Beyond *MITE—CTS v. Dynamics*: Has Management Won the Battle in the Fight Against the Tender Offer, and What Injury has the Individual Shareholder Suffered?

**I. INTRODUCTION**

The tender offer has become a widely used and effective method for obtaining control of publicly held corporations through the acquisition of shares of stock. The use of this device to obtain

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1. A "tender offer" is a method for acquiring control of a publicly held corporation and "has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1251 (1973) (footnotes omitted). Professor Robert Hamilton describes a cash tender offer as follows:

   Essentially, a cash tender offer is a public invitation to the shareholders of the target corporation to tender their shares to the aggressor for purchase for cash. As developed during the 1960's, the offering price was set usually 15-20 per cent in excess of the then current market price. The aggressor sought enough shares to ensure working control of the target corporation, though sometimes the aggressor was seeking a higher percentage of, or all of, the outstanding shares. The aggressor usually made a public offer or invitation for tenders of shares under which it was not obligated to purchase any shares unless the required amount was tendered; if an excess was tendered the aggressor could, at its option, purchase the excess shares or purchase the required amount only on a pro rata or first-come/first-serve basis. The tender offer was usually made by an advertisement in the financial press, and copies were often mailed to all shareholders as well. The offer also usually provided a generous commission to brokers who persuaded customers to tender shares.


2. See generally E. Aranow & E. Einhorn, Tender Offers for Corporate Control 64-66 (1973) [hereinafter E. Aranow & E. Einhorn].

3. The tender offer is "the most effective means now available for wresting control from a resisting management." Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Tex. L. Rev. 1, 2 (1978).
corporate control has become the object of considerable debate. Both the federal government\(^4\) and the individual states\(^5\) have responded to issues surrounding this debate by enacting legislation to govern the use of the tender offer.

The legislation adopted by some states to control the use of the tender offer has conflicted with applicable federal law. The United States Supreme Court has decided two major cases concerning this conflict, *Edgar v. MITE Corp.*\(^6\) and *CTS Corp. v. Dynamics Corp. of America*\(^7\) (hereinafter *CTS*). In the more recent of the two decisions, *CTS*, the Supreme Court upheld the validity of an Indiana statute regulating the use of the tender offer.\(^8\) An examination of the Williams Act,\(^9\) the predominant federal legislation governing tender offers, and the Act’s legislative history indicates the Court may have erred in upholding the Indiana statute, and given management of target companies a significant advantage vis-à-vis the tender offeror. The case could have the serious effect of making the tender offer a highly ineffective and expensive device for obtaining control of publicly held corporations. This note will highlight the inconsistencies between the two Supreme Court cases, explain the present effect of both cases, and suggest an approach for states considering the adoption of takeover legislation.

II. AN OVERVIEW OF THE NATURE AND HISTORY OF THE TENDER OFFER

In the past, the phenomenon of corporations purchasing their own stock was relatively common.\(^10\) Several reasons for such a purchase exist:\(^11\) (1) to eliminate small shareholdings; (2) to facilitate the purchase of the corporation; and (3) to recapitalize the corporation to obtain a more effective capital structure.\(^12\) The tendency

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11. See id. at 317-19.
12. Id. at 319.
for corporations to make such purchases usually increased during periods of stock market decline. 13 While most of these purchases were typically made in the open market, during the mid-1960s many corporations began to employ the more formal method of seeking tenders of stock directly from their shareholders. 14 During this time, the cash tender offer became increasingly utilized as a means to carry out a corporate takeover attempt. 15 Unlike the traditional takeover methods, most notably mergers and the proxy mechanism, tender offers were not heavily regulated; 16 therefore, the tender offer, in all its forms, 17 became a well-liked and widely used means for acquiring control of a corporation. 18

