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Defining and Upholding State Rights To Regulate Tender Offers after Mite and CTS

Michael A. Day

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Comment, Defining and Upholding State Rights To Regulate Tender Offers after *MITE* and *CTS*

I. INTRODUCTION

The United States Supreme Court has decided two cases over the past seven years dealing with state regulation of tender offers.¹ In the first case, *Edgar v. MITE Corp.*,² the Court invalidated the Illinois Business Takeover Act,³ concluding that its provisions were preempted under the supremacy clause and violated the commerce clause of the U.S. Constitution. During the five years after *MITE*, other courts followed the analysis of the United States Supreme Court in finding various state anti-takeover⁴ statutes unconstitutional. In each case the statutes were found violative of the commerce clause,⁵ the supremacy clause,⁶ or both.⁷ In light of the numerous decisions striking down such

1. The term "tender offer" is generally regarded as an invitation, publicly made to all shareholders of a corporation, to sell their shares at a specified price. However, the Williams Act, *infra* sections II, III, and IV, does not define tender offer and its exact meaning is unsettled. See Note, "The Tender Balance": *Dynamics Corporation of America v. CTS Corporation*, 63 CHI.-KENT L. REV. 345 (1987), which provides a historical summary of tender offers and state tender offer statutes.

2. 457 U.S. 624 (1982).

3. ILL. REV. STAT., ch. 121 ½, para. 137.51-137.70 (Smith-Hurd Supp. 1988)(repealed 1983). These provisions were repealed after the U.S. Supreme Court decision in *MITE*.

4. As noted in footnote 1 of the Court's *MITE* decision, the terms "tender offer" and "takeover offer" are often used interchangeably. Therefore, it is assumed that the term "anti-takeover" may be used to delineate those statutes which regulate takeovers, and therefore regulate tender offers. The term "anti-takeover" is used without the assumption that its purpose is to prevent takeovers and tender offers, but represents the substantive and procedural regulation of such transactions. This will be true throughout the text of this comment.

5. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes . . ."

6. U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States . . . 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."

In each case discussed and cited in this comment the supremacy clause and preemption issue arose under the provisions of the Williams Act. 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f)(1982 and Supp. III 1985).

7. See, e.g., *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983)(Oklahoma Take-Over Bid Act violative of the commerce clause); *Telvest Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983)(Virginia Take-Over Bid Disclosure Act violative of the commerce clause); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982)(Michigan Take-Over Offers Act violative of the commerce clause); *National City Lines v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982)(Missouri Takeover Bid Disclosure Act violative of both the commerce clause and the supremacy clause); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982)(Maryland Corporate Take-Over Laws violative of the commerce clause and the supremacy

state statutes it was questioned whether the states could validly regulate tender offers.⁸

On April 21, 1987, the United States Supreme Court decided the second case in this area, *CTS Corporation v. Dynamics Corporation of America*.⁹ In this case, the Court upheld the constitutionality of the Indiana Control Shares Acquisition Chapter of the Indiana Business Corporations Law,¹⁰ under both the commerce clause and the supremacy clause. This decision appears to have revived and clarified the rights of the states to regulate in this area.¹¹

clause); *Sharon Steel Corp. v. Whaland*, 466 A.2d 919 (N.H. 1983)(New Hampshire Security Takeover Disclosure Act violative of the commerce clause); *Esmark, Inc. v. Strode*, 639 S.W.2d 768 (Ky. 1982)(Kentucky Take-Over Bids Disclosure Act violative of commerce clause).

8. Prior to *MITE* the states had apparently assumed the power to regulate tender offers as part of their power to regulate and govern corporate law. The extent of this assumption is demonstrated by the numerous provisions which existed before *MITE*. See Warren, *Developments in State Takeover Regulation: MITE and Its Aftermath*, 40 BUS. LAW 671 nn.2-3 (1984), which lists thirty-seven separate state anti-takeover statutes enacted before the *MITE* decision.

However, the Court's *MITE* decision was preceded by several cases in which lower courts invalidated state takeover statutes. See, e.g., *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980)(New Jersey Corporation Takeover Bid Disclosure Law violative of the supremacy clause); *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)(Idaho Take-Over Act violative of both the commerce clause and the supremacy clause); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981)(Pennsylvania Takeover Disclosure Law violative of both the commerce clause and the supremacy clause); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978)(Delaware Tender Offers Act violative of both the commerce clause and the supremacy clause).

9. 481 U.S. 69 (1987).

10. IND. CODE ANN. §§ 23-1-42-1 to 23-1-42-11 (Burns Supp. 1987).

11. Comment, *Beyond CTS: A Limited Defense of State Tender Offer Disclosure Requirements*, 54 U. CHI. L. REV. 657 n.39 (1987), lists the following twenty-eight state statutes which are presently in existence and which are similar in content to the Indiana statute upheld in *CTS*:

