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***1001** STATE TAKEOVER LAWS, INSIDER TRADING, AND THE INTERPLAY BETWEEN THE TWO: A NEW PERSPECTIVE

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Every temptation is great or small according as the man is.

Jeremy Taylor

I. INTRODUCTION

Since the advent of corporations, states have been eager to draft incorporation statutes to comport with management's liking. [FN1] In the ***1002** beginning, states framed their corporation statutes to attract incorporators and bring in needed revenues. [FN2] More recently, many states, at the behest of management groups, have amended their corporation acts to increase management's ability to fend off corporate raiders. [FN3] State legislators generally believe a successful defense by a target corporation will minimize the prospect of losing jobs through plant closings and asset sales. Thus, they commonly favor assisting in-state takeover targets. [FN4]

In 1987, the United States Supreme Court decided *CTS Corp. v. Dynamics Corp. of America*. [FN5] In *CTS* the Court addressed the constitutionality of an Indiana takeover act that made it easier for management of a target corporation to fend off a takeover attempt. [FN6] The act helped the target company's management defend against the tender offer because, among other things, it specified that once an ***1003** acquirer purchased a certain percentage of shares in the target, the acquirer could not vote those shares without obtaining approval by a majority of disinterested shareholders. [FN7] The Supreme Court, after careful analysis, declared the law valid.

One effect of the Court's holding will be to increase the prevalence and breadth of state corporation laws designed to entrench management. [FN8] Another effect, which has gone largely unnoticed, may be to reduce the number of instances in which an individual in possession of material, nonpublic information about a tender offer purchases stock in a target company, thereby violating the insider trading provisions of the federal securities laws.

II. COMPETITION AMONG THE STATES

State incorporation statutes did not appear in the United States until after 1800. [FN9] New York was the first state to enact a general incorporation law, doing so in 1811. [FN10] Legislators of other states, recognizing the benefits to be derived from successfully persuading companies to incorporate in their states, enacted incorporation statutes of their own. [FN11] Legislators also realized that businesses were more likely to incorporate in states that accommodated the interests ***1004** of management. [FN12] Restrictions on duration, company size, and other matters thus were eliminated from the early state statutes.

Although New York was originally the most favored place for incorporation, New Jersey gradually overtook it. New Jersey became so successful in attracting incorporators that it was able to finance state operations largely on revenues generated from the issuance of corporate charters. [FN13] By 1875 New Jersey was known as the "mother of corporations." [FN14]

Delaware, too, was aware of the revenues that could be brought in through liberalization of state corporate laws. As one writer put it just before the turn of the century, Delaware was "gangrened with envy at the spectacle of the truck-patchers, sand-duners, clam diggers and mosquito-wafters of New Jersey getting all the money in the country into her coffers." [FN15] The writer said Delaware was "determined to get her little tiny, sweet, round, baby hand into the grab-bag of sweet things before it became too late." [FN16] Delaware adopted a competitive incorporation policy and thereby made its bid to attract the eye of promoters.

The incorporation philosophy adopted by Delaware near the turn of the century has reaped great benefits for the state. [FN17] Each year, corporation franchise licensing fees have accounted for a significant percentage of the state's revenues. [FN18] But Delaware is far from alone ***1005** in selling corporation law. [FN19] A large number of states are making strenuous efforts to please management. Justice Brandeis noted this "race for the bottom" in his dissent in *Louis K. Liggett Co. v. Lee*: [FN20] "Companies were early formed to provide charters for corporations in states where the cost was lowest and the law was least restrictive. The states joined in advertising their wares. The race was not one of diligence but of laxity." [FN21]

Notwithstanding the ever-present concern for raising revenue, some state legislatures recently have focused with even greater intensity on keeping jobs within their state. This legislative focus on job retention came about in response to the heightened usage of tender offers. [FN22]

III. THE RECENT WAVE OF TAKEOVERS

The American economy has been swept by four great waves of mergers and acquisitions: the late 1890s to the early 1900s, the 1920s, ***1006** the late 1960s to the early 1970s, and the late 1970s to the present. [FN23] The current wave, caused by limited outlets for corporate earnings, [FN24] has greatly outpaced the previous three waves in the sheer size of acquisitions. For instance, from 1981 to 1984, a period in which over $566 billion in corporate assets were acquired through mergers, [FN25] the average value of a merger in constant dollars exceeded the average value of mergers during the previous peak period of the late 1960s and early 1970s by over fifty percent. [FN26]

The current wave of acquisitions has also been noteworthy for the frequency with which corporate control has changed hands through the use of hostile tender offers. Until the late 1960s, corporate managers were reluctant to acquire other companies without the approval of those companies' managements. [FN27] Indeed, hostile ***1007** takeovers were considered so unacceptable that investment advisers refused to assist clients desiring to pursue such a course. [FN28] But in the late 1960s, as corporate raiders began to ignore such boardroom etiquette, hostile takeovers, and particularly hostile tender offers, became increasingly common. [FN29] During the 1980s, a decade in which the once despised corporate raiders gained a newly minted respectability, [FN30] hostile tender offers have accounted for a larger proportion of the nation's merger and acquisition activity than ever before. [FN31] More important, the threat of a hostile tender offer has frequently been sufficient to induce the target company's management to enter into a so-called friendly merger; in effect, allowing corporate raiders to win the war without firing a shot. [FN32]

Hostile tender offers for such corporate giants as Mobil, Phillips Petroleum, and Unocal have engendered fear in corporate boardrooms. [FN33] A 1978 survey revealed that forty percent of the nation's largest industrial concerns considered themselves vulnerable to a ***1008** takeover. [FN34] In response, many managers have arranged for golden parachutes--income protection in the event of a hostile takeover. [FN35] Others have taken more concrete action to protect the independence of their companies. Potential targets have frequently arranged defensive mergers, either friendly or hostile, in an attempt to reduce their liquid assets, burden themselves with debt, or create possible antitrust conflicts. [FN36] In addition, managements of vulnerable firms have executed leveraged buyouts of their companies; [FN37] repurchased stock owned by potential raiders, a practice commonly referred to as “greenmail”; [FN38] and enacted antitakeover amendments to their corporate charters. [FN39]

