Edgar v. MITE Corp. and CTS Corp. v. Dynamics Corp. of America: A Subjective Look at State Takeover Legislation

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EDGAR v. MITE CORP. AND CTS CORP. v.
DYNAMICS CORP. OF AMERICA: A
SUBJECTIVE LOOK AT STATE TAKEOVER
LEGISLATION

I. INTRODUCTION

Edgar v. MITE Corp.¹ and CTS Corp. v. Dynamics Corp. of
America² are the only two cases to date in which the Supreme Court
of the United States has ruled on the constitutionality of state laws
which regulate tender offers.³ In both instances the state statutes
were challenged on the grounds that they conflicted with the federal

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¹ 457 U.S. 624 (1982).
³ A tender offer is
[a] public offer or solicitation by a company, an individual or a group of persons to
purchase during a fixed period of time all or a portion of a class or classes of securi-
ties of a publicly held corporation at a specified price or upon specified terms for
cash and/or securities.

E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973) [hereinafter
TENDER OFFERS FOR CORPORATE CONTROL]; see also Note, The Developing Meaning of
(1973) (presenting four approaches to defining the term "tender offer").

The impetus for regulation of tender offers is said to have been the emergence of the
tender offer as a means of acquiring corporate control in the 1960's. See Hayes & Taussig,
Tactics of Cash Takeover Bids, HARV. BUS. REV., Mar.-Apr. 1967, at 135, 135. This emer-
gence has been attributed to a "continued drive for expansion and diversification by many
businesses . . . .", id. at 136, a decreasing number of willing merger partners, id., and the ease
and low costs with which tender offers are accomplished. Id. at 137. Other underlying reasons
for the extensive use of tender offers include:
1. Increased corporate liquidity and readily available credit;
2. Comparatively depressed price/earnings ratios, book values, and cash or quick
assets ratios, making acquisition via the tender offer more attractive;
3. Greater recognition . . . and knowledge . . . [of] the technique;
4. Lack of extensive federal and state regulation of tender offers;
5. Quicker and more successful results when compared with a . . . proxy contest;
6. Greater flexibility . . . ;
7. Psychology—the appeal to stockholders . . . ; [and]
8. [R]educed costs . . .

TENDER OFFERS FOR CORPORATE CONTROL, supra, at 65-66; see also E. ARANOW, H. EIN-
horn, & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 1-2
(1977) (listing similar reasons for the widespread use of tender offers).

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laws regulating tender offers under the Williams Act⁴ and that they violated the Commerce Clause.⁵ It is the standards set forth in these two cases that now act as the standards by which all state takeover legislation⁶ is judged.⁷ The problem, this Note argues, is the subjectivity of the tests applied by the Court.

First, under the preemption analysis, the Court has determined

5. U.S. Const. art. I, § 8, cl. 3.
the applicable standard to be a "purpose" analysis, under which the Court will invalidate a state statute which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Court, however, has expanded this test beyond the legislative purpose of the Williams Act, namely investor protection, by commingling the concepts of this legislative purpose with the policies behind specific means with which Congress sought to protect investors. By so doing, this Note argues that the Court has created an unclear, subjective standard that may be used to invalidate state laws which arguably further the concept of investor protection and which relies too heavily on a court's characterization of the challenged law.

Secondly, under the Commerce Clause, the use of the balancing test enunciated in *Pike v. Bruce Church, Inc.* in both *MITE* and *CTS* has also created a subjective standard that can be used to invalidate state laws. In fact, this test arguably will allow a court to invalidate a state law which has met all the objective criteria of other Commerce Clause tests.

This Note will present detailed case studies of both *Edgar v. MITE Corp.* and *CTS Corp. v. Dynamics Corp. of America.* These analyses will include a presentation of the challenged statutes, the factual and procedural histories of both cases, and the decisions reached by the Court. In addition, a brief study of the purpose and provisions of the Williams Act is also presented. This Note then presents a detailed analysis of the two cases in the areas of preemption and the Commerce Clause, and identifies the problem of the unnecessary use of subjective analysis by the Court in these two contexts. Finally, this Note concludes that this subjective analysis

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9. See infra notes 231-330 and accompanying text.
10. See infra notes 231-330 and accompanying text.
12. See infra notes 361-393 and accompanying text.
13. See infra notes 368-91 and accompanying text.
14. 481 U.S. 624 (1982); see infra notes 20-99 and accompanying text (discussing the case).
15. 481 U.S. 69 (1987); see infra notes 100-185 and accompanying text (discussing the case).
16. See infra notes 185-221 and accompanying text.
17. See infra notes 222-311 and accompanying text.
18. See infra notes 330-92 and accompanying text.
should not be undertaken by the courts and offers a proposal as to what standards should be employed.\textsuperscript{19}

II. EDGAR V. MITE CORP.

A. The Illinois Business Takeover Act

The purported purpose of the Illinois Business Takeover Act\textsuperscript{20} was to "protect the interests of Illinois securityholders of companies having a close connection with [Illinois] without unduly impeding take-over offers, and [the] Act [was to] be interpreted so as to strike a balance that [did] not favor either management of a target company or an offeror."\textsuperscript{21}

The provisions of the Illinois statute applied to any "take-over offer"\textsuperscript{22} made for corporations of which shareholders located in Illinois owned ten percent of the class of equity securities subject to the tender offer,\textsuperscript{23} or for which any two of the following three conditions were met: the corporation had its principal offices in Illinois,\textsuperscript{24} was organized under the laws of Illinois,\textsuperscript{25} or had at least ten percent of its stated capital and paid-in-surplus represented within Illinois.\textsuperscript{26}

If the Act was determined to be applicable to the offer in question, it required the tender offeror to register the offer with the Illinois Secretary of State.\textsuperscript{27} In addition, the offeror had to notify the target company of its intent to make a tender offer and the terms of that offer twenty days before the tender offer became effective.\textsuperscript{28} During this twenty day period, the offeror could not communicate its offer to the shareholders, but the target company's management was free to disseminate information to its shareholders concerning the impending offer.\textsuperscript{29} The offer would then become registered within twenty days after the registration statement was filed with the Secretary of State unless the Secretary called a hearing.\textsuperscript{30}

\begin{itemize}
  \item 19. See infra notes 331-400 and accompanying text.
  \item 20. ILL. REV. STAT. ch. 121 1/2, paras. 137.51-.70 (1979) (repealed 1983).
  \item 21. Id. para. 137.51-1.
  \item 22. See id. para. 137.52-9 (defining "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer . . . ."); see also id. para. 137.52-10 (defining "target company").
  \item 23. Id. para. 137.52-10(1).
  \item 24. Id. para. 137.52-10(2)(a).
  \item 25. Id. para. 137.52-10(2)(b).
  \item 26. Id. para. 137.52-10(2)(c).
  \item 27. Id. para. 137.54A.
  \item 28. See id. paras. 137.54B, 137.54E.
  \item 29. See id. para. 137.54E.
  \item 30. Id. para. 137.54E.
\end{itemize}
STATE TAKEOVER LEGISLATION

The Secretary of State could call a hearing at any time during the twenty day period to determine the fairness of the offer. In addition, the hearing had to be held if requested by a majority of outside directors of the target company or by Illinois shareholders who owned ten percent of the stock subject to the offer. If the Secretary held a hearing, he was required to deny registration to the offer if it "fail[ed] to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer [was] inequitable or would work . . . a fraud or deceit upon the offerees . . . ." The Secretary of State was also empowered to bring actions seeking civil penalties for violations of the Illinois Act and criminal prosecutions against individuals who willfully violated the Act.

B. The Factual History

On January 19, 1979, the MITE Corporation initiated a cash
tender offer for all of the outstanding shares of Chicago Rivet & Machine Company by filing a Schedule 14D-1 with the Securities and Exchange Commission in order to comply with the provisions of the Williams Act. MITE did not, however, comply with the provisions of the Illinois Business Takeover Act but instead, on the same day, commenced litigation in the United States District Court for the Northern District of Illinois asking for a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. In addition, MITE Corp. sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

On February 1, 1979, the Illinois Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist from making further efforts to acquire Chicago Rivet. On February 2, 1979, Chicago Rivet notified MITE that it was filing suit in Illinois state court to enjoin the proposed offer. On the same day, Illinois Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist from making further efforts to acquire Chicago Rivet. MITE then removed the action commenced by Chicago Rivet in Pennsylvania state court to the United States District Court for the Western District of Pennsylvania, which denied Chicago Rivet's motion for a temporary restraining order. After Chicago Rivet's efforts to obtain relief in Pennsylvania failed, Chicago Rivet and the Illinois Secretary of State took steps to invoke the Illinois Act.

38. Id. at 627. Chicago Rivet & Machine Co. was a publicly held Illinois corporation. Id. Of the 2,181 shareholders of record on the offer date, 589 were Illinois residents who collectively owned approximately 45 percent of the target's outstanding stock. See MITE Corp. v. Dixon, 633 F.2d 486, 488 (7th Cir. 1980), aff'd sub nom., Edgar v. MITE Corp., 457 U.S. 624 (1982). MITE Corporation offered to pay $28 per share for all the outstanding shares of Chicago Rivet. MITE, 457 U.S. at 628. This price represented a premium of more than $4 per share above the market price just prior to the announcement of the offer. Id. The total value of the offer was estimated to be over $23 million. Id. at 629.

39. See infra notes 185-221 and accompanying text (discussing the provisions of the Williams Act, as well as the purpose behind its enactment).


41. See MITE, 457 U.S. at 628.

42. Id.

43. Id. at 629.

44. Id. Prior to the actions taken in early February, on January 22, 1979, Chicago Rivet brought suit in Pennsylvania state court, seeking to enjoin MITE from proceeding on the ground that the offer violated the provisions of the Pennsylvania Takeover Disclosure Law, PA. STAT. ANN. tit. 70, § 71-85 (Purdon Supp. 1982). Id. at 628. Jurisdiction was based on the fact that Chicago Rivet conducted most of its business in Pennsylvania. See id. A complaint was also filed with the Pennsylvania Securities Commission seeking to have the takeover statute enforced against MITE Corp, id. at 628 n.3, but the Commission decided not to enforce the Pennsylvania law against the proposed offer.

MITE then removed the action commenced by Chicago Rivet in Pennsylvania state court to the United States District Court for the Western District of Pennsylvania, which denied Chicago Rivet's motion for a temporary restraining order. Id. After Chicago Rivet's efforts to obtain relief in Pennsylvania failed, Chicago Rivet and the Illinois Secretary of State took steps to invoke the Illinois Act. Id. at 628-29.

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day, however, the United States District Court in Illinois issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act.48

On February 5, 1979, MITE published its offer, which was made to all shareholders of Chicago Rivet residing throughout the United States.46 On the same day, Chicago Rivet made an offer for approximately forty percent of its own shares.47 However, after the district court entered its final judgment on February 9, 1979, finding the Illinois Act unconstitutional, MITE and Chicago Rivet entered into an agreement whereby both offers were withdrawn and MITE was given thirty days to examine the books and records of Chicago Rivet.48 After so doing, MITE was either to make a sweetened offer, which Chicago Rivet agreed not to oppose, or decide not to acquire Chicago Rivet.49 On March 2, 1979, MITE announced its decision not to make the sweetened offer.50

C. The Procedural History

Subsequent to the preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet,51 the district court entered a final judgment on February 9, 1979, declaring that the Illinois Act was preempted by the Williams Act and that it violated the Commerce Clause.52 The United States Court of Appeals for the Seventh Circuit affirmed the District Court's decision, agreeing that several of the provisions of the Illinois Act were preempted by the Williams Act and that the Illinois Act unduly burdened interstate commerce in violation of the

45. Id. at 629.
46. Id.
47. Id. Chicago Rivet made a self-tender offer for 40 percent of the company's outstanding stock at $30 per share. Id. Chicago Rivet's self-tender offer was exempt from the provisions of the Illinois Business Takeover Act. ILL. REV. STAT. ch. 121 ½, para. 137.52-9(4) (1979) (repealed 1983); see MITE, 457 U.S. at 629 n.3.
48. MITE, 457 U.S. at 629.
49. Id. at 629-30.
50. Id. at 630. Although MITE had withdrawn its offer, the Court affirmed the decision of the Court of Appeals that the case was not moot. Id. The basis of its finding was that because the Illinois Secretary of State indicated that he still intended to enforce the Act against MITE, a reversal of the District Court's ruling could possibly expose MITE to civil and criminal liability. Id.; see ILL. REV. STAT. ch. 121 ½, paras. 137.63 to .65 (1979) (repealed 1983). The Supreme Court noted that such action would be foreclosed by a finding that the Illinois Act was unconstitutional. MITE, 457 U.S. at 630.
51. See supra text accompanying note 45.
Commerce Clause. The Illinois Secretary of State appealed the case to the United States Supreme Court, which affirmed the decision of the Seventh Circuit on June 23, 1982.

D. The Supreme Court Decision

The Supreme Court, in a five to four decision, upheld the decision of the Seventh Circuit with regard to the Commerce Clause. The Court held that the Illinois Business Takeover Act conflicted with the Commerce Clause since it imposed a burden on interstate commerce that was excessive in light of the local interests the Act purported to further. In addition, a plurality of the Court held that the Act's provisions conflicted with, and were thus preempted by, the Williams Act.

1. Preemption Under the Williams Act.— The Court first addressed the Seventh Circuit's holding that the Illinois Business Takeover Act substantially frustrated the objectives of the Williams Act in violation of the Supremacy Clause. The Court concluded that in enacting the Williams Act, “Congress intended to protect investors” and furthermore that:

    Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no “intention to do . . . more than give incumbent management an opportunity to express and explain its position.”

