JUDGE VERSUS PROFESSOR: FRANK EASTERBROOK AND THE WISCONSIN ANTI-TAKEOVER STATUTE

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In *Amanda Acquisition Corp. v. Universal Foods Corp.*,[1] the Seventh Circuit addressed for the third time the question of the constitutionality of a state anti-takeover statute.[2] This time, a Wisconsin statute was at issue. Like the two generations of state anti-takeover statutes examined by the Seventh Circuit before *Amanda*, the challenge to the third proceeded on the dual claims that such statutes are preempted by the Williams Act[3] and violate the dormant Commerce Clause.[4]

Although Wisconsin is not thought of as a primary corporate takeover arena, the *Amanda* opinion is of special note because it is the first opinion by a circuit court addressing the subject since the Supreme Court upheld an anti-takeover statute in

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1. 877 F.2d 496 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 366 (1989).

2. The Seventh Circuit has addressed this question twice previously, and each time the Supreme Court reviewed its decision. The first time the Supreme Court agreed with the Seventh Circuit's holding of unconstitutionality. *See* MITE Corp. v. Dixion, 633 F.2d 486 (7th Cir. 1980), *aff'd sub nom.* MITE Corp. v. Edgar, 457 U.S. 624 (1982) (holding that the Illinois anti-takeover statute imposed a substantial burden on interstate commerce outweighing its intrastate benefit and thereby violating the Commerce Clause). The second time the Supreme Court reversed the Seventh Circuit's holding of unconstitutionality. *See* Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987) (holding that the Indiana anti-takeover statute was not preempted by the Williams Act and did not violate the Commerce Clause). With the Seventh Circuit's acquiescence in *Amanda*, as this essay demonstrates, the day for successful challenges to anti-takeover statutes may have passed.

3. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982). The Williams Act, passed in two stages in 1968 and 1970, amended the Securities Exchange Act of 1934 by adding §§ 13(d)-(e) and 14(d)-(f). Constitutionally, the argument that state anti-takeover statutes are preempted by the Williams Act is an argument that those statutes violate the Supremacy Clause. *See* U.S. CONST. art. VI ("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.").

4. *See* U.S. CONST. art. I, § 8, cl. 3. ("[T]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). In the absence of federal regulation, states are allowed to regulate commerce so long as the regulation: (1) pursues a legitimate state interest, (2) is rationally related to that legitimate state interest, and (3) does not create a burden on interstate commerce that is greater than the local putative benefit created by the regulation. *See* Pike v. Bruce Church, 397 U.S. 137 (1970).

CTS Corp. v. Dynamics Corp. of America.[5] Moreover, the statute questioned in Amanda is substantially similar to New York's recently enacted anti-takeover law.[6] Critics of pro-management interference in the corporate takeover market no doubt felt some degree of comfort knowing their arguments were going to be heard by a court that had consistently expressed hostility toward states' anti-takeover statutes in the past. Indeed, the Seventh Circuit's prior two rebuffs of management positions may have been a motivating factor in Amanda's decision to pursue its appeal. Surprisingly, however, on the third effort the Seventh Circuit—through probably its most unlikely candidate, Judge Frank H. Easterbrook—upheld the statute in an opinion that has left many securities lawyers fearing that state lawmakers across the nation may be able to "make local corporations 'takeover proof.' "[7]

Of particular interest is the obvious conflict between Judge Easterbrook's opinion in *Amanda* and former Professor Easterbrook's previously published views on the utility of unrestrained tender offers.[8] With this disparity in mind, it is tempting to conclude that Judge Easterbrook either overcompensated for his personal views or refused to seize upon critical distinctions between the Wisconsin statute and the Indiana statute recently upheld by the Supreme Court in *CTS*, a case in which the Court overruled a Seventh Circuit holding.[9] This, however, may not be a fair indictment. Although the Indiana statute at issue in *CTS* is distinguishable in some significant re-

5. 481 U.S. 69 (1987).

6. *Compare* WIS. STAT. § 180.726 (1987) *with* N.Y. BUS. CORP. LAW § 912 (McKinney 1986).