13. Id. at 315.
14. Id. at 315-16.
15. Throughout this period tender offers were primarily used by corporations to purchase their own shares and by corporations that wanted to gain control of another corporate entity, the "target" company, when the corporate offeror was on friendly terms with the management of the target company. See Fleischer & Mundheim, Corporate Acquisition By Tender Offer, 115 U. Pa. L. Rev. 317, 318 (1967) [hereinafter Fleischer & Mundheim]. Widespread use of the tender offer occurred as a result of rising levels of corporate liquidity, a relatively great amount of credit availability and the growing acceptance of the tender offer as a takeover device. See Hayes & Taussig, Tactics of Cash Takeover Bids—For Bidders, Incumbent Management and Shareholders, 45 Harv. Bus. Rev. 135 (1967).
16. Tender offers were basically only subject to disclosure and registration requirements under state and federal law. See Zilber, supra note 10, at 332-50. Furthermore, only a limited number of tender offers were subject to such requirements. Id. The Senate Committee on Banking, Housing and Urban Affairs has described the nature of federal law governing tender offers at this time as follows:

The Federal securities laws not only required disclosure in connection with the issuance and trading of securities, but also imposed disclosure and procedural regulations on certain forms of corporate control contests, particularly with regard to the solicitation of proxies. However, neither [sic] Federal nor State law prior to the 1960's regulated control contests conducted by means of a cash tender offer. Bidders thus were able to acquire control of public companies on a first-come, first-served basis. Because bidders were offering cash, and not securities, existing Federal securities disclosure requirements did not apply. In 1968, in response to the lack of information available to investors about a cash tender offer for their securities and certain abusive practices developed by bidders, Congress amended sections 13 and 14 of the Securities Exchange Act of 1934. These amendments are known as the Williams Act. S. Rep. No. 265, 100th Cong., 1st Sess. 47 (1987) (emphasis added).
17. One commentator has described the varying characteristics of the tender offer as follows:

A tender offer may be either a firm or a conditional offer inviting shareholders of one or more classes of stock to submit all or part of their
Because of the substantial lack of regulation governing tender offers, this takeover device became the most expedient means for obtaining control of a target company, especially when the takeover attempt was a "hostile" one. Other advantages of the tender offer were that it represented a less expensive means to obtain control of a target company than the traditional methods, and the consequences of the acquirer's failure to gain the desired level of control over the target tended to be less severe. However, the most important advantage of the tender offer at this time was the element of surprise associated with it. If a cash tender offer was used, the potential acquirer simply needed to place an advertisement asking shareholders to tender their shares at a fixed price. Typically, no filing with any regulatory agency was required. If the tender offeror could notify shareholders of the target without revealing the bid to incumbent management, then management would have no opportunity to convince shareholders to retain their shares.

stockholdings in exchange for cash, bonds or stock of a different class in the offeror corporation, stock in another corporation, other property, or a combination of these items. The offer is limited in time, usually to less than a month, with an option in the corporation to extend the period. Acceptance of the tender offer by the shareholder is accomplished by sending in his share certificates, accompanied by a letter of transmittal, directly to designated transfer agents of the corporation or through usual brokerage channels.

Zilber, supra note 10, at 316-17 (footnotes omitted). This article will focus on the unconditional cash tender offer.

18. E. Aranow & H. Einhorn, supra note 2, at 70.
20. When the incumbent management of a target corporation is opposed to a potential acquirer's bid for the target, the takeover attempt is often labelled as "hostile." In such a situation the bidder's choice of a means for obtaining control is limited to a tender offer, an exchange offer or a proxy contest, because a merger requires the approval of the target company's management. See Fleischer & Mundheim, supra note 15, at 320. An exchange offer is a means of obtaining control of a target company by which the offering corporation makes an offer to shareholders of the target to exchange their shares for shares of the offering corporation. For a discussion of proxy contests and the law governing them, see E. Aranow & E. Einhorn, Proxy Contests for Corporate Control (2d ed. 1968).
23. See id. at 501.
24. See id.
25. Without knowledge of the takeover attempt, management could also not
Because of a lack of adequate regulation to protect target shareholders, entities and individuals were able to abuse the tender offer process. Shareholders were often pressured into hasty decisions about whether to tender their shares, because offerors would place short time limitations on their offers. 26 If a shareholder rejected the offer, his or her interest 27 in the target corporation might be negatively effected if the tender offeror obtained control. 28 Shareholders who tendered their shares ran the risk that they could sell only a portion of their holdings, as most tender offerors sought only a limited number of shares. 29 If the tender offeror gained control of the target, these individuals' remaining interest would be at risk since the acquirer could take action harmful to the minority shareholders. 30 Without adequate information about the entity or persons making the tender offer, shareholders experienced considerable difficulty in determining whether to tender their shares. 31 Therefore, many minority shareholders often tendered their shares early, 32 at a price lower than that received by shareholders who held out for a higher price.