55. The opinions were divided as follows: Justice White delivered an opinion of which Parts I, II, and V-B became the opinion of the Court; Chief Justice Burger joined the opinion in its entirety; Justice Blackmun joined Parts I, II, III and IV; Justice Powell joined Parts I and V-B; Justices Stevens and O'Connor joined Parts I, II, and V. Justices Marshall, Brennan and Rehnquist dissented. Id. at 625-26.
56. See id. at 640-46.
57. Parts III and IV of Justice White's opinion addressed the issue of preemption under the Williams Act in which Chief Justice Burger and Justice Blackmun joined. Id. at 625-26; see supra note 55.
58. See MITE, 457 U.S. at 630-40.
59. See infra notes 185-221 (discussing the provisions of the Williams Act, as well as the purpose behind its enactment).
60. The Supremacy Clause provides that the Constitution “and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .” U.S. CONST. art. VI, cl. 2. Any state law which conflicts or interferes with a federal law is preempted by the federal law. See infra notes 222-30.
61. MITE, 457 U.S. at 633.
62. Id. at 634 (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)).
The Court further concluded that once that opportunity was extended to incumbent management, "Congress anticipated that the investor, if he so chose; and the takeover bidder should be free to move forward within the time frame provided by Congress [in the Williams Act]."\(^6\)

In light of these objectives, the Court identified three provisions of the Illinois Act that "upset the careful balance struck by Congress and which therefore [stood] as obstacles to the accomplishment and execution of the full purposes and objectives of Congress."\(^6^4\)

First, the Court found that by providing the target corporation with additional time within which to take steps to defeat the offer, the precommencement notification provisions\(^6^5\) furnished incumbent management with a powerful weapon to defend against a takeover bid.\(^6^6\) The Court believed that this consequence was precisely what Congress intended to avoid.\(^6^7\)

Similarly, the Court found that the hearing provisions\(^6^8\) of the Illinois Act "frustrate[d] the congressional purpose [of the Williams' Act] by introducing extended delay into the tender offer process."\(^6^9\)

\(^63\). *Id.* at 634. The time frame referred to by the Court is the period in which an offeror can communicate the offer to the target's shareholders upon the filing of a Schedule 14D-1 with the Securities and Exchange Commission (SEC). See *infra* notes 209-22 and accompanying text.

\(^64\). MITE, 457 U.S. at 634.

\(^65\). ILL. REV. STAT. ch. 121 1/2, paras. 137.54B, 137.54E (1979) (repealed 1983) (requiring the tender offeror to notify the Secretary of State and the target company of its intent to make an offer and the material terms of that offer 20 business days before the offer became effective); see also MITE, 457 U.S. at 635; ILL. REV. STAT. ch. 121 1/2 para. 137.54A (1979) (repealed 1983) (allowing the target company to disseminate information to its shareholders concerning the impending offer, while the offeror was prohibited from doing so).

\(^66\). MITE, 457 U.S. at 635.

\(^67\). *Id.* The Court buttressed this position by referring to the "events leading to the adoption of the Williams Act." *Id.* The Court noted that Congress had, on a number of occasions, refused to impose a precommencement disclosure requirement similar to the one contained in the Illinois Act. *Id.* at 635-36. In fact, Senator Williams' original bill contained a 20 day precommencement disclosure requirement which the SEC found "unnecessary for the protection of security holders . . . ." *Id.* at 635 (citing 112 CONG. REC. 19005 (1966)). Furthermore, a later bill introduced by Senator Williams, requiring a five day precommencement disclosure statement to be filed with the SEC was not enacted until "after the elimination of the advance disclosure requirement." *Id.* at 636. Finally, Congress rejected another precommencement notification proposal during hearings on the 1970 amendments to the Williams Act. *Id.* (citing H.R. 4285, 91st Cong., 2d Sess. (1970)).

\(^68\). ILL. REV. STAT. ch. 121 1/2, para. 137.57 (1979) (repealed 1983) (allowing the Secretary of State, the majority of outside directors of the target company, or Illinois shareholders who own 10% or more of the stock subject to the offer to call a hearing at which the Secretary of State could determine the fairness of the offer).

\(^69\). MITE, 457 U.S. at 637.
The Court concluded that not only could the Secretary of State indefinitely delay a tender offer,\textsuperscript{70} but incumbent management could also use the hearing provisions to delay the offer.\textsuperscript{71} The Court noted that Congress "recognized that delay can seriously impede a tender offer"\textsuperscript{72} when it enacted the Williams Act. The Court therefore held that the potential for delay provided by the hearing provisions upset the balance struck by Congress and conflicted with the Williams Act.\textsuperscript{73}

Finally, the Court concluded that the Illinois Act was preempted by the Williams Act since it allowed the Illinois Secretary of State to pass on the substantive fairness of the proposed tender offer.\textsuperscript{74} Since the Williams Act was "designed to make the relevant facts known so that shareholders [would] have a fair opportunity to make their decision",\textsuperscript{75} the statutes obviously conflicted.\textsuperscript{76}

2. The Commerce Clause.— Although a substantial portion of Justice White's plurality opinion dealt with the preemption issue, it was only under the Commerce Clause that a majority of the Court found the Illinois Business Takeover Act to be unconstitutional.\textsuperscript{77} In fact, although Justice White's opinion sets forth two arguments for concluding that the Act was unconstitutional, only one was em-

\textsuperscript{70} See id.; ILL. REV. STAT. ch. 121 1/2, para. 137.57 (1979) (repealed 1983). The "indefinite delay" referred to by the Court is the result of the various provisions of paragraph 137.57, which provided that the time for the hearing could be extended by the Secretary of State for the convenience of the parties. \textit{Id.} para. 137.57C. There was no limitation on the duration of the hearings, and although the statute required the Secretary of State to make a final determination within 15 days after the conclusion of the hearings, that period could also be extended if it was determined that additional time was necessary. \textit{Id.} para. 137.57D.

\textsuperscript{71} MITE, 457 U.S. at 637. The Court reasoned that since, under paragraph 137.57A of the Illinois Act, a hearing could be called by Illinois shareholders who held at least 10% of the outstanding shares of any class of equity securities which were the subject of the takeover offer, incumbent management, which in many cases would control either directly or indirectly 10% of the target company's shares, would be able to delay the commencement of an offer by insisting on a hearing. \textit{See id.}; \textit{see also supra} note 32 and accompanying text (discussing the hearing provisions).

\textsuperscript{72} MITE, 457 U.S. at 637 (quoting Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1277 (5th Cir. 1975)).

\textsuperscript{73} \textit{Id.} at 639. For a discussion of the detrimental effects of delay in the context of tender offers, \textit{see infra} note 299 and accompanying text.

\textsuperscript{74} MITE, 457 U.S. at 639; \textit{see} ILL. REV. STAT. ch. 121 1/2, para. 137.57E (1979) (repealed 1983) (requiring the Illinois Secretary of State to deny registration of an offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . or that the takeover is inequitable . . . ").

\textsuperscript{75} MITE, 457 U.S. at 639.

\textsuperscript{76} \textit{See id.} at 639-40.

\textsuperscript{77} \textit{See supra} note 55 and accompanying text (explaining the breakdown of the opinions).
braced by the majority.

The first reason for invalidating the Act on Commerce Clause grounds was that it imposed "a direct restraint on interstate commerce and . . . ha[d] a sweeping extraterritorial effect." The Court noted that the Commerce Clause has been held to permit only incidental regulation of interstate commerce by the states and prohibits direct regulation. Since tender offers for securities of a publicly held company were ordinarily communicated by the use of some means of interstate commerce, and the acceptance of tender offers resulted in transactions occurring across state lines, the Illinois statute, by regulating such offers, imposed a direct restraint on interstate commerce.

The Court also found that the Commerce Clause "preclude[d] the application of a state statute to commerce that takes place wholly outside of the [s]tate’s borders, whether or not the commerce has effects within the [s]tate." Since the Illinois Act applied to foreign corporations, it could be applied to regulate tender offers which would not affect a single Illinois shareholder and control conduct beyond the boundaries of the state. Finally, the Court noted that "if Illinois may impose such regulations, so may other [s]tates; and interstate commerce in securities transactions would be thoroughly stifled." Part V-A of Justice White’s opinion concluded that "[b]ecause the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the State, it must be held invalid . . . ."

Part B of the Court’s Commerce Clause analysis found the Illinois Act unconstitutional under the test enunciated in Pike v. Bruce Church, Inc., which seeks to balance the local interests served by the statute against the burdens imposed on interstate commerce.

78. MITE, 457 U.S. at 642.
79. Id. at 640 (citing Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925)).
80. Id. at 641.
81. Id. at 641-42.
82. Id. at 642-43.
83. Id. at 642; see ILL. REV. STAT. ch. 121 ½, para. 137.52-10 (1979) (repealed 1983); supra notes 22-26 and accompanying text (setting forth the conditions for application of the Illinois statute).
84. MITE, 457 U.S. at 642.
85. Id. at 643.
87. The test enuciated in Pike is as follows: "Where the [state] 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
The Court found that "the most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's . . . nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere."\(^8\) The Court enumerated the substantial effects of allowing the Illinois Secretary of State to block a tender offer:

Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.\(^9\)

Illinois, however, argued that the Illinois Act furthered two legitimate interests: the protection of Illinois security holders\(^9\) and the regulation of the internal affairs of companies incorporated under Illinois law.\(^9\) The Court found both interests insufficient to outweigh the burdens imposed on interstate commerce.\(^9\)

First, the Court noted that although protecting local investors was a legitimate state objective, the state did not have a legitimate interest in protecting nonresident shareholders.\(^9\) Furthermore, the Court noted that since the Act failed to cover self-tender offers, shareholders in those cases were left only with federal securities laws "which Illinois views as inadequate to protect investors in other contexts."\(^9\) The Court reasoned that this distinction was "at variance with Illinois' asserted legislative purpose and tends to undermine [Illinois'] justification for the burdens . . . on interstate commerce."\(^9\)

Second, the Court held that the state's interests in regulating the internal affairs of a corporation incorporated under its laws was unpersuasive.\(^9\) The Court reasoned that the internal affairs doctrine,
"which recognizes that only one [s]tate should have the authority to regulate a corporation's internal affairs";\textsuperscript{97} was not useful to a state in the context of a tender offer since "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."\textsuperscript{98} Furthermore, since the Act applied to corporations not incorporated in Illinois, the state's "internal affairs" argument was undermined since Illinois had no interest in regulating the internal affairs of foreign corporations.\textsuperscript{99}

### III. CTS Corp. v. Dynamics Corp. of America

#### A. The Indiana Control Share Acquisitions Chapter

The Indiana Control Share Acquisitions Chapter\textsuperscript{100} governs the voting power of "control shares" of Indiana corporations which are considered "issuing public corporations".\textsuperscript{101} Application of the Indiana Act is further limited\textsuperscript{102} to corporations in which a substantial

97. The internal affairs doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." Id. (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 comment b (1971)).


101. For the purposes of the Business Corporation Law, including the Control Share Acquisitions Chapter, the term "corporation" is defined as "a corporation for profit that is not a foreign corporation, incorporated under or subject to the provisions of this Article." IND. CODE ANN. § 23-1-20-5 (West 1989). The Seventh Circuit also acknowledges that the Control Share Acquisitions Chapter only applies to corporations "incorporated in Indiana." See Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 260 (7th Cir. 1986), rev'd on other grounds, 481 U.S. 69 (1987); see also IND. CODE ANN. § 23-1-49-5(c) (West 1989) (stating "[t]his article does not authorize Indiana to regulate the organization or internal affairs of a foreign corporation authorized to transact business in Indiana.").

102. Brief for Intervenor-Appellant at 10-11, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (No. 86-97) [hereinafter Brief for Intervenor-Appellant]. It should be noted that a strong argument exists that regulating the voting rights of shares purchased in a tender offer is, in essence, the same as regulating the purchase, sale or transfer of those shares. Voting rights, after all, are an integral part of the ownership interest purchased along with a stock certificate. By limiting the rights that a tender offeror can purchase in a control acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control acquisitions. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 398 (N.D. Ill.), aff'd, 794 F.2d 250 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987). For a full presentation of this argument, see
number of shares are held by, or a substantial number of shareholders are, Indiana residents. Control shares are defined as shares acquired by an entity which, when added to all other shares of the corporation owned by the acquiror, would bring its voting power in the corporation, but for the operation of the Act, past one of three threshold levels: 20%, 33.3%, or 50%. A person who acquires control shares may not vote them until the shares are granted voting rights by a majority of the existing disinterested shareholders.

To obtain the requisite shareholder vote, any person or entity who proposes to make or who has made an acquisition of control shares may, at that person’s election, deliver to the target corporation an “acquiring person statement” and at the time of delivery may request a special shareholders meeting for the purpose of determining whether voting rights will be granted.

Infra notes 292-311 and accompanying text.

103. IND. CODE ANN. § 23-1-42-4(a)(3) (West 1989) (requiring the corporation to have either: (A) more than 10% of its shareholders resident in Indiana; (B) more than 10% of its shares owned by Indiana residents; or (C) 10,000 shareholders resident in Indiana); see also id. § 23-1-42-4(b) (stating “[t]he residence of a shareholder is presumed to be the address appearing in the records of the corporation.”).

104. The statute applies regardless of the method by which the shares are acquired; whether by tender offer or by open market or private purchases. See id. § 23-1-42-2.

105. Only the control shares themselves (the shares purchased which raise the aggregate amount above one of the three threshold levels), and not shares previously owned by the acquiror, are subject to the provisions of the statute. Id. § 23-1-42-1.

106. Id.

107. Id. § 23-1-42-9(a) (defining interested shares as shares with respect to which the acquiror, an officer or an inside director of the corporation “may exercise or direct the exercise of the voting power of the corporation in the election of directors.”); see also Brief for Intervenor-Appellant, supra note 102, at 29 (stating “[t]he Indiana Legislature did not intend that incumbent management be permitted to vote on the voting rights issue.”).