7. *See* Nat'l. L.J., July 10, 1989, at 24.

8. Professor Easterbrook joined the Seventh Circuit in 1985. Previously, as a professor at the University of Chicago Law School, he was a leading critic of legislative anti-takeover efforts. *See, e.g.*, Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

> Commentators have proposed a bewildering number of explanations for mergers and takeovers. They include gains from increasing the ability of firms to employ information that would leak if conveyed between independent entities, 'synergy' gains as the combined firms obtain the value of some savings in joint operations, and tax benefits. None of these explanations is implausible, and none is inconsistent with a belief that tender offers improve shareholders' welfare. . . . The tender bidding process polices managers whether or not a tender offer occurs, and disciplines or replaces them if they stray too far from the service of the shareholders.

Id. (footnotes omitted).

9. *See* 481 U.S. 69 (1987), *rev'g* Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986).

spects from the statute in *Amanda*, a strict reading of *CTS* makes these differences irrelevant. In fact, if *CTS* is to be read, as it seems on its face, to authorize extensive state regulation of the internal affairs of domestic corporations, then the position articulated in *Amanda* is defensible regardless of the distinctions between state statutes.[10]

The Wisconsin statute[11] questioned in *Amanda* is an example of a third-generation anti-takeover statute.[12] Effectively, the statute inhibits tender offers by prohibiting, for a period of three years, certain business combinations that often follow hostile tender offers.[13] Specifically, the statute requires an "interested stockholder," one who owns ten percent or more of a resident domestic corporation's stock, to obtain approval of the corporation's board if, within three years of becoming an interested stockholder, he intends to effect any of a number of transactions with the corporation.[14] The court stated that transactions under the purview of the statute include "a merger with the bidder or any of its affiliates, sale of more than [five percent] of the assets to [the] bidder or affiliate, liquidation of the target, or a transaction by which the target guarantees the bidder's or affiliate[']s debts or passes tax benefits to the bidder or affiliate."[15] Thus, no matter how positive the shareholders' reception to the tender offer is, unless the target's board consents, the Wisconsin statute effectively partitions the bidder from the target once the bidder obtains ten percent of the target's stock.[16]

10. Whether the Supreme Court supports such a strict reading of the *CTS* opinion and agrees with the *Amanda* opinion will probably not be known for some time. As an economic matter, the District Court's denial of injunctive relief ended this case. *See Amanda*, 877 F.2d at 499. Amanda Acquisition Corporation, however, pursued its appeal and later petitioned the Supreme Court to review the Seventh Circuit's ruling. The Supreme Court denied certiorari on November 6, 1989. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 58 U.S.L.W. 3277 (1989).

11. WIS. STAT. § 180.726.

12. *See supra* note 2. For a more extensive discussion of the first two generations of anti-takeover law, including the *MITE* and *CTS* cases, see Comment, *The Constitutionality of the Delaware Anti-Takeover Statute*, 13 HARV. J.L. & PUB. POL'Y 319 (1990) (this issue).

13. This type of statute is known as a business combination statute. New Jersey and New York both have similar anti-takeover statutes. *See* N.J. STAT. ANN. § 14A:10A (West 1987); N.Y. BUS. CORP. LAW § 912 (McKinney 1986). Delaware has a similar anti-takeover statute, although a bidder can avoid its application by acquiring eighty-five percent or more of the target's shares. This is an exemption that is missing from the New York, New Jersey, and Wisconsin statutes.

14. *See* WIS. STAT. § 180.726(2).

15. *Amanda*, 877 F.2d at 498.

16. *See id.* at 498.

In the case at hand, Amanda Acquisition Corporation[17] made a tender offer for the stock of Universal Foods Corporation.[18] The offer was at a premium over the market price[19] and was conditional in three respects: (1) at least seventy-five percent of Universal's outstanding stock had to be tendered,[20] (2) the anti-takeover statute had to be judicially declared void, and (3) Universal's poison-pill stock had to be redeemed.[21] The only condition adjudicated by the *Amanda* court was the second, the validity of the Wisconsin statute.