Judicial attempts to curb abuses of the tender offer process, by expanding the application of existing securities laws, proved unsuccessful. 34 This deficiency necessitated effective legislation governing the tender offer.

deploy any of the weapons in its arsenal to defeat the takeover attempt, such as mustering support of shareholders by paying an increased regular dividend, repurchasing shares on behalf of the corporation thereby reducing the number of shares available for tender, or arranging an apparently attractive merger with a "friendly" third party corporation. See Note, Cash Tender Offers, 83 HARV. L. REV. 377, 379-80 (1969).

26. See Zilber, supra note 10, at 316-17.
27. Both the individual shareholder's financial and control interests in his or her shares might be negatively affected.
30. See supra note 28.
31. Id.
33. Although the price offered to shareholders was fixed, competing offers and shareholder resistance to the fixed price often caused the tender offeror to increase the offering price to those who had not yet tendered. See A. Bromberg & L. Lowenfels, SECURITIES FRAUD & COMMODITIES FRAUD, § 6.1 (100) at 109 (Supp. 1969).
34. See, e.g., Schoenbaum v. Firstbrook, 268 F. Supp. 385, 390 (S.D.N.Y.)
III. THE WILLIAMS ACT

To remedy the gap in federal regulation of tender offers, Senator Harrison Williams sponsored legislation in October 1965 to require tender offerors to make advance disclosures. The original proposal evolved over the next two years in response to various concerns expressed by the SEC, interested parties from private industry, and the New York Stock Exchange.

When introducing the legislation on the Senate floor, Senator Williams stated:

This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities.

Senator Williams emphasized the theme of investor protection on the day the measure was passed by the Senate. He also expressed his concern for the interests of the individual investor. Affirming...
the view that the legislation was designed to fill "a rather large gap in the securities statutes," Manuel Cohen, then Chairman of the Securities Exchange Commission, so testified before the Senate Subcommittee on Securities.40

In highlighting the objectives of the proposed legislation, Senator Williams focused primarily on the interests of the shareholder, but he also expressed the viewpoint that the legislation was neither intended to protect entrenched management nor to give unfair advantage to the tender offeror, and he continued to assert this notion throughout the legislative process:

I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.41 Experience . . . has amply demonstrated that the disclosure requirements of the Federal securities acts are an aid to legitimate business transactions, not a hindrance42 . . . . We have taken extreme care to avoid tipping the scales in favor of management or in favor of the person making the takeover bids.43

Specifically, the Williams Act created disclosure requirements which applied prior to the commencement of a tender offer.44 The most significant portions of this legislation added §§ 13(d) and 14(d)

40. In his testimony before the Senate Subcommittee, Mr. Cohen impliedly indicated that the SEC supported the objective announced by Senator Williams. Mr. Cohen stated: "[T]he general approach . . . of this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts. . . ." Hearings on S. 510 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 200 (1967).
41. This language is also found in both the House and Senate Reports. S. REP. No. 550, 90th Cong. 1st Sess. (1967) [hereinafter Senate Report]; H.R. REP. No. 1711, 90th Cong., 2d Sess., 4, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811 [hereinafter House Report].
42. 113 CONG. REC. 854, 854-5 (1967) (emphasis added).
43. 113 CONG. REC. 24662, 24664 (1978) (emphasis added).
44. See 15 U.S.C. §§ 78m (d)-(e), 78n (d)-(f) (1982).
to the Securities and Exchange Act of 1934.45 These sections require a tender offeror to provide shareholders of the target with timely and detailed information when the offeror acquires a set percentage of the target’s shares or begins acquiring shares as part of a plan to obtain control.46