IV. JOB RETENTION

Corporate managers have not been alone in their apprehension over the increased popularity of tender offers. A growing number of states have become concerned that outsiders might launch bids for in-state companies and then “close down plants and leave local residents jobless.” [FN40] For example, one Ohio state representative remarked***1009** during a legislative debate over a takeover statute that the third largest employer in his district had recently been the target of a successful takeover effort. [FN41] The representative went on to state that shortly after the takeover, both the head office and the plant, which employed approximately 900 people, were closed. [FN42] Likewise, the Minnesota Legislature, attempting to design a state business corporation act, set forth findings on the effects of takeovers on the state's job base. It found that takeovers “threaten the jobs and careers of Minnesota citizens and undermine the ethical foundations of companies, and in addition jobs are eliminated and career commitments to employees are breached or ignored.” [FN43] The legislature also found that successful takeovers “often result in plant closings or consolidations that damage communities dependent on the jobs ... provided by these plants.” [FN44] Motivated by such concerns, state have enacted takeover statutes. [FN45]

A valid takeover law must be considered an important asset to a state. Management groups will appreciate the advantages to be ***1010** enjoyed by a target company that can claim protection under such statutes and will be more likely to seek incorporation in states with such statutes. To this end, no state can deem itself a serious participant in the "race for the bottom" unless it has in place takeover statutes capable of withstanding constitutionally based assaults.

V. CONSTITUTIONAL CONSIDERATIONS

The concerns of a state regarding prevention of injury to the state's job base are manifestly parochial, as is a state's concern for its revenue generating capacity. However, when pondering the validity of a state's takeover law, a federal court likely will disregard the latter concern, [FN46] while placing a great deal of emphasis on the former. [FN47]

The commerce clause [FN48] generally requires a court analyzing a takeover statute to devote careful thought to the state's desire to protect itself against increased unemployment. [FN49] This desire and, more ***1011** important, the benefits derived from its implementation [FN50] must be balanced against the burdens placed on interstate commerce. [FN51] Therefore, a takeover statute that protects the local job base, along with the communities dependent on those jobs, and that does not unduly interfere with interstate commerce will be upheld. [FN52] Along similar lines of reasoning, a state statute that is carefully tailored so that ***1012** it intrudes only minimally on applicable federal takeover law also will survive a supremacy clause [FN53] analysis. [FN54]

Prior to 1982, courts passing on the validity of state takeover statutes generally turned in mixed reviews. [FN55] In 1982, in *Edgar v. MITE Corp*., [FN56] the Supreme Court handed down an opinion which held that the Illinois takeover act failed under commerce clause principles. [FN57] The opinion also stated that the supremacy clause mandated invalidation of the Illinois law, but the views expressed in that aspect of the opinion were adhered to by a mere plurality of the Court. [FN58]

Although only three Justices joined in the preemption rationale of *MITE*, most lower courts thereafter invalidated state takeover laws on both commerce clause and supremacy clause grounds. [FN59] ***1013** Moreover, a number of states, after considering their takeover statutes in light of *MITE*, repealed their takeover statutes and replaced them with updated statutes. [FN60] Although at least one of these post-*MITE* takeover statutes survived judicial review, [FN61] most did not. [FN62]

Many onlookers were taken aback when the Supreme Court handed down its opinion in *CTS*, [FN63] reversing both the trial court [FN64] ***1014** and a unanimous Court of Appeals for the Seventh Circuit. [FN65] In that case, the Court was presented with the issue of whether an Indiana takeover act violated the commerce clause and the supremacy clause. The Court upheld the statute on both grounds.

Upon release of Justice Powell's opinion in *CTS*, [FN66] several legislatures promptly responded to the Court's endorsement of the Indiana statutes by enacting similar laws. Arizona, Florida, Massachusetts, Minnesota, North Carolina and Washington either ***1015** amended their takeover statutes or adopted new statutes immediately following *CTS*. [FN67] It is commonly believed that many or all of those states took such action at the request of influential in-state corporations that were takeover targets. [FN68] As a result of *CTS*, state legislators have reason to be optimistic that carefully tailored takeover laws will pass constitutional muster.

VI. STATE TAKEOVER STATUTES AND INSIDER TRADING

A motivating factor behind the Supreme Court's decision in *CTS*, although neither expressly stated nor implied in the opinion, may have been the disgust and anxiety members of the Court were likely experiencing as a result of the large amount of insider trading abuses which had occurred in connection with corporate takeovers. [FN69] The Justices undoubtedly realized that one of the effects of their decision to uphold the Indiana takeover act against constitutional challenge would be to cause fewer takeover attempts. [FN70] This in turn would ***1016** decrease the number of occasions in which a target company's stock price dramatically increased in value. As a result, there would be fewer opportunities for those in possession of advance knowledge of corporate affairs to trade on such inside information. Accordingly, the Justices may, in part, have seen *CTS* as a means of increasing adherence to the insider trading laws by a business community which appeared unwilling to conform on its own.

Although the announcement of a takeover bid generally has no significant effect on the price of the acquiring company's stock, [FN71] takeovers attempts can result in huge profits to the shareholders of target companies. Takeover bids are typically forty to fifty percent above the market price of the target company's stock and are generally even higher when more than one bidder is involved. [FN72] Potential profits to shareholders of target companies are so great that a company's stock price will jump dramatically merely on the basis of rumors that the company is to be taken over. [FN73] Unfortunately, for many individuals with advance knowledge of takeover bids, the temptation of such large and quick profits outweighs the risk of sanctions for insider trading. According to the committee report accompanying the Insider Trading Sanctions Act of 1984:

> Insider trading has become a more widespread problem in recent years, with the increase in mergers and tender offers, which often result in immediate and dramatic price movements in the stock of a target company, and with the growth of the options market, where a small investment in options can yield enormous profits if the underlying stock increases in value as a result of a tender offer announcement or other news. This potential for immense profits is a powerful lure to this illegal activity. [FN74]

United States v. Reed [FN75] demonstrates the immense profits an insider can earn by trading on nonpublic information concerning an impending***1017** takeover. In that case, an individual who purchased approximately $3000 in call options earned more than $430,000 when the corporation in which he purchased those options became the subject of a tender offer. [FN76]

