given bidder. Thus, investors are not only "gagged" in the corporation's discussion of the propriety of takeover but may be blindfolded as well. This not only disrupts the informational balance between interested parties, but it further frustrates the design of the Williams Act. This is particularly alarming, if one accepts the contention that takeovers occur primarily to weed out management with sub-optimal performance.

Wisconsin's statute, when combined with the business judgment rule and its presumption of good faith, elevates management's position beyond the reach of any interested party. As a result of management's preferential position, any post hoc rationale for fixed and self-serving decisions voluntarily offered by incumbent management for resisting takeover will be protected.

Advocates of Wisconsin's anti-takeover statute may assert that Wisconsin was legislating within an area of traditional state interest: the regulation of the "internal affairs" of domestic corporations. However, the Supreme Court of the United States has held that the internal affairs doctrine "appears to be based more on the need for a uniform and certain standard to govern the internal affairs of a corporation than on the perceived interest of..." 131

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131. The business judgment rule generally defines the fiduciary responsibilities of managers and the circumstances under which they can take certain actions. The rule comes into play because the judiciary has recognized that it is ill-equipped to assess the quality of management judgments. Thus, courts are reluctant to review the acts of directors in situations where the directors apply their expertise and the court is lacking in such expertise. Accordingly, the courts will presume good faith on the part of management. See generally HENN & ALEXANDER, LAWS OF CORPORATIONS (3d ed. 1983). Cf. Gearhart Indus., Inc. v. Smith Int'l., Inc., 741 F.2d 707 (5th Cir. 1984) (applying Texas law); Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2nd Cir. 1980) (applying New York law); Berman v. Gerber Products, 454 F. Supp. 1310 (W.D. Mich. 1978) (applying Michigan law); see also Steinberg, Tender Offer Regulation: The Need For Reform, 23 WAKE FOREST L. REV. 1, 14 (1988).

Nevertheless, some courts are skeptical of the rule's presumption of good faith regarding tender offers. Once a plaintiff demonstrates that a director had an interest in the transaction at issue, the burden of proof shifts to the director to prove that the transaction was fair and reasonable to the corporation. See Treadway Companies, Inc., v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980) (applying New Jersey law). It has been said that "regardless of their technical 'independence,' directors of a target corporation are in a very special position, where the slavish application of the majority's version of the good faith presumption is particularly disturbing." Panter v. Marshall Field & Co., 646 F.2d 271, 301 (7th Cir. 1981) (Cudahy, C.J., concurring in part and dissenting in part), cert. denied, 454 U.S. 1092 (1981).
Thus, the internal affairs doctrine provides no basis to place state takeover laws beyond the parameters of the Williams Act. The fact that this statute has been lodged within Wisconsin's Corporation Law will not make this statute lawful.

Although the Court in CTS Corp. did note that if the Williams Act "were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer," a wide variety of traditional state corporate laws would be pre-empted.133 In CTS Corp., the Court adopted neither the broad notion of federal pre-emption, nor the converse proposition that all state corporate laws necessarily survive constitutional scrutiny.134

The contrast between the Wisconsin takeover statute and the Williams Act is apparent. The powerful tool furnished to target management is precisely what Congress intended to avoid, and for this reason, the Wisconsin takeover statute clearly frustrates the objectives of the Williams Act. Accordingly, compliance with both the Williams Act and the Wisconsin statute is impossible. Thus, the Wisconsin statute is not likely to pass constitutional muster.