46. These requirements, particularly § 13(d), mandate any person acquiring more than five percent of certain classes of securities of particular publicly held corporations to file a statement with the Securities and Exchange Commission within 10 days after acquiring the securities. See 15 U.S.C. § 78m(d)(1) (1982); see also 17 C.F.R. § 240.13d-1 (1986). The statement must contain specific information concerning the tender offeror, and the purpose behind the offeror’s tender offer. See 15 U.S.C. § 78m(d)(1)(A)-(E) (1982). The purpose of this disclosure statement is to provide management and shareholders of the target company with detailed information concerning large purchases of stock, which are often indicators of takeover attempts. See 15 U.S.C. § 78m(d)(1) (1982).

Section 13(d) is applicable to the securities of corporations registered under § 12 of the Securities and Exchange Act of 1934. See 15 U.S.C. § 78m(d). Such a corporation is required to register its equity securities under § 12 if: (1) they are to be listed on a national securities exchange; or (2) the class of equity securities is held by 500 or more persons and the corporation has total assets exceeding one million dollars. See 15 U.S.C. §§ 78(l)(a), 78(l)(g)(1)(A), 78(l)(g)(1)(B) (1982). In 1982, the SEC increased this one million dollar figure to three million dollars to account for inflation.

Section 14(d) governs formal tender offers which would result in the acquirer having more than five percent of the equity securities of a publicly held corporation. See id. The disclosure requirements under this section are substantially similar to those under § 13(d). See id. Such disclosures must be made to the Securities and Exchange Commission and the target company no later than the date that material soliciting or requesting tender offers is first published or sent or given to any security holders. See id; see also 17 C.F.R. § 240.14d-3(a) (1986).

In addition to the “procedural” disclosure requirements, § 14(d) also contains three “substantive” provisions which were designed to give individual shareholders support in their decisions whether to tender their shares. Section 14(d)(5) gives shareholders the right to withdraw tendered shares during specified time periods. See 15 U.S.C. § 78n(d)(5) (1982). Shareholders who tender their shares may withdraw them (1) during the first 15 business days after the commencement of the tender offer, and (2) if the offeror has not purchased their shares, any time after 60 days from the commencement of the offer. 15 U.S.C. § 78n(d)(5) (1982); 17 C.F.R. § 240.14d-7(a)(1) (1986). The Williams Act originally allowed shareholders to withdraw tendered shares for the first seven business days following commencement of the tender offer. See 15 U.S.C. § 78n(d)(5). In 1979, the SEC expanded these withdrawal rights, lengthening the period to 15 days. 17 C.F.R. § 240.14d-7(a)(1) (1986). Furthermore, if the shares have not been purchased, shareholders may withdraw tendered shares for 10 business days following the commencement of a competing bid. See 17 C.F.R. § 240.14d-7(a)(2) (1986). Section 14(d)(6) states that acquisitions must be made on a pro rata basis from each tendering shareholder,
Congress was committed to a policy of neutrality in contests for control.47 Legislators were convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management."48 This policy of "evenhandedness" represented a conviction that neither side in the contest should be extended additional advantages vis-à-vis the investor, who, if furnished with adequate information, would be "in a position to make his own informed choice."49