Between the Supreme Court's 1982 decision in *Edgar v. MITE* and its April 1987 decision in *CTS*, the Securities and Exchange Commission, together with the Department of Justice, uncovered some of the largest financial frauds in American history as a parade of Wall Street notables were investigated, indicted and convicted for insider trading schemes in which they netted tens of millions in illegal profits by purchasing securities in companies while in possession of material nonpublic information indicating that these companies would be the subject of upcoming takeovers. In the “Yuppie Five” case, the Commission alleged that Michael David, a former associate at the New York office of Paul Weiss, Rifkind, Wharton & Garrison, misappropriated from his law firm confidential information concerning the identity of takeover targets, that David provided this information to three friends who were employed as arbitrageurs and one who was employed as a stockbroker, and that all five purchased securities in these companies. In May 1986, a federal grand jury indicted the five individuals for crimes stemming from this insider trading scheme. All five defendants subsequently pleaded guilty. Also in May 1986, the Commission charged Dennis Levine, at that time a managing director of Drexel Burnham Lambert, Inc., with purchasing securities while in possession of nonpublic information showing that the issuers of these securities were takeover targets. Levine consented to an injunction prohibiting him from future violations of the securities laws and disgorgement of $11.6 million in illegal profits. After being indicted, Levine pleaded guilty and was sentenced to two years imprisonment and given a $362,000 fine. In a related case, five Wall Street associates of Levine were indicted. [FN77] They pleaded guilty and were sentenced for swapping or selling to ***1018** Levine nonpublic information concerning takeovers and, as far as three of the five were concerned, trading while in possession of such nonpublic information. [FN78] In November 1986, the Commission alleged that Ivan Boesky, an arbitrageur, purchased securities in takeover targets while in possession of nonpublic information concerning upcoming takeovers. Boesky consented to a permanent bar from employment in the securities industry, $50 million in disgorgement, and a record $50 million in penalties. [FN79] Finally, in February 1987, the Commission alleged that Martin Siegel, an executive with Drexel and formerly with Kidder Peabody & Co., provided Boesky with nonpublic information concerning upcoming takeovers and also traded for his own account while in possession of that nonpublic information. Siegel pleaded guilty to related criminal charges and agreed to pay $9 million in penalties. While these cases illustrate that insider trading can be detected and punished, many individuals, perhaps including members of the Supreme Court, viewed the cases as evidence that “criminal conduct is at the heart of a substantial amount of market activity by established securities industry professionals.” [FN80]

Moreover, the Supreme Court appears to have been concerned about the limited resources with which the Securities and Exchange Commission labored to detect and prevent insider trading. In its 1985 decision in *Bateman Eichler, Hill Richards, Inc. v. Berner*, [FN81] the Court noted Congress' finding that “ i n recent years, the securities markets have grown dramatically in size and complexity, while Commission enforcement resources have declined.” [FN82] In the same opinion, the Court lamented that the Commission “does not have the resources to police the industry sufficiently to ensure that ***1019** false tipping does not occur or is consistently discovered.” [FN83] Concern about the proliferation of insider trading and the Commission's lack of resources may thus have prompted the Court to uphold the Indiana takeover statute, and thereby decrease the opportunities for insider trading.

The federal courts have historically played a significantly greater role in deterring insider trading than they have for most other illegal acts. For unlike the vast majority of federal crimes, Congress has never enacted a statutory definition of insider trading. Most insider trading cases have been brought under section 10(b), [FN84] the general antifraud provision, of the Securities Exchange Act of 1934, [FN85] and Rule 10b-5 [FN86] promulgated thereunder. The vagueness of these provisions as applied to insider trading has allowed the courts to develop a definition of insider trading on a case-by-case basis. The benefit of this approach is that the courts have been able to adapt the definition of insider trading to account for changed circumstances and the increasing sophistication of the participants in such dealings. [FN87] Because of the judiciary's significant responsibility for deterring insider trading, the Court may have been more likely to allow ***1020** its frustration over widespread abuse to influence its decision in *CTS*.

VII. CONCLUSION

The Supreme Court's decision in *CTS* to uphold the Indiana takeover statute has encouraged states to enact similarly constructed laws. By reducing the number of takeovers, such statutes should likewise reduce the amount of insider trading. Unfortunately, no statute can eradicate the greed and materialism which underlie insider trading violations. Too many individuals appear to have adopted George Bernard Shaw's credo that “[m]oney is indeed the most important thing in the world; and all sound and successful personal and national morality should have this fact for its basis.” [FN88] For so long as many of this nation's most talented individuals remain committed to personal wealth and material happiness at almost any cost, insider trading, along with a host of other societal ills, will continue to flourish.

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[FN1]. Pre-19th century corporations must be distinguished from corporations created after 1800. During the former time period, corporations were not perceived as entities established solely to bring about personal gain. Instead, these entities were generally charged with carrying out regulatory functions today customarily reserved for the governmental sector, while, at the same time, acting in pursuit of profits. *See* Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REVV. 105, 110 (1888). *See also*, W. HUSBAND & J. DOCKERAY, MODERN CORPORATION FINANCE 33 (3d ed. 1952) ("By the end of the eighteenth century, it is likely that no more than 250 private business corporations were in existence; and practically all of them were of a quasi-public nature--turnpike companies, tollbridge companies [and] water supply companies...").

[FN2]. *See* R. LARCOM, THE DELAWARE CORPORATION, 9-10 (1937).

[FN3]. *See, e.g.*, Wysocki, *The Delaying Game: To Stall Takeover Bids, Many Companies Use Obscure New Statutes*, Wall St. J., Nov. 19, 1975, at 26, col. 1; ("There's little doubt that takeover laws in most states have been supported by and sometimes instigated by managements at major companies. In Idaho, for instance, a statute that took effect July 19 [1975] was largely the brainchild of Morrison-Knudsen Co."). See also note 68, *infra*.

[FN4]. It may be argued that it is not prudent economic policy for a state to impede tender offers, thus hindering an activity which can permit assets to flow toward their most efficient use. *See* Edgar v. MITE Corp., 457 U.S. 624, 644 (1982). Notwithstanding this consideration, courts must resist the temptation to probe the wisdom underlying a state's subscription to a certain set of theoretical principles as "[t]he Constitution does not require the States to subscribe to any particular economic theory." CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 92 (1987). Additionally, a state's attempt to hinder tender offers aimed at in-state companies may not represent an attempt by that state to block property from ascending towards its highest valued use. Rather, the state may actually favor optimal utilization of assets and may merely be interested in seeing that the target's resources are reallocated within the context of a more humane and less abrupt time frame than would be brought about pursuant to a successful tender offer. *See* Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. L. 35, 71 (1988).

