State Takeover Statutes under Attack - Casualties in the Battle for Corporate Control - Mite Corp. v. Dixon

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Before this Note went to print the Supreme Court affirmed the Seventh Circuit's decision in MITE Corp. v. Dixon, solely on the ground that the Illinois Business Take-Over Act impermissibly burdened interstate commerce. The Court properly objected to the Illinois Act's overly broad jurisdictional reach, but it left other issues undecided, most notably, whether the Williams Act preempted Illinois' approach to regulating tender offers. This Note examines the Seventh Circuit's resolution of these issues, including those left undecided by the Supreme Court, and considers the threat that the Seventh Circuit decision poses to the viability of other state takeover laws, significantly those laws whose jurisdictional provision does not burden interstate commerce.

INTRODUCTION

In MITE Corp. v. Dixon, the Court of Appeals for the Seventh Circuit invalidated the Illinois Business Take-Over Act because it conflicted with the federal scheme for regulating tender offers under the Williams Act and it unduly burdened interstate commerce. Several other state takeover laws have also been successfully challenged on identical grounds, and consequently, the validity of other state takeover laws is in doubt. Whether

2. ILL. REV. STAT. ch. 121 1/2, §§ 137.51-70 (1979).
wholesale condemnation of state legislation is justified depends on the interpretation given to the Williams Act. If, as the opinion in MITE implies, the Act represents a comprehensive attempt to regulate tender offers, even the most benign state efforts cannot be countenanced. Conversely, if the Act merely sets minimum standards for tender offer regulation, the states may be free to enact more stringent, consistent legislation. Clearly, the purpose ascribed to the Williams Act will have a significant impact on the limits of state authority in this field.

Equally important in construing the Williams Act are the roles that the state and federal governments must assume in regulating securities transactions. An overbroad reading of Congress' purpose in enacting the Williams Act may alter the cooperative approach that has long existed between the states and the federal government. Federal securities laws have traditionally emphasized disclosure as the best means of protecting investors, while state blue sky and corporate laws have addressed more substantive aspects of securities transactions within their separate jurisdictions. In recent years this


6. See Moylan, State Regulation of Tender Offers, 58 Marq. L. Rev. 687 (1975) [hereinafter cited as State Regulation].


8. Long before federal entry into the field, the states regulated the issuance of securities and certain forms of takeovers, at first indirectly by means of state corporation acts and later by means of local blue sky laws governing the sale of securities within each state. See notes 103 & 104 infra. When Congress first began to regulate securities transactions, it specifically preserved the right of the states to act in this field as long as the actions were consistent with federal law. See note 162 infra. Since then state and federal statutes have supplemented each other in regulating corporate and securities transactions. Compare Ill. Rev. Stat. ch. 32, § 157.28 (1979) (governing voting of shares) with 15 U.S.C. § 78n(a)-(c) (1976) (governing proxy solicitations).

9. Sec. e.g., Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977). In Santa Fe Industries, minority shareholders, seeking to set aside a merger and recover the fair value of their stock, brought an action under federal securities law. The Supreme Court held that § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 did not reach breaches of fiduciary duty among shareholders because the federal statute merely assured that all relevant information be furnished so shareholders could decide whether to accept or reject the terms of the merger. Under the Delaware "short-form merger" statute governing the transaction, dissatisfied shareholders were left to pursue the state appraisal remedy. The Court expressed a reluctance to extend the federal securities laws if they "would overlap and quite possibly interfere with state corporate law." Id. at 479.
balance has taken on greater significance as a result of Supreme Court
decisions which have favored a more restrictive view of federal involve-
ment. Consequently, state law remedies have become increasingly impor-
tant in providing alternative forms of relief for injured shareholders. A
proper reading of the Williams Act must accommodate the crucial role of
local securities regulation with the overall structure of federal regulation,
and must not impose broad restrictions on state power which would under-
mine the authority states have traditionally exercised over a corporation’s
internal affairs.

Thus, the decision in MITE has significance beyond the issue concerning
the validity of the Illinois Act. Because a majority of states have enacted
takeover laws, it is essential to critically evaluate the Seventh Circuit’s
interpretation of the Williams Act and the impact the Act has on the balance
of state and federal authority in the field of securities law. Furthermore,
though the court’s opinion was not based on the new tender offer rules
promulgated by the Securities and Exchange Commission (SEC or Commis-
sion), the preemption and interstate commerce principles developed in
MITE will continue to be significant in analyzing future court cases. Like-

10. Under Chief Justice Burger, Supreme Court decisions have sought to reduce the work-
load of the federal judiciary by limiting new causes of action under federal securities laws,
redefining the elements of those actions that were too well entrenched to be eliminated, and
creating new procedural obstacles to private enforcement efforts. E.g., Santa Fe Indus., Inc. v.
Green, 430 U.S. 462 (1977). See Dickinson, Exclusive Federal Jurisdiction and the Role of the
States in Securities Regulation, 65 IOWA L. REV. 1201, 1201-02 (1980) [hereinafter cited as
Federal Jurisdiction].

During the past decade, the Supreme Court has significantly affected the level at which state
and federal governments participate in various substantive areas. In the field of securities
regulation, the Court has restricted federal involvement to a significant degree, leaving it to the
states to provide appropriate remedies in many cases. See Dickinson, supra , at 1201-02. In view
of the strong role the states have occupied for so long in regulating matters of a purely corporate
nature, the federal interest in this field is much more limited than that of the states. Conse-
quently, the level of conflict between local takeover laws and the Williams Act, between state
interests and federal interests, should reach a higher threshold before the supremacy of federal
law is asserted. Minor inconsistencies are tolerable if, overall, the operation of both statutory
schemes can be reconciled. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127
(1973). See generally Note, The Preemption Doctrine: Shifting Perspectives on Federalism and
the Burger Court, 75 COLUM. L. REV. 623 (1975).


12. See notes 198-200 and accompanying text infra. A state which has a legitimate interest in
regulating the internal affairs of a company organized under its laws would arguably have little
or no interest in controlling corporations that are merely present within the state, or that are
partially owned by residents of that state. But cf. Shipman, supra note 7, at 751-55 (such
expanded state control can be justified when foreign corporations have a substantial enough
presence within the regulating state).

13. See note 45 infra.

14. 17 C.F.R. §§ 240.14d-1 to -101 (1980). The rules were promulgated pursuant to § 14(d)
of the Williams Act, 15 U.S.C. § 78n(d) (1976), to regulate activities related to the making of a
tender offer. Rule 14d-2, which defines the circumstances under which a tender offer is deemed
to have commenced, especially Rule 14d-2(b), which triggers a tender offer if specified informa-
tion is made public, raises the possibility of preemption for most state takeover acts. Whereas the
states generally require disclosure statements and a statutory waiting period before a tender offer
wise, the validity of the new tender offer rules and the extent of the SEC's rule-making authority may well depend, at least in part, on the extent of state and federal power to govern corporate takeovers via tender offers.15

**Tender Offer Legislation Before Mite**

During the early 1960's the cash tender offer16 gained recognition as a uniquely effective means of attaining control of a corporation.17 In a cash may commence, see notes 48-49 and accompanying text infra, Rule 14d-2(b) causes the offer to become effective immediately upon publication of a press release, for example. Compliance with both schemes is impossible when the state law requires the offeror to wait while the SEC requires the offeror to proceed. The tender offer in *MITE* was made prior to the effective date of the new rules which apply only to offers commenced on or after January 7, 1980.

15. See notes 202-19 and accompanying text infra.


17. Prior to the 1960's tender offers were used primarily as a means for the issuer to repurchase its own securities. See D. Austin & J. Fishman, *Corporations in Conflict—The Tender Offer* 7 (1970) [hereinafter cited as D. Austin & J. Fishman]. Several reasons have been suggested for the emergence of tender offers as a takeover device:

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, sophistication, and knowledge with respect to the takeover via tender technique;
4) Lack of extensive federal or state regulation of tender offers;
5) Quicker and more successful results when compared with a full-dress proxy contest;
6) Greater flexibility—the ability to hedge by reserving certain options against a final and irrevocable commitment;
7) Psychology—the appeal to shareholders in straight dollars and cents language, eliminating the need, as in a proxy contest, to convince the shareholder that the insurgent can do a more efficient job;
8) Notwithstanding the actual capital investment, the reduced costs of effecting a tender offer when compared with a proxy contest;
9) A new "respectability" for cash tender offers.

tender offer, the bidder made an offer to purchase a minimum number of the company's outstanding shares within a specified period and at a fixed price, usually at a premium over the market price.\textsuperscript{18} The offer was made directly to the shareholders; consequently, the need to deal with hostile management or to engage in costly, drawn-out proxy contests was eliminated.\textsuperscript{19} Until 1968, cash tender offers were essentially unregulated.\textsuperscript{20} Their proponents viewed them as serving a useful economic function,\textsuperscript{21} but critics portrayed them as acts of piracy resulting in the sacking and pillaging of "proud old companies."\textsuperscript{22} Such a portrayal was not entirely inaccurate. For example, conglomerates were sometimes more interested in the liquidation value of a company whose stock was significantly undervalued.\textsuperscript{23} Where a takeover by conven-

\textsuperscript{18} The higher price was intended as an inducement for shareholders to tender their shares. But higher prices also provided an opportunity for market disruption when the offer was for less than all outstanding shares. Market professionals could tender at the higher price such shares as they owned along with any that could be borrowed or pledged. When the tender offer was completed and the price returned to near its earlier level, the professionals went back into the market and covered the "short tender" at the lower price, the difference constituting their profit. Individual investors were at a disadvantage when competing against such practices; furthermore, there was a potential for havoc if the short tender could not be covered. See Henry, Activities of Arbitrageurs in Tender Offers, 119 U. Pa. L. Rev. 466, 467 (1971); Moylan, Exploring the Tender Offer Provisions of the Federal Securities Law, 43 Geo. Wash. L. Rev. 551, 556 (1975) [hereinafter cited as Exploring the Tender Offer].

\textsuperscript{19} Corporate officials had less opportunity to resist a tender offer than a merger or a sale of assets in which the proposal was debated at a meeting and subject to shareholder approval. Acquisition by tender offer obviated the burden of providing comprehensive advance disclosure under SEC proxy rules, and was also less vulnerable to judicial scrutiny. See Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. Pa. L. Rev. 317 (1967).

\textsuperscript{20} Prior to 1968, shareholder relief was limited to actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and SEC Rule 10b-5. See Sowards & Mofsky, Corporate Take-Over Bids: Gap in Federal Securities Legislation, 41 St. John's L. Rev. 499 (1967).