108. IND. CODE ANN. § 23-1-42-6 (West 1989). The acquiring person statement must set forth the following information:

(1) the identity of the acquiring person;
(2) a statement that the acquiring person statement is made pursuant to this chapter;
(3) the number of shares owned by the acquiring person;
(4) the range of voting power under which the control share acquisition falls; and
(5) if the control share acquisition has not yet taken place:

(a) a reasonable description of the terms of the proposed acquisition; and
(b) certain representations of the acquiring person concerning the legality of the acquisition and the financial capacity to make the acquisition.

Id.

109. Id. § 23-1-42-7(a). The request for the special shareholder’s meeting must be accompanied by a promise of the acquiring person to pay the corporation’s expenses to hold such meeting. Id.

If the request is made, the directors of the issuing corporation shall call the special shareholder’s meeting within ten days of that request, id., set a record date, id. § 23-1-42-8(a), and
If the shareholders of the issuing corporation do not confer voting rights to the acquired shares, the target corporation may, at its election, redeem the control shares from the acquiror at the fair market value, but it is not required to do so. Similarly, if the acquiror does not submit an acquiring person statement, the issuing corporation may redeem the shares at any time after sixty days following the acquiror's last purchase, provided the corporate bylaws or articles of incorporation allow it to do so.

Finally, in the event that control shares are accorded full voting rights and the acquiring party has acquired control shares with a majority or more of all voting power, all shareholders of the issuing corporation have dissenter’s rights and may receive fair value for their shares.

B. The Factual History

The Dynamics Corporation of America (DCA) began acquiring CTS Corporation (CTS) common stock in 1980 due to CTS’ prior earnings performance and its excellent growth prospects. By 1981,
however, CTS had become an attractive takeover target since the corporation had undergone a change in management which had resulted in a series of ill-fated corporate decisions detrimental to CTS. DCA continued investing in CTS, believing it could be "a significant and supportive investor of CTS and make positive contributions to its continued growth," and by 1986 had decided that "the basic core of CTS' business still had strength and [DCA] possessed the talents to return CTS to its rightful position as a profitable leader . . . if new philosophies and disciplines . . . were directing the forward progress of CTS."

By early 1986, DCA had increased its ownership interest to approximately 9.7% of the common stock of CTS. On March 10, 1986, DCA announced a cash tender offer for an additional one

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115. See E. Aranow & H. Einhorn, supra note 3, at 1-12. These authors note the following characteristics they consider to play an important role in determining the attractiveness of a potential takeover target:

1. the price/earnings ratio;
2. significantly lower or declining earnings when compared with competition;
3. surplus liquid assets;
4. concentrated share ownership;
5. asset size; and
6. other characteristics including (most relevant to this case):
   a. nominal debt and contingent liabilities;
   b. declining dividends [earnings per share]; and
   c. an absence of strong leadership in management.

Id.

116. 1986 DCA ANNUAL REPORT, supra note 113, at 2. During the period 1981 through 1986 CTS' new management made a series of ill-considered corporate acquisitions, some of which ended in large operating losses while others were folded completely. Id. at 2-3. Printex Corp., one of the CTS acquisitions, resulted in an $18 million write-off due to its disposition. Id. at 2-3. The detrimental effects of the acquisitions are further evidenced by the net operating losses of $2.5 million in 1984 and $13.1 million in 1986. Id. at 3. During the same period CTS also went from a company having no long term debt to a company with over $41.3 million of long term debt by the end of 1986. Id. at 2-3.

117. Id. at 2. In the years just prior to the tender offer, DCA had been gradually increasing its ownership interest in CTS, from 8.3% to 9.2% in 1984, and from 9.2% to 9.5% by January, 1985. Id. at 14.

118. Id. at 3.

119. DCA is a New York corporation with its principal place of business in Greenwich, Connecticut. Brief for Intervenor-Appellant, supra note 102, at 19; see also 1986 DCA ANNUAL REPORT, supra note 113, at 1.

120. DYNAMICS CORPORATION OF AMERICA, 1985 ANNUAL REPORT 12 (1986) [hereinafter 1985 DCA ANNUAL REPORT]. As of January 28, 1986, DCA owned 554,600 of the approximately 5.8 million CTS shares outstanding. Id. at 12. The market value of the DCA investment in CTS at that time was $19.8 million. Id.

121. CTS Corporation is an Indiana corporation with its principal place of business in Elkhart, Indiana. Brief for Intervenor-Appellant, supra note 102, at 8.
million shares of CTS,\textsuperscript{122} which would raise its ownership interest to approximately 27.5%.\textsuperscript{123} DCA's intention was to increase its investment in CTS in order to conduct a proxy contest,\textsuperscript{124} with the objective in hope that the nominees for the board of directors chosen by DCA would be elected by the shareholders of CTS, who would then return the company to profitability.\textsuperscript{125}

On the same day DCA announced its tender offer, it also filed suit in the United States District Court for the Northern District of Illinois,\textsuperscript{126} seeking injunctive relief under section 14(a) of the Securities Exchange Act of 1934.\textsuperscript{127} The complaint alleged non-compliance with SEC rules "and misrepresentations in connection with the sending of proxy solicitations."\textsuperscript{128}

Approximately one week earlier, on March 4, 1986, Indiana enacted a new business corporation law\textsuperscript{129} which contained a chapter entitled "Control Share Acquisitions."\textsuperscript{130} Although the new law became applicable to all Indiana corporations on August 1, 1987,\textsuperscript{131} corporations could elect to be governed by its provisions prior to that date.\textsuperscript{132} On April 1, 1986, CTS elected to be governed by the new

\textsuperscript{122} CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 75 (1987). The cash tender offer was for 1,000,000 shares of common stock of CTS Corp. at $43 per share. 1986 DCA ANNUAL REPORT, supra note 113, at 14.

\textsuperscript{123} CTS, 481 U.S. at 75; 1986 DCA ANNUAL REPORT, supra note 113, at 14. On April 24, 1986, DCA purchased the additional 1,000,000 shares through its offer raising its aggregate holdings to 1,554,600 of the approximately 5,657,000 CTS shares outstanding. \textit{Id}. The market value of the DCA investment in CTS as of December 31, 1986 was approximately $50.1 million. \textit{Id}.

\textsuperscript{124} Brief of Intervenor-Appellant, supra note 102, at 8. On March 10, 1986, DCA also announced a proxy contest to elect its own candidates to the CTS board of directors at CTS' annual meeting on April 25, 1986. \textit{Id}; see also 1985 DCA ANNUAL REPORT, supra note 120, at 16.

\textsuperscript{125} 1986 DCA ANNUAL REPORT, supra note 113, at 2. CTS resisted the DCA proxy effort made in March, 1986, and was successful in defending its incumbent management. \textit{Id} at 3.


\textsuperscript{128} CTS, 637 F. Supp. at 390.

\textsuperscript{129} \textsc{Ind. Code Ann.} §§ 23-1-17-1 to 23-1-54-2 (West Supp. 1987); see \textsc{CTS Corp. v. Dynamics Corp. of America}, 481 U.S. 69, 72 (1987).

\textsuperscript{130} \textsc{Ind. Code Ann.} §§ 23-1-42-1 to -11; see \textit{CTS}, 481 U.S. at 72. For a complete discussion of the provisions of this chapter, see supra notes 100-12 and accompanying text.

\textsuperscript{131} \textsc{Ind. Code Ann.} § 23-1-17-3(a) (West Supp. 1987).

\textsuperscript{132} \textit{Id}. § 23-1-17-3(b) (requiring the corporations' board of directors to adopt by resolution that the provisions of the Indiana Act should apply to their corporation and that the resolution must specify a date on which the provisions will apply and must be filed with the secretary of state before that date).
law, and DCA then amended its complaint to challenge the constitutional validity of the Indiana Act.

C. The Procedural History

On April 9, 1986, the district court ruled that the Williams Act preempted the Indiana Act and granted DCA's motion for declaratory relief. The court held that the Indiana statute "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management and the takeover bidder in takeover contests," as embodied in the Williams Act.

On April 17, 1986, the district court issued a second opinion regarding the validity of the Indiana Act under the Commerce Clause. The court held that "the substantial interference with in-


134. Id. The amended complaint not only challenged the constitutional validity of the Indiana Act, but also sought to preliminarily enjoin a shareholder rights plan adopted by the CTS board on March 22, 1986, for the admitted purpose of warding off DCA's hostile tender offer. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 406, 407 (N.D. Ill. 1986). Although the decision on this matter is not directly relevant to the constitutional validity of the Indiana Act, this decision, as well as the one reached in Dynamics Corp. of America v. CTS Corp., 635 F. Supp. 1174 (N.D. Ill. 1986) (concerning the adoption of a second defensive plan by the CTS board, namely a "white knight" shareholder rights plan), are relevant to the potential detrimental effects of the Indiana statute in relation to the provisions of the Williams Act. For a complete discussion of this topic, see infra notes 307-11 and accompanying text.

135. Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389 (N.D. Ill.), aff'd, 794 F.2d 250 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987). For purposes of this section the procedural history discussion will be limited to the holdings of the courts below with regard to the constitutional issues.

136. Id. at 399.

137. Id. at 400. The Indiana Attorney General had not been properly certified pursuant to 28 U.S.C. § 2403(b) (1982). CTS, 637 F. Supp. at 400. The statute requires that: in an action in a United States court to which a State is not a party thereof, wherein the constitutionality of any statute of that State affecting public interest is drawn into question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence and for argument on the question of constitutionality.


Because of this failure, the district court limited its original discussion to the Williams Act challenges. CTS, 637 F. Supp. at 400. CTS then moved to certify the April 9, 1986 opinion for immediate appeal. Id. The district court was concerned that if the Court of Appeals reversed, it would simply remand for resolution of the Commerce Clause issue. Id. Instead, it decided to rule on the alternative grounds despite the State's failure to intervene, providing a record whereby the entire controversy over the effectiveness of the Indiana statute could be definitively resolved on appeal. Id. The appeal was then certified to the Indiana Attorney General, thereby giving it the opportunity to intervene at the appellate level. Id. (citing Merrill v. Town of Addison, 763 F.2d 80, 83 (2d Cir. 1985)) (stating that for purposes of section 2403(b), certification can be satisfied at the appellate level).
terstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce.

CTS appealed the district court's holding on these claims to the Court of Appeals for the Seventh Circuit. On April 23, 1986, the court of appeals issued an order affirming the judgment of the district court. CTS then appealed the case to the United States Supreme Court, which reversed the order of the Seventh Circuit on April 21, 1987.

D. The Supreme Court Decision

The Supreme Court, by a six to three majority, reversed the

140. See id. The decision by the Seventh Circuit was issued just six days after the district court's second ruling, and only 23 days after DCA had first contested the application of the Indiana Act. See CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 76 (1987). The reason for the rapid disposition of the case was due to the imminence of the CTS annual meeting and the question of DCA's ability to vote the shares acquired through the tender offer at that meeting. See id.

Just prior to the decision by the Supreme Court, DCA and CTS reached an agreement resolving all outstanding differences between the two companies. See 1986 DCA ANNUAL REPORT, supra note 113, at 19; CTS CORPORATION, 1986 ANNUAL REPORT at 16 (1987) [hereinafter 1986 CTS ANNUAL REPORT]. As indicated earlier, the proxy contest waged by DCA in March, 1986 was unsuccessful. See supra note 125. By late 1986, DCA was considering another proxy contest, but by December, 1986, discussions began between DCA and CTS which resulted in the aforementioned agreement. 1986 DCA ANNUAL REPORT, supra note 113, at 19. Under the plan, CTS agreed to cease soliciting offers to purchase all or a part of the company. Id. On March 4, 1987, the Board of Directors of CTS was reduced from 8 to 7 members and three representatives of DCA were elected to the board. Id. Furthermore, the CTS board was to recommend to the CTS shareholders at the 1987 annual meeting proposals in favor of (i) paying approximately $2.2 million to DCA as reimbursement for costs and expenses related to the proxy fight for CTS; and (ii) granting DCA the option to purchase shares of CTS common stock with the condition that DCA's ownership interest would not exceed 35%. Id. CTS and DCA also exchanged releases and dismissed with prejudice all pending litigation between them, except the agreement provided that the voting rights of the shares acquired by DCA through the tender offer would ultimately be governed by the outcome of the U.S. Supreme Court decision regarding the Indiana Act. Id. Finally, the agreement provided that approval by an 80% vote of the CTS board was required for amendments to the CTS bylaws, changing the date of the CTS annual meeting, adopting shareholder rights plans, changing the size of the CTS board, or the soliciting of proxies by DCA or CTS. Id. If 80% of the board could not agree on the 1988 slate of directors, both sides would be free to solicit proxies for the 1988 meeting with CTS, agreeing not to interfere with DCA's efforts in that regard. Id.
142. CTS, 481 U.S. at 71. Justice Powell delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Brennan, Marshall, and O'Connor joined. Id. Justice
order of the Seventh Circuit and held that the Indiana Control Share Acquisitions Act is consistent with the provisions of the Williams Act, and that it does not violate the Commerce Clause since the Act's limited effect on interstate commerce is justified by the state's interest in its domestic corporations.

1. Preemption Under the Williams Act.— In deciding the preemption issue under the Williams Act, the Court used its prior decision regarding the Illinois Business Takeover Act in Edgar v. MITE Corp. as a reference point in comparing the provisions of the Indiana Act. The Court found the Indiana Act differed in major respects from the Illinois statute and used those distinctions to overcome the preemption argument.

The Court began with the premise that a significant purpose of the Williams Act is to strike a careful balance between the interests of the offeror and the target company and to place investors on equal footing with the offeror in order to protect them from the coercive aspects of tender offers. The Court reasoned that since the Indiana

Scalia filed an opinion concurring in part and concurring in judgment. Justice White filed a dissenting opinion, Part II (relating to the Commerce Clause) of which Justices Blackmun and Stevens joined. Id. at 78-87 (discussing whether the Williams Act preempts the Indiana Act).

144. See id. at 87-94 (discussing whether the Indiana Act violates the Commerce Clause of the United States Constitution).