[FN5]. *CTS*, 481 U.S. 69.

[FN6]. Appellee, Dynamics Corporation of America, argued that the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, IND. CODE § 23-1-17-1 to -5 (Supp. 1986) should be struck down on both preemption and commerce clause rationales. *CTS*, 481 U.S. at 72-75.

[FN7]. IND. CODE § 23-1-42-9(b) (Supp. 1986).

[FN8]. Some states include their pro-management takeover legislation within the state "blue-sky" provisions while others have made it part of their general corporation law section. However, since a careful analysis will generally reveal that the primary purpose of the takeover law in question focuses on entrenchment of management, as opposed to protection of in-state investors, such law should be looked upon as a part of the state's corporation law statutes regardless of where in the state statutory framework it is found. *See* Longevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213, 220 (1977). *Cf*. One scholar notes it has become clear that takeover statutes were not aimed at safeguarding investors, "but at preserving intact the corporate ecosystem of resident companies. [And] [f]rom both a political and economic standpoint, it makes a great deal of sense for states to prefer the interests of those various noninvestor constituents who vote and directly contribute to their economics over ... nonresident shareholders ...." Johnson, *State Takeover Statutes: Constitutionality, Community, and Heresy*, 45 WASH. & LEE L. REV. 1051, 1054 (1988).

[FN9]. R. BAKER & W. CARY, CASES AND MATERIALS ON CORPORATIONS 4, 9 (3d ed. 1958).

[FN10]. A. FREY, C. MORRIS & J. CHOPER, CASES AND MATERIALS ON CORPORATIONS 2 (1966).

[FN11]. L. SOLOMON, R. STEVENSON & D. SCHWARTZ, CORPORATIONS--PROBLEMS, CASES AND MATERIALS 5, Vol. I (1981). *See generally* Bebel, *Why the Approach of Heckmann v. Ahmanson Will Not Become the Prevailing Greenmail Viewpoint: Race to the Bottom Continues*, 18 TEX. TECH. L. REV. 1083, 1115-16 (1987).

[FN12]. L. SOLOMON, R. STEVENSON & D. SCHWARTZ, CORPORATIONS--PROBLEMS, CASES AND MATERIALS 5, Vol. I (1981).

[FN13]. II W. COOK, STOCK AND STOCKHOLDERS 1604 (3d ed. 1894).

[FN14]. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 26 (3d ed. 1983).

[FN15]. *Little Delaware Makes a Bid for the Organization of Trusts*, 33 AM. L. REV. 418-19 (1899).

[FN16]. *Id*.

[FN17]. *See generally*, G. SEWARD, BASIC CORPORATE PRACTICE 5 (1966). ("[A] high percentage of important corporations are formed in Delaware and many businesses which originally were formed elsewhere are subsequently transferred to Delaware when they become successful." In January 1965, thirty-five percent of all companies listed on The New York Stock Exchange were incorporated in Delaware).

[FN18]. From 1913 to 1934, franchise taxes and like fees generated approximately twenty-five percent of Delaware's revenues. *See* Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 276 (1976). During the period 1960 through 1980, franchise tax revenue collected by Delaware averaged 15.77 percent of total receipts. *See* Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225, 242 (1985).

[FN19]. In 1921 the Governor of Michigan advised the Michigan Legislature that the state's corporation laws were not as hospitable to management as were the laws of competing states. In prodding Michigan lawmakers to modernize the state's corporation laws, he remarked that "most of our business corporations are being organized in other states, only to return here as foreign corporations." Michigan H.R. Jour. 37 (1921).

[FN20]. Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[FN21]. *Lee*, 288 U.S. at 558-59 (Brandeis, J. dissenting).

To be sure, it may not always be appropriate for representatives of states not having attractive corporation laws to place pejorative labels on states which do have such laws. It may be argued that states have an obligation to protect the interests of both their residents and corporations doing business under their corporation statutes. One commentator who is supportive of liberal state corporation laws has taken the position that it is inaccurate to view the competitive process as a race for the bottom; rather, it should be deemed a “climb to the top.” Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 920 (1982). Professor Fischel believes that the corporation laws of Delaware and similar states expand the powers of management but, at the same time, visit no harm upon shareholders. He reasons that

> [i]f incorporation in Delaware were really harmful to shareholders, shares of firms located there would trade for less, managers would reduce the value of their services, and the firm might be an attractive takeover candidate with the probable result that existing managers would be displaced. Since managers have no incentive to injure themselves in this fashion, a far more likely explanation is that Delaware has achieved its prominent position because its permissive corporation law maximizes, rather than minimizes, shareholders welfare.

[FN22]. Additionally, the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f) (1981)) was passed in 1968 in order to provide federal regulation governing tender offer bids. *See generally* Piper v. Chris-Craft Industries, 430 U.S. 1 (1977).

[FN23]. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 129 (1985); Cheit, *Foreword* to D. COMMONS, TENDER OFFER: THE SNEAK ATTACK IN CORPORATE TAKEOVERS xi (1985). Most mergers at the turn of the century were horizontal combinations which created monopolies and increased economies of scale. The merger wave of the 1920s was characterized by vertical integration along with the integration of related, but noncompetitive, firms. The “merger mania” of the late 1960s and early 1970s produced huge conglomerates through the acquisition of unrelated businesses. Finally, the current wave has been marked by the merger of large, established, mostly unrelated businesses. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERSSSSSS 129-45 (1985).

[FN24]. From the end of World War II through the 1960s, economic expansion in the United States, the revival of the European and Japanese economies, and the economic development of the Third World created opportunities for American companies to profitably reinvest earnings into expanded business operations. But with the slowing of the global economy in the 1970s and increasing competition from foreign companies both at home and abroad, it was no longer profitable for American companies in mature industries to reinvest their earnings. On the other hand, the tax code deterred companies from greatly increasing dividends or maintaining large amounts of passive investments. Because dividends were taxed as ordinary income while long-term capital gains were taxed at only forty percent of the rate for ordinary income, many investors preferred to invest in corporations that retained earnings, which hopefully would be reflected in higher stock prices, rather than in corporations which returned a larger share of their profits to investors as dividends. Likewise, corporations which invested too much of their profits in passive investments, such as savings accounts or stock certificates, might have been subject to the federal accumulated earnings tax. Furthermore, in a stock market in which the shares of most companies were undervalued, companies with large cash reserves were attractive takeover candidates since the acquiror could use the target's cash reserves to pay part of the price offered to the target's shareholders. As a result, in the late 1970s many companies began channeling their earnings into the acquisition of other enterprises. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 154-64, 230-31 (1985).