\textsuperscript{21} Conventional wisdom had it that the tender offer was a means of assuring survival of the fittest by dislodging entrenched but inefficient management. See D. Austin & J. Fishman, supra note 17, at 179-80; Brudney, A Note on Chilling Tender Solicitations, 21 Rutgers L. Rev. 609, 632-34 (1967) [hereinafter cited as Brudney]. Under this theory, the offer came whenever stock prices were below book value or attractive in terms of price/earnings ratio. The cause for low prices was assumed to be poor management, the ouster of which would be a boon to the corporation and shareholders alike. See Exploring the Tender Offer, supra note 18, at 558. However, more recent experience suggests that the contrary may be true, i.e., offers are frequently aimed at well-run companies and their management. See Liman, Has the Tender Movement Gone Too Far?, 23 N.Y.L. Sch. L. Rev. 687, 707-08 (1978) [hereinafter cited as Liman]; Note, The Constitutionality of State Takeover Statutes: A Response to Great Western, 53 N.Y.U. L. Rev. 872, 874 n.9 (1978) [hereinafter cited as State Takeover Statutes]. Ironically, the theoretical utility of a tender offer may be thwarted when shareholders act in their own best interests. See Exploring the Tender Offer, supra note 18, at 558.


\textsuperscript{23} See, e.g., Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947); Feit v. Leased Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971). Additional factors could attract a tender offer, such as the target company's lower earnings compared to competitors', surplus liquid assets and undervalued fixed assets, concentrated institutional share ownership, and
tional means was likely to be opposed, the tender offer was a safe\(^\text{24}\) and quick\(^\text{25}\) alternative to obtaining control. Moreover, a tender offer added the luxury of complete secrecy until the offer was made, and even then the offeror was not required to disclose his identity, source of funds, future plans, or equity in the target company. On the other hand, incumbent management was nearly helpless to resist a takeover despite extreme measures to perpetuate its tenure.\(^\text{26}\)

Once the tender offer was made individual shareholders faced pressure to tender their shares as soon as possible. A shareholder who vacillated might find that the opportunity to sell his shares had passed. Conversely, if he tendered immediately he would be unable to accept a better offer later.\(^\text{27}\) For shareholders left holding some or all of their shares after an offer expired, there was a good chance that little would remain of the company. The resulting uncertainty was further aggravated by a lack of information on which to base a decision.

When federal regulation of cash tender offers was first proposed in 1965,\(^\text{28}\) its purpose ostensibly was to protect incumbent management from the on-
slaughts of "corporate raiders." The bill provided for twenty days advance notice to both the target company and the SEC if the intended offer would have resulted in ownership by the offeror of five percent or more of the target company's outstanding shares. Although the original bill was never passed, many of its provisions formed the basis for the second bill, which was introduced in 1967. During the interim, however, solicitude for management's interests gradually yielded to a greater awareness of the needs of shareholders. In addition, the use of tender offers ceased to be viewed as wrong per se. As a consequence, the second bill manifested less concern with preventing takeovers than with protecting investors. The bill, which became known as the Williams Act, was finally enacted in the form of two amendments to the Securities Exchange Act of 1934.

The principal aim of the Williams Act is to benefit the interests of shareholders without unduly impeding legitimate takeover bids. To achieve this result, it is required that information material to an investor's decision be disclosed concurrently with the making of a tender offer. This approach

29. 111 Cong. Rec. 28257 (1965). One writer dubbed the original bill "The Incumbent Management Protection Act" as more accurately reflecting the interests that were to be protected. Exploring the Tender Offer, supra note 18, at 553.

30. 111 Cong. Rec. at 28259 (1965). The fact that the bill was not passed with this provision has been construed by some, including the MITE court, 633 F.2d at 497 n.23, as conclusive evidence that the purpose of the original bill conflicted with that congressional purpose embodied in the Williams Act, as passed. Cf. State Regulation, supra note 6, at 688. Under this reasoning the numerous state takeover acts that incorporate such pre-offer notice provisions would be preempted. However, the fact that Congress rejected provisions similar to those found in state takeover acts does not mean the state laws are automatically preempted. See, e.g., De Canas v. Bica, 424 U.S. 351 (1976). Moreover, an attempt to impart significance to the difference in the approaches taken by the two bills would be a "hazardous matter" if the purpose for doing so was to strike down legislation. United States v. O'Brien, 391 U.S. 367, 383-84 (1968). See note 151 infra.


32. See State Regulation, supra note 6, at 688. Ironically, official opinion appears to be coming around full circle. Unsettled by the legitimacy hostile tender offers have come to enjoy, Chairman Harold Williams of the SEC bemoaned current treatment of corporations as nothing more than the sum of their properties. He complained that increasing recourse to acquisitions and takeovers to achieve corporate expansion had hurt the United States economically. Conglomerate Mergers—Their Effects on Small Business and Local Communities, 1980: Hearings Before the Subcomm. on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Comm. on Small Business, 96th Cong., 2d Sess. 255, 287-88 (testimony of Harold M. Williams, Chairman, Securities and Exchange Commission).


35. 15 U.S.C. § 78n(d)(1) (1976). The tender offer made in MITE was governed by the disclosure requirements set forth in 17 C.F.R. § 240.14d-100 (1979). If the tender offer would result in ownership by the bidder of five percent or more of the class of the target company's securities for which the offer was made, the bidder had to file Schedule 14D-1, which included:
differs from the pre-offer notice requirement called for in the original bill.36 The Act also provides that tendered shares may be withdrawn any time up to seven days after the offer,37 or after sixty days if the shares have not been taken up.38 If the shares tendered within ten days exceed the number stated in the offer, all shares offered must be taken up pro rata.39 Additionally, the Act requires that any increase in the price for shares while the offer is still open applies to shares that have already been deposited.40 Finally, the Act generally prohibits false statements or omissions of any material fact, as well as fraudulent or manipulative practices in connection with tender offers.41

The advent of the Williams Act produced fears that the tender offer would cease to be an effective takeover device.42 Those fears proved groundless, but critics of the Act suggested that the federal regulation fell short of its goal of investor protection.43 The primary objection was that shareholders and management had insufficient time to evaluate a hostile tender offer. Responding to pressure for stricter control,44 state legislatures enacted their own tender
offer regulations. These regulations were sometimes justified by the recognized state interest in the internal affairs of its corporations. State statutes generally adopted Congress' intent to provide investor protection, but in some respects they diverged from the specific approach taken in the Williams Act. Delay was one difference between the state and federal approach that was common to all state statutes. The states generally imposed a waiting period before a contemplated tender offer was allowed to proceed; however, the potential for delay varied. Some statutes required nothing more than official clearance of the disclosure statement. Others interposed a specific waiting period, typically twenty days, while also requiring disclosure and


46. See, e.g., Ill. Rev. Stat., ch. 121½, § 137.51-1 (1979), which provides:

The purpose of this Act shall be to protect the interests of Illinois security holders of companies having a close connection with this State without unduly impeding takeover offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of the target company or an offeror. The takeover bid is essentially a matter involving the corporation, its directors, officers, and stockholders; thus, some commentators contend it should be considered an internal affair which the state may reasonably regulate on a global basis. See, e.g., Shipman, supra note 7, at 741-45. Takeover acts generally seek to increase the protection afforded to investors. See, e.g., Ill. Rev. Stat. ch. 121½, § 137.51-1 (1979). Logically, therefore, the acts should be part of the state "blue sky" laws regulating local securities transactions, but jurisdiction over the tender offer is based primarily on minimum contacts of the target company with the state, rather than involvement with resident investors. See note 52 infra. Because of the extraterritorial reach of the takeover acts, they are more analogous to state corporation laws than to narrower blue sky laws. See Langevoort, supra note 7, at 220. Not surprisingly, the states differ in how they categorize their takeover statutes. Id. at 220 n.43.

possibly a hearing.\textsuperscript{48} In addition to the disclosure and hearing provisions a few states required that the offer be "fair".\textsuperscript{49} Opponents of state statutes argued that delay worked in favor of incumbent management to frustrate consummation of the tender offer.\textsuperscript{50} The asserted pro-management bias of the state takeover acts spawned criticism that they were enacted more for the benefit of local companies than for the protection of shareholders.\textsuperscript{51}

Another problematic feature of state takeover laws was their extraterritorial reach. Jurisdiction was based on a combination of factors establishing a minimum contact with the state, such as, incorporation within the state, principal place of business or substantial assets in the state, or a certain number of resident shareholders.\textsuperscript{52} Thus, for example, a tender offer occurring in one state and affecting shareholders scattered throughout the country might be subject to the takeover law of another state where a manufacturing plant of the target company was located.\textsuperscript{53} Such an extreme application of

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\item \textsuperscript{49} See, e.g., ILL. REV. STAT. ch. 121½, § 137.57E (1979); N.J. STAT. ANN. § 49:5-4a(2) (West Supp. 1981-82).
\item \textsuperscript{50} See P. DAVEY, DEFENSES AGAINST UNNEGOTIATED CASH TENDER OFFERS 14 (1977) ("[T]he more the better—generally considered critical in successfully fending off tender offers.") See also Wilner & Landy, supra note 44, at 9-10.
\item \textsuperscript{51} See note 44 supra. Some statutes have explicit provisions that demonstrate a parochial interest. See, e.g., KY. REV. STAT. §§ 292.560 -.630 (Cum. Supp. 1978) (purpose of the act is "the prevention of take-over bids through the purchase of corporate securities") (emphasis added).
\item \textsuperscript{52} See note 44 supra. Jurisdiction is based on the target company having either 10% of its outstanding shares held by Illinois residents or any two of the following characteristics: (a) its principal executive office in the state, (b) incorporation under the laws of the state, (c) at least 10% of its stated capital and paid-in surplus represented in the state.
\item \textsuperscript{53} Jurisdiction in such a case would run counter to the historical preference for the laws of the charter state to govern the internal affairs of a corporation. Some states, however, have been permitted to apply local law to internal transactions of "foreign" corporations. See, e.g., Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 321-22, 327 (5th Cir. 1959), cert. denied, 361 U.S. 885 (1959); Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 411, 12 Cal. Rptr. 719, 727 (1961). See also Latty, Pseudo-Foreign Corporations, 65 YALE L.J. 137 (1955).
\item \textsuperscript{54} See, e.g., ILL. REV. STAT. ch. 121½, § 137.52-10 (1979). Jurisdiction is based on the target company having either 10% of its outstanding shares held by Illinois residents or any two of the following characteristics: (a) its principal executive office in the state, (b) incorporation under the laws of the state, (c) at least 10% of its stated capital and paid-in surplus represented in the state.
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\item The state's interest in regulating the takeover of corporations with a significant presence in the state is clear; numerous jobs and substantial revenues may be at stake. Furthermore, contacts with the state of incorporation may be minimal. See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977). Nevertheless, there is a serious danger that multiple and inconsistent laws will be applied if more than one state attempts to assert jurisdiction. See MITE Corp. v. Dixon, 633 F.2d at 502.
the law could hardly be justified on the basis of shareholder protection.\(^5^4\) Some states attempted to avoid the inconsistency with a comity provision.\(^5^6\) Nevertheless, serious questions of federalism were raised that have not been overlooked by commentators\(^5^7\) nor, more recently, by the courts.\(^5^8\)

Initially, offerors attempted to comply with the applicable state laws, but in 1978 several state laws came under constitutional attack.\(^5^9\) The demise of state takeover acts appeared imminent after the Fifth Circuit held that Idaho's statute violated the supremacy clause and the commerce clause of the United States Constitution.\(^6^0\) The Supreme Court, however, reversed the appeals court on procedural grounds leaving the constitutional issues unresolved.\(^6^1\) Nevertheless, it was only a matter of time before another state law would be struck down. When the events in *MITE Corp. v. Dixon* began to unfold, the decisional law and commentary were almost unanimously against the validity of state takeover laws.