Initially, Amanda filed suit in the Eastern District of Wisconsin[22] demanding, among other things,[23] that the Wisconsin law be declared unconstitutional and that injunctive relief be granted from Universal's defensive tactics.[24] The District Court denied Amanda's motion for injunctive relief and declared that the Wisconsin Business Combination Statute was constitutional and not preempted. Because Amanda's financing was contingent on a prompt merger with Universal, the denial of relief from the statute economically put an end to the case. Regardless of this fact, Amanda appealed to the Seventh Circuit.[25]

17. *See id.* Amanda Acquisition Corporation is a Delaware corporation that was formed for the sole purpose of acquiring the stock of Universal Foods. Amanda is a subsidiary of High Voltage Engineering Corporation, whose principal equity investors are Berisford Capital, PLC, a British venture capital firm, and Hyde Park Partners, L.P., a limited partnership affiliated with the principals of Berisford.

18. *See id.* Universal Foods Corporation is a diversified Wisconsin corporation traded on the New York Stock Exchange.

19. *See id.* In mid-November 1988, stock in Universal was selling at approximately $25 per share. On December 1, 1988, Amanda tendered an offer of $30.50 per share. Before the case reached the Seventh Circuit, that offer had been incrementally increased to $38 per share.

20. *See* WIS. STAT. § 180.25(9). This provision is a second-generation anti-takeover provision that removes the voting rights from shares acquired in a tender offer. These voting rights may be restored under certain conditions, one of which is the successful acquisition of seventy-five percent or more of the outstanding shares. To avoid the application of this provision, Amanda conditioned its offer on at least a seventy-five percent tender response.

21. *See Amanda*, 877 F.2d at 498.

22. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984 (E.D. Wis. 1989).

23. *See Amanda*, 877 F.2d at 499. The plaintiffs also moved to enjoin the operation of Universal's poison-pill plan and to dismiss Universal's counterclaim alleging federal securities law violations. Universal had counterclaimed that Amanda was in violation of the margin rules established by the Federal Reserve Board. Although each of these claims was still active at the appellate level, the Seventh Circuit only addressed the constitutional question. Because the court upheld the statute, the tender offer necessarily failed and the remaining claims became moot. *See id.*

24. *See* Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 987 (E.D. Wis. 1989).

25. It should be noted that Amanda's principals, Hyde Park Partners, L.P. and High Voltage Engineering, are not newcomers to the legal wranglings that pervade takeover

The Seventh Circuit did not consider the claims for injunctive relief but addressed the constitutional claims on their merits.

Although the *Amanda* opinion understandably came as a surprise to those familiar with the Seventh Circuit's past opinions, Judge Easterbrook's opinion makes sense once one identifies and examines three deferential considerations that restrained the court: (1) the limited role of the judiciary, (2) the force of precedent, and (3) the principle of federalism.

Addressing the preemption claim, the court first examined the policy arguments behind both Amanda's position and the statute, concluding that where the two conflicted it was the duty of the court to defer to the latter. Second, the court looked to the *CTS* case, noting that the principle of stare decisis must be respected. And lastly, the court examined the proper roles of state and national legislation in our federal system. While all three of these restraints are visible factors in the court's preemption analysis, the court ultimately rested its preemption opinion on the third, holding that the Wisconsin statute is a proper exercise of state power. In addressing the Commerce Clause claim, the court again noted the same three restraints, but here it hinged its analysis on the second and third, the federalism restraint and the restraint of precedent.

Amanda's first attack on the Wisconsin statute was a claim that it was preempted by the Williams Act. Amanda argued that Congress, by passing the Williams Act, had affirmatively entitled investors to receive the benefits of tender offers.[26] Amanda also argued that the Wisconsin law makes almost all tender offers fatally unattractive to all bidders considering a business combination soon after an acquisition of stock.[27] Thus,

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battles. In fact, Hyde Park acquired High Voltage only after securing a preliminary injunction, affirmed at the circuit court level, on a claim that the Massachusetts anti-takeover statute (MASS. GEN. L. ch. 110C, § 3) probably violated the Commerce Clause and was probably preempted by the Williams Act. *See* Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988). Given this history, it is likely that Hyde Park Partners had an interest in the *Amanda* litigation that extended beyond its bid for Universal.