ALASKA STAT. §§ 45.57.010-45.57.120 (1986); ARK. STAT. ANN. §§ 67-1264 to 67-1264.14 (1980); CONN. GEN. STAT. ANN. §§ 36-456 to 36-469 (1981 and Supp. 1986); DEL. CODE ANN. tit. 8, § 203 (1981 and Supp. 1986); HAW. REV. STAT. §§ 417E-1 to 417E-11 (1985); IDAHO CODE §§ 30-1501 to 30-1513 (Supp. 1986); IOWA CODE ANN. §§ 502.102, 502.211-502.2156 (West Supp. 1986); KAN. STAT. ANN. §§ 17-1276 to 17-1285 (1981 and Supp. 1985); LA. REV. STAT. ANN. §§ 51:1500-51:1512 (Supp. 1986); MASS. ANN. LAWS ch. 110c, §§ 1-13 (Law. Co-op. 1985); MICH. COMP. LAWS ANN. §§ 451.901-451.917 (WestSupp. 1986); MINN. STAT. ANN. §§ 80B.01-80B.13 (1986); MISS. CODE ANN. §§ 75-72-101 to 75-72-121 (Supp. 1986); MO. ANN. STAT. §§ 409.500-409.531 (Vernon Supp. 1987); NEB. REV. STAT. §§ 21-2418 to 21-2430 (1983); NEV. REV. STAT. §§ 78-376 to 78-3778 (1985); N.H. REV. STAT. ANN. §§ 421-A1 to 421-A16 (1983 and Supp. 1986); N.J. STAT. ANN. §§ 49:5-1 to 49:5-19 (West Supp. 1986); N.Y. BUS. CORP. §§ 1600-1613 (McKinney 1986); N.C. GEN. STAT. §§ 78B-1 to 78B-11 (1985); OHIO REV. CODE ANN. § 1707.041 (Anderson 1985); OKLA. STAT. ANN. tit. 71, §§ 431-450 (West Supp. 1987); 70 PA. CONS. STAT. ANN. §§ 71-85 (Purdon Supp. 1986); S.C. CODE ANN. §§ 35-2-10 to 35-2-130 (Law. Co-op. Supp. 1985); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to 47-32-48 (1983); TENN. CODE ANN. §§ 48-5-102 to 48-5-112 (1984); VA. CODE ANN. §§ 13.1-528 to 13.1-541 (1985); WIS. STAT. ANN. §§ 552.01-552.25 (West Supp. 1986).

This comment explains and analyzes the United States Supreme Court's reasoning in both *MITE* and *CTS*. It demonstrates the extent to which *CTS* is an extension of *MITE* while also detailing the important differences between the two cases and the respective state statutes on which these cases are based. Finally, the probable effects of the *CTS* decision are presented and recommendations are made regarding the future application of this revolutionary case.¹²

II. SUMMARY AND ANALYSIS OF *Edgar v. MITE*

The MITE Corporation is a Delaware corporation with its principal place of business in Connecticut.¹³ James Edgar, the defendant, was the Secretary of State for the State of Illinois, charged with the administration and enforcement of the Illinois Business Takeover Act.¹⁴ On January 19, 1979, MITE initiated a cash tender offer for the outstanding shares of an Illinois corporation, Chicago Rivet and Machine Co. On this same date, MITE filed the schedule required by the Securities and Exchange Commission, in compliance with the provisions of the Williams Act.¹⁵ MITE made a tender offer of \$28 for each share of Chicago Rivet and Machine stock, but failed to comply with the provisions of the Illinois Business Takeover Act.¹⁶ MITE immediately commenced this suit in the United States District Court for the Northern District of Illinois, asking for a declaratory judgment that the Illinois Act was preempted by the Williams Act and that it violated the commerce clause.¹⁷ MITE also sought a temporary restraining order and permanent injunction prohibiting enforcement of the Act by the Illinois Secretary of State.¹⁸

On February 2, 1979, the district court granted a preliminary injunction from enforcement of the Illinois Act and entered final judg-

12. The scope of this comment is primarily limited to analysis of these two cases, their interplay, differentiation and effects. Extensive inquiry into economic issues resulting from state tender offer statutes is beyond that scope. However, detailed analysis of economic issues has been addressed in a number of articles. See Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 1257 (1985); Jarrell & Bradley, *The Economic Effects of Federal and State Regulation of Cash Tender Offers*, 23 J. L. & ECON. 371 (1980); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978); Note, *Antitakeover Legislation: Not Necessary, Not Wise*, 35 CLEV. ST. L. REV. 303 (1987).

13. *MITE*, 457 U.S. at 626.

14. ILL. REV. STAT., ch. 121 ½, para. 137.51 to 137.70 (Smith-Hurd Supp. 1988)(repealed 1983).

15. *MITE*, 457 U.S. at 627.

16. *Id.* at 628.

17. *Id.*

18. *Id.*

ment on February 9, 1979, stating that the Illinois Act was preempted by the Williams Act and that it violated the commerce clause.¹⁹ The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision on both preemption and commerce clause grounds.²⁰

The United States Supreme Court noted probable jurisdiction²¹ and affirmed the decisions of the two lower courts.²² In determining that the Illinois Act was unconstitutional, the Court first considered the purpose of the Williams Act and the preemptive power of that federal statute under the supremacy clause. Second, the Court analyzed the Illinois Act's impact on interstate commerce, in light of the commerce clause.

*A. The Supremacy Clause and the Preemptive Effect of the Williams Act*²³

Three Justices, White, Burger and Blackmun, believed that the Illinois Act violated the supremacy clause because it conflicted with the purposes of the Williams Act.²⁴ These Justices stated that "Congress

19. *Id.* at 629. It is interesting to note that after the district court's decision, MITE and Chicago Rivet entered into an agreement whereby all prior tender offers were extinguished and MITE was allowed to inspect Chicago Rivet's books for thirty days, after which it could make a tender offer of \$31 per share—which tender offer Chicago Rivet agreed not to contest—or MITE could decide not to proceed with a tender offer. On March 2, MITE announced that it had decided not to make a tender offer.

20. *MITE Corp. v. Dixon*, 633 F.2d 486, 498 (7th Cir. 1980).

21. 451 U.S. 968 (1981).

22. *Edgar v. MITE*, 457 U.S. 624 (1982). Before beginning analysis of the Supreme Court's decision, it should be noted that the Court's opinion in *MITE* is fragmented, to say the least, with six separate opinions being filed.