\(^{54}\) See note 46 *supra*.
\(^{55}\) See note 46 and accompanying text *supra*.
\(^{56}\) See, e.g., *ILL. REV. STAT. ch. 121-1/2, § 137.53 (1979)* (exempts offerors from filing and requisition requirements if the other jurisdiction has statutes which give substantially equal protection to shareholders).

57. These questions are the focal point of this Note, and reflect the central concern of most commentators, cited herein, who have examined the impact of state takeover laws. The weight of opinion is against the validity of the takeover laws under both the supremacy clause and the commerce clause. But to some extent the conclusion that the state laws are preempted under the former relies on the more convincing conclusion that they impermissibly burden interstate commerce. Examined exclusively under the supremacy clause, it is doubtful that most state takeover laws would be preempted by the Williams Act. Moreover, their invalidity under the commerce clause is founded principally on the extraterritorial impact they have. If this were ameliorated, most constitutional objections would be significantly weakened. See notes 196-201 and accompanying text *infra*.

58. Initially, courts followed the lead of the majority of commentators in finding that state takeover laws were unconstitutional under both the supremacy clause and the commerce clause. But the contrary view eventually gained momentum in some jurisdictions. See, e.g., *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979). In *AMCA* the court determined that the Williams Act was not so pervasive as to preclude concurrent state regulation and the federal interest was not so dominant in the field of securities regulation as to preclude state participation in the same field. Because simultaneous compliance with the Williams Act and the Ohio act was possible, the latter was not preempted. Moreover, the Ohio act served a legitimate public interest which was not outweighed by the burden of out-of-pocket costs of compliance, and the Act did not favor parochial interests to the detriment of other states. Hence, the Ohio Act was constitutional under both the supremacy clause and the commerce clause. *See also Strode v. Esmark, Inc.*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538 (Cir. Ct. Franklin County, Ky. May 13, 1980) (Kentucky Act upheld under reasoning similar to *AMCA*), aff'd, [1981-82] Fed. Sec. L. Rep. (CCH) ¶ 98,238 (Ky. App. Apr. 3, 1981).

59. See note 4 and accompanying text *supra*.
**DEPAUL LAW REVIEW**

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**THE MITE DECISION**

**Facts and Procedural History**

On January 19, 1979 the MITE Corporation (MITE)\(^2\) offered to pay $28.00 per share\(^3\) for all outstanding shares of the Chicago Rivet & Machine Company (Chicago Rivet).\(^4\) MITE filed Schedule 14D-1 with the SEC, as required by federal law.\(^5\) Instead of complying with concurrent provisions of the Illinois Business Take-Over Act,\(^6\) however, MITE filed suit against Chicago Rivet and the Illinois Secretary of State\(^7\) to enjoin enforcement of the Illinois Act and to have the Act declared null and void on its face because it violated the supremacy clause and the commerce clause of the United States Constitution.\(^8\)

Responding to MITE's action, Chicago Rivet brought suit in a Pennsylvania state court,\(^9\) alleging that the tender offer would violate the Pennsylvania Takeover Disclosure Law.\(^7\) Jurisdiction in that action was based on the fact that Chicago Rivet had both its principal place of business and a substantial number of its assets in Pennsylvania. A complaint was also filed with the Pennsylvania Securities Commission seeking to have the Pennsylvania law enforced against MITE. At the same time, Chicago Rivet moved to dismiss the action commenced in the northern district of Illinois on grounds that neither of the defendants had any present intention of invoking the Illinois Act against MITE. The district court, however, denied the motion and ordered the defendants not to proceed against MITE under the Illinois Act without giving at least two business days' prior written notice.\(^7\)

MITE subsequently removed the action that Chicago Rivet had initiated in Pennsylvania to federal court, challenging the constitutionality of the Pennsylvania Act. Soon thereafter, the Pennsylvania Securities Commission decided not to enforce the Pennsylvania Act against the proposed tender offer, and the district court in the northern district of Illinois denied Chicago Rivet's motion to restrain MITE's original suit.\(^7\) As a result, each defendant

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62. MITE Corporation and MITE Holdings, Inc. were Delaware corporations with their principal executive offices in New Haven, Connecticut. 633 F.2d at 488.
63. The price to be offered represented a premium of more than $4.00 per share over the market price just before the offer was announced. 633 F.2d at 488.
64. The target company was a publicly-held Illinois corporation with its principal executive offices in Bellwood, Illinois. Of 2,181 shareholders of record, 589 were residents of Illinois who collectively owned more than 43% of the outstanding common stock.
65. See note 35 supra.
66. ILL. REV. STAT. ch. 121\(\frac{1}{2}\), §§ 137.51-70 (1979).
67. MITE Corp. v. Dixon, No. 79 C 200 (N.D. Ill. Feb. 9, 1979). Illinois Secretary of State Alan J. Dixon and Chicago Rivet & Machine Company were both named defendants in this action.
68. MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).
69. 633 F.2d at 488-89.
71. 633 F.2d at 489.
72. Id.
notified MITE that they intended to halt the proposed tender offer because it was violating the Illinois Act. MITE then renewed its request for relief before the federal district court in Illinois. The district court found the Illinois Act to be unconstitutional under the supremacy and commerce clauses of the Constitution and enjoined the Illinois Secretary of State from enforcing the Act against MITE. The tender offer finally appeared in the national edition of the Wall Street Journal on February 5, 1979.

On appeal, the Illinois Secretary of State challenged the district court’s decision that the Illinois Act was unconstitutional. The Seventh Circuit, however, affirmed the lower court’s ruling.

The Seventh Circuit’s Rationale

In determining whether the Illinois Business Take-Over Act was preempted by the Williams Act, the Seventh Circuit noted that Congress had not expressly chosen to bar the states from regulating tender offers, nor had Congress instituted a scheme so pervasive as to manifest an implicit intention to preempt concurrent state legislation. Thus, the court’s analysis was limited solely to whether the Illinois Act stood “as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.” The court determined that the dominant purpose embodied in the Williams Act was investor protection. Investors were protected through the “market approach” which contemplated full disclosure by both the offeror and the incumbent managers of a target company so that the investor could determine for himself whether to tender his shares pursuant to the offer.

73. MITE Corp. v. Dixon, No. 79 C 200 (N.D. Ill. Feb. 9, 1979).
74. Although MITE subsequently withdrew its tender offer, it still faced criminal and civil liability under the Illinois Act for having made the tender offer on February 5, 1979. As a result, the issues raised on appeal were not moot. 633 F.2d at 490. Cf. Tyco Laboratories, Inc. v. Connolly, 473 F. Supp. 1157 (D. Mass. 1979) (challenge to the constitutionality of the Massachusetts Act rendered moot by plaintiff’s post-trial disclaimer of any further interest in making a tender offer).
75. Chicago Rivet did not join in the appeal. 633 F.2d at 488.
76. MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980).
77. Id. at 491. Under § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1976), state authority to regulate securities was explicitly preserved to the extent it did not conflict with federal securities legislation. According to the Supreme Court, “[t]he section was plainly intended to protect, rather than to limit, state authority.” Leroy v. Great W. United Corp., 443 U.S. 173, 182 (1979). The MITE court, however, took the position that § 28(a) was aimed primarily at preserving state blue sky laws. 633 F.2d at 491 n.5.
78. In Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1274-75 (5th Cir. 1978), the court concluded that the 1934 Act did not preclude state tender offer legislation, but refused to consider whether the Williams Act amendments to the 1934 Act signalled Congress’ intention to completely occupy the field. The MITE court concluded they did not. Thus, a state takeover statute could, at least theoretically, be structured so as not to frustrate the congressional objective of investor protection. 633 F.2d at 493, 502-03.
79. 633 F.2d at 492.
80. Id.
81. The market approach of the Williams Act, described as the function of getting all relevant information to the investor so that he could decide for himself whether or not to tender,
sured against this standard, the Illinois statute was found to be at odds with the federal scheme in several respects.

Most troublesome for the court was the provision granting the Secretary of State power to deny registration of the takeover offer if, in his opinion, the offer was unfair. This approach empowered the secretary to pass on the substantive fairness of an offer and to prohibit the offer from going forward if he found it to be “inequitable.” The court objected to this provision, not because it might slow the progress of tender offers, but because it was preempted by the conflicting approach of the Williams Act which necessitated that well informed investors be permitted to decide for themselves whether to tender their shares. Insofar as Illinois relied on the judgment of its Secretary of State rather than the investors’ own judgment, its regulatory scheme was held to be in conflict with federal law.