145. See infra notes 185-221 and accompanying text (discussing the background and provisions of the Williams Act).

146. See supra notes 20-36 and accompanying text (discussing the operation of the Illinois Business Takeover Act).


148. See CTS, 481 U.S. at 81. The Court stated the following:

As the plurality opinion in MITE did not represent the views of a majority of the Court, we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated . . . in MITE.

Id. (footnote omitted).

149. See id. at 80 (stating "[The Indiana Act differs in major respects from the Illinois statute that the Court considered in Edgar v. MITE Corp. . . . ").

150. Id. at 82-83. The Court discussed the coercive aspects of tender offers using the following example:

If . . . shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price.
Act allows shareholders to act as a group in the corporation's best interests, it serves to protect shareholders from this type of coercion by permitting them to reject the offer by voting not to confer voting rights on the acquiror. By protecting shareholders of Indiana corporations from this type of coercion, the Court concluded that the Indiana Act furthered the federal policy of investor protection.

Additionally, the Court noted that the policy of balancing the target's interests with those of the offeror is not upset by the Indiana Act since it "does not give either management or the offeror an advantage in communicating with the target company's shareholders."

The Court next addressed the possibility of delay brought about by the Indiana Act. The Court found that the Indiana Act does...
not impose an absolute fifty day delay on tender offers,\textsuperscript{155} nor does it preclude the offeror from acquiring the tendered shares as soon as the Williams Act permits.\textsuperscript{166} In addition, the Court pointed out that an offeror who is apprehensive that the shares will not receive voting rights can make a conditional tender offer, offering to accept shares only on the condition that voting rights will be conferred within a specified period of time.\textsuperscript{157}

The Court also noted that even if the Act does impose some additional delay on tender offers, the additional delay is not sufficient to create a conflict with the Williams Act.\textsuperscript{158} The Indiana Act allows voting rights to be vested (assuming a positive shareholder vote) within fifty days after the commencement of the offer, well within the sixty day maximum period provided by Congress.\textsuperscript{159} Finally, the Court observed that if the Williams Act were interpreted to preempt any state statute that limited or delayed the unobstructed exercise of power after the consummation of a tender offer, it would render other state corporate laws invalid.\textsuperscript{160} Such a broad interpretation, the Court believed, would be erroneous.\textsuperscript{161}

2. The Commerce Clause.— The Court then addressed the possibility that the Indiana Act violated the Commerce Clause.\textsuperscript{162} The Court began its analysis by asserting that "[t]he principal objects of . . . Commerce Clause scrutiny are statutes which discriminate

\textsuperscript{155} CTS, 481 U.S. at 84. Compare \textsc{Ind. Code Ann.} § 23-1-42-7(b) (West 1989) (requiring the special meeting of shareholders to be held within 50 days after receipt by the issuing corporation of the request for such meeting) with \textsc{Ill. Rev. Stat.} ch. 121 1/2, para. 137.57A (1979) (repealed 1983) (allowing the Illinois Secretary of State to call a hearing on the offer and prohibiting the offer from going forward until the hearing, which could be indefinitely prolonged, was complete).

\textsuperscript{156} CTS, 481 U.S. at 84.

\textsuperscript{157} Id. The Court noted that the Williams Act permits tenders offers to be conditioned on the purchaser obtaining regulatory approval and saw "no reason to doubt that this type of conditional offer would be legitimate as well." \textit{Id.} at 84-85.

\textsuperscript{158} \textit{Id.} at 85. The Court stated that "nothing in \textsc{MITE} suggested that any delay imposed by state regulation . . . would conflict with the Williams Act. The plurality argued only that the offeror should 'be free to go forward without unreasonable delay.'" \textit{Id.} (citing \textit{Edgar v. MITE Corp.}, 457 U.S. 624, 639 (1982) (emphasis added)).

\textsuperscript{159} CTS, 481 U.S. at 85 (stating "[w]e cannot say that a delay within that congressionally determined period is unreasonable.").

\textsuperscript{160} Id. The Court noted that state corporate laws normally permit corporations to stagger the terms of directors and provide for cumulative voting. \textit{Id.} at 85-86. They then argue that both these types of provisions may act to delay the ability of the offeror to gain control of the corporation. \textit{Id.} at 86.

\textsuperscript{161} See \textit{id.}

\textsuperscript{162} \textit{Id.} at 87-94.
against interstate commerce." The Court held that the Indiana Act does not discriminate against interstate commerce since it has the same effects on both in-state and out-of-state offerors. In addition, even though the statute may apply mostly to out-of-state entities, nothing in the Indiana Act places a greater burden on out-of-state offerors than on in-state offerors.

The second step of the Court's analysis found that the Commerce Clause also works to invalidate state laws which adversely affect interstate commerce by causing certain activities to be subject to inconsistent regulations. Again, the Court found that the Indiana statute did not pose such a problem, reasoning that "so long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." Therefore, the Court concluded that the "Indiana Act does not create an impermissible risk of inconsistent regulation by different States."

The Court turned to the Seventh Circuit's opinion, which found that the Indiana Act had a direct and substantial adverse affect on out-of-state tender offers. That finding was based on the Pike balancing test, which seeks to balance the state's interest against any adverse effects the state statute may have on interstate commerce. The majority believed that the Seventh Circuit "failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." In defining the state's interests, the Court noted that it is a necessary part of the corporate governance for states to enact laws which regulate corporate activities, and such regulation must necessarily affect certain

163. Id. at 87 (citing Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36-37 (1980); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).
164. Id. at 87.
165. Id. at 88. The Court determined that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Id. (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978)).
166. Id. (citing Southern Pacific Co. v. Arizona, 325 U.S. 761, 774 (1915)).
167. Id. at 89.
168. Id.
169. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 264 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987) (holding "[t]he law in question is an explicit regulation of tender offers.").
170. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); supra note 87 (setting forth the Pike balancing test).
171. CTS, 481 U.S. at 89.
aspects of interstate commerce. The Court concluded that it “is an accepted part of the business landscape . . . for [s]tates to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares,” and that “[a] [s]tate has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors . . . have an effective voice in corporate affairs.”

Since the primary purpose of the Indiana Act is to protect the stockholders of Indiana corporations, and this purpose is achieved by allowing shareholders to decide collectively whether the change in management is in the best interests of the corporation, the Court believed “it is well within the [s]tate’s role as overseer of corporate governance to offer this opportunity,” and to protect shareholders from the coercive aspects of tender offers. It is this interest of protecting shareholders of Indiana corporations through corporate governance that the Court weighed against the adverse effects on interstate commerce.

For the purposes of its analysis, the Court noted only two potentially adverse effects on interstate commerce. First, DCA had argued that a state has “‘no legitimate interest in protecting the nonresident shareholders.’” The Court rejected this contention, however, by asserting that since the Indiana Act only applies to Indiana corporations, and every application of the statute will affect a significant number of Indiana residents, the only transactions affected by the statute are, in essence, in-state transactions. Second, the Court addressed DCA’s argument that the Act will limit the number of successful tender offers, holding that there is little evidence that this will result from the Indiana Act. The Indiana Act does not pre-

172. Id. at 89-90.
173. Id. at 91.
174. Id.
175. Id.
176. Id. at 91-92.
177. Id. at 90.
178. Id. at 90-91.
179. Id. at 93 (citing Brief for Appellee at 21, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (No. 86-71) (quoting Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)).
180. Id. at 93. The Court’s decision is based on the finding that the Illinois statute struck down in MITE applied to foreign corporations as well as domestic corporations. Id.; see MITE, 457 U.S. at 644. Since Illinois had no interest in protecting non-residents and the statute adversely affected interstate commerce, “there [was] nothing to be weighed in the balance to sustain the law.” Id.
181. CTS, 481 U.S. at 93.
clude any resident or non-resident entity from purchasing shares in Indiana corporations.\textsuperscript{182} Furthermore, since the state may define the attributes of the corporations and its stock, and so long as the Indiana Act provides that residents and non-residents have equal access to them, there is no Commerce Clause violation.\textsuperscript{183} The Court concluded that "[t]o the limited extent that the Act affects interstate commerce, [it] is justified by the state's interests in defining the attributes of shares in its corporations and in protecting shareholders."\textsuperscript{184}

IV. THE WILLIAMS ACT

A. The Background of the Act

Until 1968, the year the Williams Act\textsuperscript{185} went into effect, cash tender offers were for the most part unregulated.\textsuperscript{186} As the use of tender offers dramatically increased, Congress was compelled to address the abuses that accompanied them. Although the proponents of tender offers recognized that the device served legitimate business and economic purposes,\textsuperscript{187} the opponents of the technique portrayed

\begin{itemize}
\item \textsuperscript{182} See supra notes 155-57 and accompanying text.
\item \textsuperscript{183} CTS, 481 U.S. at 93.
\item \textsuperscript{184} Id. at 94.
\item \textsuperscript{186} See Sowards & Mofsky, \textit{Corporate Take-Over Bids: Gap in Federal Securities Regulation}, 41 ST. JOHN'S L. REV. 499, 504-05 (1967) (noting that prior to the passage of the Williams Act, shareholder relief related to cash tender offers was limited to actions under sections 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5).
\item \textsuperscript{187} See generally \textit{Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S.510 Before the Subcomm. on Securities of the Comm. on Banking and Currency, 90th Cong., 1st Sess. 56 (1967) (remarks of Sen. Hayes) [hereinafter \textit{Hearings on S.510}] (setting forth various reasons for the increased use of tender offers). For a complete discussion of the benefits which result from the tender offer process, see Easterbrook & Fischel, \textit{Auctions and Sunk Costs in Tender Offers}, 35 STAN. L. REV. 1 (1982) (advocating a no auction rule in the tender offer process because of the possibility of increased wealth to investors and society even though auctions may raise the price in a tender offer); Easterbrook & Fischel, \textit{Takeover Bids, Defensive Tactics, and Shareholder Welfare}, 36 BUS. LAW. 1733 (1981) (analyzing the use of defensive tactics by management in response to a tender offer and concluding that defensive tactics are harmful to a target company's shareholders); Easterbrook & Fischel, \textit{The Proper Role of a Target's Management in Responding to a Tender Offer}, 94 HARV. L. REV. 1161 (1981) (arguing that the prospect of a tender offer leads to more efficient management); Easterbrook & Jarrell, \textit{Do Targets Gain from Defeating Tender Offers?}, 59 N.Y.U. L. REV. 277 (1984) (presenting studies which provide evidence that management tactics to defeat tender offers negatively affect the benefit to shareholders); Fischel, \textit{Efficient Capital Market Theory, the Market for Corporate Control and the Regulation of Cash Tender Offers}, 57 TEX. L. REV. 1 (1978) (finding that state and federal regulations that hinder the use of tender offers lessen the incentive of incumbent management to perform efficiently); Gilson,
it as a tool for corporate raiders in their quest to sack and pillage “proud old companies.”

As the congressional hearings progressed, and convincing evidence of the benefits served by the tender offer process was presented, the focus of the legislation changed from one of protecting incumbent management to one of providing “full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.”

The “full and fair disclosure” requirement sought to address the problems tender offers presented for the individual investor. These problems included the secrecy involved in the tender offer process, and the undue pressure shareholders might experience, forcing them to act hastily and to accept the offer before any other group had an


189. See Hearings on S.510, supra note 187, at 56-57. Studies presented at the Congressional hearings indicated that the majority of successful tender offerors did not liquidate the acquired company. Id. at 56. In addition, the Hearings indicated that the typical target of a takeover bid was a company which was relatively unprofitable and excessively liquid in the period preceding the tender offer. Id. at 56-57.

190. 113 CONG. REC. 854-55 (1967) (remarks of Sen. Williams). Senator Williams stated:

I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror.

Id. at 854; see also Piper v. Chris Craft Indus., Inc., 430 U.S. 1, 35 (1977) (holding that the sole purpose of the Williams Act is investor protection).


192. See H.R. REP. No. 1711, 90th Cong., 2d Sess. 3-4 (1968). Prior to the passage of the Williams Act a tender offeror was not required to disclose his identity, the source of his funds, his equity in the target company, or what he intended to do with the target company in the event he gained control. Id.
opportunity to present opposing arguments or competing offers.\textsuperscript{183} Through full and fair disclosure, investors would be provided sufficient information so that they might arrive at an informed investment decision.\textsuperscript{184}

A major aspect of this attempt to protect the investor was to avoid favoring either management or the offeror.\textsuperscript{185} The basis for this concern was to prevent incumbent management from being helpless in its ability to resist a takeover,\textsuperscript{186} yet not provide incumbent management with a weapon to be used to defeat takeover attempts and discourage takeover bids.\textsuperscript{187}

For these reasons, Congress adopted a policy of “evenhandedness . . . [which] represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice.”\textsuperscript{188}

B. The Major Provisions of the Act

The Williams Act\textsuperscript{189} added sections 13(d) and (e) and sections 14(d), (e) and (f) to the Securities Exchange Act of 1934.\textsuperscript{200} The Act was amended in 1970,\textsuperscript{201} and at present regulates tender offers

\begin{itemize}
  \item \textsuperscript{193} See Hearings on S.510, supra note 187, at 17. The crux of this problem was that a shareholder who hesitated in tendering his shares might miss the opportunity to sell his shares since a bidder was under no obligation to purchase more than the minimum number of shares stated in the offer which were purchased on a first come-first served basis. \textit{Id.} Furthermore, if the shareholder tendered his shares immediately he would thereby be precluded from accepting a better offer later. \textit{Id.}
  \item \textsuperscript{194} See 113 CONG. REC. at 854-55 (remarks of Sen. Williams) (stating “[t]he purpose of this bill is to require full and fair disclosure for the benefit of stockholders . . .” so that the stockholder can make an informed decision as to whether or not to accept a tender offer).
  \item \textsuperscript{195} See supra note 190 and accompanying text.
  \item \textsuperscript{196} See Note, supra note 147, at 994 n.26.
  \item \textsuperscript{197} See Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (noting that Congress, when enacting the Williams Act, “intended to do no more than give incumbent management an opportunity to express and explain its position.”).
  \item \textsuperscript{198} Edgar v. MITE Corp., 457 U.S. 624, 633-34 (1982) (citation omitted).
  \item \textsuperscript{201} See Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497. The Act was amended to provide additional protection for investors and includes:
    \begin{enumerate}
      \item a reduction in the percentage of stock ownership needed to trigger the disclosure requirements of the Act from ten percent to five percent;
      \item an extension of the Act to cover exchange tender offers;
      \item an extension of the Act to cover tender offers for insurance companies; and
      \item rule making power for the SEC.
    \end{enumerate}
\end{itemize}
in five areas: (1) disclosure in connection with certain stock acquisitions; (2) purchases by a corporation of its own stock; (3) tender offers; (4) fraud in connection with tender offers; and (5) changes in majority directors.\textsuperscript{202}

1. Disclosure in Connection with Five Percent Acquisitions.—Section 13(d) requires that any person,\textsuperscript{203} acquiring beneficial ownership\textsuperscript{204} of an equity security\textsuperscript{205} in excess of five percent must disclose certain information within ten days to the SEC, to each exchange where the security is traded, and to the issuer of the security.\textsuperscript{206} The section also requires an amendment to be filed if any

\textit{See E. Aranow \& H. Einhorn, supra note 3, at 68.}

\textsuperscript{202} The scope of this Note is limited to the regulation of tender offers; specifically, the relevant areas are: (1) the disclosure requirements of persons acquiring more than 5% of certain classes of equity securities under section 13(d), 15 U.S.C. § 78m(d) (1982); and (2) the regulation of tender offers under section 14(d), 15 U.S.C. § 78n(d) (1982).