On the issue of the commerce clause, Justice White's opinion was joined by Chief Justice Burger. *Id.* at 640. Justices Powell, Stevens and O'Connor filed separate opinions concurring with the portion of Justice White's commerce clause analysis which stated that the burdens placed on interstate commerce outweighed any local interest served by the Illinois Act. Justices Burger, Stevens and O'Connor also agreed with Justice White's opinion that the Act was unconstitutional as a direct regulation of interstate commerce.

Furthermore, on the supremacy clause issue, Justice White was joined by Justices Burger and Blackmun. They reasoned that the Illinois Act was preempted by the Williams Act since it violated the neutrality and investor autonomy purposes of the federal Act. *Id.* at 630.

Justice Marshall wrote a dissenting opinion joined by Justice Brennan. *Id.* at 655. Finally, Justice Rehnquist filed a separate dissenting opinion. *Id.* at 664.

23. This portion of Justice White's opinion did not constitute a majority opinion as it was joined only by Chief Justice Burger and Justice Blackmun. The overall fragmentation of the opinion led the *CTS* majority to state, "As the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 81 (1987). However, the *CTS* Court also stated that it thought the Indiana Act passed the Williams Act purposes articulated by Justice White. *Id.* at 82.

24. *MITE*, 457 U.S. at 631.

[A] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S.

[in passing the Williams Act] sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice."²⁵ The Williams Act was therefore seen as an information-requiring mechanism under which the offeror must disclose information regarding its background and identity, the source of its purchasing funds, the purpose of its purchase, and its previous holdings in the target company.²⁶ In addition, the Williams Act is seen as a shareholder protecting statute since it 1) allows stockholders to withdraw their tendered shares during the first seven days of the tender offer or at any time after the first 60 days if the offeror has not yet purchased their shares,²⁷ and 2) requires that all shares be purchased at the same price.²⁸

These three Justices concluded that the Illinois Act had three provisions which "upset the careful balance struck by Congress" between offerors and target management.²⁹ First, the Illinois Act contained a pre-commencement requirement under which an offeror had to make known its intent to purchase, to the Illinois Secretary of State, 20 days before its offer became effective.³⁰ Second, the Illinois Act created potential for unreasonable delay since the Secretary of State could call a hearing during the 20 day pre-commencement period to determine the fairness of the offer. The Secretary's decision could be delayed indefinitely under the Act.³¹ Third, the Illinois Act gave the Secretary of State power to deny registration of the tender offer if he determined the tender offer to be inequitable or the disclosure to be less than full and fair.³²

B. *The Commerce Clause*

A majority of the Court agreed that the Illinois Act violated the commerce clause,³³ stating, "A state statute must be upheld if it 'regu-

132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)

Id.

25. *MITE*, 457 U.S. at 634.

26. *Id.* at 632 (citing 15 U.S.C. § 78n (d)(1)(1982 and Supp. III 1985); 17 C.F.R. § 240.24d-3 (1981)).

27. 15 U.S.C. § 78n (d)(5)(1982 and Supp. III 1985).

28. 15 U.S.C. § 78n (d)(7)(1982 and Supp. III 1985).

29. *MITE*, 457 U.S. at 634.

30. ILL. REV. STAT. ch. 121 ½, para. 137.54.A (Smith-Hurd Supp. 1988)(repealed 1983).

31. ILL. REV. STAT. ch. 121 ½, para. 137.57.A (Smith-Hurd Supp. 1988)(repealed 1983).

32. ILL. REV. STAT. ch. 121 ½, para. 137.57.E (Smith-Hurd Supp. 1988)(repealed 1983).

33. See *supra* note 22.

lates 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.’”³⁴ First, the Court found that the Illinois Act placed excessive burdens on interstate commerce by giving the Secretary of State power to deny nationwide tender offers.³⁵ The Court reasoned that hindering tender offers not only interfered with shareholder opportunity to profit by tendering shares, but also obstructed the improved efficiency and reallocation of economic resources accomplished by tender offers.³⁶

Second, the Court rejected arguments that the burdens of the Illinois Act are justified since the Act protects resident shareholders and regulates the internal affairs of Illinois corporations. “While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.”³⁷ In addition, “[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company.” Finally, the Act “applies to corporations that are not incorporated in Illinois and have their principal place of business in other states.”³⁸

Four members of the Court felt that the Illinois Act also violated the commerce clause by directly regulating interstate commerce.³⁹ “Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the state, it must be held invalid as were the laws at issue in *Shafer v. Farmers Grain Co.* and *Southern Pacific*.”⁴⁰

III. SUMMARY AND ANALYSIS OF *CTS v. Dynamics Corp.*

CTS Corporation (CTS) is an Indiana Corporation. Prior to the origin of this case, Dynamics Corporation of America (Dynamics), a

34. *MITE*, 457 U.S. at 640 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)). This test has become known as the “*Pike* balancing test” and will be referred to as such in this comment.

35. *Id.* at 643.

36. *Id.* at 643-44.

37. *Id.* at 644.

38. *Id.* at 645.

39. *Id.* at 640-43. Justice White was joined by Chief Justice Burger with Justices Stevens and Powell filing separate concurring opinions. Although the “direct regulation” theory was not accepted by a majority, it was used by a district court to invalidate a Missouri Takeover Statute. See *Icahn v. Blunt*, 612 F. Supp. 1400, 1414-18 (W.D. Mo. 1985).

40. *Id.* at 643 (citing *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925) and *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945)).