[FN25]. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 144-45 (1985).

[FN26]. Cheit, *Foreword* to D. COMMONS, TENDER OFFER: THE SNEAK ATTACK IN CORPORATE TAKEOVERS xii (1985).

[FN27]. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 230 (1985); INVESTOR RESPONSIBILITY RESEARCH CENTER, INC. 5 (1987).

[FN28]. INVESTOR RESPONSIBILITY RESEARCH CENTER, INC. 5 (1987).

[FN29]. *Id.*

Tender offers had the advantage of being quick and subject to very little federal or state legislation. The other common means of acquiring corporate control, proxy fights and proposed exchange offers, were subject to the Securities Act of 1933 and the Securities and Exchange Act of 1934. E. ARANOW & H. EITHORN, TENDER OFFERS FOR CORPORATE CONTROL 65 (1973).

A common form of hostile tender offer during this period was the “Saturday-night-special”, an offer at a price significantly above the current market price and open only for a short period of time. Saturday-night-specials were intended to stampede shareholders of target companies into tendering their shares for fear that they would receive a much lower price for the shares if the acquiror gained majority control. The Williams Act prohibited Saturday-night-specials by requiring all tender offers to remain open for at least twenty business days. *Corporate Takeovers (Part I): Hearings Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, House of Representatives*, 99th Cong., 1st Sess. 184 (1985) (statement of Joseph R. Wright, Jr., Deputy Director, Office of Management and Budget).

[FN30]. Bianco, *The Raiders*, BUS. WK. March 4, 1985 at 80, 88.

[FN31]. OFFICE OF THE CHIEF ECONOMIST, SECURITIES AND EXCHANGE COMMISSION, *Motivations for Hostile Tender Offers and the Market for Political Exchange* 2, September 25, 1985.

[FN32]. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 1-2 (1985).

[FN33]. The advent of junk-bond financing has increased the vulnerability of large corporations to hostile takeovers by allowing “relatively small groups of investors....to amass the sizeable funding necessary to mount credible takeover attacks on some of the very largest companies such as Phillips Petroleum, Revlon, Trans World Airlines, Union Carbide, CBS and USX (formerly United States Steel).” CONGRESSIONAL RESEARCH SERVICE, 99TH CONG., 1ST SESS., CORPORATE MERGERS AND HIGH YIELD (JUNK) BONDS: RECENT MARKET TRENDS AND REGULATORY DEVELOPMENTS, 1 (Comm. Print 1986).

[FN34]. *Multicompanies*, FORBES, January 8, 1979, at 238, 242.

[FN35]. By 1982, fifteen hundred companies had amended their corporate charters to provide senior managers with golden parachutes in the event of a takeover. K. DAVIDSON, MEGAMERGERS: CORPORATE AMER-

ICA'S BILLION-DOLLAR TAKEOVERS 1 (1985).

[FN36]. *Id*. at 242.

[FN37]. *Id*.

[FN38]. *Id*. at 40-41.

[FN39]. A survey of Standard & Poors 500 corporations revealed that as of the end of 1984 one hundred and twelve firms had enacted antitakeover amendments to their corporate charters. THE OFFICE OF THE CHIEF ECONOMIST, SECURITIES AND EXCHANGE COMMISSION, *Shark Repellents and Stock Prices: The Effects of Antitakeover Amendments Since 1980* 2 (July 24, 1985). Antitakeover amendments, commonly referred to as shark repellents, include supermajority provisions which require mergers to be approved by significantly more than fifty percent of the outstanding common stock; fair price amendments which generally prohibit companies making two-tiered tender offers from paying shareholders who tender their shares in the second stage less than those who tendered their shares in the first stage; staggered terms for members of the board of directors; and authorization for the board to issue preferred stock with special voting rights (which is usually sold to parties friendly to management) or to grant existing shareholders warrants for the purchase of common stock at a very low price in the event of a takeover not approved by management. *Id*. at 7-11.

[FN40]. Aranow and Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. REV. 767, 768 (1971). *See also* Millon, *State Takeover Laws: A Rebirth of Corporation Law*?, 45 WASH. & LEE L. REV. 903, 919 (1988) (“Many believe that the so-called”bust-up“takeover, in which the successful bidder seeks to liquidate target company assets or otherwise restructure the company to pay off acquisition indebtedness and realize a quick profit, has replaced the hostile bid designed to continue operations under efficient management.”).

[FN41]. Vorys, 43 OHIO B.J. 65, 68 (1970).

[FN42]. *Id*.

[FN43]. Act of Apr. 25, 1984, ch. 488, § 1, subd. 1(3), 1984 Minn. Laws 471. Similarly, the preamble to a 1987 North Carolina takeover statute found that “takeover attempts of corporations in North Carolina have been occurring with increasing frequency; and Whereas, such activity can be highly disruptive to communities within North Carolina ... North Carolina has a vital interest in providing to these corporations the benefits of the provisions of the North Carolina Shareholder Protection Act...” 1987 N.C. Sess. Laws 124. Legislative findings of this sort may increase the chances that the statute will be upheld. In *S.C. Hwy. Dept. v. Barnwell Bros*., 303 U.S. 177, 190-92 (1938) the Supreme Court stated that courts should avoid an examination addressing the wisdom and propriety underlying a particular state statute. Instead, the courts were instructed to look to whether there was some rational basis behind the statute. Legislative findings tending to support a state's actions make it more likely that a reviewing court will later find the state had a rational basis for taking the action it did.

[FN44]. Act of Apr. 25, 1984, ch. 488, § 1, subd. 1(4), 1984 Minn. Laws 471.