2. Wisconsin's Takeover Statute Violates the Commerce Clause

Although the United States Constitution clearly gives Congress authority to regulate commerce,135 it does not explicitly restrict the states from doing so when Congress has not chosen to regulate in a certain area. This leaves the determination of the states' roles in regulating interstate commerce to the Supreme Court.136

Traditionally, the Supreme Court has applied a two-tiered approach in analyzing state economic regulation under the commerce clause. The Court has held that "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests" the statute will be struck down without further inquiry.137 However, when a statute only has indirect effects on interstate commerce and regulates even-handedly, an analysis is utilized which attempts to balance the local benefits of the statute against

133. CTS Corp., 481 U.S. at 85 (emphasis added).
135. See supra note 87 and accompanying text.
any incidental burdens the statute might impose on interstate commerce.\textsuperscript{138} The Supreme Court applied this balancing test in \textit{MITE},\textsuperscript{139} determining that the state’s asserted interests were “insufficient to outweigh the burdens Illinois imposes on interstate commerce.”\textsuperscript{140}

However, the Supreme Court may have shifted its approach in order to evaluate state takeover statutes which pass constitutional muster.\textsuperscript{141} For example, in \textit{CTS Corp. v. Dynamics}, the Court was presented with a statute which conditioned acquisition of control in the corporation on approval of a majority of the pre-existing disinterested shareholders (shareholder enhancer). The analysis the Court developed may have to be addressed in addition to the traditional commerce clause analysis.

\textit{a. The Traditional Pike Test}

In 1970, a unanimous Supreme Court developed a balancing test to be used to resolve issues of the commerce clause. Derived from \textit{Pike v. Bruce Church, Inc.},\textsuperscript{142} this test provided:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. \ldots If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.\textsuperscript{143}

Under this traditional test, the burden imposed on interstate commerce by a state statute must not be excessive in relation to the local interests served by the statute.\textsuperscript{144} Thus, an examination of the interests to be served by the enactment of Wisconsin’s takeover statute and the burdens it imposes is necessary.

\begin{itemize}
\item \textsuperscript{138} Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
\item \textsuperscript{139} Edgar v. MITE, 457 U.S. 624 (1982).
\item \textsuperscript{140} Id. at 644.
\item \textsuperscript{141} See \textit{CTS Corp.}, 481 U.S. at 69.
\item \textsuperscript{142} 397 U.S. 137 (1970).
\item \textsuperscript{143} Id. at 142 (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960)).
\item \textsuperscript{144} Commentators recognize that the “local interests served” by anti-takeover statutes are not the motivating force behind the statute’s enactment. \textit{See Coffee, The Uncertain Case For Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups}, 1988 Wis. L. Rev. 435; Johnson & Millon, \textit{Does the Williams Act Preempt State Common Law in Hostile Takeovers?}, 16 SEC. REG. L.J. 339 (1989).
\end{itemize}
i. Local Interests Served

Various groups’ interests would be served by maintaining the status of corporations through anti-takeover statutes such as the one enacted in Wisconsin. Such interested groups include target corporations and their management, suppliers, corporate lawyers representing target corporations and organized labor and party groups. The interests preventing a takeover have a particularly dominating influence where the ramifications of a takeover would have some detrimental economic effect on a community.

This is especially true in communities where a well-known employer is threatened by a takeover bid or where unemployment or slower economic growth exists. The possibility of plant closings, bust-ups, lay-offs, or movement of jobs to distant states tends to broaden the base of opposition to takeovers and promote the development of state legislative strategy. However, a unanimous Supreme Court has held that mere protection of local economic interests is generally an impermissible purpose under the commerce clause. The courts generally will strike down a statute that regulates interstate commerce directly, discriminates against interstate commerce, or favors state economic interests over out-of-state interests.

If Wisconsin’s true purpose is the protection of investors from being coerced into accepting tender offers that are abusive, there is little doubt that legislation could be passed which would achieve that purpose without utterly thwarting all nationwide tender offers for Wisconsin companies. Legislation should provide for a collective decision-making process through

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145. Both houses of the legislature, the local unions representing Heileman, the state AFL-CIO and the mayor of LaCrosse all pushed for Wisconsin's anti-takeover legislation. See Davis, Epilogue: The Role of the Hostile Takeover and the Role of the States, 1988 Wis. L. Rev. 491, 496-97. See generally Romano, supra note 27, at 13.