New York corporation, held 9.6% of CTS's common stock. On March 10, 1986, Dynamics announced a tender offer for an additional one million shares of CTS stock, the ownership of which would bring Dynamics' interest in CTS to 27.5%. On the same date, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated federal securities laws.⁴¹ The Board of Directors for CTS elected to be governed by the Indiana Business Corporation Law, Control Share Acquisitions Chapter.⁴²

On March 31, 1986, Dynamics moved to amend its complaint to allege that the Indiana Anti-takeover Statute was preempted by the Williams Act⁴³ which provides protection to shareholders by requiring extensive disclosure and by placing investors on equal ground with corporate management. Dynamics also claimed that the Indiana Statute placed excessive burdens on interstate commerce, thereby violating the commerce clause,⁴⁴ which gives Congress the power to regulate interstate commerce.⁴⁵ The district court ruled in favor of Dynamics as to both issues and granted declaratory relief. The district court stated that the Indiana statute frustrated the "purpose and objective of Congress" to create a balance between the parties to a takeover contest⁴⁶ and that the Indiana statute created an "impermissible indirect burden on interstate commerce."⁴⁷

CTS appealed to the Court of Appeals for the Seventh Circuit which affirmed the decision of the district court.⁴⁸ The United States

41. In its original complaint, Dynamics alleged a number of federal securities act violations by CTS. However, these allegations became irrelevant after Dynamics amended its complaint to allege only that the Indiana Act was unconstitutional under the *MITE* precedent.

42. IND. CODE ANN. §§ 23-1-42-1 to 23-1-42-11 (Burns Supp. 1987). This statute is an example of a "Second Generation" "voting rights model" anti-takeover statute. Generally its provisions provide that 1) shareholders acquiring "control shares" of 20%, 33%, and 50% of outstanding shares may be denied voting rights unless they comply with the statute (§ 23-1-42-1), 2) holders of "disinterested shares" are required to vote their shares to determine if the offeror shall have voting rights in the additional shares acquired (§ 23-1-42-3), and 3) transferability of shares is restricted and the target corporation may redeem the shares within a specified period after acquisition by the offeror (§ 23-1-42-10 sixty days).

For additional types of "Second Generation" statutes, a term used to identify anti-takeover statutes passed after *MITE*, see Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 478-83 (1987).

43. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 391 (N.D. Ill. 1986). See 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f) (1982 and Supp. III 1985).

44. U.S. CONST. art. I, § 8, cl. 3.

45. By amending its complaint, Dynamics was able to utilize *MITE* and its progeny. This strategy, if successful, would present the opportunity for quick resolution, while allowing Dynamics to continue its tender offer efforts.

46. Dynamics Corp., 637 F. Supp. at 399.

47. *Id.* at 406.

48. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250 (7th Cir. 1986).

Supreme Court reversed the decisions of the district and appellate Courts and concluded that the Indiana statute was consistent with the provisions and purpose of the Williams Act and was not an excessive burden on interstate commerce.⁴⁹ Examination of the Court's Williams Act and commerce clause analysis provides a better understanding of the issues involved, introduces the provisions and application of the Indiana Act and prepares the way for differentiating *CTS* and *MITE*.

A. The Supremacy Clause and the Preemptive Effect of the Williams Act

Dynamics contended that the Indiana statute was preempted by the Williams Act because it was inconsistent with the purposes of the federal act. The general purpose of the Williams Act is to require disclosure of information to shareholders⁵⁰ and to protect their power to decide how to vote and manage their own shares. The Court disagreed with Dynamics' allegation of inconsistency. It first noted that federal law may preempt state law " 'where compliance with both federal and state regulations is a physical impossibility . . .,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). . . ."⁵¹ The Court concluded that entities could comply with both the Indiana Act and the Williams Act, and, therefore, that the Indiana Act could be preempted only if it frustrated the purposes of the federal act.⁵²

The Court then set out the two basic requirements which Congress intended the Williams Act to impose on offerors in order to "plac[e] investors on an equal footing with the takeover bidder."⁵³ First, it requires a statement disclosing information regarding the offeror's background and identity, the source and amount of funds, the purpose of the purchase, shares already owned and other information on any contracts or arrangements concerning the securities.⁵⁴ Second, the Williams Act includes procedural protections. These provisions include 1) the rights of shareholders to withdraw tender of their shares

49. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 94 (1987).

50. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985)(the U.S. Supreme Court declared that the Williams Act is primarily a disclosure statute).

51. *CTS*, 481 U.S. at 79 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

52. *Id.* at 79.

53. *Id.* at 82 (citing *Piper v. Chris-Craft Industries*, 430 U.S. 1, 30 (1977) quoting the Senate Report accompanying the Williams Act, S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967)).

54. 15 U.S.C. § 78m (d)(1)(1982); 17 C.F.R. §§ 240.13d-1, 240.14d-3 (1986).

within specified periods of time;⁵⁵ 2) the length of time an offer must remain open;⁵⁶ 3) pro rata purchase of shares if tendered shares exceed the number the offeror seeks;⁵⁷ and 4) offeror obligation to pay the same price for all shares acquired.⁵⁸

The Court determined that the Indiana statute was not inconsistent with the purposes of these Williams Act provisions. It concluded that the Indiana Act "protects them [the shareholders] from the coercive aspects of some tender offers" by allowing shareholders to vote as a group, while still allowing individuals to tender individually.⁵⁹ In addition, the Court held that the Indiana statute did not create unreasonable delay in tender offer communication and deliberation when compared with the waiting periods of the Williams Act.⁶⁰ Consequently, the Court found that the Williams Act did not preempt the Indiana Act since the state provisions did not conflict with the provisions or purposes of the federal act.⁶¹

B. *The Commerce Clause*

Dynamics also claimed that the Indiana statute violated the commerce clause,⁶² citing *Edgar v. MITE Corp.*⁶³ for the proposition that state anti-takeover statutes violate the commerce clause by putting excessive burdens on interstate commerce. The Court of Appeals for the Seventh Circuit agreed with Dynamics.