The legislative history of a Pennsylvania takeover act similarly made it clear that the bill was designed to protect local corporations, their employees and the communities in which they are situated. *See* Steinberg, *The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184, 185 (1984) (“[W]hen a corporation has been started in Pennsylvania and the people who started it have invested their capital to put our Pennsylvanians to work, we have an obligation to help that corporation as much as we can ....”).

[FN45]. Virginia was the first state to enact state takeover legislation. 1968 Va. Acts 119; VA. CODE ANN. §§ 13.1-528-541 (Supp. 1970). (Virginia passed its statutes several months before the Williams Act became law). After the Williams Act was passed, many states followed Virginia's lead. By 1979, takeover legislation had been enacted in 37 states. R. JENNINGS & H. MARSH, SECURITIES REGULATION 631 (5th ed. 1982); *see also* Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. REV. 767, 770 n.16 (1971).

[FN46]. Statutes fashioned so as to primarily further state economic objectives have traditionally been accorded little deference in the context of a judicial commerce clause analysis. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[FN47]. In his concurrence to *Edgar v. MITE Corp*., 457 U.S. 624, Justice Powell recognized that a state may be injured when upper echelon jobs are lost as a result of a successful tender offer. He noted that

> [w]hen corporate headquarters are transferred out of a city and State ... the State and locality from which the transfer is made inevitably suffer significantly. Management personnel many of whom have provided community leadership may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life ... also tend to diminish when there is a move of corporate headquarters.

Id. at 646.

The concerns expressed by Justice Powell appeared prophetic when Gulf Corporation was a target for acquisition in 1984. During the pendency of Standard Oil of California's bid to acquire Gulf, it was reported that the local United Way would likely lose one of its largest benefactors should the deal be consummated. The University of Pittsburgh, which had received in excess of $3.5 million from Gulf during the decade preceding the takeover bid, similarly believed that the contributions it had grown accustomed to would vanish if Gulf were to fall into the hands of new management. Last, it was reported that if Gulf were to succumb to Standard Oil of California's offer, Pittsburgh might “lose some of its most prominent citizens - Gulf people who serve on the boards of local hospitals, businesses, schools, churches and civic groups.” Wall St. J., Mar. 9, 1984, at 33, col. 3.

[FN48]. The commerce clause states: “Congress shall have the power To ... regulate Commerce among the several States ....” U.S. CONST. art. I, § 8.

[FN49]. Courts have generally applied the balancing test of *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970), when construing state takeover statutes. *See, e.g., MITE*, 457 U.S. at 641. However, a court would be justified in applying a more stringent test if it encountered takeover legislation drafted in a blatantly protectionist manner. Although not within the takeover context, the Supreme Court addressed such a statute in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Oklahoma had passed legislation prohibiting the export and sale of minnows taken from state waters. In striking down the statute, the Court stressed that the “strictest scrutiny” should be applied to the arguments of a state which purport to justify a protectionist statute which is discriminatory on its face. *Hughes*, 441 U.S. 322, 338.

[FN50]. Although a state may promulgate takeover legislation with the expectation that such law will contribute to the local health, safety and welfare, a court surveying the constitutionality of the statutory scheme may be unpersuaded. Beginning in 1829, when *Willson v. The Black Bird Creek Marsh Co*., 27 U.S. (2 Pet.) 245 (1829) was decided, it has been an accepted notion of our jurisprudence that, within limits, the Constitution does allow a state to make use of its police powers. However, a court may find that a takeover statute does not add to the health, welfare and safety of the locality if the statute's proponent is unable to show that management of the target company will further state interests more than would a management team installed by the bidder. *See MITE*, 457 U.S. 624, 645 (In striking down the Illinois takeover law, the Court found that "the protections the Illinois Act affords resident security holders are, for the most part, speculative."). *See also* Icahn v. Blunt, 612 F. Supp. 1400, 1417 (W.D. Mo. 1985) ("It is difficult to discern the rational basis for concluding that incumbent management will protect the economic interests of Missouri if there is a conflict with ... the economic interests of the corporation.").

[FN51]. This balancing test is not applied to statutes which are found to directly regulate interstate commerce. Statutes of this sort will be struck down without hesitation. *See MITE*, 457 U.S. 624, 640.

In *MITE*, Justice White, speaking for a plurality of the Court, considered the Illinois law to directly regulate interstate commerce. However, in a separate aspect of the opinion which was joined by a majority of the Court, Justice White then went on to also analyze the legislation under the assumption that it amounted to only indirect regulation of interstate commerce. Notwithstanding the consideration that a mere plurality of the Court viewed the Illinois statute as an impermissible direct burden on interstate commerce, it was prudent for the *MITE* Court to analyze the Illinois act from the perspective of it constituting both direct and indirect regulation of interstate commerce. Courts in general act wisely when they undertake an analysis from each of the perspectives because, as Justice Stone has pointed out, it is most difficult to determine whether a specific statute comprises a direct, as opposed to indirect, form of regulation. DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

Further, it is peculiar that the *MITE* Court attempted to create a direct versus indirect dichotomy at all. At least one distinguished scholar is of the view that the Court long ago abandoned the direct versus indirect formulation. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 408 (2d ed. 1988).

[FN52]. The balancing test enunciated in *Pike v. Bruce Church* has served as a workhorse for courts weighing the attributes of a state takeover policy against the evils imparted by that policy. The exact language of that test is as follows: "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." 397 U.S. 137, 142 (1970).

[FN53]. The supremacy clause provides that: "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.

[FN54]. The Williams Act was carefully constructed so as to favor neither management nor bidder. The legislative history shows that the bill was intended to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." SENATE COMM. ON BANKING AND CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S.REP. No. 550, 90th Cong., 1st Sess. 3 *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813. The Williams Act was designed solely to insure that investors would be provided with information sufficient to allow them to make a reasoned decision. *See* Piper v. ChrisCraft Industries, 430 U.S. 1, 36 (1977). As a consequence, an overzealous legislature which tilts the playing field in favor of incumbent management will likely see its efforts voided on account of the supremacy clause.

Likewise, a state statutory scheme which interposes unreasonable delays upon the tender offer process will also be subject to the death knell of the supremacy clause. The Supreme Court has recognized that it is imperative that bids be allowed to follow their course unfettered by state provisions tending to delay the process. *See MITE*, 457 U.S. 624, 638-40.