\textsuperscript{203} For purposes of the 1934 Act, the term “person” is defined as “a natural person, company, government or political subdivision, agency, or instrumentality of a government.” Id. § 78c(a)(9) (1982). The Williams Act further provides that “two or more persons acting as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer . . . shall be deemed a ‘person’ . . .” Id. § 78n(d)(2) (1982).

\textsuperscript{204} The term “beneficial owner” under the Williams Act means any person who has the right to determine how stock is to be voted. \textit{See} Bath Indus. v. Blot, 427 F.2d 97, 112 (7th Cir. 1970); 17 C.F.R. § 240.13d-3 (1987).

\textsuperscript{205} The Williams Act applies to any equity security: (1) of a class registered pursuant to section 12 of the Securities Exchange Act of 1934; (2) of an insurance company which would have been required to register except for the exemption provided by section 12(g)(2)(G) of the 1934 Act; or (3) issued by a closed-end investment company registered under the Investment Company Act of 1940. 15 U.S.C. § 78m(d)(1) (1982); 17 C.F.R. § 240.13d-1(d) (1987).

\textsuperscript{206} 15 U.S.C. § 78m(d)(1) (1982); 17 C.F.R. § 240.13d-1(a) (1987). Schedule 13D requires that the following information be disclosed:

\begin{enumerate}
\item the identification of the issuer and the class of equity security to which the statement relates;
\item the identity and background of the person filing the statement;
\item the source and amount of funds to be used in the acquisition;
\item the purpose of the transaction;
\item the person's current interests in the issuer or its securities;
\item any contracts, arrangements, understandings or relationships which exist with respect to the securities of the issuer;
\item exhibits containing material including proposals relating to: (a) borrowings to finance the acquisition; (b) acquisition of control, liquidation, sale of assets, mergers, changes in the business or corporate structure; and (c) the transfer or voting of the securities, finder's fees, options, guarantees, or proxies.
\end{enumerate}

\textit{See} 17 C.F.R. § 240.13d-101 (1987). Certain acquisitions of stock need not be registered under section 13(d) if: made by means of a registration statement under the 1933 Act, 15 U.S.C. § 78m(d)(6)(A) (1982); made by the issuer of the stock, id. § 78m(d)(6)(C); or if the acquisitions made during the preceding 12 months do not exceed two percent of the class. Id. § 78m(d)(6)(B). The SEC may also exempt any acquisition which was not made for the pur-
material changes occur in the facts set forth in the original statement. 207

2. Regulation of Tender Offers.— Section 14(d) requires any person who uses the mails, any means or instrumentality of interstate commerce or any facility of a national securities exchange to make a tender offer for an equity security to file a Schedule 14D-1 containing information required by Section 13(d)208 with the SEC no later than the time the offer is first published or sent to security holders, if after consummation of the offer that person would be the beneficial owner of more than five percent of that security.209 All material information included in Schedule 14D-1 must also be disseminated to shareholders along with the date for withdrawal and the date for proration.210 Anyone other than the person filing the Schedule 14D-1 who solicits or recommends a position regarding the tender offer must file a Schedule 14D-9 with the Commission.211

Section 14(d) and its accompanying rules additionally provide substantive protection for the investor.212 First, stockholders who tender their shares may withdraw them during the first seven days of a tender offer213 and, if the offeror has not purchased them, at any...
time after sixty days from the commencement of the offer.\textsuperscript{214} This provision was intended to give the investor time to change his mind and prevent the offeror from tying up the securities for an indefinite period.\textsuperscript{218} Moreover, the offer must remain open for at least twenty business days.\textsuperscript{216}

Second, if more shares are tendered than the offeror sought to acquire, purchases must be made on a \textit{pro rata} basis from each tendering shareholder.\textsuperscript{217} The underlying reason is that allowing an investor to reach his or her decision increases the likelihood of an informed and intelligent investment decision.\textsuperscript{218}

Finally, if the terms of the offer are changed before its expiration, any increase in consideration must be paid to all tendering shareholders, including those who already received payment for their tendered shares.\textsuperscript{218} This provision insures that all shareholders will be treated equally regardless of when they decided to accept the offer.\textsuperscript{220}

It is important to note that the Williams Act also contains a broad antifraud provision which prohibits the use of false or misleading statements and fraudulent or manipulative devices by either the offeror, the target company's management, or by any other individual in connection with a tender offer.\textsuperscript{221}

V. COMMENTS AND ANALYSIS

A. The Williams Act

1. Identifying the Problem.— The Supreme Court has developed three categories to determine whether state legislation must
yield to federal law under the Supremacy Clause. The first and most obvious category of preemption is where it is apparent from a federal statute, its legislative history, or the widespread acceptance of the federal scheme that Congress intended to occupy the field. The Williams Act, which amends the Securities Exchange Act of 1934, does not expressly prohibit states from regulating takeovers. Therefore, it has been noted that Congress simply left the determination of whether a state law conflicts with the Williams Act to the courts on a case-by-case basis.

Secondly, courts will find federal preemption where a state statute directly conflicts with a valid federal law, or where "compliance with both federal and state regulations is a physical impossibility." Since there was neither direct conflict nor impossibility of compliance with either the Illinois or Indiana statutes and the Williams Act, the Supreme Court in MITE and CTS turned to the third category to determine the validity of each of these statutes.

Under the third category of preemption, a state law will be invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Thus, the issue identified by the Court in both MITE and CTS, in seeking to determine the validity of the state takeover statute, was whether the provisions of the statute frustrated the purposes and objectives of the

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222. See, e.g., City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (holding that, in light of the pervasive nature of the scheme of federal regulation of aircraft noise, state law was preempted); Pennsylvania v. Nelson, 350 U.S. 497 (1956) (noting that the scheme of federal regulation in the Smith Act is so pervasive that Congress left no room for the states to supplement).


224. See 15 U.S.C. § 78bb(a) (1982). When Congress amended the Securities Exchange Act of 1934 to include the Williams Act, it did not amend section 28(a) which provides: "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) 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."


228. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 79 (1987) (stating that "[i]t is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law."); MITE, 457 U.S. at 631-32 (stating that "[o]ur inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both the provisions of the Williams Act and the more burdensome requirements of the Illinois law.").

Since MITE and CTS are thus far the only two cases in which the Supreme Court of the United States has ruled on the constitutionality of state takeover legislation under the Supremacy Clause, it has become commonplace for federal and state courts to turn to the “purpose” analysis first enunciated in MITE, and followed in CTS, when analyzing the provisions of the statute being challenged in the seemingly continuous attack on state takeover legislation. The problem, however, is that the purpose analysis adopted in MITE and seemingly reinforced in CTS does not limit itself to the purpose of the Williams Act. Instead, it evaluates the statute by commingling the means adopted to accomplish that purpose and a court’s characterization of those means as either furthering or frustrating the concept of investor protection. When formulating this purpose analysis, the MITE Court commingled the concepts of purpose and the means by which that purpose should be accomplished. While each substantive provision of the Williams Act may have an individual “purpose” that it seeks to accomplish, those purposes should not be confused with the overall purpose of the legislation. By interpreting substantive provisions of the Williams Act to be definitive guidelines by which the overall purpose of investor

230. CTS, 481 U.S. at 79; MITE, 457 U.S. at 632.
232. See MITE, 457 U.S. at 630-40.
233. See CTS, 481 U.S. at 79. The Court began its preemption analysis by stating that although “the plurality opinion in MITE did not represent the views of a majority of the Court . . . [w]e need not question that reasoning . . . because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated . . . in MITE.” Id. at 81. The Court continued by analyzing the provisions of the Indiana statute using the same analysis employed in the MITE decision. Id. at 81-87.
234. See infra notes 237-75 and accompanying text.
235. See supra notes 59-76, 145-61 and accompanying text (discussing the Supremacy Clause analysis in MITE and CTS).
236. Id.
237. See, e.g., 15 U.S.C. § 78n(d)(5) (purpose of the 60 day provision is to prevent the bidder from tying up an investor’s shares indefinitely); id. § 78n(d)(6) (purpose of the pro rata provision is to alleviate the fear that the later shares tendered in excess of the amount stated in the offer will be rejected); id. § 78n(d)(7) (purpose of the increased price provision is to assure equal treatment of all tendering shareholders).
protection should be accomplished, the Court has expanded the purpose analysis beyond the scope of purpose itself. Instead, the Court has limited a state's ability to further the concept of investor protection by limiting the means by which a state can seek to accomplish that goal.\textsuperscript{238}

The expansion of the purpose of the Williams Act as well as the limitation on the instrumentalities employed by a state is readily apparent from the Court's rejection of the Illinois statute in \textit{MITE}.\textsuperscript{239} Despite the plurality opinion in \textit{MITE}, the Illinois Act can be characterized as a statute which furthered the sole purpose and objective of the Williams Act by seeking to protect investors.\textsuperscript{240}

If one accepts the premise that the Williams Act was designed to protect investors through full and fair disclosure,\textsuperscript{241} the registration requirement of the Illinois Act arguably complements this legislative scheme by requiring additional disclosure,\textsuperscript{242} imposing administrative review on the adequacy of that disclosure\textsuperscript{243} and extending the period of public scrutiny of the offer.\textsuperscript{244} Thus, the Illinois Act would provide shareholders with additional information enabling them to make an intelligent and more informed decision as to whether to accept or reject an offer.\textsuperscript{245}

Despite this additional protection, the plurality opinion objected to the fact that the registration statement had to be filed twenty business days before the offer became effective,\textsuperscript{246} a requirement rejected by Congress when it adopted the Williams Act.\textsuperscript{247} Further-

\begin{itemize}
  \item[238.] See infra notes 242-80 and accompanying text.
  \item[239.] \textit{MITE}, 457 U.S. at 624; see supra notes 59-76 and accompanying text.
  \item[240.] See infra notes 242-80 and accompanying text.
  \item[241.] See supra notes 190-95 and accompanying text (discussing the protection sought by the full and fair disclosure requirement).
  \item[242.] ILL. REV. STAT. ch. 121 ½, para. 137.54C (1979) (repealed 1983); see supra note 27 and accompanying text (describing the registration requirement).
  \item[243.] ILL. REV. STAT. ch. 121 ½, paras. 137.57-58 (1979) (repealed 1983); see supra notes 31-34 and accompanying text (discussing administrative review provisions).
  \item[244.] ILL. REV. STAT. Ch. 121 ½, paras. 137.57-58 (1979) (repealed 1983).
  \item[245.] See Brief for Appellant at 8, 17-23, Edgar v. MITE Corp., 457 U.S. 624 (1982) (No. 80-1188) [hereinafter MITE Appellant Brief]; see also Brief for the State of Ohio as Amicus Curiae at 5-6, Edgar v. MITE Corp., 457 U.S. 624 (1982) (No. 80-1188) [hereinafter MITE State of Ohio Brief] (arguing that the Ohio and Illinois Acts share a mutual purpose; that is, effectively complementing the Williams Act by benefitting shareholders, as well as protecting investors).
  \item[246.] Edgar v. MITE Corp., 457 U.S. 624, 634-36 (1982); supra notes 27-30 and accompanying text.
  \item[247.] See supra note 67 and accompanying text (discussing these provisions of the Illinois Act).
\end{itemize}
more, the Court believed that this precommencement period upset the balance established by Congress by favoring incumbent management and "frustrating the objectives of the Williams Act."248 The mere fact that Congress considered, but refused to adopt an advance notice requirement, does not establish that the inclusion of such a provision in the Illinois Act conflicts with the objectives of the Williams Act.249 If the purpose of the Williams Act is investor protection,250 the precommencement period, if used to protect investors, does not conflict with that objective. In addition, the Court's determination that the precommencement period frustrated the objectives of the Williams Act, by providing the target company with additional time to take defensive measures,251 rests on the assumption that one of the purposes of the Williams Act was to create neutrality or to strike a particular balance between takeover bidders and targets,252 which may not be accurate.