The United States Supreme Court rejected this argument. It distinguished *MITE* from *CTS* by stating that the Illinois anti-takeover statute in *MITE*⁶⁴ exceeded the state's rights by regulating out-of-state corporations and protecting out-of-state shareholders.⁶⁵ In contrast, the Indiana statute regulates only Indiana corporations and "applies only to corporations with a substantial number of shareholders in Indi-

55. 15 U.S.C. § 78n (d)(5)(1982 and Supp. III 1985); 17 C.F.R. § 240.14d-7(a)(1)(1986). Shareholders may withdraw their offers within the first 7 business days of the tender offer or after 60 days from the offer's commencement if the offeror has not purchased.

56. A tender offer must remain open to shareholders for 20 business days. 17 C.F.R. § 240.14e-1(a)(1986).

57. See 15 U.S.C. § 78n (d)(6)(1982 and Supp. III 1985); 17 C.F.R. § 240.14 (8)(1986).

58. See 15 U.S.C. § 78n (d)(7)(1982 and Supp. III 1985).

59. *CTS*, 481 U.S. at 82-83.

60. *Id.* at 85.

61. *Id.* at 86.

62. U.S. CONST. art. I, § 8, cl. 3.

63. 457 U.S. 624 (1982).

64. Illinois Business Takeover Act, ILL. REV. STAT., ch. 121 ½, para. 137.51 to 137.70 (Smith-Hurd Supp. 1988)(repealed 1983).

65. *CTS*, 481 U.S. at 93.

ana."⁶⁶ This limited application of the statute was within the state's power to regulate commerce since the state had an interest in, and benefited from, protecting such entities.⁶⁷

IV. RECONCILING AND DIFFERENTIATING THE CASES

Close examination of the *MITE* and *CTS* cases suggests that the United States Supreme Court correctly decided the issues presented by anti-takeover statute litigation. *CTS* thereby offers an effective precedent to be followed in future cases. The Court properly identified the factors used in other anti-takeover statute struggles and, using these factors, distinguished the Indiana statute from other disputed statutes. By doing so, the Court provided a consistent extension of prior cases. These effects appear not only to conform to the purposes of the Williams Act and commerce clause, but to actually promote those purposes by supplying information and protection to shareholders, and by providing local benefits which outweigh any burdens placed on interstate commerce.

A. *Consistent Extension of Prior Cases*

In tender offer cases decided prior to *CTS*, the courts' analyses focused on the purposes of both the Williams Act⁶⁸ and the commerce clause.⁶⁹ Where statutes frustrated these purposes the courts declared them invalid⁷⁰ and where the statutes coincided with these purposes the courts upheld them.⁷¹ The United States Supreme Court followed this same review procedure in *CTS* in reaching its decision favoring the validity of the Indiana statute. Thus, *CTS* furnishes a consistent extension of prior cases.

66. *Id.* The Indiana Act provides that "Issuing public corporation" includes only those Indiana corporations that have (1) One hundred (100) or more shareholders; (2) Its principle place of business, its principal office, or substantial assets within Indiana; and (3) Either:

- (A) More than ten percent (10%) of its shareholders resident in Indiana;
- (B) More than ten percent (10%) of its shares owned by Indiana residents; or
- (C) Ten thousand (10,000) shareholders resident in Indiana.

IND. CODE ANN. § 23-1-42-4 (Burns Supp. 1986). See *supra* note 42 and accompanying text.

67. *Id.* See *supra* note 34 and accompanying text.

68. 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f)(1982 and Supp. III 1985).

69. See *supra* note 5.

70. See *supra* note 1.

71. See, e.g., *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984)(declaring Minnesota Takeover Act constitutional).

1. *State anti-takeover provisions giving preemptive effect to the Williams Act*

MITE and its progeny identified three major provisions, found in many anti-takeover statutes, which frustrate the purposes of the Williams Act. These three provisions are 1) pre-commencement periods,⁷² 2) hearing deadlines which create unreasonable delays⁷³ and 3) decisional powers placed in hands other than the shareholders.⁷⁴ The United States Supreme Court followed this established procedure of analysis and, unlike the *MITE* decision and its progeny, determined that the statute in *CTS* did not frustrate the purposes of the Williams Act in any of these ways. The *CTS* statute was upheld because, unlike the statutes in *MITE* and its progeny,⁷⁵ it “does not give either [target] management or the offeror an advantage . . . , does not impose an indefinite delay on tender offers . . . , nor does [it] allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company.”⁷⁶

a. *Pre-commencement periods.* State anti-takeover statutes which include pre-commencement periods prevent an offeror from communicating the offer to shareholders.⁷⁷ Such provisions have been determined to favor the management of the target corporation. These provisions generally require an offeror to withhold notice of a tender offer from shareholders for a specified period of time. By preventing the offeror from communicating offer information to shareholders, pre-commencement periods give target management time to disseminate their own information to shareholders. This can unfavorably prejudice shareholders prior to disclosure of the tender offer,⁷⁸ particularly in those in-

72. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 80 (1987).

73. *Id.* at 81.

74. *Id.*

75. *See* *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982); *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986).

76. *CTS*, 481 U.S. at 83-84.

77. *Id.* at 80.

78. [P]roviding the target company with additional time within which to take steps to combat the offer, the pre-commencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the shareholders who will not have an offer before them during this period. These consequences are precisely what Congress determined should be avoided, and for this reason, the pre-commencement notification provision frustrates the objectives of the Williams Act.