26. *See Amanda*, 877 F.2d at 502. These benefits take the form of a premium over the market price of the targeted security. Benefits also accrue to shareholders when management is more diligent in its duties because it is mindful of the possibility of a takeover if its efforts cause the market to undervalue the enterprise. Finally, benefits accrue to shareholders who do not tender to the extent that the offer succeeds and new management increases the productivity or efficiency of the enterprise. These latter benefits—synergy gains, economies of scale, and the like—also accrue to public investors generally to the extent that the economy at large gains.

27. "The district court found that this statute 'effectively eliminates hostile leveraged buyouts.' As a practical matter, Wisconsin prohibits any offer contingent on a

Amanda argued that the law effectively prohibits the holders of affected Wisconsin corporate stock from receiving a federal statutory entitlement.

In evaluating this argument, Judge Easterbrook first examined the economic policies behind the respective positions and candidly admitted that "[i]f our views of the wisdom of state law mattered, Wisconsin's takeover statute would not survive."[28] The court's opinion thus makes it clear that the judges understood and espoused Amanda's policy position.[29] The court agreed that "[t]he prospect of monitoring [entrenched management] by would-be bidders, and an occasional bid at a premium, induces managers to run corporations more efficiently and replaces them if they will not."[30] In addition, the court found it particularly offensive that the Wisconsin law achieves its effect only by removing shareholder autonomy. As Judge Easterbrook put it, "[S]tate [anti-takeover] laws have bite only when investors, given the choice, would deny managers the power to interfere with tender offers . . . ."[31] In the end, however, Judge Easterbrook abandoned the economic policy arguments on the ground that they were better suited to the legislative rather than the judicial arena.[32] In doing so, he confessed that "[s]kepticism about the wisdom of a state's law does not lead to the conclusion that the law is beyond the state's power . . . . Unless a federal statute or the Constitution bars the way, Wisconsin's choice must be respected."[33] After all, "a law can be both economic folly and constitutional."[34]

The court then examined whether the Wisconsin law constituted a proper exercise of state power or whether it was preempted by the Williams Act. In the end, the court concluded that the Wisconsin statute was an acceptable exercise of state power for several reasons. First, section 28(a) of the Williams Act states: "Nothing in this chapter shall affect the jurisdiction

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merger between bidder and target, a condition attached to about [ninety percent] of contemporary tender offers." *Amanda*, 877 F.2d at 499.

28. *Id.* at 500.

29. Judge Easterbrook devotes three pages of the twenty-one-page opinion to a lecture on the faulty economics behind anti-takeover statutes and the injury they inflict on shareholders. *See id.* at 500-02.

30. *Id.* at 500.

31. *Id.* at 502; *see also* Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 128-31 (1987).

32. *See Amanda*, 877 F.2d at 502.

33. *Id.*

34. *Id.* at 509 (quoting *CTS*, 481 U.S. at 96-97 (Scalia, J., concurring)).

of the securities commission . . . of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."[35] With this as background, the court pointed out that "[a]lthough some of the SEC's regulations . . . conflict with some state takeover laws, the SEC has not drafted regulations concerning mergers with controlling shareholders, and the [Williams] Act itself does not address the subject."[36] The court concluded that states have leeway under Section 28(a) to prohibit some transactions that are permitted under federal law. As applied to *Amanda*, the Williams Act regulates the process of tender offers, and permits, but does not require, business combinations to follow a successful acquisition.

The court also argued that it is difficult to infer preemption in an area that has been customarily left up to the States,[37] and the internal regulation of corporate entities has long been considered to be the domain of the incorporating state.[38] This ability to regulate the internal affairs of corporations has produced many laws that, like the Wisconsin law at issue, delay the transfer of control to the owners or make an acquisition less attractive.[39] The court was quick to point out that none of these laws have run afoul of the Williams Act because the Williams Act only regulates the mechanical procedures required for a tender offer. These state laws, including the Wisconsin statute at issue in *Amanda*, regulate what can be done with the stock before a tender offer commences or after a tender offer concludes, but they do not regulate the process of the tender offer itself. The court found this type of legislation acceptable in that "[f]ederal securities laws frequently regulate process while state corporate law regulates substance."[40]

35. *Id.* at 502 (quoting the Securities and Exchange Act of 1934, § 28(a), 15 U.S.C. § 78bb(a)).