At the outset, any conclusion that a purpose of the Williams Act was to create neutrality is immediately suspect because courts and commentators have concluded that the actual purpose was investor protection.253 The Williams Act, as enacted, imposed both disclosure requirements and delay burdens on the takeover bidder and therefore was not neutral.254 In fact, it has been argued that the Williams Act indicated a legislative choice to favor incumbent management as a way of increasing investor protection.255 Furthermore, the argument that a purpose of the Williams Act was to strike a particular balance with regard to tender offers has been questioned.256

All federal legislation can be said to strike a particular balance, yet that balance does not constitute legislative purpose. The "balance" analysis should only be used to preempt state laws where Con-

248. MITE, 457 U.S. at 635 (emphasis added).
250. See Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977) (holding that the sole purpose of the Williams Act is investor protection).
251. MITE, 457 U.S. at 635-36.
252. See supra notes 61-73 and accompanying text (discussing the purpose analysis in the MITE decision).
253. See Piper, 430 U.S. at 35 (noting that the sole purpose of the Williams Act is investor protection); see also Fischel, supra note 187, at 27 (concluding that the Williams Act's shareholder protection purpose has been realized); Jarrell & Bradley, supra note 187, at 372 (discussing the William's Act's protection for target shareholders).
254. See supra notes 186-220 and accompanying text.
255. See Jarrell & Bradley, supra note 187, at 404.
256. See Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 261-62 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987) (questioning the reasoning of MITE which suggested that Congress intended to strike a particular balance between the target and the takeover bidder).
gress provided that states were precluded from striking any other balance. No such provision exists with regard to the Williams Act.\textsuperscript{257} Even if it did, it would not be a basis for preemption under a purpose analysis. Regardless, even if it is found that Congress was committed to a policy of neutrality in contests for corporate control, its policy of evenhandedness does not go to the purpose of the legislation. Neutrality between management and the bidder is just one characteristic directed toward the purpose of investor protection.\textsuperscript{258}

The Illinois Act can also be said to have enhanced investor protection through the provisions allowing for administrative hearings and review.\textsuperscript{259} The express purpose of the administrative hearings was to determine if the offer failed to provide full disclosure of material information or would work a fraud or deceit on investors.\textsuperscript{260} Fraudulent and deceptive practices were defined in the realm of disclosure rather than the substantive fairness of the offer.\textsuperscript{261} This evaluation period can be said to create sufficient time within which a shareholder could access the disclosure statements in order to reach an informed decision.\textsuperscript{262} It would have prevented spur of the moment decisions by shareholders in response to an offer made at a substantial premium, without first having an adequate opportunity to evaluate the terms of the offer.\textsuperscript{263} If, however, a shareholder sought to make an immediate profit on the target's securities in the open market during the offering period, the Act did not preclude him from so doing.\textsuperscript{264} Finally, management could use the extended period to solicit competing bids or negotiate a higher bid from the takeover bidder.\textsuperscript{265}

The Court, however, noted two problems with the provisions allowing for administrative review. First, the plurality opinion noted

\textsuperscript{257} See infra notes 266-78 and accompanying text (analyzing the purpose analysis in \textit{MITE}).

\textsuperscript{258} Piper v. Chris-Craft Indus., 430 U.S. 1, 29 (1977); Hyde Park Partners v. Connolly, 839 F.2d 837, 850 (1st Cir. 1988) (quoting \textit{Piper}, 430 U.S. at 29); see also Edgar v. \textit{MITE Corp.}, 457 U.S. at 646-47 (Powell, J., concurring) (noting that incidental protection of local management does not contradict the Williams Act neutrality policy).

\textsuperscript{259} See supra notes 31-34 and accompanying text (discussing the administrative hearing provisions).

\textsuperscript{260} See supra note 31 and accompanying text.


\textsuperscript{262} See MITE Appellant Brief, \textit{supra} note 245, at 17-23; MITE State of Ohio Brief, \textit{supra} note 245, at 6-11.

\textsuperscript{263} See MITE Appellant Brief, \textit{supra} note 245, at 22-23; MITE State of Ohio Brief, \textit{supra} note 245, at 9-10.

\textsuperscript{264} See MITE State of Ohio Brief, \textit{supra} note 245, at 10.

\textsuperscript{265} See MITE Appellant Brief, \textit{supra} note 245, at 21.
that the hearing provisions frustrated the congressionally determined purpose of "neutrality" and the concomitant objective of allowing "investors and the takeover offeror . . . to go forward without unreasonable delay" by introducing extended, and possibly infinite delay into the tender offer process. Delay, it felt, may have prevented shareholders from accepting, within a reasonable time, a tender offer they considered fair within a reasonable time and might also have a chilling effect on the use of tender offers, thereby denying shareholders the right to sell their shares at a premium. Secondly, insofar as the statute enabled the Secretary of State to pass on the substantive fairness of the proposed offer, the statute was preempted since Congress intended for investors to be free to make their own decisions.

As previously noted, the notion that the Williams Act sought to create "neutrality" or to strike a particular balance is inherently suspect. Yet, even if one accepts these concepts as a possible policy of the Williams Act, they do not go to the purpose of the legislation. At most, they indicate a means by which Congress sought to implement its objective of investor protection and as such are irrelevant with regard to a purpose analysis under the Supremacy Clause.

At the outset, the Court's concern with the possibility of indefinite delay was purely speculative since the record contained no evidence of the actual effect of the Illinois statute. However, if in fact the Illinois Act did impose additional delay into the tender offer process, the Court should not have been concluded that such a result "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" since investor protection was actually furthered. The Court reasoned that the congressional objective of investor protection may be diminished if shareholders are denied the opportunity to sell their shares at a premium. But this reasoning is based on the assumption that investor protection could only be accomplished through the right of offerors to make

266. MITE, 457 U.S. at 639.
267. See supra notes 59-76 and accompanying text (discussing the practical applications and effects of the hearing provisions).
268. See MITE, 457 U.S. at 633.
269. Id. at 639-40.
270. See supra notes 253-58 and accompanying text.
271. See MITE Corp. v. Dixon, 633 F.2d 486, 497 (7th Cir. 1980), aff'd sub nom., Edgar v. MITE Corp., 457 U.S. 624 (1982) (stating that "any conclusion as to the actual effect [the Illinois Act] has had, or may have, on tender offers in Illinois would be purely speculative because the record is devoid of evidence on that subject.")
272. MITE, 457 U.S. at 631.
273. Id. at 633-34.
successful tender offers. This is not the case. Shareholders must often be protected from unfair and coercive tender offers that are obviously not in their best interests, and the success of all tender offers could not possibly have been a purpose of the Williams Act.

Finally, the Court's argument that the provision of the Illinois statute—which allowed the Secretary of State to pass on the substantive fairness of the proposed offer—frustrates the objectives of the Williams Act, entirely ignores the express purpose of the hearing provisions as well as the defined terms of the Act. However, even if the Court believed that the Secretary of State could rule on the substantive fairness of the offer, it failed to show how this stood as an obstacle to the congressional purpose of investor protection. In fact, by holding that the hearing provisions conflicted with the congressional intent of allowing "investors to be free to make their own decisions," the Court further expanded the "purpose" of the Williams Act to include the concept of investor autonomy.

The foregoing analysis merely seeks to demonstrate that the Court has unnecessarily expanded the purpose of the Williams Act.
by interpreting substantive provisions of that Act as being indicative of the overall legislative purpose. As a result, this Note argues that the determination of the constitutional validity of state takeover statutes now depends on a court's characterization of that statute's substantive provisions. Since the provisions of the Illinois Act could be characterized as "directly conflicting" with the provisions of the Williams Act, such an expansive approach to the purpose and objectives of the Williams Act was needless and, in fact, may have delayed the arrival of investor protection through state takeover legislation until the Court's decision in CTS.

The Court in CTS was clearly presented with an opportunity to rein in the expansive view of the purpose analysis it first enunciated in MITE. Unfortunately, by adhering to the reasoning of the plurality opinion in MITE, the Court actually weakened the persuasiveness of its own argument. If the Court had simply concluded that the Indiana Act furthered the congressionally determined purpose of investor protection, its reasoning would appear much more convincing than it does in light of the guidelines developed in MITE.

The CTS Court believed that allowing shareholders to vote as a group furthered the concept of investor protection. This conclusion, however, ignores some very relevant and practical consequences of this provision which arguably conflict with the neutrality objective announced in MITE. It is widely accepted that most shareholders are passive investors who have little interest in, and little incentive to learn, the details of corporate management. Passive shareholders want to be told whether to sell or hold their shares and they want management to take the appropriate action to maximize the value of

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279. See CTS, 481 U.S. at 81 (referring to the "broad interpretation of the Williams Act articulated . . . in MITE"). See generally Comment, supra note 147, at 989 (examining the decision in MITE and the issue of whether the Williams Act preempts Illinois takeover laws).

280. Compare ILL. REV. STAT. ch. 121 ½, para. 137.54E (1979) (repealed 1983) (providing for a 20 day precommencement period) with 17 C.F.R. § 240.14d-2(b) (1987) (providing that "a public announcement by the bidder . . . shall be deemed to constitute the commencement of a tender offer . . . ").

281. See, e.g, CTS, 481 U.S. at 82-84; see supra notes 150-52 and accompanying text (discussing the Court's interpretation of shareholder protection).

282. See Easterbrook & Fischel, supra note 89, at 1171. These authors reason that no shareholder can really benefit from monitoring the firm's management since any benefit would be dispersed among all of the company's stockholders according to the size of their investment, and not according to their efforts. Id. Since all shareholders can take a free ride on any one stockholder's efforts, it is in their own self-interest to remain passive. Id.; cf. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 254 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987) (noting that many "shareholders are passive investors").
their stock. For this reason, shareholders routinely vote for management and pay little or no attention to the issues of shareholder votes. As a result, successful campaigns against incumbent management are rare. It follows that by allowing disinterested shareholders to vote collectively, the provisions of the Indiana Act may actually give incumbent management a distinct advantage in the tender offer process contrary to the asserted objective of the Williams Act.

However, the Court concluded in CTS that investors need to be protected from the coercive aspects of tender offers. The Court's argument that the shareholder vote serves to protect investors from the coercive aspects of tender offers rests on the assumption that of the total number of shares tendered pursuant to a tender offer, the majority of those shares will be tendered as a result of coercion. This assumption entirely ignores any profit motive of individual investors and the effect the premium has on the decision to tender shares. It is widely held that the majority of investors who buy stock are motivated by one basic objective—to make a capital investment and get back their money plus a return on that investment.

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283. Easterbrook & Fischel, supra note 89, at 1171. (stating that shareholders “want to be told whether they should sell their shares now or wait for a better offer to come along. Better yet—for it is difficult to absorb information about a subject you don’t know much about—they want management to create a process that will maximize the value of their shares in a takeover situation.”).

284. Id. at 1170-71.

285. Id. The authors believe that this result is simply a product of the concept of passive investment. Id. Since each shareholder realizes that his ability to affect the outcome of any corporate issue is practically nonexistent unless he owns a large block of stock, the shareholder’s self-interest leads him to ignore the issues. Id. It follows that if the majority of shareholders share this feeling, management will normally prevail. Id.

286. See supra notes 282-85 and accompanying text.

287. See supra notes 196-99 and accompanying text (discussing the policy of even-handed treatment).

288. CTS, 481 U.S. at 82-84; see also Brief for Intervenor-Appellant, supra note 102, at 91-95; supra notes 150-52 and accompanying text.

289. See supra note 150 (discussing the shareholders desire to avoid facing depressed stock prices).

290. See E. Aranow & H. Einhorn, supra note 3, at 30-31; Easterbrook & Fischel, supra note 89, at 1161.

291. See B. Manning, A Concise Textbook on Legal Capital 8 (2d ed. 1981) (contending that the one basic objective of investors who buy stock is to receive the highest possible return on their capital investment); Booth, Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty, 60 N.Y.U. L. Rev. 630, 641 (1985) (noting that shareholders as passive investors seek the great best possible return on their investment); Burgman, Reappraising the Role of the Shareholder in the Modern Public Corporation: Weinberger's Procedural Approach to Fairness in Freezeouts, 1984 Wis. L. Rev. 593, 636 (1984) (making reference to
Therefore, assuming the majority of shares are not tendered as a result of coercion, the shareholder vote may actually harm individual investors by denying them the opportunity to sell their shares at a premium. The practical effect of the Indiana Act may be to deter tender offers from being made, in clear conflict with the "purpose" of the Williams Act developed in MITE.

The Court, however, found that the Indiana Act does not prevent an offeror from purchasing shares as soon as permitted under federal law. This argument is premised on the belief that a purchaser will spend millions of dollars to acquire shares that are worthless for the purpose of exercising control. The Court totally ignored the practical effects of the statute. As the District Court noted: "[v]oting rights . . . are an integral part of the ownership interest purchased along with a stock certificate. By limiting the rights that a tender offeror can purchase in a control acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms . . . ."

It is difficult to understand how the Court could hold that removal of voting rights from shares does not have the practical effect of blocking a "voting rights" transaction. If the Court looked to the substance of the transaction rather than its form, it would have seen that the Indiana Act had the potential of blocking the

the characterization of public shareholders as passive investors whose "sole expectation is the best possible return on [their] investment"; Steinberg, The Securities and Exchange Commission's Administrative, Enforcement, and Legislative Programs and Policies—Their Influence on Corporate Internal Affairs, 58 NOTRE DAME L. REV. 173, 202 (1982) (stating that "shareholders undeniably are primarily interested in obtaining the maximum economic return on their investments"); Comment, The Union Judgment Rule, 54 U. Chi. L. REV. 980, 988 (1982) (authored by Bruce A. Hersfelder & Elizabeth E. Schriever) (noting that "[a]ll shareholders in a publicly held corporation have a common goal—to maximize the return on their investment"); Comment, Unocal Corp. v. Mesa Petroleum Co., 72 VA. L. REV. 851, 856 (1986) (authored by James F. Ritter) (stating that "[s]hareholders are concerned mainly with receiving a satisfactory return on their investment . . . .")