MITE, 457 U.S. at 635. In addition, the Court noted that Congress had refused to impose a pre-commencement requirement during its adoption of the Williams Act. *Id.* Although the interests of management are often consistent with the interests of shareholders, since management personnel are usually shareholders themselves, the protective purposes of the Williams Act are not permis-

stances when management's interests are opposed to an offer which is otherwise in the best interests of the shareholders.

The Williams Act protects shareholders by placing them on equal footing with the offeror and target management.⁷⁹ This purpose is frustrated when target management is favored with a period of time to oppose a tender offer before the shareholders are apprised of the offer—which may act to the detriment of shareholders by reducing the value of their shares or depriving them of an attractive or profitable decision.⁸⁰

The statute in *CTS* included no such pre-commencement period provision, eliminating one possible source of conflict or frustration of the federal act.⁸¹ An offeror could disclose the offer to shareholders without this required waiting period. Shareholders could therefore be informed of the offer at the same time target management might try to avoid the takeover, which allows shareholders to make an informed choice without the danger of prejudicial influence. The absence of such a provision allows both target management and the offeror to distribute information to shareholders on an equal basis.

b. Delayed hearing deadlines. Some anti-takeover statutes, like the Illinois Act in *MITE*, have included provisions which allow shareholders, management or state officials to call for hearings prior to any decision by shareholders concerning tender of their shares or the grant of voting rights.⁸² Where these provisions exist without some reasonable deadline, unreasonable delay may ensue, preventing shareholders from exercising their decision-making rights in a timely fashion. Such delays may “upset the balance struck by Congress by favoring management [or others] at the expense of stockholders.”⁸³

The Indiana statute in *CTS* included a maximum deadline of 50 days within which a meeting had to be held to determine whether an

sive on conditions of consistent interests but rather apply to all tender offers within its scope.

79. *CTS*, 481 U.S. at 82 (citing *Piper v. Chris-Craft Industries*, 430 U.S. 1, 30 (1977) (quoting the Senate Report accompanying the Williams Act, S. REP. No. 550, 90th Cong., 1st Sess. 4 (1967)).

80. See *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982); *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).

81. See IND. CODE ANN. §§ 23-1-42-1 to 23-1-42-11 (Burns Supp. 1987).

82. “The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed.” *MITE*, 457 U.S. at 637.

Although the Act specifies that the Secretary of State's decision should be made within 15 days after the hearing, this period could be extended without limitation. ILL. REV. STAT., ch. 121 ½, paras. 137.57.A, B, C and D (Smith-Hurd Supp. 1988)(repealed 1983).

83. *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982). See also *Telvest v. Bradshaw*, 697 F.2d 576, 578 (1983).

acquiror of control shares⁸⁴ should be given voting rights.⁸⁵ The United States Supreme Court held that the 50-day deadline in *CTS* was within the 60-day maximum tender offer period created by Congress.⁸⁶ Therefore, the deadline in *CTS* could not be said to create unreasonable delay in light of the federal statute, even where decisions extend to the maximum deadline date.

c. Decisional powers outside shareholders. State law provisions which grant decisional powers to state authorities or to persons other than the shareholders themselves, have been the basis for determining that some anti-takeover statutes are invalid.⁸⁷ In *MITE*, the United States Supreme Court stated that giving the Secretary of State authority to pass on the fairness of a tender offer resulted in "investor protection at the expense of investor autonomy," and that "Congress intended for investors to be free to make their own decisions."⁸⁸

In *CTS* the United States Supreme Court encountered no such provision in the Indiana statute under scrutiny. Under the Indiana statute, the shareholders are the only persons with power to grant the voting rights of a control share acquiror.⁸⁹ This allows the shareholders to protect themselves and their investment by casting votes in what they believe to be their best interest. Once again, this is consistent with the Williams Act since it allows investors to make their own decisions as to the fairness of an offer or action.

2. State anti-takeover provisions and the commerce clause

Like the Williams Act, the commerce clause has been an essential part of the courts' analyses in anti-takeover statute cases. The commerce clause provides that Congress may regulate interstate commerce.⁹⁰ Courts have consistently expressed concern that anti-takeover statutes not be allowed to place excessive burdens on interstate commerce. To uphold a state anti-takeover statute under the commerce clause, courts require that 1) there be a substantial state interest and benefit which exceeds the burden placed on interstate commerce⁹¹ and 2) the statute be applied primarily to in-state corporations and share-

84. IND. CODE ANN. § 23-1-42-1 (Burns Supp. 1987).

85. *Id.* at § 23-1-42-7.

86. 15 U.S.C. § 78n (d)(5)(1982 and Supp. III 1985).

87. ILL. REV. STAT., ch. 121 ½, para. 137.57.E (Smith-Hurd Supp. 1988). See, e.g., *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 911 (8th Cir. 1984).

88. *MITE*, 457 U.S. at 639-40.

89. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 83 (1987).

90. *Id.* at 87.

91. See *supra* notes 34, 47-49 and accompanying text.

holders.⁹² The United States Supreme Court found that the *CTS* statute met both of these requirements and declared the statute valid, unlike *MITE* and its progeny.

a. Benefit-burden balance test. A state statute will 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 benefit."⁹³ Courts have interpreted this to mean that direct regulation of interstate commerce by the states is not permissible.⁹⁴ Any regulation must be indirect and must effect a local benefit which outweighs the burden it places on interstate commerce.