36. *Id.*

37. *See id.* (citing California v. ARC Am. Corp., 109 S. Ct. 1661, 1665 (1989); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985); and Air Line Pilots Ass'n v. UAL Corp., 874 F.2d 439, 447-48 (7th Cir. 1989)).

38. *See id.* For an historical overview of the Supreme Court's treatment of state regulation of internal corporate affairs, see Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1044-48 (1986).

39. In particular, state laws that permit staggered or classified boards of directors delay transfer of corporate control, and supermajority voting requirements usually demand that a higher premium is paid to gain the required support. *See Amanda*, 877 F.2d at 503; *see also* R. CLARK, CORPORATE LAW § 9.1.3 (1986).

40. *Amanda*, 877 F.2d at 503.

Lastly, noting the restraint of precedent, the court pointed out that the last time it had held a state anti-takeover statute preempted by the Williams Act, its view had received "rough treatment"[41] from the Supreme Court; the Court had reversed the Seventh Circuit's holding in *CTS*. Indeed, even when the Supreme Court struck down the anti-takeover statute in *MITE*, the preemption argument never gained the support of more than a three-Justice plurality.[42] Having been so recently corrected by the Supreme Court for its ruling in *CTS*, the Seventh Circuit in *Amanda* conceded that "[n]othing in the Williams Act says that the federal compromise among bidders, targets' managers, and investors is the only permissible one."[43]

Although the Seventh Circuit disposed of the preemption claim with very little hesitation, the court could have seized upon material distinctions between the Wisconsin statute and its Indiana analog in *CTS* to reach a different result without offending the principle of stare decisis. First, the Supreme Court concluded that the statute upheld in *CTS* "protects the independent shareholder against both of the contending parties [management and bidder]. Thus, the [Indiana] Act furthers a basic purpose of the Williams Act, 'plac[ing] investors on an equal footing with the takeover bidder.' "[44] The Wisconsin statute, however, much like the statute struck down by the Court in *MITE*, has the opposite effect. By insulating entrenched management from the continual policing inherent in the possibility of a hostile tender offer, the Wisconsin statute operates "to favor management against offerors, to the detriment of shareholders."[45] This shift of benefits and burdens

41. *Id.*

> Because Justice White's views of the Williams Act did not garner the support of a majority of the Court in *MITE*, we reexamined that subject in *CTS* . . . . '[We concluded that] whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stifled by the weight of precedent.' The rough treatment our views received from the Court—only Justice White supported the holding on preemption—lifts the 'weight of precedent.'

Id. (citations omitted).

42. In *MITE*, Chief Justice Burger and Justices White and Blackmun formed a plurality which agreed with the Seventh Circuit that some provisions of the statute were preempted by the Williams Act through the Supremacy Clause of the Constitution. The remaining Justices never addressed the preemption question. *See MITE*, 457 U.S. at 624.

43. *Amanda*, 877 F.2d at 503; *see also* Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 71-74.

44. *CTS*, 481 U.S. at 82.

45. *Id.*

cuts directly against the purpose of the Williams Act. Also, the Indiana statute upheld in *CTS* is consistent with the federal policy behind the Williams Act: investor protection.[46] The goal of investor protection is not found in either the Wisconsin law or the statute struck down in *MITE*. In fact, the goal of the Wisconsin law, judging from its outcome, is simply to vest the current management with greater control over their positions. And lastly, in upholding the *CTS* statute, the Supreme Court seemed to put great weight on the fact that the statute in question "allows shareholders to evaluate the fairness of the offer collectively."[47] Once again, the statute in question in *Amanda* does not meet this standard. Rather than allowing the shareholders to evaluate the fairness of the offer collectively, the statute functionally prohibits shareholders from evaluating offers at all and unilaterally vests management with control over the tender offer determinations.[48]