146. "Bust-up" generally refers to a takeover where the bidder seeks to finance the acquisition by selling off pieces of the target company. The Court has examined this phenomenon in its discussion of the Williams Act. See Piper v. Chris-Craft Indus., 430 U.S. 1, 29 (1977).

147. See Langevoort, supra note 19, at 2.

148. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980). In Lewis, the Court succinctly articulated:

In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition. Id. at 43-44; accord Pike, 397 U.S. at 142; H.P. Hood & Sons, 336 U.S. at 532-39; see also, Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1282-86 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). See generally Note, Securities Regulation — Pre-emption, 13 GA. L. REV. 265 (1978); Note, Idaho Takeover Laws Held Unconstitutional, 14 IDAHO L. REV. 521 (1978).

the shareholder vote. Thus, shareholders could protect themselves without the imposition of excessive, unnecessary and unconstitutional burdens on interstate commerce manifest in Wisconsin’s anti-takeover law.

ii. The Burdens Imposed on Interstate Commerce

The most obvious burden the Wisconsin Act imposes on interstate commerce arises from the statute’s nationwide effect on investors. The purpose and effect of Wisconsin’s anti-takeover statute is to deter the successful consummation of most nationwide tender offers for publicly held Wisconsin companies. Because of the anti-takeover statute, investors in Wisconsin and other states who own stock are deprived of the opportunity to benefit from stock premiums, improved efficiency of management, and the reallocation of economic resources to their highest valued use.

The anti-takeover statute’s three year freeze-out period is directly harmful to investors.\footnote{150} This lengthy waiting period will hurt stockholders by decreasing the overall number of takeover bids made for Wisconsin companies.\footnote{151} This would have a direct impact on the shareholders’ opportunities to sell their shares. The result would be a direct restraint on interstate commerce through the regulation of stock transactions in interstate commerce.\footnote{152}

Other factors which must be considered are alternate protections to shareholders. The Supreme Court has held that “the extent of the burden that will be tolerated will of course depend [upon] . . . whether it could be promoted as well with a lesser impact on interstate activities.”\footnote{153} State takeover statutes of the business combination variety such as the one passed in Wisconsin should be found unconstitutional because they are not necessary. In fact, most anti-takeover statutes codify the same “self help” defensive tactics that firms can adopt in their corporate charter by majority

\footnote{150}{See supra notes 109-12 and accompanying text.}
\footnote{151}{But see CTS Corp., 481 U.S. at 93-94. In his discussion of the merits of the Indiana statute, Justice Powell concluded that the statute would be valid under the commerce clause whether or not it had the effect of decreasing the number of tender offers for Indiana Corporations. Id.}
\footnote{152}{Id. This author finds Justice White’s dissent in CTS Corp. more persuasive. Justice White concluded that Indiana’s anti-takeover statute violated the commerce clause because it imposed a direct restraint on interstate commerce by regulating the purchase and sale of stock in interstate commerce. Id. at 97-101 (White, J., dissenting).}
\footnote{153}{See Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (“the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”); Pike, 397 U.S. at 142.
shareholder vote. Shareholder adoption of such measures is also more in
conformity with traditional notions of corporate governance.\textsuperscript{154}

In conclusion, the burdens of the Wisconsin takeover statute under the
traditional \textit{Pike} analysis outweigh the state’s interest in protecting inter-
ested parties within the state of Wisconsin. Therefore, if challenged under
this commerce clause test, the statute is not likely to pass constitutional
muster.