To determine whether state legislation is void for encroaching upon a federally regulated area, an analysis which focuses on the legislative purpose for adopting the federal law is necessary.50 Congress did not explicitly prohibit states from regulating takeovers; it left to the courts the determination of whether a particular state statute conflicts with the Williams Act.51 A state statute is void to the extent that it actually conflicts with a valid federal statute.52 However, a state law is also said to conflict with a federal law when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.53 There-

if more shares are tendered than the offeror sought to acquire. 15 U.S.C. § 78n(d)(6) (1982). By ensuring each tendering shareholder a proportionate share of any premium between the per share tender offer price and the market price of a share of stock, this provision prevents the shareholder from having to make a hasty tender, and allows the individual more time to make an informed decision. The Williams Act originally required pro rata acceptance only of those shares tendered within 10 days following the commencement of the offer. See 15 U.S.C. § 78n(d)(6) (1982). In December, 1982, the SEC adopted a rule requiring pro rata acceptance at any time during the period of the tender offer. See 17 C.F.R. § 240.14d-8 (1986). Section 14(d)(7) provides that the tender offeror must pay the same price for all shares purchased; if the offering price is increased before the end of the offer, those who already have tendered their shares must receive the benefit of the increased price. 15 U.S.C. § 78n(d)(7) (1982). Finally, at a minimum, the tender offer must remain open for at least 20 business days. 17 C.F.R. § 240.14e-1(a) (1986).

49. Id. at 633-34 (emphasis added).
50. See id. at 636-37.
51. See id. at 631.
52. MITE, 457 U.S. at 631. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).
fore, when a state statute frustrates the objectives of the Williams Act in some substantial way, it is void.\textsuperscript{54}

IV. EARLY JUDICIAL DECISIONS—THE CONSTITUTIONAL CHALLENGES TO STATE TENDER OFFER LEGISLATION

In Gibbs v. Ogden,\textsuperscript{55} the Supreme Court struggled with the tension between state and federal regulation of commerce. The commerce clause states: "Congress shall have Power . . . [t]o regulate . . . commerce . . . among the several States . . . ."\textsuperscript{56} In explaining the power to regulate commerce, the Court stated "that the people intended, in establishing the constitution, to transfer from the several states to a general government, those high and important powers over commerce, which, in their exercise were to maintain a uniform and general system."\textsuperscript{57} Congress' power to regulate commerce is exclusive whenever the subjects of regulation "are in their nature national, or admit only of one uniform system, or plan of regulation . . . ."\textsuperscript{58}

The commerce clause grants a specific power to Congress to regulate commerce, while implicitly limiting state power to do so.\textsuperscript{59} Indeed, the reason for the existence of the commerce clause is "to create an area of free trade among the several States."\textsuperscript{60} The modern test articulating this limitation was set forth in Pike v. Bruce Church, Inc.\textsuperscript{61} Pike established a balancing test weighing the local benefits promoted by the particular state legislation against the burdens imposed upon interstate commerce.\textsuperscript{62} Another case often relied upon by parties attacking the validity of state statutes impacting upon

\textsuperscript{54} See MITE, 457 U.S. at 632.
\textsuperscript{55} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{56} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{57} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 13 (1824).
\textsuperscript{58} Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).
\textsuperscript{61} 397 U.S. 137 (1970).
\textsuperscript{62} Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The court stated the general rule which emerged from the case as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Id.
interstate commerce is *Southern Pacific Railroad v. Arizona*. In *Southern Pacific*, the Court recognized that:

When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.64

Both the commerce clause and the preemption doctrine, which is derived from the supremacy clause,65 have been used to invalidate overreaching state statutes.66 Under the supremacy clause, a state law is invalid if it directly conflicts with federal law, making compliance with both impossible.67 The preemption doctrine extends this concept, so that a state law may be invalid, and therefore preempted by federal law, when such state law merely "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."68

The Supreme Court has adopted a case-by-case approach to the preemption issue, making a determination about whether a state law will be preempted difficult.69 The Court has tended to uphold state law under the preemption doctrine in the absence of some congressional intent to preempt state law.70 This intent may be found in

63. 325 U.S. 761 (1945).
65. The supremacy clause provides:
This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. CONST. art. VI, § 2.
67. *Id.*
70. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974);
express provisions, or may be inferred from a legislative scheme or from the need to promote a uniform national policy. However, the mere existence of federal legislation is insufficient to preempt state law.