Another provision in the Illinois Act authorized hearings that could be extended indefinitely. In particular circumstances, incumbent management might be able to take advantage of this provision to thwart a proposed tender offer. This potential for misuse ran counter to what the court perceived as “the congressionally-mandated purpose that shareholders be free within a reasonable time to accept a tender offer they deem fair.” The was relied on by the Fifth Circuit to strike down the Idaho Act. Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), rev’d on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

82. ILL. REV. STAT. ch. 121½, § 137.57E (1979).
83. According to the appellant, review by the secretary was to see if the offer failed to provide full disclosure of material information or would work a fraud or deceit, but review was not intended to allow the secretary to evaluate the substantive fairness of the amount offered. Brief for Appellant at 17, MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980) [hereinafter cited as Brief for Appellant].
84. The court interpreted the Williams Act to require “unfettered choice by well-informed investors.” 633 F.2d at 494.
85. Id.
86. ILL. REV. STAT. ch. 121½, § 137.57 (1979). A hearing could be requested up to 15 business days after the offeror’s registration statement had been filed. The hearing need not be held until 10 business days after the request was received and the time for the hearing could be extended for the convenience of the parties. There was no limit on the duration of the hearing, and after it was concluded the Secretary of State had up to 15 business days to make a determination unless additional time was needed.
87. Id. § 137.57A permitted a request for a hearing to be made by a majority of the “independent” directors of the target company or by Illinois residents holding at least 10% of any class of shares subject to the tender offer. Though incumbent management was not directly given the right to request a hearing, it could conceivably influence the directors or control a sufficient number of shares to have one called. 633 F.2d at 494-95.
88. Although the hearing provision could be abused to create excessive delays, the court failed to acknowledge that some benefits would accrue to shareholders from holding such a hearing. Thus, the court dismissed appellant’s argument that shareholders “will benefit from not being forced into making a hasty decision [and] would also benefit from the greater opportunity for receiving a better offer.” Brief for Appellant, supra note 83, at 16. In fact, evidence suggests that state regulation of tender offers does result in better offers for shareholders, while the use of tender offers as a takeover device continues unabated. See note 138 infra.
89. 633 F.2d at 494.
court singled out other delay mechanisms in the Illinois statute that could obstruct the successful completion of a legitimate tender offer. For example, the twenty day pre-effective filing requirement\(^9\) appeared to tip the regulatory balance achieved by the Williams Act toward incumbent management, thus impairing the vigor of the tender offer device and making it more difficult for shareholders to tender their shares at a premium. Actual and potential delay which the Illinois Act created presumably reduced the chances that a successful tender offer would be made, thereby causing detriment to shareholders. These aspects of the Illinois Act were found to be in direct opposition to what the court felt was Congress' judgment that delay grossly beyond that allowed in the Williams Act was in conflict with the federal scheme for regulating tender offers.\(^91\)

The Seventh Circuit next compared Illinois' interest in regulating tender offers with the burden imposed by the state takeover act on interstate commerce. The asserted state interest was twofold: to protect resident security holders\(^92\) and to regulate the internal affairs of Illinois corporations.\(^93\) The court agreed that the first was a legitimate interest, but found that the protection accorded by the Illinois Act represented only a marginal improvement over the Williams Act, and whatever protection the Illinois Act provided was offset by the potential for delay under the Act.\(^94\) More importantly, the Illinois law could be invoked even if none of the affected security holders were residents of the state.\(^95\) This feature belied the purported state interest. The second interest was also found to be un compelling. The Illinois Act could be applied to foreign corporations and to those with their principal place of business outside Illinois.\(^96\) Clearly the state had no interest in regulating the internal affairs of those corporations.\(^97\)

In contrast, the impact of the Illinois law on the interstate sale of securities was significant. The law was global in its reach, and once triggered, all purchases or offers to purchase stock pursuant to a tender offer could be stopped, including transactions entirely out of state.\(^98\) Furthermore, other states could claim authority over a tender offer under similar laws.\(^99\) with the

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90. ILL. REV. STAT. ch. 121 1/2, § 137.54(E) (1979).
91. 633 F.2d at 498.
92. Brief for Appellant, supra note 83, at 121. See note 46 supra.
93. Brief for Appellant, supra note 83, at 121.
94. 633 F.2d at 500.
95. ILL. REV. STAT. ch. 121 1/2, § 137.52-10 (1979). See note 52 supra. But cf. ILL. REV. STAT. ch. 121 1/2, § 137.52-9(5) (1979) ("an offer . . . for which regulation under this Act is not necessary for the protection of security holders of the target company in this State" may be exempted by the Secretary of State).
96. ILL. REV. STAT. ch. 121 1/2, § 137.52-10 (1979). See note 53 supra.
97. 633 F.2d at 502. But see Shipman, supra note 7, at 751-55 (sound reasons exist for a state to assert jurisdiction over foreign corporations with a substantial presence within the state).
98. The tender offer in MITE represented a proposed transaction in interstate commerce of more than $23,000,000, affecting shareholders of Chicago Rivet residing throughout the United States. 633 F.2d at 502.
99. The defendants' attempt to invoke the Pennsylvania act to stop the tender offer in Illinois illustrates how more than one state's laws might apply. Id. at 489.
result that "any single state would have effective veto power over the offer even if it received the enthusiastic endorsement of all the other states." 100 Because the Illinois Act substantially obstructed interstate commerce without countervailing local benefit, it was found to violate the commerce clause. 101

**Analysis and Criticism**

Underlying the dual challenge to the Illinois Act was the larger issue concerning the extent of state and federal power to concurrently regulate securities and corporate transactions. Although the court was careful to point out that not all state tender offer legislation was barred by the Williams Act, 102 its treatment of the Illinois statute left serious doubt that any other could stand. Such harsh scrutiny was not entirely warranted. Control over the creation and internal management of corporations traditionally has been a prerogative of the states, 103 and in the field of securities regulation, federal intrusion has not precluded parallel state legislation. 104 Given this background, a state takeover act differing from the specific approach adopted in the Williams Act should not necessarily be declared null and void. If the objectives that federal and state statutes seek to attain are essentially the same, 105 legitimate state goals should yield only in the face of a clearly predominant federal interest. 106 The interests identified by the Seventh Cir-

100. *Id.* at 502.
101. *Id.*
102. 633 F.2d at 502-03.
103. The power to create corporations is one of the attributes of sovereignty possessed by the states. People v. New York, C. & St. L. R.R., 129 N.Y. 474, 482, 29 N.E. 959 (1892). Although the federal government has, from its inception, had this power, see, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the states traditionally have been the source of corporate charters since revolutionary times. See 4 J. Davis, Essays in the Earlier History of American Corporations 24 (1917). Recently, however, there has been a renewed interest in the movement for more federal regulation of the internal affairs of large multi-state corporations. See Young, Federal Corporate Law, Federalism and the Federal Courts, in Corporations at the Crossroads: Governance and Reform 237, 242-44 (D. DeMott ed. 1980). See also the proposed Corporate Democracy Act of 1980, H.R. 7010, 96th Cong., 2d Sess., 126 Cong. Rec. 2490 (daily ed. April 2, 1980).
104. State blue sky laws regulating securities were upheld by the Supreme Court as valid exercises of police power well before federal entry into the field. See Hall v. Geiger-Jones Co., 422 U.S. 539 (1917)(Ohio blue sky law); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (South Dakota blue sky law); Merrick v. N.W. Halsey & Co., 242 U.S. 568 (Michigan blue sky law). Moreover, when Congress enacted the Securities Exchange Act of 1934, § 28(a) included a saving clause aimed specifically at preserving state blue sky laws. See note 124 infra.
105. Cf. New York State Dep’t of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complimentary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.")
106. The states clearly will be precluded from legislating over matters which are necessarily national in import, Goldstein v. California, 412 U.S. 546, 553-54 (1973), or which are governed by a federal regulatory scheme so pervasive as to leave no room for concurrent state legislation. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). The limits of federal interests are not always defined clearly, however, and when they collide with strong local
cuit, however, were not so clear as to warrant a wholesale invalidation of the Illinois Act. In *MITE* the state law was forced to yield to an unnecessarily broad interpretation of the Williams Act, as well as a restrictive view of the states' role in regulating securities transactions and corporate affairs. Indeed, the reasons advanced in *MITE* did not support entirely the court's conclusion, and consequently, the decision provides a poor standard for assessing the validity of other state takeover statutes.

**The Preemption Challenge**

As long as Congress acts within the scope of authority delegated to it, that act is supreme, and state laws which are inconsistent with a congressional enactment cannot stand. The clearest case for preemption exists when Congress expressly reserves to itself, or takes from the states, the power to regulate within a particular field. In that event there is no room for state action, regardless of whether the state law comports with federal policy. Even without specific expressions of congressional intent to preempt, federal regulation in a particular area may be so pervasive, or the federal interest so dominant, as to leave no possibility for concurrent state legislation. An-

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107. The court found no reason to believe that Illinois had any special purpose for regulating the change of control contemplated in the bid for shares of Chicago Rivet, an Illinois corporation. 633 F.2d at 501. Yet the analogous authority of states to regulate ordinary mergers and the sales of substantial corporate assets is well established. See notes 198-99 and accompanying text infra.


109. The preeminence of federal law over conflicting state law is a constitutional tenet embodied in the supremacy clause, U.S. Const. art. VI, cl. 2.


111. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941) (registration of aliens). The less comprehensive a federal regulatory scheme, however, the less likely it is that a state intrusion will be preempted. See, e.g., *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973) (work incentive programs for welfare recipients); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973) (recovery of oil spill cleanup costs).
other clear ground for preemption exists when state and federal laws are
directly contradictory in their requirements, making compliance with both
impossible.112

Actual conflict, however, need not be limited solely to cases in which one
law, by its very terms, is irreconcilable with the other. Though a conflict
may not be apparent on its face, a state law may nevertheless be struck down
if it conflicts with the underlying objectives of a congressional enactment.113
The problem in such a case is one of statutory construction, and whether a
conflict is found to exist will depend on the relative weight assigned to the
perceived goals and effects of each statute. The issue is especially uncertain
with respect to the degree of conflict that will be tolerated. The Supreme
Court has recently indicated that some conflict is permissible providing that
the primary congressional purpose of the federal law is not frustrated.114

The preemption challenge in MITE was based on an alleged conflict
between the Illinois Business Take-Over Act and the underlying congression-
al purpose embodied in the Williams Act.115 Thus, the court was required to
construe both laws to determine whether the state law, as applied, frustrated
Congress' purpose in enacting the Williams Act.116 At the outset, the court
correctly indentified investor protection as the primary goal of federal tender
offer regulation.117 Accordingly, it would seem that the "crucial inquiry"
should have been limited to determining whether the Illinois Act differed
from the Williams Act in such a way as to frustrate this clear intent of
Congress.118 The court's inquiry, however, gradually strayed from the clear
standard of investor protection.

For example, the Illinois statutory provisions allowing for independent
review of a tender offer119 was found to stand in fundamental conflict with
federal law.120 But the fact that the Secretary of State could rule on the
fairness of a tender offer was never shown to be an actual obstacle to the congressional purpose of investor protection. On the contrary, the court determined that Illinois offered "investor protection at the expense of investor autonomy," even though it was never shown that investor "autonomy" was an express purpose of the Williams Act. This subtle expansion of the Act's purpose eventually took the court well beyond what Congress reasonably must have intended to achieve when it enacted the tender offer legislation in 1968. At the same time it improperly restricted the ability of the states to supplement the broad remedial aims of the federal scheme with state takeover legislation suited to particular local concerns.

Considering the lack of specific prior regulation in the field, one must assume that Congress decided to rely primarily on disclosure because it was the proven and least disruptive means of assuring minimal protection for investors, not because it was the definitive method for regulating tender offers. By preserving the saving clause, section 28(a) of the 1934 Act, Congress left the door open for the states to fulfill their traditional laboratory function of devising supplementary legislation suited to specific local concerns.