[FN55]. See 3B H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW, § 13.34 [2] (rev. perm. ed. 1988) (In the years preceding *MITE*, there was a fair amount of litigation concerning the constitutionality of state takeover laws; however, the results were inconclusive). In *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) an Idaho takeover statute was struck down on both commerce clause and supremacy clause grounds. But some courts subsequently passing on state takeover statutes refused to follow *Great Western. See* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979); Wylain, Inc. v. Tre Corp., 412 A.2d 338 (Del. ch. 1980).

[FN56]. *MITE*, 457 U.S. 624.

[FN57]. *Id*. at 644-45.

[FN58]. *Id*. at 635-41. Chief Justice Burger, Justice Blackman and Justice White believed the Illinois takeover act frustrated the purposes of the Williams Act.

[FN59]. *See, e.g*., Fleet Aerospace Corp. v. Holderman, 796 F.2d 135, 139 (6th Cir. 1986); Terry, On Behalf of C. Herman Terry v. Yamashita, 643 F. Supp. 161, 165-66 (D. Haw. 1986). *See also* L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 205-09 (6th Cir. 1985) (Michigan Take-Over Offers Act upheld on commerce clause grounds but invalidated on supremacy clause principles); Bendix Corp. v. Martin-Marrietta Corp., 547 F. Supp. 522 (D.Md. 1982); National City Lines, Inc. v. LLC Corp., 687 F.2d. 1122, 1133 (8th Cir. 1982). *But see* Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425, 1429 (10th Cir. 1983), Telvest v. Bradshaw, 697 F.2d 576, 579-82 (4th Cir. 1983) (invalidating state takeover acts on commerce clause grounds only).

[FN60]. Statutes enacted in response to *MITE* are sometimes referred to as second generation takeover statutes. Ohio enacted its second generation takeover statute within a few months of the date *MITE* was handed down. OHIO REV. CODE ANN. § 1701.831 (Anderson 1985). Maryland adopted a separate form of second generation statutory scheme after Ohio's modified takeover law went into effect. The Maryland provisions differed from those of Ohio in that they guarded against front-end loaded, two tier tender offers by requiring approval of any merger by a supermajority shareholder vote unless certain conditions, possibly including payment of a “fair price,” were met. In contrast, the Ohio law was more far-reaching in the respect that it prohibited the acquisition of shares in excess of a certain level unless a majority of disinterested shareholders voted in favor of such acquisition. *See* Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 115-20 (1987). The Maryland approach proved to be the more popular of the two. Within three years following its enactment, thirteen states adopted similar fair price schemes while only five followed Ohio's lead. *Id*. at 117. Pennsylvania declined to follow either Ohio or Maryland but instead adopted both a “share redemption model” and a “fiduciary duty model.” *See* Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 480 (1987).

[FN61]. *See* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) In *Cardiff*, the Eighth Circuit held Minnesota's takeover act to be constitutional on both commerce clause and supremacy clause grounds but invalidated provisions granting the local securities commissioner broad discretion in deciding whether a bidder should be obligated to make additional disclosure. The two sections struck down were MINN. STAT. ANN. §§ 80B.03(2), (6) (West 1984). The court was apparently offended by the “open-ended” authority the provisions visited upon the commissioner. Section 80B.03(2) empowered the official to require “such additional information as [he] by rule prescribes.” Section 80B.03(6) required an offeror to disclose any “additional information the Commissioner may by rule prescribe.”

[FN62]. *See* Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986) *vacated sub nom*. Ohio v. Fleet Aerospace Corp., 481 U.S. 1001 (1987); Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Mo. 1985); Terry, On Behalf of C. Herman Terry v. Yamashita, 643 F. Supp 161 (D. Haw. 1986); APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985), *vacated as moot*, No. 85-5346 (8th Cir. Nov. 25, 1985) (the litigants reached a settlement before the Eighth Circuit reviewed the matter on appeal). *See also* Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 496 n.133 (1987).

[FN63]. *See, e.g.*, Herzel & Shepro, *Supreme Court Strikes a Surprise Blow Against Takeovers*, 8 THE COMPANY LAW. 237 (1987) ("The decision, CTS Corp. v. Dynamics Corporation of America, took the U.S. takeover industry by surprise.").

It is interesting to note that neither the balancing test of *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970), which related to the only decisional aspect of *MITE* upon which the majority agreed, nor any other balancing test was utilized in *CTS* even though the *Pike v. Bruce Church* test had generally played an integral role in state takeover law opinions issued by courts prior to *CTS. See* Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 700 (1981); Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1866 (1987).

[FN64]. *CTS*, 637 F. Supp. 389 (N.D. I11. 1986).

[FN65]. *CTS*, 794 F.2d 250 (7th Cir. 1986).

While the outcome of *CTS* was opposite that of *MITE, CTS* did not overrule *MITE*. After noting that the *CTS* Court was not bound by the supremacy clause aspect of the *MITE* opinion, since a mere plurality of the Court joined in that segment of the decision, Justice Powell concluded that the Indiana act conformed with the guidelines outlined in *MITE*. Justice Powell stated that the Indiana statutory scheme 1) did not favor management in its attempts to communicate with shareholders; 2) did not impose an unreasonable delay on tender offers; and 3) left investors free to make their own decisions on the issue of whether they would tender their shares to the bidder. *CTS*, 481 U.S. 69, 83-84. The Court further distinguished the legislation before it from that construed in *MITE* by noting that the Indiana takeover act did not have a discriminatory effect upon interstate commerce. *Id*. at 88.

[FN66]. In *MITE*, the Court wholeheartedly endorsed the underpinnings of free market economic theory. It found that the Illinois act placed undue burdens on interstate commerce as it interfered with the opportunity of target company shareholders to sell stock at the tender offer price. "The reallocation of resources to their highest valued use, a process which can improve efficiency and competition, [was thus] hindered." *MITE*, 457 U.S. 624, 643. In contrast, the *CTS* Court responded to its construction of the bidders' contention that "tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively" by noting that the states are not obligated to adhere to any particular theory of economics. *CTS*, 481 U.S. 69, 91. Further, the *CTS* Court also made it clear that, within the context of judicial evaluations regarding the acceptability of tender offers, generalizations involving economic theory are to be avoided. In doing so, Justice Powell stated that "generalizations usually require qualification." *Id*., at n.13. He stressed that "there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in more effective management or otherwise be beneficial to shareholders." *Id*. (emphasis in original).