Arguing that the Wisconsin statute contradicts the purposes or the general scheme of the Williams Act, however, is apparently not enough to conclude that the latter preempts the former. Although that might be enough under the *MITE* analysis, it is important to remember that in *MITE*, the preemption analysis only received support from a plurality of the Supreme Court.[49] In *CTS*, the Court narrowed the relevant preemption standard, finding that preemption of a state statute occurs only " 'where compliance with both federal and state regulations is a physical [sic] impossibility . . . .' "[50] Following this line of reasoning led Judge Easterbrook to point out that although "[i]t is not attractive to put bids on the table for Wisconsin corpora-

46. *See id.*

> The Indiana Act [upheld in *CTS*] operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the [Indiana] Act protects them from the coercive aspects of some tender offers.

Id. at 82-83.

47. *Id.* at 84.

48. This is not to say that the mechanics of the Williams Act are interfered with, but simply that tender offers will become so unattractive and scarce that the mechanics of the Williams Act will become moot, and shareholders will lose their opportunity to evaluate tender offers. As a commissioner at the Securities and Exchange Commission said, "A decision like this from that judge may be sufficiently powerful to portend a trend that would leave the Williams Act, as a practical matter, no longer governing takeovers." Nat'l L.J., July 10, 1989, at 24 (quoting Joseph A. Grundfest).

49. *See supra* note 41 and accompanying text.

50. *CTS*, 481 U.S. at 79 (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

tions . . . because Wisconsin leaves the process alone once a bidder appears, its law may co-exist with the Williams Act."[51]

The court then turned to Amanda's Commerce Clause claims. Because the Wisconsin statute does not discriminate against interstate commerce on its face, a straightforward Commerce Clause analysis does not apply. Thus, Amanda argued that the statute had the effect of unreasonably restricting commerce, much of the effect of which was felt outside of Wisconsin, thereby violating the dormant Commerce Clause. Amanda thus claimed an "unreasonable burden on commerce," invoking the balancing test articulated in *Pike v. Bruce Church*[52] and applied subsequently in *MITE*. Although this argument seems to comport with traditional dormant Commerce Clause analysis, the court refused to accept it.[53] Instead, Judge Easterbrook pointed to the restraint of precedent and asserted that "*CTS* dispatched this concern [the application of the *Pike* balancing test] by declaring it inapplicable to laws that apply only to the internal affairs of firms incorporated in the regulating state."[54]

Rather than applying a *Pike* balancing test, the court asserted that after *CTS*, the proper analysis in this area is two-fold: First, does the law discriminate among either bidders or investors on

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51. *Amanda*, 877 F.2d at 505.

52. 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly 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. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

53. The court claimed:

> [A]lthough *MITE* employed the balancing process described in *Pike* to deal with a statute that regulated all firms having 'contacts' with the state, *CTS* did not even cite that case when dealing with a statute regulating only the affairs of a firm incorporated in the state, and Justice Scalia's concurring opinion questioned its application.

Amanda, 877 F.2d at 505. The court also questioned, but never answered, whether baleful effects on commerce were enough to trigger the balancing test in *Pike*, or whether discrimination was necessary. *See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

54. *Amanda*, 877 F.2d at 507; *see CTS*, 481 U.S. at 89-94. The cited pages tend to support Judge Easterbrook's assertion. However, at the start of the concluding paragraph of the *CTS* opinion, the Supreme Court seemed to slip back into a *Pike* analysis when it said, "To the limited extent that the [Indiana statute] affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders." *Id.* at 94.

the basis of their domicile? Second, does the law threaten to create inconsistent, overlapping corporate regulation?[55] If both of these questions can be answered negatively, the jurisprudence of *CTS* requires that the statute at issue be allowed to stand.[56]

In examining the first question—whether the law discriminates according to domicile—the court returned a resounding "no."[57] In reaching this conclusion, the court analyzed the impact of the law on both resident and non-resident investors and bidders. The court acknowledged that the law does negatively affect out-of-state investors and bidders but found that the law has the identical negative impact on resident investors and bidders. The court asserted, therefore, that the law perpetrated no discrimination based on residence.