121. Id. at 494.

122. In filling a gap that had existed in federal securities legislation prior to 1968, the Williams Act sought to provide full and fair disclosure that would benefit stockholders without unduly obstructing legitimate business transactions. 113 CONG. REC. 854-55 (1967) (remarks of Sen. Williams). The obvious model for the new tender offer legislation was that of the 1933 and 1934 Acts which had worked well until then. Id. at 855. Thus, like exchange offers under the 1933 Act and proxy solicitation under the 1934 Act, cash tender offers were best regulated on the premise that "secrecy in this area [was] inconsistent with the disclosure pattern generally prevailing in the American securities markets." Id.

123. 15 U.S.C. § 78bb(a) (1976), states in part:

Nothing 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 any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

The clause was drafted to preserve pre-existing state blue sky laws, and for that reason, one commentator has argued that it does not save the later and substantially different state takeover acts. Langevoort, supra note 7, at 247. However, the wording of § 28(a) plainly does not exclude prospective state legislation, and Congress enacting the Williams Act did not expressly bar state regulation of tender offers. 633 F.2d at 491. Therefore, whether Congress implicitly accepted the prospect of state entry into the field, § 28(a) creates at least the presumption that state takeover acts are not preempted. See Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 YALE L.J. 510, 519 n.63 (1979).

Ironically, despite unflagging opposition to state takeover statutes, the SEC is apparently quite willing to borrow from the collective experience of the states. Dissatisfied with the vaunted market approach to balancing the competing interests at stake in a tender offer, the Security and Exchange Commission has advocated reliance on the judgment of independent directors to deter "inappropriate" takeovers. Under another section of the Williams Act governing "going private" transactions, the Commission has long sought to impose a substantive fairness standard quite similar to the one that proved fatal to the Illinois Act. Regardless of the interpretive value of comments made by the SEC during the deliberations on the Williams Act, the Commission's more recent espousal advocating some form of merit review under the Williams Act lends credence to the argument that the market approach is neither the only nor the preferred method for regulating tender offers.


126. See also McCauliff, supra note 124, at 309-12.


130. See 633 F.2d at 494 n.14.
The MITE court went on to criticize the various provisions of the Illinois Act that could have been used by incumbent management to foster delay.\textsuperscript{131} Notwithstanding a lack of evidence regarding the actual effect of the Illinois provisions on tender offers,\textsuperscript{132} and uncertainty about the particular effect of delay on shareholders,\textsuperscript{133} the court concluded that delays which might have resulted under the state act necessarily conflicted with specific goals Congress had sought to achieve. First, delay was deemed to prevent shareholders from accepting within a reasonable time a tender offer they considered fair.\textsuperscript{134} Second, the potential for delay presumably had a chilling effect on the use of tender offers.\textsuperscript{135} As a result, the court concluded that shareholders would be denied the right to tender their shares at a premium.\textsuperscript{136}

The effects of delay ascribed to the Illinois Act, however, were equally attributable to the Williams Act. Compared with the absence of specific tender offer legislation prior to 1968, the disclosure and procedural requirements imposed by Congress had a measurable effect on the subsequent viability of tender offers. Given the inevitable redistribution of economic benefits that can accompany a shift in regulatory policy,\textsuperscript{137} the Williams Act may fairly be understood to have been a legislative choice to sacrifice some of the advantages of an entirely unregulated tender offer market in favor of increased protection for shareholders of target corporations. In this respect the Illinois Act was no different than the Williams Act in the type of result it achieved, only in the degree.\textsuperscript{138}

\textsuperscript{131} See provisions set forth in notes 86, 87 & 90 supra.
\textsuperscript{132} Compare 633 F.2d at 495 (some courts have noted "the possible inhibition or withdrawal of tender offers" resulting from state takeover statutes) with id. at 498 ("despite the proliferation of state takeover statutes, there is no clear indication that those endeavoring to obtain corporate control have curtailed their use of the tender offer mechanism").
\textsuperscript{133} It is generally assumed that the added delay inherent in state regulation makes tender offers less attractive to bidders, thereby causing shareholders to lose the opportunity to sell their undervalued shares at a good price, and allowing inefficient management to remain in control. See Langevoort, supra note 7, at 238-39. See also note 21 supra. However, it is often the better managed companies that attract takeover bids. See McCauliff, supra note 124, at 307; State Takeover Statutes, supra note 21, at 874 n.9. Furthermore, target companies that have been successfully taken over are not necessarily better run afterwards. See Liman, supra note 21, at 707-08. An unpublished study by Goldman, Sachs & Co. of 85 takeover bids between January 1, 1976 and June 8, 1979, revealed that more than 50% of target companies that had successfully defeated a hostile tender offer had shares with a market price higher than that of the rejected offer price or had been acquired by another company for more than the original offer. Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101, 106 (1979).
\textsuperscript{134} 633 F.2d at 494.
\textsuperscript{135} Id. at 497.
\textsuperscript{136} Id. at 496.
\textsuperscript{137} See generally L. THUBOW, THE ZERO-SUM SOCIETY (1980) (regulations create economic benefits for some and impose costs upon others).
\textsuperscript{138} See Jarrell & Bradley, The Economic Effects of Federal and State Regulations of Cash Tender Offers, 23 J.L. & Econ. 371 (1980). This Article points out that both federal and state takeover regulations may be seen as benefitting shareholders of firms that are taken over. Compared to premiums of 32% in cash tender offers before the Williams Act, premiums rose to
Nevertheless, the Seventh Circuit went to great lengths to distinguish the two enactments. In so doing, the court unjustifiably expanded the purpose of the Williams Act. According to the court’s interpretation, investors were granted much more than mere protection. The *MITE* court also reasoned that shareholders have the right to an unfettered choice and the right to accept an offer within a reasonable time. This rationale can be reconciled with the purposes of a disclosure statute such as the Williams Act. However, the court’s statement that shareholders have a right to make a profit on the sale of their shares was unwarranted and led to the further conclusion that “investor protection” was inextricably dependent on the right of offerors to make successful tender offers. This line of reasoning disregards the earlier notion that the Williams Act be neutral towards offerors or incumbent management. If, as the court implied, tender offers were meant to succeed for the benefit of shareholders, it logically follows that management cannot be permitted to resist takeover attempts that offer shareholders an opportunity to sell at a profit.

The Seventh Circuit’s liberal view of investor protection under the Williams Act virtually assured the demise of the Illinois Act. A close examination of the court’s position, however, indicates that a conclusion of conflict between state and federal goals in regulating tender offers rested on insubstantial grounds.

The proliferation of “rights” resulting from the court’s construction of the Williams Act cannot be said to derive unambiguously from Congress’ primary purpose of investor protection. Because several propositions espoused by the court were subject to a contrary interpretation, and were arguably

nearly 53% after its enactment. Subsequent passage of state takeover laws caused premiums to rise to 73%. In purely economic terms, federal and state tender offer regulations have achieved their objective of “protecting” target shareholders. The authors, however, found that this protection was achieved at a social cost borne especially by those investors who were worse off because of higher premiums. Increased regulation deterred bidding for marginally attractive targets. *Id.* at 404. Thus, while the central aim of the Williams Act was advanced by state legislation, the validity of that aim may be questioned. See notes 226-27 and accompanying text *infra.*

139. 633 F.2d at 494.
140. *Id.* at 496.
141. *Id.*
143. For example, the court reasoned that delay impermissibly increased incumbent management’s ability to defeat a tender offer, thereby harming investors. But the court also admitted that the contrary proposition found support in legal literature and in the Supreme Court’s decision in Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). 633 F.2d at 495-96. The court went on to criticize the delay caused by the Illinois Act concluding that it had a chilling effect on the use of tender offers. While acknowledging that shareholders might actually benefit from delay, and that the use of tender offers had not visibly been curtailed, the court preferred to rely on its understanding that Congress had prohibited delay beyond that contemplated under the Williams Act. *Id.* at 497-98. The harsh light in which the Illinois Act was cast, even when favorable interpretations were equally plausible, robbed the court of the detachment and objectivity essential to its preemption analysis. It ignored the Supreme Court’s admonition which enjoined “seeking out conflicts between state and federal regulation where none clearly exists.” Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).
contradicted by specific language of a Supreme Court decision,\textsuperscript{144} it cannot
be safely asserted that Congress specifically intended investor protection to
take on such dimensions. Furthermore, the "rights" uncovered by the court
had no explicit basis in the statutory language of the Williams Act. Such
rights probably would not support an independent cause of action for an
aggrieved shareholder,\textsuperscript{145} much less a frustrated offeror.\textsuperscript{146} By the same
token, they could not form the basis of a preemptive conflict sufficiently
clear to justify invalidation of the Illinois statute.

It is true that the nature of the preemption challenge in \textit{MITE} required
that the court construe both the state and federal statutes.\textsuperscript{147} But the court
did not have unrestrained liberty to adopt whatever interpretations were
most convenient.\textsuperscript{148} Unlike an actual conflict based on the impossibility of
simultaneous compliance,\textsuperscript{149} a conflict based on the frustration of underlying
congressional objectives is more elusive, and thus, more susceptible to subject-
ive interpretation.\textsuperscript{150} Because of that danger, the court was under an obliga-
tion to exercise particular care and to eschew guesswork and ambiguous
evidence.\textsuperscript{151}

\begin{footnotes}
\item 144. The Supreme Court clearly stated that "the sole purpose of the Williams Act was the
\item 145. It is doubtful that private action alleging the failure of a shareholder to make a profit
pursuant to a tender offer could be implied from the Williams Act. \textit{Cf. Santa Fe Indus., Inc. v.
Green}, 430 U.S. 462, 477-78 (1977) (private cause of action should not be implied where
unnecessary to advance primary, rather than subsidiary congressional purposes).
\item 146. In \textit{Piper v. Chris-Craft Indus., Inc.}, 430 U.S. 1 (1977), the Supreme Court refused to
create a private right of action for damages under the Williams Act. "[Congress'] express policy
of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of
participants [offerors] whose activities prompted the legislation in the first instance." \textit{Id.} at 30.
\item 148. When analyzing the preemption issue, the Supreme Court pointed out that where
Congress legislates "in a field which the States have traditionally occupied . . . we start with the
assumption that the historic police powers of the States [are] not to be [ousted] by the Federal Act
unless that was the clear and manifest purpose of Congress." \textit{Rice v. Santa Fe Elevator Corp.},
\item 149. See note 112 and accompanying text \textit{supra}.
\item 150. The difficulties inherent in ascertaining congressional motives and their relevance to
legislative purpose have been explored principally in the areas of equal protection and first
amendment rights. \textit{See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of
The Least Dangerous Branch} 209-10 (1977): \textit{Ely, Legislative and Administrative Motivation in
Constitutional Law}, 79 Yale L.J. 1205 (1970). The principal lesson to be gleaned from instances
where congressional motive has been the determinative factor in preemption analysis is that the
inquiry should be engaged in cautiously and only when necessary.
\item 151. \textit{See United States v. O'Brien}, 391 U.S. 367, 383-84 (1968). The \textit{O'Brien} Court stated:
Inquiries into congressional motives or purposes are a hazardous matter. When
the issue is simply the interpretation of legislation, the Court will look to statements
by legislators for guidance as to the purpose of the legislation, because the benefit to
sound decision-making in this circumstance is thought sufficient to risk the possibility
of misreading Congress' purpose. It is entirely a different matter when we are asked to
void a statute that is, under well-settled criteria, constitutional on its face, on the
\end{footnotes}
The MITE court, however, followed a different course. Disregarding the expressed purpose of the Illinois Act, the court examined a number of provisions that exhibited a potential for conflict. The conclusion of preemption was premised not on an evaluation of the state law as it was applied, but on the possibility of its abuse. For example, the conclusion that the Illinois Act greatly contributed to delay in making a tender offer was unsupported by the record. Delay in MITE was precipitated by the offeror's voluntary decision not to comply with state statutory provisions.