One can readily detect the economic theory dichotomy created by the two opinions. And, since both opinions are valid, lower courts may find themselves in somewhat of a quandary. Most probably, Justice Powell was offended by Justice White's endorsement of a certain set of economic principles and went out of his way to set the record straight. Nonetheless, onlookers may find themselves hardpressed to conclusively determine the Supreme Court's position in this area.

[FN67]. ARIZ. REV. STAT. ANN., §§ 10-1201 (Supp. 1988); FLA. STAT. § 607.109 (1989); MASS. GEN. L. ch. 110D (1988); MINN. STAT. § 302A.011 (1989); S.B. 687, ch. 124, 1st Sess., 1987 N.C. Sess. Laws 122; WASH. REV. CODE 23A.50.040(1989).

[FN68]. *See, e.g., Hostile Takeover Measure is Signed in Massachusetts*, Wall St. J., July 22, 1987, at 8, col. 4 (recounting incident where Gillette Company persuaded Massachusetts to pass anti-takeover legislation. Governor Dukakis signed the takeover legislation at a Gillette factory in South Boston). Similarly, in the wake of *CTS*, Boeing induced Washington to adopt protective measures while Greyhound caused Arizona to do the same. *See* Shapiro and Strauss, *Breathing New Life Into State Takeover Statutes*, 19 INST. ON SEC. REG. 457, 497 (1988). [Hereinafter, Shapiro and Strauss, NEW LIFE]. In North Carolina, Burlington Industries prompted state lawmakers to pass two takeover acts designed to frustrate bidders. *See* Farris, *The Constitutionality of the North Carolina Control Share Acquisition Act*, 66 N.C. L. REV. 1123, 1124 (1988). The Minnesota Legislature appears to have acted the most promptly. Minnesota's takeover legislation was “pushed through the legislature in a matter of hours.” *See* Shapiro and Strauss, *New Life*, at 497. Minnesota's takeover law was enacted at the insistence of Dayton Hudson Corp. *Id*., at 497-98. Florida updated its takeover law at the urging of Harcourt Brace Jovanovich. *See* Mendelsohn & Berg, *Tender Offer Battles in Legislative Arena Shift to Pre-emption*, Legal Times, Sept. 14, 1987, at 26. *See also* T. HAZEN, THE LAW OF SECURITIES REGULATION 386 (1985) (State takeover acts are not customarily passed in order to protect investors. “In most instances state tender offer acts were passed at least in part to protect incumbent management of local companies that were potential takeover targets.”).

[FN69]. *See* Wermiel, Ingersoll & Stewart, *Justices Uphold States' Curbs on Takeovers*, Wall St. J., Apr. 22, 1987, at 2, col. 1 (“The Supreme Court made no mention of the Ivan Boesky insidertrading scandal, but takeover lawyers said that the widespread public perception of abuses associated with hostile takeovers undoubtedly contributed to a climate in which judges are likely to look with favor on legislative efforts to regulate takeovers.”).

[FN70]. State takeover legislation increases the cost of takeover attempts. *See* W. Pugh & J. Jahera, State Antitakeover Legislation and Shareholder Wealth 4, (presentation at the 1988 annual meeting of the Financial Management Association, New Orleans, LA) (“Most of the [state takeover] legislation makes a takeover more costly to the bidder.”). By increasing the costs associated with takeovers, the Court made takeovers less attractive.

[FN71]. THE OFFICE OF THE CHIEF ECONOMIST, SECURITIES AND EXCHANGE COMMISSION, *Do Bad Bidders Become Good Targets*? 22-24 (August 25, 1988).

[FN72]. K. DAVIDSON, MEGAMERGERS: CORPORATE AMERICA'S BILLION-DOLLAR TAKEOVERS 2 (1985). In comparison, the average takeover premium in the 1960s was only between 13% and 25%. *Id*. at 240.

[FN73]. THE OFFICE OF THE CHIEF ECONOMIST, SECURITIES AND EXCHANGE COMMISSION, *Stock Trading Before the Announcement Of Tender Offers: Insider Trading Or Market Anticipating*? 3 (Feb. 24, 1987).

[FN74]. H.R. REP. No. 559, 98th Cong., 1st Sess. 5 (1984).

[FN75]. United States v. Reed, 601 F. Supp. 685 (1985).

[FN76]. *Id*. at 690-91.

[FN77]. The five individuals were Robert M. Wilkis, with Lazard Freres & Company; Ira B. Sokolow, with Shearson, Lehman Brothers; David S. Brown, vice president of Goldman Sachs & Co.; Ilan K. Reich, a lawyer with Wachtell Lipton Rosen & Katz; and Randall C. Cecola, with Lazard Freres & Company.

[FN78]. Only Wilkis, Brown and Cecola were indicted, pleaded guilty and were sentenced for trading while in possession of nonpublic information.

[FN79]. After the Supreme Court's decision in *CTS*, Boesky pleaded guilty to criminal charges related to his insider trading scheme and was sentenced to three years imprisonment.

[FN80]. H.R. REP. No. 5133, 100th Cong., 2d Sess. 11 (1988). *See also Insider Trading Dilemma*, 21 MERGERS AND ACQUISITIONS 7 (1986). ("Despite elaborate procedures to keep the lid on premature disclosure of major business developments such as mergers, acquisitions, and divestitures prevention of leaks has been difficult at best and there is no easy way to halt, with certainty, illegal or unethical conduct by the people directly involved in, or close to, the deals themselves.").

[FN81]. Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985).

[FN82]. *Id*. at 315 (quoting H.R. REP. No. 355, 93rd Cong., 1st Sess. 6 (1983).

[FN83]. *Id*.

[FN84]. 15 U.S.C. § 78j(b) (1982). Section 10(b) provides as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[FN85]. 15 U.S.C. §§ 78a-78kk (1982) & Supp. IV (1986).

[FN86]. 17 C.F.R. § 240.10b-5 (1988). Rule 10b-5 provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (1) To employ any device, scheme or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[FN87]. H.R. REP. No. 5133, 100th Cong., 2d Sess. 11 (1988).

[FN88]. G. SHAW, THE IRRATIONAL KNOT xiv (1905).

91 W. Va. L. Rev. 1001

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