The second question—whether the law threatened to create inconsistent, overlapping corporate regulation—was also easily dispatched with a "no." In reaching this conclusion, the court pointed to the fact that the Wisconsin law is only applicable to a subset of corporations chartered within Wisconsin and could have no regulatory effect on corporations chartered in other states.[58]

In conclusion, the Seventh Circuit pointed out that even though the Wisconsin law is constitutionally sound, its future is limited because of its faulty economic premises. Specifically, the statute creates an inequity in its resultant benefits and burdens. Presently, the major beneficiaries of the statute are the entrenched management, workers, and suppliers of Wisconsin's corporations, most of whom are an integral part of Wisconsin's economy. The parties who bear the brunt of payment for these benefits are the shareholders of Wisconsin corporations, most of whom, undoubtedly, have no other ties to the state. In effect, by following the Supreme Court's analysis established in *CTS* and affirming the district court in *Amanda*, the Seventh Circuit allowed Wisconsin to enforce "cost-exporting

55. *See supra* notes 49-50 and accompanying text.

56. *See CTS*, 481 U.S. at 87-89.

57. *See Amanda*, 877 F.2d at 506 ("Because nothing in the [Wisconsin] Act imposes a greater burden on out-of-state offerors than it does on similarly situated [Wisconsin] offerors, we reject the contention that the Act discriminates against interstate commerce."); *see CTS*, 481 U.S. at 88.

58. *See Amanda*, 877 F.2d at 507.

legislation."[59]

In the end, Judge Easterbrook concluded that the court was unable to strike down the Wisconsin statute. Although the tone of the opinion makes it clear that Judge Easterbrook was not pleased with the result, he seems to take heart in the fact that although *CTS* seems to permit states unlimited regulatory discretion in the internal affairs of the corporations they charter, in the long run, statutes like Wisconsin's will collapse under the weight of a competitive interstate financial market.[60]

Given the early history of state anti-takeover jurisprudence, *Amanda* is a somewhat unexpected result. Had the reasoning developed in *MITE* been applied in this case, the Wisconsin law would surely have been struck down. Most courts and commentators were convinced that *MITE* marked the end of state anti-takeover statutes, but the jurisprudence in this area took a surprisingly different course in *CTS*.[61] In turn, the *Amanda* court was extremely deferential to the direction of the *CTS* jurisprudence. In upholding the Wisconsin statute, the most visible factors that restrained the Seventh Circuit were (1) the limited role of the judiciary, (2) the force of precedent, and (3) the proper power of states in the federal system. Addressing the preemption question, the court noted each of these restraining factors, and, relying on the third, concluded that the statute was a proper exercise of Wisconsin's state power. Each of these three restraints were again visible as the court addressed Amanda's claim that the statute violated the Commerce Clause. In the end, however, the court's analysis rested on the second and third restraints: The authority of *CTS* required that the statute be upheld and the statute was a proper exercise of Wisconsin's state power.

As for the future of state anti-takeover legislation, it seems that the *Amanda*-style reasoning may carry the day. If this is

59. *Id.*; *see* Fischel, *supra* note 42.

60. When entrepreneurs want to raise capital for a corporate venture, they must decide where to incorporate. The choice of where to incorporate in turn affects the price investors are willing to pay for shares. And because shares of stock have many perfect substitutes which offer the same risk-return combinations, it is impossible for the entrepreneur to pass on the effects of the law to investors. . . . Nor can a state export costs to the founding entrepreneur since corporations can be incorporated anywhere, regardless of the firm's physical location. States that enact laws that are harmful to investors will cause entrepreneurs to incorporate elsewhere.

Id.

61. *See supra* note 11.

true, it appears that corporate shareholders are at the mercy of the respective incorporating legislatures to protect their interest in tender offers. If, however, legislatures fall into line with Wisconsin and make their state corporations takeover-proof, Judge Easterbrook is confident that in the long run, corporate shareholders' interests will be vindicated through the workings of the competitive interstate regulatory process that the *Amanda* opinion protected.