\textbf{b. The CTS Corp. Test}

The Supreme Court, in \textit{CTS Corp.}, first noted that the “principal objects
of dormant commerce clause scrutiny are statutes that discriminate against
interstate commerce.”\textsuperscript{155} Thus, regulation must be dispensed even-
handedly and cannot discriminate against interstate commerce. Second, the
Court observed that state regulations have been invalidated which “ad-
versely may affect interstate commerce by subjecting activities to inconsis-
tent regulations.”\textsuperscript{156}

Wisconsin’s anti-takeover statute passes the first prong of the \textit{CTS Corp.}
test\textsuperscript{157} as it applies equally to both intrastate and interstate offerors.\textsuperscript{158} The

\textsuperscript{154} Management has at its disposal a great arsenal to fight off tender offers. Tactics used by
management to thwart hostile takeover include: 1) the “reverse bear-hug,” where the target re-
sponds to the offer by expressing a willingness to negotiate but only at a prohibitively high price;
2) the “sandbag,” where the target delays the offer by engaging in bad-faith negotiations; 3) the
“show-stopper,” a lawsuit seeking an injunction barring the offer, usually on the ground that the
merger violates antitrust laws; 4) the “white knight,” where a bidder comes to the “rescue” of the
target; 5) the “scorched earth,” a defense that seeks to convince the acquirer that the target will
not be worth acquiring if the offer continues, typically because the target firm will sell its “crown
jewels.” See Baysinger & Butler, \textit{supra} note 26, at 1257; Carney, \textit{Controlling Management Oppor-
tunism in the Market for Corporate Control: An Agency Cost Model}, 1988 Wis. L. REV. 385; see
also Herzl, Schmidt, & Davis, \textit{Why Corporate Directors Have a Right to Resist Tender Offers}, 3

For a discussion of case law surrounding various anti-takeover tactics utilized by management,
see generally \textit{Gearhart Indus.}, 741 F.2d at 707 (sale of discounted subordinate debentures contain-
ing springing warrants); Treco, Inc. v. Land of Lincoln Sav. and Loan, 749 F.2d 374 (7th Cir.
1984) (amendment to by-laws); Panter v. Marshall Field, 646 F.2d 271 (7th Cir. 1981) (acquisi-
tions to create antitrust problems); Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980), \textit{cert. de-
nied}, 450 U.S. 999 (1981) (refusal to tender); Treadway v. Care Corp., 638 F.2d 357 (2d Cir. 1980)
(sale to white knight); Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980) (sale of
stock to favored party).

Managerial defensive tactics, which use valuable corporate assets, may be inefficient as they
tend to increase the costs of successful tender offers. See Easterbrook & Fischel, \textit{supra} note 30, at
1161.

\textsuperscript{155} \textit{CTS Corp.}, 481 U.S. at 87.

\textsuperscript{156} \textit{Id.} at 88.

\textsuperscript{157} See \textit{supra} notes 101-22 and accompanying text.

\textsuperscript{158} \textit{Id.}
statute imposes no greater burden on out-of-state offerors than it does on similarly-situated offerors in Wisconsin. This does not result in discrimination to foreign bidders. Therefore, further analysis dedicated to this portion of the test is unnecessary. However, because Wisconsin's anti-takeover statute will adversely affect interstate commerce by subjecting activities to inconsistent regulation, the statute violates the second prong of the CTS Corp. test.

Wisconsin's business combination takeover statute defines "resident domestic corporations" in such a manner so as to include corporations which were not incorporated in Wisconsin. Wisconsin's anti-takeover statute would apply to a Wisconsin corporation with "significant business operations" in the state even though there may be no Wisconsin resident shareholders. However, Wisconsin's desire to protect local constituencies at the expense of the interstate market in securities is impermissible.

The anti-takeover statute imposes restrictions upon certain post-acquisition transactions and asset transfers. These broad restrictions appear to apply even to the consolidation of out-of-state operations which is per se illegal.

Unlike the Indiana statute upheld in CTS Corp., Wisconsin's anti-takeover statute could operate to bar transactions with companies whose connection to Wisconsin is limited to the involvement of operating units within Wisconsin borders. This may subject corporations with interests in Wisconsin to both the regulations of Wisconsin and their state of incorporation which also could have a legitimate interest in regulating takeover bids. Thus, the Wisconsin statute poses a significant risk of inconsistent regulation by different states upon particular takeover activities.