292. CTS, 481 U.S. at 84.
293. See CTS, 481 U.S. at 100 (White, J., dissenting) (stating "[t]he majority ignores the practical impact of the Chapter . . . .").
295. See E. ARANOW & H. EINHORN, supra note 3, at 70. These authors note that the tender offer process, as a means for acquiring corporate control, is only effective if the offeror is able to vote the shares it has acquired. Id.
296. Cf. CTS, 481 U.S. at 99 (White, J., dissenting) (arguing that "[t]his Court is not bound by [t]he name, description or characterization given [a challenged statute] by the legislature or the courts of the State," but will determine for itself the practical impact of the law." (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) (emphasis added)).
transaction as did the Illinois statute in *MITE*.  

The Court rejected this contention by reasoning that if a tender offeror fears an adverse shareholder vote, it can simply make a conditional tender offer, offering to purchase shares on the condition that they receive voting rights within a specified time. However, this solution, which gives the offeror the ability to purchase shares at a later date, creates another conflict with the Williams Act as identified in *MITE* because it imposes additional delay into the tender offer process. In the case of a conditional tender offer, the purchaser still does not gain control of the shares until fifty days after the commencement of the offer. This leaves management in place for three extra weeks with "free reign to take . . . defensive steps . . . ." This arguably would have an effect similar to the precommencement period and create the possibility of delay which resulted from the hearing provisions that were struck down in *MITE*. The CTS Court, however, rejected this contention, saying

297. See CTS, 637 F. Supp. at 398.

298. CTS, 481 U.S. at 84-85. The Court noted that the SEC "does not appear to have spoken authoritatively on this point", but believes "[t]here is no reason to doubt that this type of conditional tender offer would be legitimate as well." Id. at 84 n.8.

299. In the realm of tender offers, delay has been characterized as a potent weapon in the tender offer fight. See Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 CORNELL L. REV. 213, 238 (1977); see also Wachtell, Special Tender Offer Litigation Tactics, 32 BUS. LAW. 1433, 1437-42 (1977). By providing a substantial delay, incumbent management is afforded the opportunity to take defensive measures in its quest to thwart the offer. See E. ARANOW & H. EINHORN, supra note 3, at 219-76. The defensive tactics available to the target include:

A. Repurchases of its own shares by the target;
B. Open-market purchases of the target's shares by friendly third parties;
C. Concentrated selling of the offeror's shares by friendly third parties;
D. Dividend increases;
E. Stock splits;
F. Issuance of additional shares;
G. Creation of incompatibility between the target and the offeror;
H. Defensive mergers;
I. Discriminatory voting provision;
J. Triggering of state takeover statutes;
K. Legal action;
L. Publicity; and
M. Restrictive loan agreements.

Id.  


301. CTS, 481 U.S. at 85 n.9 (quoting Brief for Appellee at 37, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (No. 86-97)).

302. *MITE*, 457 U.S. at 636-37. The *MITE* Court, relying on the congressional record leading to the adoption of the Williams Act, indicated that Congress refused to impose a precommencement period since it "furnished incumbent management with a powerful tool to
it is "unlikely" that management will take such action. Secondly, the Court noted that even if this problem existed, it did not control the preemption analysis since "[n]either the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors." 

At this point, the Court seems to have ignored the evidence in the case. It is apparent from the record that CTS management tried three times to protect itself from the DCA offer. In addition, although it may be true that no federal law can protect shareholders from corporate management, that is not the issue with preemption purpose analysis. According to the analysis in MITE, what is at issue is a state law that "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress" by providing for an extended delay in the tender offer process.

Finally, the CTS Court reasoned that even if the Indiana Act did impose some additional delay, the MITE opinion did not suggest that delay would necessarily create a conflict with the Williams Act—only an unreasonable delay would do so. The Court concluded that the fifty day delay produced by the Indiana statute was not unreasonable since it was within the sixty day maximum period combat tender offers" and thereby frustrated the objectives of the Williams Act. 

303. CTS, 481 U.S. at 85 n.9.

304. Id.


On March 22, 1986, CTS' board of directors adopted a shareholder rights plan under which CTS shareholders received a dividend distribution of one right per share. Id. The right entitled the holder to purchase a unit of CTS securities, which consisted of stock and debt, should any person or group acquire 15% or more of CTS' common stock. Id. The effects of this plan was to inflict an immediate economic loss on the acquiring party which, according to CTS, would have caused a loss of approximately $24 million to DCA. Id. at 408.

On April 23, 1986, CTS management adopted a second shareholder rights plan as a part of a white knight strategy. Dynamics Corp. of America v. CTS Corp., 635 F. Supp. 1174, 1176-77 (N.D. Ill. 1986). This plan would force any party seeking to acquire 28% or more of CTS' common stock to pay shareholders a minimum of $50 per share. Id. at 1177. The purpose of this plan was to limit the size of DCA's holdings to under 28% which would be sufficient for a CTS special committee to attempt a sale of the entire company. Id.

Finally, in November, 1986, CTS' directors adopted a third rights plan which was similar to the plan adopted in April, 1986, except it reduced the minimum price to $35 per share. 1986 CTS ANNUAL REPORT supra note 141, at 12.


307. CTS, 481 U.S. at 85.
established by Congress with regard to tender offers. 308

The MITE Court was concerned with the possible effect delay might have on the tender offer process. The delay provided by the Indiana statute and its potential effects are, therefore, the same as that which was thought to be offensive in MITE. However, if the Court chooses to follow the analysis in MITE by confusing the purpose of the Williams Act with the means by which Congress sought to accomplish that objective, it seems to have entirely misinterpreted the purpose of the sixty day provision—its express purpose being to prevent offerors from tying up the stock of investors for an indefinite period of time. 309 It has nothing to do with when the offeror should be permitted to begin purchasing stock. For this, Congress established the twenty day provision, a standard which acts to “strike the balance between the offeror and the target.” 310 It is difficult to see how a delay which is nearly twice as long as that established by Congress can be considered reasonable and not in conflict with the MITE interpretation of the Williams Act. 311

2. A Proposed Solution. Whether the MITE and CTS decisions are correct with regard to the preemption challenge is not the issue which this Note seeks to address. Instead, the issue is the standard by which the Court has evaluated those statutes. The Court has chosen to evaluate state takeover legislation using the “purpose analysis” standard enunciated in Hines v. Davidowitz. 312 In applying this purpose analysis, however, the Court has strayed from the actual purpose of the Williams Act. 313 Each particular provision of a statute has a “purpose” behind its enactment in that it was designed to accomplish a particular result. 314 These should not, however, be confused with the actual purpose of the legislation. Moreover, these “purposes” should not provide the basis by

308. Id.
310. See SEC Release No. 33-6022, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 82,373, 82,595. This release arguably provides evidence that indicates that Congress believed the 20 day period strikes the balance it sought to create between the target and the offeror. In 1979 the SEC considered a 30 day period but later abandoned the idea because it concluded “a minimum period of thirty business days is unnecessarily long.” Id.
311. The 50 day period provided by the Indiana Act, IND. CODE ANN. § 23-1-42-7(b) (West 1989), is substantially longer than the Williams Act’s 20 business day requirement. 17 C.F.R. § 24.14e-1(a) (1987).
312. 312 U.S. 52 (1941).
313. See supra notes 231-80 and accompanying text.
314. See supra note 237 and accompanying text.
which state legislation will be preempted. By allowing this expansive view of the purpose of the Williams Act to continue as the applicable standard, the Court may preclude states from developing other provisions which may further the concept of investor protection but which do not strictly comply with the provisions of the Williams Act. It is for this reason that this Note concludes that the current purpose analysis employed by the Court is not the correct standard by which state takeover legislation should be judged.

When applying any purpose analysis the Court must, due to the nature of such an analysis, subjectively characterize the provisions of the statute being challenged. The problem, however, is that subjective characterizations are inherently suspect. In the context of state takeover legislation, the Court must subjectively characterize the provisions of those statutes as either furthering or frustrating the Williams Act's objective of investor protection. This type of characterization of state statutes may be more suspect if the provisions of the federal statute are additionally interpreted to indicate an expanded legislative purpose. The Court, therefore, can and should limit the amount of subjective analysis necessary to decide any particular case.

The Court can accomplish this objective by either of two alternatives. First, the Court can continue to employ the purpose analysis but abandon the expansive view of the Williams Act developed in

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315. See generally Comment, supra note 147.
317. See Hyde Park Partners, 839 F.2d at 850 (stating that "[our task is to indentify the principal result of [the state law]] and to determine "whether the ... provisions are beneficial to investors caught between management and offerors." (emphasis added)); see also BNS Inc. v. Koppers Co., 683 F. Supp. 458, 467 (D. Del. 1988) (citing Hyde Park).
319. See supra notes 190-248 and accompanying text (discussing the investor protection purpose of the Act).
320. See supra notes 252-78 and accompanying text (discussing the neutrality interpretation of the Act's purpose).
321. See United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (stating that "[i]nquiries into congressional motives or purposes are a hazardous matter" and "the stakes are sufficiently high for us to eschew guesswork. . .").
MITE. The Court would simply focus on the overall objective of the Act—namely investor protection. The second, and arguably better alternative, would be for the Court to discard the use of the purpose analysis completely. A state statute would then be preempted only where the provisions of that statute directly conflict with the provisions of the Williams Act.322

With regard to the first alternative, if the Court still chooses to adhere to the standard that a state takeover statute will be preempted if it "stands as an obstacle to the full accomplishment of the purpose and objective" of the Williams Act,323 the Court need only determine whether the statute either furthers or frustrates the goal of investor protection.324 The means by which the state seeks to accomplish that goal becomes irrelevant and quite simply should no longer serve as a basis for preemption in this analysis.

This alternative, however, still leaves the preemption issue subject to a court's interpretation as to whether or not the state statute furthers the congressional objective of investor protection.325 This Note, therefore, proposes that courts eliminate the use of the purpose analysis altogether and only preempt state legislation which directly conflicts with the substantive provisions of the Williams Act.326

The Williams Act, as it amended the Securities Exchange Act of 1934,327 is subject to the savings clause of section 28(a) of the Exchange Act.328 This section provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or person insofar as it does not conflict with the provisions of

322. See supra note 227 and accompanying text (discussing direct conflict as a ground for preemption).
324. See supra note 317-19 and accompanying text.
326. Cf. CTS, 481 U.S. at 96 (Scalia, J., concurring) (finding preemption without a purpose analysis).
328. Id. § 78bb(a) (1976).
this chapter or the rules and regulations thereunder." As Justice Scalia noted "[u]nless it serves no function, that language forecloses pre-emption on the basis of conflicting 'purpose' as opposed to conflicting 'provision'... [or at least] refutes the proposition that Congress meant the Williams Act to displace all state laws with conflicting purpose."330

B. The Commerce Clause

1. Identifying the Problem.— The tender offer process normally implies the use of the mails or some other means of interstate commerce.331 If the offer is accepted, the process also results in transactions that take place across state lines.332 For these reasons, state laws regulating tender offers are subjected to Commerce Clause scrutiny.

When analyzing state legislation, the Court has developed a number of tests which can be used to determine whether a state regulation which affects interstate commerce is unconstitutional.333 First, the Commerce Clause will be found to be violated by a state statute which directly regulates interstate commerce.334 The MITE Court, when performing its "direct regulation" analysis, included the issue of extraterritoriality.335 This test invalidates a state law which applies to commerce that takes place wholly outside that state's borders.336 Applying this test, the MITE Court concluded that the Illi-

329. Id.
330. CTS, 481 U.S. at 96 (Scalia, J., concurring) (emphasis in original).
332. Id.
333. See Raymond Motor Transp. v. Rice, 434 U.S. 429, 440-41 (1977) (finding that no single approach encompasses all cases involving a state statute's effect on interstate commerce).
334. See Schafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925) (holding that "a state statute which by its necessary operation directly interferes with ... [interstate] commerce is a prohibited regulation ... "). Courts and commentators have, however, found the direct-indirect standard to be misleading and confusing. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 408 (2d ed. 1988); Maltz, How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence, 50 GEO. WASH. L. REV. 47, 48 (1978) (finding that courts have mistakenly taken an ad hoc approach to the distinction between direct and indirect regulations).
335. See MITE, 457 U.S. at 641-43.
336. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806 (1976); see also Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (stating that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the States power."); Southern Pac. Co. v. Arizona, 325 U.S. 761, 775 (1945) (holding that a state law violated the Commerce Clause where the "practical effect of such regulation [was] to control [conduct] beyond the boundaries of the state . . . ").
nois Act violated the Commerce Clause since it acted as "a direct restraint on interstate commerce and [had] a sweeping extraterritorial effect." By contrast, the CTS Court was not concerned with the extraterritoriality issue.

The Indiana Act in CTS can be characterized as a statute that regulates tender offers. The statute operates to directly interfere with interstate transactions between non-resident shareholders and a non-resident offeror similar to the way that the Illinois statute did in MITE. However, a distinction was drawn because the Court found that the Indiana Act applied only to Indiana Corporations whereas the Illinois statute extends to corporations outside the state. The MITE Court was concerned with the possibility that the Illinois Act would apply even if not a single shareholder was an Illinois resident, i.e. to commerce wholly outside of its borders. The Indiana Act only applies to corporations having substantial shareholders in Indiana. Therefore, that statute does not raise the extraterritoriality issue.

A second test developed by the Court will invalidate a state law that discriminates between in-state and out-of-state participants. Under this approach, the Illinois and Indiana statutes are the same in that neither law imposes a greater burden on out-of-state offerors than it does on similarly situated in-state offerors. This discrimination test is a valid standard by which all state takeover legislation can be judged. There is, however, one other point worthy of comment.

337. MITE, 457 U.S. at 642.
338. See supra notes 293-94 and accompanying text (discussing the limits placed on a tender offeror by the Indiana Act).
339. See supra notes 78-85 and accompanying text.
340. See CTS, 481 U.S. at 93.
341. MITE, 457 U.S. at 642-43.
345. CTS, 481 U.S. at 87-88; MITE, 457 U.S. at 642.
The CTS decision limits its discrimination analysis to the issue of disparate treatment of in-state and out-of-state offerors. Justice White's dissent, however, appears to be concerned with the possibility that the Indiana statute has a protectionist purpose and therefore "discriminates" against out-of-state interests. While this belief is not untenable, it demonstrates the subjectivity of the discrimination test.