In contrast, the court was extremely liberal in construing the purpose of the Williams Act. Discarding the clearly articulated standard of investor protection, which was identified by the Supreme Court as the sole objective of the Act, the court instead undertook a meticulous search through the Act's legislative history to uncover congressional "goals" that conflicted with the Illinois Act. In so doing, the court equated mere characteristics of the Williams Act with its purpose, though only conflict with the Act's purposes could be properly used as the basis for preemption.

More importantly, the Seventh Circuit's narrow scrutiny failed to place the Williams Act within the larger scheme of federal securities legislation. Without this perspective, remarks made during the give-and-take of the legislative process could take on exaggerated significance. Rather than institute a comprehensive plan for regulating tender offers, Congress merely intended to fill a gap in existing legislation. The Williams Act was meant to be of the same cloth as the entire fabric of federal securities laws.

basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

152. But cf. Goldstein v. California, 412 U.S. 546, 554-55 (1973). The Court in Goldstein was careful to distinguish those situations in which the concurrent exercise of power by the federal government and the states may possibly lead to conflicts and those situations where conflicts will necessarily arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." Id. (citing The Federalist No. 32, p. 243 (B. Wright ed. 1961)). See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960) (Supreme Court refused to seek out conflicts between state and federal regulation where none clearly existed).

153. 633 F.2d at 497-98. See notes 174-75 and accompanying text infra.

154. See Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977), and note 146 supra.

155. For example, the court compared ILL. REV. STAT. ch. 121½, § 127.57A (1979), which potentially afforded incumbent management an opportunity to instigate hearings that would delay the tender offer, against "the congressional goal of insuring freedom of action of informed stockholders," which is one or two steps removed from the acknowledged goal of investor protection. 633 F.2d at 494-95.

156. In Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29 (1977), the Supreme Court distinguished Congress' policy of neutrality in contests for control as merely a characteristic of the Williams Act rather than its purpose—the protection of investors (emphasis added).

157. 113 CONG. REC. 854 (1967) (remarks of Sen. Williams) ("This legislation will close a significant gap in investor protection under the Federal securities laws . . . .")

158. See Shipman, supra, note 7, at 759-60. The author argued that if the Williams Act represented an integrated national policy, the legislature would have weighed more carefully all
such, the Act simply made cash tender offers subject to the same type of disclosure and procedural requirements as had previously existed in other areas.

Viewed in this light, the conclusion that the Williams Act conferred important new rights on shareholders is untenable. For instance, it would be anomalous to suggest that the type of consideration used in a takeover should affect the rights of the parties involved. Nevertheless, that is the result under the MITE court's interpretation. A tender offer wholly or partially paid for with non-exempt securities remains subject, under the Securities Act of 1933, to the same waiting period that was proscribed under the Illinois Act. Furthermore, in a tender offer subject to the 1933 Act, the SEC may call for a hearing or issue a stop order if at any time it appears that the mandatory registration statement is false or misleading. It seems unlikely that Congress intended to leave one form of tender offer subject to delay and governmental review, while exempting previously unregulated cash tender offers from such strictures.

A better view would have recognized that the Williams Act merely intended to bring cash tender offers within the established purview of federal securities laws. These laws have traditionally emphasized disclosure as the most effective means of protecting the investing public, while permitting state legislation to supplement federal law with more stringent, consistent provisions suited to local concerns. Thus, the disclosure approach to pro-

159. Under legislation existing prior to the Williams Act, exchange offers (securities issued in exchange for securities) had to be registered pursuant to the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbb (1976). According to § 77h(a), registration of securities did not become effective until 20 days after it was filed. Id. at § 77h(a). Compare § 77h(a) and ILL. REV. STAT. ch. 121 1/2, § 137.54E (1979) (takeover offer does not commence until 20 business days after the date of filing the registration statement) with MITE Corp. v. Dixon, 633 F.2d at 495 ("the [Illinois] Act's 20-day pre-effective filing requirement, [is] also subject to more general attack on the ground that [it] may result in unacceptable delay"). See also § 7A of the Clayton Act, 15 U.S.C. § 18A (1976). This section imposes notification and waiting period requirements on large firms contemplating mergers or acquisitions.


Protecting investors under the Williams Act can accommodate reasonable delay and independent review of tender offers, as found in the Illinois Act. Therefore, the state statute is not preempted so long as it seeks to augment the degree of investor protection in a takeover situation and is consistent with the approach taken in other sections of the 1933 and 1934 Acts. Nevertheless, the conclusion that the Illinois Act is not preempted by the expressed or underlying objectives of the Williams Act does not foreclose the possibility that the state law raises a significant barrier to the broader interests of unimpeded interstate commerce.

The Commerce Clause Challenge

Unlike the narrow compass of the preemption doctrine, the commerce clause\textsuperscript{163} embraces a wide range of activities including matters beyond those specifically addressed by Congress.\textsuperscript{164} Through its negative implications, the commerce clause assures that less explicit objectives of national policy will not be hampered by parochial state legislation. Thus, despite a lack of conflict with the particular purpose of the Williams Act, the Illinois statute might nevertheless encroach upon the national interest in the free flow of commerce.\textsuperscript{165} Nonetheless, Illinois is not wholly without power to pursue valid local interests, even when the exercise of that power affects interstate

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advisers in 1940, the Investment Advisers Act had no saving clause when originally enacted. Twenty years later Congress amended the act to clearly express the states’ concurrent jurisdiction in this area, “in view of the important role which State authorities must play in the supervision of securities.” S. REP. NO. 1760, 86th Cong., 2d Sess. 9 (1960), \textit{reprinted in} [1960] U.S. CODE CONG. & AD. NEWS 3502, 3511. One explanation for Congress’ grant of concurrent jurisdiction in the field of securities regulation is that the federal scheme essentially adopted a disclosure approach, whereas existing state blue sky laws employed more substantive, “merit” standards. \textit{See, e.g.}, 11C H. SOWARDS & N. HIRSCH, BUSINESS ORGANIZATIONS-BLUE SKY REGULATION § 1.01, at 1-4 (1981).

163. The power to regulate commerce was expressly delegated to Congress by the Constitution. “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

164. While Congress has near plenary power to regulate commerce among the states, the Constitution does not say what the states may or may not do absent congressional action. H.P. Hood & Sons v. DuMond, 336 U.S. 525, 534-35 (1949). Even if Congress does not legislate in a particular area, the states may nevertheless be constrained in the exercise of their own power. When danger emanates from interstate commerce a state may protect its citizens’ health and safety, and from exposure to fraud, however, the unique interdependence of the states requires that they abstain from burdening or constricting the flow for their own economic advantage and to the detriment of other states. Id. at 533.

165. The precise limits of state power have been hard to define. For more than 150 years the Supreme Court has struggled to elaborate an accurate test for discerning the extent to which states may control interstate commerce. According to Justice Marshall, the commerce power was exclusively federal, though the states could, in the pursuit of other legitimate goals, take action which affected commerce to some extent. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824). Later courts have applied less restrictive standards. For example, in Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1852), Pennsylvania was allowed to regulate matters primarily of local rather than national concern. The relevant standard has also been cast in terms of direct
commerce, or to some extent, regulates it.\footnote{166} The ultimate question when competing interests are at stake is whether the constraints imposed by the Illinois law on interstate commerce are too burdensome to be permitted.

In \textit{MITE} the commerce clause analysis was limited to balancing the putative interests of the state in regulating tender offers against the burden imposed by those regulations on interstate commerce.\footnote{167} Insofar as the court did not assess the arguably protectionist nature of the Illinois statute\footnote{168} the court overlooked the most formidable grounds for striking down the law.\footnote{169} Although the court did not find the law to be discriminatory, it also did not establish whether a legitimate local purpose existed.\footnote{170} It may have been that

\begin{itemize}
  \item \textit{versus indirect}, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), or discriminatory versus nondiscriminatory impact on interstate commerce. \textit{Compare} Philadelphia v. New Jersey, 437 U.S. 617 (1978) (state regulation prohibiting importation of waste materials held to have a discriminatory impact on interstate commerce) \textit{with} Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (state regulation of containers in which milk could be sold held not to have a discriminatory impact on interstate commerce). Professor Tribe has suggested that an underlying consideration has often been whether state action imposes distinct burdens on out-of-state interests that are not represented in the state's political process. \textit{True}, \textit{supra} note 110, at 326-27. Today, local regulation will probably be upheld if it rationally relates to a legitimate state end, and the state interest involved outweighs the burden on interstate commerce and any discrimination against it. \textit{Id.} at 326. \textit{See note 167 infra}.