The threat of inconsistent regulation was applied to the Indiana statute in the Court's discussion in CTS Corp. The Court in CTS Corp. addressed this commerce clause issue when it stated: "[The takeover statute poses no problem so long as] each State regulates voting rights only in the corporations it has created . . .." Therefore, the extraterritorial effect on

159. But see IND. CODE ANN. § 23-1-20-5 (state takeover statute only applies to corporations incorporated in Indiana).
160. See supra notes 101-22 and accompanying text.
161. It has been held that "[s]tatutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere impose a burden on commerce that is per se illegal." Kidwill, 577 F.2d at 1282 (citing Pike, 397 U.S. at 145).
162. CTS Corp., 481 U.S. at 88.
163. Id. at 89.
interstate commerce caused by the Wisconsin statute undoubtedly violates the second portion of the test laid down by the court in CTS Corp.\textsuperscript{164}

In conclusion, states will continue to argue that they have a substantial interest in protecting employees, customers, suppliers, local communities and other constituencies. However, Wisconsin's statute flies in the face of core commerce values and is likely to be found unconstitutional if challenged.

V. THE FUTURE OF TAKEOVER REGULATION UNCLEAR

In the future, Congress may once again take an important role in the state takeover debate. The CTS Corp.\textsuperscript{1} decision occurred in the midst of Congress' review of existing federal tender offer laws.\textsuperscript{165} The question still remains whether Congress will either broaden federal regulation of tender offers which, in turn, may once again pre-empt certain state actions or reaffirm the traditional role of states in regulating corporate affairs.\textsuperscript{166} The balancing of federal and state regulation is likely to be a difficult task for federal lawmakers and will draw considerable debate.\textsuperscript{167} However, it is unlikely that Congress will allow state law to be swept away to facilitate nationwide tender offers.\textsuperscript{168}

Additionally, the Securities and Exchange Commission ("SEC") is presently more favorably disposed to regulate takeovers.\textsuperscript{169} The new chairman of the SEC has asked Congress to provide the SEC with the power to pre-
empt state anti-taking laws.\textsuperscript{170} This makes sense considering the SEC’s ability to respond quickly as legislators draft successive generations of takeover statutes aimed to provide state advantages. This may be the only way for consistent regulation to steer through what SEC chairman calls “a maze of overlapping and conflicting regulation.”\textsuperscript{171}

Even if Congress or the SEC take the lead in takeover regulation, it is likely that the political forum will simply shift from the state legislatures to Congress or the doors of the SEC.\textsuperscript{172} Given the zeal with which states have pursued the protection of their corporate citizens, it is doubtful whether Congress or any regulatory agency will be able to withstand the political pressure which can be and has been created surrounding this issue. The stakes are sufficiently high to force legislative ingenuity. Ultimately, the battles surrounding takeover legislation may be destined to rage on in our courts.

V. CONCLUSION

State regulation of the takeover process was inevitable. The political and economic pressure exerted by internal interests in Wisconsin has resulted in the formation of regulations that will not withstand a constitutional challenge. Wisconsin’s new takeover statute is a clear example of how good intentions can result in legislation that is constitutionally questionable.

Pre-emption and commerce clause concerns will continue to create problems for drafters of state takeover legislation. Recent case law indicates that the statutes enhancing shareholder interests are far more likely to withstand constitutional challenge than those statutes enhancing the interests of management. However, pro-management legislation unnecessarily interferes with the natural movements of the market and the shareholder’s right to contract with a bidder. Managers have far too much incentive to short-circuit takeover attempts. The result can be the inability of investors to receive the full economic potential of their investment and the blockage of an important market force which contributes to corporate efficiency.

The future of takeover legislation is likely to shift from the state forum to the federal arena. However, considering local interests affected in any


\textsuperscript{171} N.Y. Times, Sept. 19, 1987, § 1 at 41, col. 3.

given takeover situation, it is likely that the courts will ultimately be required to resolve the constitutional and practical issues raised by the existence of corporate takeovers in a capitalistic society.

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