Although the *Pike* test, set forth above, is the traditional commerce clause balancing test and was relied upon by the Court in *MITE*, the Court did not mention this test in *CTS*. Some authorities have speculated that the Court saw no need to perform this balance test since it had concluded that tender offers constitute an area in which the states may regulate.⁹⁵

The United States Supreme Court stated in *CTS* that:

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.⁹⁶

b. Application limited to state interests. By creating its anti-take-

92. See *supra* notes 37, 47-49 and accompanying text.

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

94. See *supra* notes 39, 40 and accompanying text.

95. The balancing approach as traditionally articulated requires a weighing of local benefits against incidental interstate burdens However, once it is assumed that the state properly can regulate in a manner that directly affects the economic interests of nonresidents—which inevitably may create burdens on interstate commerce—this test collapses into a simple cost-benefit analysis of the law. In many respects, the Court's hands-off approach in *CTS* is a return to an older style of commerce clause analysis, in which a determination that an issue was particularly suited for state-by-state regulation effectively ended the inquiry. See, e.g., *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938). The Court's approach may be a product of the assumption that a shareholder implicitly consents to be governed by the laws of the state of incorporation when he or she purchases shares, thereby eliminating at least part of the justification for heightened federal court scrutiny. One factor that may have contributed to the Court's unwillingness to engage in a serious balancing was that no evidentiary record was established in the district court on the effects of the statute or its motivation; indeed, the state of Indiana did not intervene until the case was on appeal.

Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96, 103 n.45 (1988).

96. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987).

over statute, the state of Indiana was simply exercising its right to regulate its own corporations. The statute in *CTS* was limited in application to businesses incorporated in Indiana.⁹⁷ This limitation has not been present in any of the anti-takeover statutes invalidated under the commerce clause.⁹⁸

In addition, the Indiana statute in *CTS* requires that an Indiana corporation have a substantial number of Indiana shareholders before the statute applies.⁹⁹ The Court acknowledged in *CTS* that "unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana."¹⁰⁰

The differences between the *CTS* statute and the statutes in other anti-takeover statute cases, are material regarding this limitation of application.¹⁰¹ By limiting the statute to resident corporations with a substantial number of resident shareholders, the statute in *CTS* applies only to corporations and shareholders in which the state has a substantial and legitimate local interest. Due to these limits, the statute is only an incidental burden to interstate commerce, far outweighed by the interests and benefits the statute bestows on the state of Indiana.

B. Underlying Attitude Toward Tender Offers

One commentator has suggested, "One profound difference between *MITE* and *CTS* is the attitude of the Court toward takeovers."¹⁰² In *MITE* the Court glorified hostile takeovers as an effective mechanism for "reallocating economic resources and disciplining inefficient management."¹⁰³ The Court's approach relied upon then current academic publications, which heavily espoused the view that the law should require target management to accept a passive role during hostile takeovers.¹⁰⁴

In contrast, the Court adopts a more skeptical attitude toward the

97. See IND. CODE ANN. § 23-1-42-5 (Burns Supp. 1987).

98. See *MITE*, 457 U.S. 624 (1982); *Bendix*, 547 F. Supp. 522 (D. Md. 1982); *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).

99. IND. CODE § 23-1-42-4(a)(Supp. 1986).

100. *CTS*, 481 U.S. at 93.

101. *Id.*

102. Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 93 (1988).

103. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96, 102 (1988).

104. *Id.*; See, e.g., Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981)(a classic article advocating this view and drawn from heavily by *MITE*).

virtues of tender offers in *CTS*. This change in attitude is illustrated by Justice Powell's comment that

[i]t is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in [sic] more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely.¹⁰⁶

A number of studies, undertaken in recent years, "criticize the coercive or otherwise problematic characteristics of some tender offers. . . ." ¹⁰⁶ This reasoning reveals that one valid, underlying difference between *MITE* and *CTS* is the evidence that these takeovers have proved less attractive than they at one time appeared and, therefore, stand less deserving of the positive presumption previously given.

Another possible reason for the Court's change of attitude may be the criminal indictments of persons allegedly engaged in unlawful insider trading in connection with takeover activity.¹⁰⁷

The Court's skeptical attitude also may have been influenced by contemporary events. The considerable social or cultural dislocation involved in a takeover severely tests an academic preference for a free takeover market, and the recent *insider trading scandals* involving the arbitrage community have cast a harsh light on the acquisition business.¹⁰⁸

V. PROBABLE EFFECTS OF *CTS*

The *CTS* case is bound to have some immediate effects in the area

105. *CTS*, 481 U.S. at 92 n.13 (emphasis in original).

106. Langevoort, 101 HARV. L. REV. at 102. In footnote 40 Professor Langevoort cites the following articles criticizing characteristics of tender offers:

Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1722-23 (1985); Bradley & Rosenzweig, *Defensive Stock Repurchases*, 99 HARV. L. REV. 1377, 1401-02 (1986); Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1169 (1984); Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 307-09 (1983).

Id.

107. Fischel, 1987 SUP. CT. REV. at 93.

108. Langevoort, 101 HARV. L. REV. at 103 (emphasis added). See also Fischel, 1987 SUP. CT. REV. at 93-95.

of state anti-takeover legislation. The correctness of the United States Supreme Court's decision is reflected by considering its impact on the three classes of parties involved in tender offers, namely, 1) the states, 2) the shareholders, and 3) both the offeror and target managements.