  \item \textit{167. 633 F.2d at 500. The \textit{MITE} court patterned its commerce clause analysis after Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). According to Pike, a state statute would be upheld if it regulated evenhandedly to effectuate a legitimate local public interest, and interstate commerce was only incidentally affected. If the burden on such commerce clearly exceeded the putative local benefits, or the same benefits could be achieved by other means having less impact on interstate activities, the state statute would be struck down. \textit{Id.} at 142.}

  \item \textit{168. MITE Corporation did not argue that the Illinois Act was so economically protectionist as to be illegal per se. 633 F.2d at 502 n.31. \textit{Cf.} Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1034 (4th Cir. 1980) (Fourth Circuit refused to base preemption on assumption that Virginia act favored local management). State takeover statutes were sometimes enacted as a result of pressure from local concerns, \textit{see note 44 supra}, and some actually expressed an undeniably protectionist bent. \textit{See note 51 supra}.}

  \item \textit{169. For the late Justice Black, the only restriction on the states' power to regulate interstate commerce, absent congressional legislation, was that they refrain from patently discriminating against interstate commerce in favor of local trade. P. BENSON, \textit{THE SUPREME COURT AND THE COMMERCE CLAUSE}, 1937-1970 at 246-49 (1970). Although restrictions do exist, the Supreme Court has been intolerant of economically discriminatory state legislation. See City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350-52 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). At least one state court had adopted a similar position. \textit{E.g.}, Unitrode Corp. v. Dynamics Corp. of America, 379 Mass. 487, 399 N.E.2d 5 (1980) (the court found that the Massachusetts act's departure from neutrality, said to be indicative of an "anti-takeover philosophy" in state legislation, constituted a principal ground for invalidating the act.)}

  \item \textit{170. Though the Seventh Circuit recognized Illinois' interest in protecting resident shareholders, the legitimacy of that interest was apparently undermined by the state's potential control over tender offers that did not involve any Illinois residents. 633 F.2d at 500-01. Elsewhere the}
by examining the nature and extent of Illinois' interests the court tacitly accepts that the purpose of the law was valid. Moreover, a presumption of validity is in accordance with Congress' explicit consent to nonconflicting state securities laws under section 28(a) of the 1934 Act. Additionally, the long standing dual system for regulating securities under state and federal laws has demonstrated that a cooperative approach to regulation is not only tolerable, but desirable. Federal interests in this field need not be jealously guarded providing that concurrent state legislation accords with the predominant interests established by Congress and the Supreme Court.

Assuming, therefore, that the Illinois Act sought a legitimate purpose, the question then becomes the degree to which the burden on interstate commerce will be tolerated. The burden must be measured in terms of the cost and effects of compliance with the Illinois Act rather than the more burdensome consequences of noncompliance; otherwise, the practical impact of the law will remain indeterminate. In this respect, the MITE court failed to distinguish the burdens resulting directly as a consequence of the Illinois Act from those arising out of the offeror's defiance of its provisions. Had MITE Corporation chosen to comply with the Illinois Act, it would have encountered only incidental and administrative costs and a waiting period.

court contrasted the state's possible interest in regulating transfers of control in domestic corporations, and the lack of valid interest in regulating the affairs of foreign corporations. Under the analysis in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the absence of a legitimate interest would presumably obviate the need to balance local benefits and interstate burdens. See note 167 supra. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (burden on interstate commerce must be balanced against putative local benefits).

See State Takeover Statutes, supra note 21, at 923. "[I]f the effects of noncompliance were typically balanced against the benefits of state regulation, it would be a rare state statute that survived the commerce clause test."

"The same day [that MITE Corporation] filed its Schedule 14D-1 with the SEC, [it] also commenced an action . . . seeking to have the Illinois Act declared null and void on its face. . . ." 633 F.2d at 488. When the State attempted enforcement of the Illinois Act, a preliminary injunction was ordered precluding application of the Act to MITE. Id. at 489. Yet the court undertook its commerce clause analysis as if the Act had been invoked. Id. at 502.

Under the Illinois Act the filing fee was $1,250, $500 more for a hearing, and $250 more for an interpretive opinion. Ill. Rev. Stat. ch. 121/2, § 137.61 (1979). Cf. AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 939 (S.D. Ohio 1979). The Ohio act in AMCA Int'l imposed a cost of $100,000 in personnel and office expenses and $453,000 in loan commitment fees. When these costs were compared to the contemplated purchase price of $200,000,000 and other costs not related to the Ohio act, they were not considered overly burdensome. Moreover, delay in AMCA was equally attributable to the FTC which had not completed its consideration of the antitrust implications of the proposed takeover under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18A (1976), when the action was commenced.

Although the Seventh Circuit assumed the worst, i.e., that the tender offer would be extended indefinitely, a commerce clause analysis should be based on the assumption that state laws will be reasonably carried out, rather than abused, unless evidence indicates the contrary. Cf. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). In that case the
Insofar as the balancing undertaken by the Seventh Circuit emphasized the "potentially weighty" burden that the Illinois Act might have imposed, it was defective. Too much weight was given to burdens that never arose. In contrast, the state's presumably legitimate attempt to increase investor protection was dismissed as too speculative, and the interest in regulating shifts of control of companies incorporated under Illinois law also was found to be uncompelling. Although the tender in this case was made for an Illinois corporation, the court emphasized that foreign corporations with their principal place of business outside the state also could be subject to Illinois' tender offer regulations. On this basis, the court ruled that the burdens placed on interstate commerce by the Illinois Act were excessive.

The principal concern in MITE was that the global impact of the Illinois Act could result in the delay or frustration of a contemplated tender offer. The court's concern, however, was misplaced. From the point of view of investors, delay merely extended the time to make an informed decision, and for offerors, delay would be no more burdensome than that resulting from statutory mandates requiring shareholders to approve a conventional merger or sale of assets. To the extent that delay might lessen the chances of a successful takeover, offerors would be no worse off than in an exchange offer or a proxy contest. Indeed, the similarity between proxy contests and tender offers for control was substantial enough for Congress to append the new regulations for third party tender offers to the existing section for proxy regulation under the 1934 Act. In addition, both takeover methods allow "the offeror and management equal opportunity to fairly present their Supreme Court refused to sustain a commerce clause challenge to Detroit's air pollution ordinance, based on the possibility of conflicting requirements, when nothing in the record suggested the existence of competing or conflicting local regulations. Id. at 448.

178. 633 F.2d at 502.
179. Id. at 500.
180. Id. at 501.
181. See note 64 supra.
182. 633 F.2d at 501-02.
183. Id. at 502.
184. The statutory procedure for consummating a merger or sale of substantial corporate assets requires among other things that the board of directors approve the plan and submit the plan to a vote at a shareholders' meeting. The merger or sale can also involve a proxy fight subject to federal disclosure regulations. See ILL. REV. STAT. ch. 32, §§ 157.61, .63-.66, .72-.73 (1979). The potential for delay using these traditional methods is at least as long as that imposed by the Illinois takeover statute.
185. The registration requirements for an exchange offer under the Securities Act of 1933, 15 U.S.C. § 77f (1976), and the rules governing proxy solicitation, 15 U.S.C. §§ 78n(a)-(c) (1976), 17 C.F.R. §§ 240.14a-1 to 14b-1 (1980), either impose mandatory waiting periods, see, e.g., 15 U.S.C. § 77h(a) (1976) (registration not effective until 20 days after filing); 17 C.F.R. § 240.14a-6 (1980) (proxies must be filed 10 days prior to dissemination), or create the potential for delay. See, e.g., 15 U.S.C. § 77h(b) (1976) (SEC may delay registration indefinitely). Moreover, as proxy solicitations are frequently an adjunct to transactions requiring shareholder approval, they are subject to the more extensive delay inherent under state corporation acts. See note 184 supra.
Although the ensuing delay might encourage other offerors to make a higher bid, no national interest would be served by having one offeror succeed rather than another. Shareholders would benefit and commerce would be stimulated by permitting the best offer to be accepted.

Nevertheless, the analogy between conventional takeover methods and tender offers is limited. Mergers and proxy contests are corporate matters which are of peculiar interest to the charter state, and the federal government will intrude only to the extent necessary to protect shareholders. In comparison, the regulation of takeovers may be beyond the political competency of the states because tender offers often affect shareholders scattered throughout the United States and abroad. If the target company is incorporated in another state, the basis for regulating the tender offer is difficult to justify. Jurisdiction based on substantial assets within the state or a minimum number of resident shareholders could be claimed by a diversity of states. Thus, the likelihood of multiple laws regulating a single transaction, even if compliance were possible, could create precisely the chaotic condition envisioned by the Seventh Circuit. The potential for balkanization that could result from diverse and concurrent state takeover statutes is properly a ground for concern.

189. See Langevoort, supra note 7, at 241-46. In MITE the target company was owned by shareholders of which only 589 were residents of Illinois. 633 F.2d at 488.
190. However, the Supreme Court long ago held that a corporation organized in one state, seeking to do business in another, may be required to qualify under the latter's "foreign corporation" laws before doing business there. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). See, e.g., Ill. Rev. Stat. ch. 32, §§ 157.102-125 (1979).
192. The court was concerned that any state could block a tender offer even if all the other states involved enthusiastically endorsed it. 633 F.2d at 502. Moreover, a comity provision would be no panacea in cases where the charter state, or some other state with a superior interest, had takeover act. See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). In that case the target was a publicly owned Washington corporation. Though Washington itself did not have a takeover statute, and Maryland and New York both had possible bases for asserting jurisdiction, Idaho's takeover act ultimately prevailed.
193. When the commerce clause was drafted, the Confederation had been suffering from the tendency of each state to seek its own narrowly conceived economic self-interest. The urgent need for uniformity was accomplished in the new Constitution by entrusting the commerce power to the federal government. But Congress alone could not address every instance of incompatible state legislation, and it became necessary for the federal judiciary to assume an active role in assuring that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. . . ." H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949). See generally L. Tribe, supra note 110, at 319-22. Thus, whenever conflicting state regulations actually foreclose the pursuit of some economic activity, they are most vulnerable to constitutional attack. See, e.g., Bibb v. Navajo Freight Lines, Inc., 339 U.S. 520 (1959) (conflicting mudguard regulations in Illinois and Arkansas made compliance impossible for interstate carriers passing through both states).
It does not follow, however, that any attempt by the states to regulate tender offers necessarily runs afoul of the commerce clause. In the case of the Illinois Act, concern about its overly broad jurisdictional reach provides the only solid justification for striking it down as violative of the commerce clause. If the statute extended exclusively to target companies incorporated in Illinois the principal constitutional objection to its application would not exist. Without those provisions which authorize control over nondomestic corporations, the Illinois Act would comport with the body of state corporation laws, which historically have justified the charter state regulating the internal affairs of its corporations anywhere in the nation.