The issue in a "protectionist" analysis is whether the statute protects local industry and promotes in-state employment and supply opportunities at the expense of out-of-state parties. The concern, therefore, is the purpose and/or effect of the statute. By contrast, the discrimination test, as currently employed, is and should only be concerned with the equality of the statute's application. This test, therefore, requires only an analysis of the statute on its face rather than a study of the statute's purpose and effect.

The third test applied by the Court will invalidate a state statute that may adversely affect interstate commerce by subjecting activities to inconsistent regulations. Under this test, the CTS Court concluded that so long as each state regulates the corporations it created, each corporation will be subject to the law of only one state. Therefore, the Indiana Act did not impose an "impermissi-

346. CTS, 481 U.S. at 100-01 (White, J., dissenting) (stating that the "Commerce Clause was included in our Constitution . . . to prevent the very type of economic protectionism Indiana's Control Share Chapter represents . . ."); see also Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and the Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1868-73 (1987). See generally Regan, supra note 344, at 1092 (noting that even where courts articulate a different analysis, they are really concerned with economic protectionism).


348. See Regan, supra note 344, at 1094-98 (noting that the Commerce Clause was intended to strike down laws that protect local interests by discriminating against foreigners); see also B.T. Inv. Managers, Inc., 447 U.S. at 27; Philadelphia v. New Jersey, 437 U.S. 617 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 144-45 (1970).

349. See Regan, supra note 344, at 1110-43.

350. CTS, 481 U.S. at 87-88; see also id. at 95 (Scalia, J., concurring).

351. See, e.g., Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (noting that "if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 671 (1981) (objecting to Iowa truck-length regulations which were "out of step with the laws of all other Midwestern and Western States."); see also Southern Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945) (noting the confusion and difficulty that would result from the unsatisfied need for uniformity).

352. CTS, 481 U.S. at 88-89.
ble risk of inconsistent regulation." The MITE Court, on the other hand, did not explicitly address the problem of inconsistent regulation. It is obvious, however, that the Court was concerned with this possibility. Again, the distinction between the two statutes giving rise to the differing results is the jurisdictional reach of the statute. If a state confines the reach of its law to its own corporations as the Court held the statute in CTS did, the threat of invalidation on the basis of inconsistent regulation is essentially eliminated.

The final test applied by the Court in the context of state takeover statutes is the balancing test announced in Pike v. Bruce Church, Inc. This test provides: "Where a 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." This test is arguably the common ground of the MITE and CTS decisions. There is no doubt that the MITE decision employs the Pike balancing test. Although there are those who believe that CTS does not employ the Pike test, the conclusion that a balancing approach was used seems to be well supported. The use of the

353. Id.
354. See MITE, 457 U.S. at 645 (noting that "only one state should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation would be faced with conflicting demands. . . .").
355. See supra notes 22-26, 341-344 and accompanying text.
357. Id. at 142 (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).
358. See MITE, 457 U.S. at 643.
359. See, e.g., Regan, supra note 346, at 1866-68 (beginning the discussion by stating: "The first thing I want to point out about CTS is the absence of any reference to balancing . . . ."); Langevoort, supra note 347, at 103 n.45 (concluding that the CTS Court refused to balance); Note, The Delaware Takeover Statute: Constitutionally Infirm Even Under the Market Participant Exception, 17 Hofstra L. Rev. 203, 213 (1988) (authored by Ivy B. Dodes) (noting that "the CTS Court implicitly dismissed the [Pike] test when analyzing state statutes which merely regulate 'corporate governance.' "). But see Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986) (stating that "when a state statute directly regulates or discriminates against interstate commerce, or . . . favor[s] in-state interests over out-of-state interests, we have generally struck down the statute without further inquiry.").
360. Although the Court does not explicitly state that it is balancing, as suggested in Pike, it does begin the major portion of its Commerce Clause analysis (Part C, CTS, 481 U.S. at 89-93) by referring to the Seventh Circuit's decision which admittedly used a balancing analysis. See Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 263 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987). The key comment by the Court was that "the Court of Appeals failed to appreciate the significance for Commerce Clause analysis . . . ." CTS, 481 U.S. at 89
balancing approach in *MITE* and *CTS*, and its continued use by the lower federal courts presents the problem in the area of state takeover legislation under the Commerce Clause.

The *Pike* balancing test requires a court to consider whether the burden on interstate commerce imposed by a state law "is clearly excessive in relation to the putative local benefits." As Justice Scalia noted in his concurring opinion, "such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all." The concern here, as it was in the area of preemption, is that the Court must undertake a subjective analysis to determine the primary purpose of the legislation. That determination would entail choosing between the two purposes that are possible in the context of state takeover legislation—namely, investor protection and management entrenchment. Furthermore, even if the Court could accurately make that determination, it should not be the Court's function to say...
that "the protection of entrenched management," if non-discriminatory, "is any less important a 'putative local benefit' than the protection of entrenched shareholders." Justice Scalia, believing that such an inquiry should not be the function of the Court, stated:

I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other's objective—or the ultimate (and most ineffable) judgment as to whether, given the importance-level \( x \), and effectiveness-level \( y \), the worth of the statute is "outweighed" by impact-on-commerce \( z \).

Thus, the ultimate problem with the balancing approach is that it allows a court to subjectively characterize the statute being challenged.

What makes this approach even more questionable is that it allows a court to strike down a state law that satisfies all the objective criteria of the other Commerce Clause tests. As noted in the pre-emption argument, it is when a court undertakes this type of subjective analysis that it is most suspect. Courts should, therefore, limit the amount of subjective analysis necessary to decide the Commerce Clause issue. The following analysis of the Indiana Act demonstrates the dangers of the subjective analysis under the balancing test and the possibility that a statute which furthers the concept of investor protection could be found unconstitutional.

The Indiana Act's extraterritorial effect burdens interstate commerce by permitting the prevention of transactions between non-resident shareholders and non-resident offerors through a shareholder vote. However, this may be only the beginning of the list of adverse effects the statute has on interstate commerce.

For example, the entire tender offer process may be substantially discouraged by the increased costs coupled with the lessened certainty of success of a tender offer made for shares of a company located in a state with this type of anti-takeover legislation. By discouraging tender offers or providing sufficient delay for manage-
ment resistance, the shareholder may be injured.\textsuperscript{370} It is widely accepted that shareholders benefit from tender offers\textsuperscript{371} and it is difficult to see how a statute that hinders their use can claim investor protection as one of its primary purposes. The shareholder may lose the opportunity to sell his shares at a substantial premium. In cases where opposition to a tender offer leads to a higher price received by target shareholders, there may be no gain in the realm of interstate commerce. Instead, there could be an overall loss, because the target company expends resources to ward off the takeover and the bidder spends more to achieve success—one group's gain is offset by the other's loss and society as a whole is hurt as resources are inefficiently allocated.\textsuperscript{372} In reality, shareholder losses increase by the amount the bidder spends in attempting to overcome that resistance.\textsuperscript{373} The result is that fewer tender offers will be made, thereby harming all shareholders.\textsuperscript{374}

The obstruction of tender offers also burdens the interstate market for corporate control.\textsuperscript{375} As the \textit{MITE} Court noted, tender offers play an important role in "[t]he reallocation of economic resources to their highest valued use," and the result of burdening them is that "a process which can improve efficiency and competition, is hindered."\textsuperscript{376} As a corollary, the function that tender offers provide an important check on incumbent management is also diminished.\textsuperscript{377}

The Indiana statute, which is not limited in application to tender offers,\textsuperscript{378} may also inhibit the buying and selling of large blocks of shares of corporations governed by the statute, and may further disrupt trading in, and the regulation of, national securities markets.\textsuperscript{379} This may not be a statute that merely has an incidental

\textsuperscript{370} See, e.g., \textit{MITE}, 457 U.S. at 643; \textit{Telvest, Inc.}, 697 F.2d at 580; Dynamics Corp. of America v. CTS Corp. 637 F. Supp. 389, 403 (N.D. Ill.), aff'd, 794 F.2d 250 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987).

\textsuperscript{371} See Easterbrook & Fischel, \textit{supra} note 89, at 1164; \textit{supra} note 89 and accompanying text.

\textsuperscript{372} See Easterbrook & Fischel, \textit{supra} note 89, at 1175.

\textsuperscript{373} \textit{Id.}

\textsuperscript{374} \textit{Id.} (arguing that resistance is inefficient and diminishes shareholder value).


\textsuperscript{376} \textit{MITE}, 457 U.S. at 643; see Easterbrook & Fischel, \textit{supra} note 187, at 1173-74; Fischel, \textit{supra} note 187, at 5, 27-28, 45.

\textsuperscript{377} See Easterbrook & Fischel, \textit{supra} note 187 at 1169.

\textsuperscript{378} See \textit{supra} notes 100-12 and accompanying text.

\textsuperscript{379} See \textit{CTS}, 481 U.S. at 99-101 (White, J., dissenting). In this context, the SEC has contended that "any state regulatory scheme that impairs transactions in securities would seriously threaten the liquidity of the national securities markets and disrupt the federal 'common
effect on interstate commerce. Its effects could be direct and substantial.\textsuperscript{380} Even if the state's interests were legitimate, the Act's adverse effects on interstate commerce would easily outweigh those interests.

The CTS Court's focus on corporate governance actually serves two purposes in its balancing analysis.\textsuperscript{381} The first, and most significant, is the importance of a state's ability to regulate the internal affairs of the corporations it creates.\textsuperscript{382} Secondly, the Court focused on corporate governance to show that the statute has no substantial effect on interstate commerce since it does not actually regulate tender offers, but instead simply defines the attributes of the corporations it creates.\textsuperscript{383}

While it is true that states have an important and legitimate interest in governing their corporations, the Court's reasoning is misplaced. The area of corporate governance, or the regulation of the internal affairs of a corporation formed within the state, allows a state to govern "the relationships \textit{inter sese} of the corporation"\textsuperscript{384} on matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.\textsuperscript{385} These matters include regulation of the areas including mergers, voting

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\textsuperscript{380} See supra notes 370-78 and accompanying text.
\textsuperscript{381} See supra notes 169-84 and accompanying text.
\textsuperscript{382} See supra notes 97, 171-74 and accompanying text.
\textsuperscript{383} See supra notes 175-84 and accompanying text.
\textsuperscript{384} See supra notes 175-84 and accompanying text.
agreements, election of directors, relative rights and duties of officers, directors, and shareholders, issuance of dividends, shareholder liability issues and dissenter’s rights. The state, therefore, has the ability to govern existing intracorporate relationships. If the internal affairs doctrine only applies to existing intracorporate relationships, then its application to tender offers is not logically correct. The Indiana statute seeks to govern relationships that may only exist in the future and does not govern a corporate relationship at all.

The Court, however, seemed to extend the internal affairs doctrine on the pretense that it is warranted by the state’s desire to protect the investors of the corporations it creates. It reasoned that the state of incorporation must be allowed to do so since no other state can. But the Court may well have found that the investor protection provided by the Indiana Act was non-existent, and that the statute may actually have served to harm investors. Therefore, the Indiana Act, in its practical application, may place excessive burdens on interstate commerce—burdens that far outweigh any local benefits sufficient to invalidate the Act under the balancing test.

2. A Proposed Solution.— While some courts have noted that under CTS, the balancing test may not apply to statutes that regulate intrastate corporate governance, others still acknowledge that there are three tests that state takeover statutes must satisfy. First, the statute must not discriminate between in-state and out-of-state interests; second, it must not subject corporations to inconsis-

386. See Restatement (Second) of the Conflict of Laws §§ 302 comments a, e (defining “internal affairs” matters).


389. CTS, 481 U.S. at 91-93.

390. Id.

391. See supra notes 371-81 and accompanying text (discussing the potential harm to stockholders.)

392. See Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 844 (1st Cir. 1988) (noting that “the balancing test does seem to have been abandoned by the CTS court in cases where the state law merely regulates intrastate ‘corporate governance.’”); BNS Inc. v. Koppers Co., 683 F. Supp. 458, 472 (D. Del. 1988) (suggesting that the CTS Commerce Clause test protects regulations limited to in-state corporations and shareholders).

393. See supra notes 330-69 and accompanying text.

tent regulations; and third, it must satisfy the requirements of the balancing test. This Note concludes, however, that regardless of the corporate governance distinction, the use of the balancing test should be eliminated.

First, as noted earlier, the Court should limit the amount of subjective analysis necessary to decide the Commerce Clause issue. The judiciary is not sufficiently equipped to perform an adequate examination of the economic data on the effects of a state statute on the enacting state as well as on competing states. Therefore, deference should be given to state legislatures to protect what they deem to be a valid state interest.

Second, it is arguable that the objective tests remaining under the Commerce Clause are sufficient to protect the national interest in the free flow of interstate commerce without having to resort to a court's determination of the purpose behind the legislation. As Justice Scalia has argued:

As long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive [the] Court's scrutiny under the Commerce Clause whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for Congress to prescribe its invalidity.

VI. CONCLUSION

There is little doubt that tender offers will continue to be used as a means of acquiring corporate control. It therefore seems almost inevitable that the vast majority of state takeover statutes will one day be challenged in the court on constitutional grounds. Thus, the Supreme Court should once again decide the issue of the constitutionality of state takeover legislation in order to establish clear stan-
dards by which these statutes should be judged.

Justice Scalia's pointed concurrence is the course that the Court should take in both the areas of preemption and under the dormant Commerce Clause. What is most important, however, is that the Court decide these issues by establishing standards that are much less subjective and less dependent on how a particular court characterizes the substantive provisions of the state takeover statute being challenged.

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