A. *Impact on the States*

Although the extent of *CTS*'s impact cannot be immediately ascertained, it is evident that some effects will be almost immediate.¹⁰⁹ First, *CTS* confirms the states' rights to protect the interests of its resident shareholders and resident corporations.¹¹⁰ This right has been declared by some courts and authorities,¹¹¹ but because an overwhelming majority of cases declared state anti-takeover statutes invalid,¹¹² it became questionable whether the states could actually regulate within the fed-

109. The following sentiment existed while awaiting the decision of the U.S. Supreme Court in the *CTS* case: "The Supreme Court's decision in *Dynamics* will undoubtedly provide greater clarity in this area, while at the same time spawning a new generation of state statutes designed to squeeze through the interstices of the Court's opinion." Danilow and Bentley, *State Takeover Statutes After MITE*, 20 REV. SEC. & COMMODITIES REG. 13, 21 (1987). This statement reflects the importance of the *CTS* decision, even before the case was heard. In addition, it exemplifies the understanding of the states and many authorities that there is room for this exercise of their power. It also recognizes the commitment of the states to discover the boundaries of this power and legislate accordingly.

110. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987).

111. The right of the states to regulate in this area was never completely foreclosed in the pre-*CTS* cases. The following quotes, issued prior to *CTS*, represent the view that the states have the right to regulate tender offers, so long as the regulation is confined to a yet undefined degree:

I join Part V-B [of the majority opinion] because its Commerce Clause reasoning leaves some room for state regulation of tender offers I agree with Justice Stevens that the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.

MITE, 457 U.S. at 646-47 (Powell, J., concurring).

I am not persuaded, however, that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. Accordingly, although I agree with the Court's assessment of the impact of the Illinois statute, I do not join its preemption holding.

MITE, 457 U.S. at 655 (Stevens, J., concurring).

We have reservations, however, about the district court's conclusionary statement that *MITE Corp.* 'sounded the death knell for state control of federally regulated tender offers,' if the court meant by this statement that *all* state regulation regarding tender offers is foreclosed.

Fleet Aerospace Corp. v. Holderman, 796 F.2d 135, 139 n.5 (6th Cir. 1986)(emphasis in original).

112. See *supra* note 7. Although a number of cases were decided in this area between the *MITE* and *CTS* decisions, only *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984)(upholding the Minnesota Takeover Act) was decided in favor of the state regulation.

eral provisions of the Williams Act and the commerce clause.¹¹³ *CTS* substantiates this state right, to the extent that the states properly confine such regulations.

Second, *CTS* provides guidelines along which the states may structure anti-takeover statutes. Prior to *CTS*, the states lacked a standard by which such statutes could be measured.¹¹⁴ *MITE* and its progeny told the states what could not be done, rather than giving guidelines as to what could be done, within the federal and constitutional framework.¹¹⁵ Those cases provided no guarantee that state statutes would be held constitutional if the statutes avoided the "trouble provisions" identified in these cases.¹¹⁶ Because the Indiana statute passed scrutiny under the factors of the Williams Act and the commerce clause, *CTS* demonstrates that such provisions will be upheld if states adopt provisions which protect the shareholder's decision-making power and access to information, while providing substantial benefits to the states' residents. It is presently unclear if the Indiana statute represents the ultimate extent of regulation available to the states. However, *CTS* does represent an acceptable starting point from which states may proceed. At least for the present, it is clear that by drafting provisions consistent with the Indiana statute scrutinized in *CTS*, the states will be on safe ground.

B. CTS Effects on Shareholders and Corporate Management

As a result of the *CTS* case, it is likely that many states will adopt similar statutes, resulting in at least two major effects on shareholders and corporate management. First, as intended by the Williams Act, all parties will be put on equal footing,¹¹⁷ that is, management of both the target company and the offeror will be required to "lay their cards on the table," providing shareholders with access to information, thereby giving shareholders the opportunity to make well-informed decisions.

Second, the power to make decisions will be in the hands of the shareholders. Management's only part will be to disseminate information, without the ability to prejudice the shareholders prior to disclosure

113. See Comment, *State Regulation of Tender Offers: Legislating Within the Constitutional Framework*, 54 *FORDHAM L. REV.* 885 (1986)(states that the *MITE* decision has cast doubt on the ability of states to effectively regulate tender offers).

114. Block, Barton & Roth, *State Takeover Statutes: The "Second Generation"*, 13 *SEC. REG. L. J.* 332 (1986).

115. *CTS* provided badly needed clarification in this area of state regulation. Danilow & Bentley, *State Takeover Statutes After Mite*, 20 *REV. SEC. & COMMODITIES REG.* 13, 21 (1987).

116. The "trouble provisions" include: 1) pre-commencement periods; 2) outside decisional powers; 3) unreasonable delays; 4) substantial out-of-state application; and 5) other provisions; discussed in previous sections of this comment. See *supra* notes 77-89 and accompanying text.

117. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987).

of both sides' positions. This will place all three classes of parties—the shareholders, the offeror and target management—on the same footing. The likely result is a fair opportunity for management to present its proposals and an equally fair opportunity for the shareholders to decide which proposal is most attractive and beneficial to them.

VI. CONCLUSION

The United States Supreme Court's decision in *CTS* provides solid precedent and sound analysis which should be followed by other courts in assessing the validity of state anti-takeover statutes. Previous cases reflected the presumption that states have the authority and right to enact such protective statutes. *CTS* is an extension of this presumption and sets out guidelines which define the extent and content of an enforceable statute. Anti-takeover statutes can successfully comply with the purposes of the Williams Act and the commerce clause. These statutes must protect the decision-making rights of informed shareholders and be limited to legitimate interests of the state, and the benefits provided must outweigh the burdens placed on interstate commerce. The Court's approval of the Indiana statute establishes a model by which other states may pattern their own statutes. *CTS* does not exhaust the possible provisions that might be upheld, since it extends the Court's *MITE* analysis in identifying those provisions which will not be allowed in state statutes. However, for now *CTS* clarifies the right of states to legislate such administrative regulations and suggests a basis upon which anti-takeover statutes may be successfully structured.

Michael A. Day