If state takeover laws were uniformly administered by the charter state, a great deal of uncertainty would be alleviated. Bidders would face, at most, two levels of compliance when contemplating a tender offer. The Williams Act would assure minimal disclosure and substantive protection for the benefit of shareholders nationwide. This could be supplemented according to the incorporating state's perception of its particular protective requirements. Such an approach would hardly be novel. Presently, investors who purchase shares in a company are automatically subject to regulation by the charter state in matters affecting the internal affairs of a corporation. Conventional mergers and the sale of substantial corporate assets are two such matters which are subject to state regulation and closely analogous to the tender offers governed by the Williams Act. Moreover, concurrent state

194. Under contemporary standards a showing of actual conflict is probably necessary before local regulations will be struck down. See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

195. Several courts, deciding that a local takeover law was unconstitutional, found it unnecessary to strike down the entire state law. See, e.g., Kennecott Corp. v. Smith, 507 F. Supp. 1206 (D.N.J. 1981) (antifraud provisions of New Jersey Act upheld); Kelly v. Beta-X Corp., 103 Mich. App. 351, 302 N.W.2d 596 (1981) (provisions of Michigan act regarding corporations with less than $1,000,000 in assets or fewer than 500 shareholders and fraud protection upheld).

196. If Ill. Rev. Stat. ch. 121 1/2, § 137.52-10(1) (1979) (10% of target company's shares held by Illinois residents), § 137.52-10(2)(a) (target company's principal executive office in Illinois), and § 137.52-10(2)(c) (10% of target company's capital in Illinois) are excluded, the remaining provision would define "target company" as one organized under Illinois law. Id. § 137.52-10(2)(b).

197. As it stands now, it may be difficult to know in advance which one or more state laws will be asserted over a particular tender offer. See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979). For a discussion of Kidwell see note 171 supra.

198. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." Cort v. Ash, 422 U.S. 66, 84 (1975).

199. Tender offers, mergers, and the sale of corporate assets are merely alternative methods for shifting control of a business. The last two are typically governed by state corporation acts, and are subject as well to federal proxy regulations when shareholder votes are solicited. See notes 184-85 supra. By making local tender offer regulation part of a state's corporation act, the state could more properly exercise control over the corporate transaction, leaving the Williams Act to secure adequate protection for investors in the nation's securities markets.
jurisdiction over tender offers does not necessarily result in a more onerous burden on interstate commerce than those burdens already tolerated in other takeover methods. As long as the state laws are applied evenhandedly, the state should be free to regulate takeovers of their own corporations.

**BEYOND MITE**

A fundamental difficulty in assessing the impact of MITE on state takeover acts is that the case was decided under the old rules promulgated pursuant to the Williams Act. These rules were extensively revised, and the revisions became effective shortly after the events in MITE occurred. In their present form the new rules represent a unilateral effort by the SEC to directly preempt state takeover laws. The effect of the new rules, primarily Rule 14d-2(b), is to cause a tender offer to commence immediately upon disclosure of certain prescribed information. In contrast, most state laws provide for mandatory pre-offer disclosure and a waiting period. The state disclosure requirement triggers the tender offer under the SEC rule, while under state law, the offer is held in abeyance. Consequently, compliance with both the SEC rule and state law is impossible.

The resulting conflict means that under the supremacy clause, state takeover laws must yield to the SEC rules. Providing the rules were properly within the scope of the Commission's rule-making authority, they have the force and effect of law, hence they are binding on the states. Only if the

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200. Under state corporation acts the charter state generally has jurisdiction over the internal affairs of a corporation wherever it is located. See Shipman, supra note 7, at 741-45; note 198 supra. The potential for some burdening of interstate commerce presently exists. It is thus unclear why state tender offer regulations pose either an inherent or unique threat to interstate commerce greater in kind or degree than that which currently inheres in other types of state blue sky or corporate regulation.

201. The commerce clause test in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), should be applied to assure evenhanded application. See note 167 supra.

202. See note 35 supra.


204. See note 125 supra.

205. A tender offer may be initiated by: (1) long form publication, (2) summary advertisement, (3) sending copies of the offer to shareholders, or (4) some other means. 17 C.F.R. § 240.14d-2(a)(1980). If a public announcement is made concerning a prospective tender offer, it may be deemed to commence immediately if it identifies the bidder, the target company, and the price and number of shares involved. However, an offer commenced in this way can be retracted within five days. Id. § 240.14d-2(b)(c). Notice, however, that these rules apply only to cash tender offers or offers for which the consideration consists of exempt securities under the 1933 Act. Hence, a tender offer that is 95% percent for cash and 5% for non-exempt securities would not be affected by the rule. Canadian Pac. Enterprises (U.S.), Inc. v. Krouse, 506 F. Supp. 1192, 1195 (S.D. Ohio 1981).

206. See notes 48-49 and accompanying text supra.

SEC exceeded its authority in promulgating the new rules can their effect be challenged. In this respect the SEC’s authority “to make such rules and regulations as may be necessary or appropriate” is undeniable. But it is also true that “[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is ‘the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’” The difficult question, therefore, is whether the will of Congress in enacting the Williams Act went so far as to allow the SEC to independently exclude state participation in tender offer regulation.

A literal interpretation of the statute and decisional law might lead to the conclusion that Congress intended the SEC to have such authority. Such was the result in one case where, after carefully demonstrating the statutory basis for Rule 14d-2(b) and the extensive deliberations that went into its formulation, the court concluded that the rule was valid because it was neither arbitrary nor capricious. The court felt justified in reaching this conclusion despite evidence that the SEC was not really concerned with whether an advanced filing requirement was needed, except insofar as it created a preemptive conflict. Another court in the same district, however, severely criticized the SEC for arrogating to itself the supposed power, unexercised by Congress, to engage in wholesale preemption when principles of federalism mandated that unnecessary conflict be avoided.

The opinion in the latter case suggests that implicit limitations on an agency’s rule-making authority exist, particularly in light of the tenth amendment. It is contrary to the spirit of our system of dual sovereignty to permit an agent of the federal government to have independent power to thwart state legislation. Even congressional power to preempt is ameliorated in that members of the House and the Senate are locally elected and presumably sensitive to state interests. The SEC, on the other hand, has a rela-

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211. Id. at 1195. Mr. Francis Wheat, a former commissioner of the SEC, testified that the Commission was primarily concerned with imposing preemption for preemption’s sake, and that the lack of any factual data or studies in support of Rule 14d-2(b) reinforced this conclusion. Id.
213. U.S. CONST. amend. X, provides that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
214. In the years before the Constitution was finally ratified, the states were extremely reluctant to give up any portion of their sovereignty. In seeking to quell popular misgivings about the creation of a strong central government, Madison pointed out that each of the principal branches of the federal government would be dependent on the will of the states. Their accountability to a local electorate would prevent the President or legislature from becoming too overbearing. The Federalist No. 45, at 236 (J. Madison) (M. Beloff ed. 1948). Even after ratification of the Constitution, concern for the potential abuses that could spring from a strong
tively free rein to set the limits of its own power. Congress has not specifically excluded concurrent state legislation with regard to the Williams Act, despite persistent recommendations for such an amendment. In fact, section 28(a) of the 1934 Act strongly supports the proposition that concurrent state legislation is not prohibited in the field of tender offers. In view of the past deference exercised by Congress and the Supreme Court towards the traditional role of the states in the field of corporate regulation, the SEC's unilateral abridgement of that role is certainly questionable.

Nevertheless, the validity of Rule 14d-2(b) and its preemptive effect, has generally been accepted by the courts. In turn, the states have manifested a strong concern for assuring the continued validity of their takeover statutes. Wisconsin, Indiana, Nevada, and Pennsylvania, for example, have taken steps to harmonize local takeover laws with the Williams Act.

Central government was an important impetus in the passage of the Bill of Rights. These were viewed as limitations on federal power that needed to be expressed, whereas the states themselves were confident of their own ability to prevent abuses at the local level. See generally J. Chandler, Genesis and Birth of the Federal Constitution (1924).

An independent federal regulatory agency, like the SEC, has wide-ranging discretion to act within the field it regulates. Judicial oversight of agency action is limited to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1976). Moreover, the Supreme Court has been willing to give independent agencies free rein to pursue their own policies, even to the point of allowing an agency to substitute its own judgement for such legislative guidance as Congress had provided. FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). In reviewing agency action the Supreme Court has been more disposed to intervene in the face of some procedural irregularity rather than a lack of substantive authority. O. Stephens & G. Rathjen, The Supreme Court and the Allocation of Constitutional Power 494-96 (1980). See generally I K. Davis, Administrative Law Treatise §§ 3:1-13 (1978).

The President is likewise limited in the influence he can exercise over an independent agency. Though he appoints commissioners with the advice and consent of the Senate, an early case held that he cannot remove a commissioner simply on the basis of a difference in political views. Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Congress itself exercises primary control over administrative discretion through the general standards and procedural safeguards it builds into its enabling statutes. But in an effort to retain this control after administrative authority has already been granted, Congress is increasingly favoring the use of a congressional veto to foreclose undesirable agency action. The constitutionality of such a device has been widely debated though not yet definitively established. See generally Bruff & Cellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977); Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework, 52 Ind. L.J. 367 (1977); Schwartz, The Legislative Veto and the Constitution—a Reexamination, 46 Geo. Wash. L. Rev. 351 (1978).

See note 125 supra.

See note 123 supra.


Furthermore, a uniform solution to the numerous criticisms leveled at the state laws has been proposed.

The Tender Offer Committee of the North American Securities Administrators Association has presented the final draft of its State Uniform Take-Over Act for comment. The proposed act would, among other things, limit a state’s jurisdiction to offers for a company organized under its laws. In addition, the act would largely eliminate conflict with Rule 14d-2(b) by conforming the date on which an offer is deemed to “commence” with the SEC’s definition. The proposed act, however, retains a provision for hearings and investigations on the fairness of a tender offer by state administrators, similar to the Illinois provision which was invalidated in MITE. The success of these recent efforts remains to be seen.

**CONCLUSION**

Despite a troubled history, the states continue to demonstrate a need for local tender offer regulation. Whether local takeover acts are constitutionally valid, however, must be considered apart from their political desirability. It is one thing to criticize the current patchwork of state laws for obstacles they raise to the easy use of tender offers in corporate takeover attempts. A certain lack of uniformity must be expected considering that each state has the power to devise its own approach to regulating tender offers. But despite the inconvenience state acts engender, the question of their legality demands an impartial analysis which isolates those features that are constitutionally infirm from those that are merely troublesome. If the Williams Act had been intended by Congress as the exclusive legislation in this area the result achieved in MITE would be more justifiable. Congress, however, apparently left the door open to concurrent state legislation. Thus, absent a constitutional defect in the state approach, it remains for Congress alone to close that door.

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222. Id. § 3(k).
223. Id. § 6.
224. See notes 82-85 and accompanying text supra.
226. See notes 123-62 supra.
227. See Merrick v. Halsey & Co., 242 U.S. 568 (1917) (upholding the Michigan blue sky law as a valid exercise of police power). In Merrick, the Court stated, “It may be that there are better ways to meet the evils at which the statute is directed . . . We can only reply that it is not our function to decide between measures and upon a comparison of their utility and adequacy determine their legality.” Id. at 589.