After the enactment of the Williams Act, the constitutionality of state takeover legislation was first addressed by the United States Court of Appeals for the Fifth Circuit in Great Western United Corp. v. Kidwell. In Great Western, the court invalidated the Idaho Takeover Statute under the preemption doctrine and the commerce clause. Under the Idaho Statute, both the Director of the Idaho Department of Finance and the management of a target company were to receive advance notice of a tender offer, and both could request an informational hearing concerning such offer. The state argued that the legislation was designed to protect investors by involving the directors and officers of the target in the evaluation of a tender offer. The court held the Idaho statute was preempted by the Williams Act because the “market approach” adopted by Congress and the “fiduciary approach” adopted by Idaho were incompatible.

The court also examined the Idaho statute under the commerce clause. The State argued that the statute fulfilled the legitimate purpose of protecting incumbent management and investors, and preserving local industry. The court stated that if the purpose of the statute in favoring management was to prevent the removal of


75. Great Western, 577 F.2d at 1279, 1286.


78. Great Western, 577 F.2d at 1279.

79. Id.

80. Id. at 1282-83.
local business to other states, such purpose would be invalid.81 The court ultimately held that the burdens created by the Idaho statute’s extraterritorial regulation of tender offers were not outweighed, under the *Pike* test,82 by the legitimate benefits which the Idaho takeover law provided.83

A year later, in *AMCA Int’l Corp. v. Krouse*,84 (hereinafter *AMCA*) a federal district court, citing the decision that overturned *Great Western*,85 upheld the Ohio Takeover Act86 against similar constitutional challenges.87 The Ohio statute required the offeror to announce a takeover bid and disclose the terms of the bid twenty days before the commencement of the offer,88 required the filing of a comprehensive disclosure statement,89 permitted the Ohio Division of Securities to call a hearing concerning such offer at its discretion or at the request of incumbent management,90 and provided for administrative inquiry into the fairness of the tender offer.91

The court in *AMCA* based its decision in large part on Congress’ intention to protect investors through enactment of the Williams Act.92 The court indicated the Williams Act “accords no ‘right’ to a tender offeror to make an offer, much less to succeed in consummating it.”93 In finding that the Ohio Act made a greater contribution to investor protection than the Williams Act,94 the court held that the state law did not conflict with the federal act.95

Under its commerce clause analysis of the Ohio Act, the court further held that in light of the *Pike* test, the Act was not unconstitutional.96 The court indicated that tender offers are essentially internal affairs transactions, and because the Ohio Act regulated the

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81. *Id.* at 1282.
82. *See supra* notes 61-62 and accompanying text.
83. *Great Western*, 577 F.2d at 1285-86.
93. *Id.* at 937 (citing *Piper v. Chris-Craft Indus.*, Inc., 430 U.S. 1 (1977)).
95. *Id.*
96. *Id.* at 941.
internal affairs of its corporations, it served a legitimate local purpose.97 Weighing this interest against any burdens which the Act placed on nonresident shareholders and other states, the court held that such burdens were outweighed by the benefits provided by the Ohio Act.98

The district court's reasoning in AMCA was not well received by other courts. In Dart Indus. Inc. v. Conrad,99 an Indiana district court held the Delaware Tender Offers Act unconstitutional under the supremacy clause and the commerce clause.100 The court held the Delaware statute was preempted (by the Williams Act) because of its requirement that notice of a tender offer be given to the target company, but not to shareholders.101 The court indicated the statute had the potential to seriously delay an interstate tender offer.102 Additionally, the court found the Delaware statute was extra-territorial in purpose and effect, and therefore had a significant impact on interstate commerce.103 Thus, the court held that because of the significant burden which the statute imposed on the national securities market, it failed the Pike test.104 The court concluded that tender offers serve beneficial economic functions, and, by the adoption of the Williams Act, Congress intended to create a legislative scheme which would favor neither the offeror nor incumbent management and provide investors with sufficient information to make their own decisions whether to tender shares.105

In Crane Co. v. Lam,106 the court examined the Pennsylvania Takeover Disclosure Law, which contained provisions similar to those in the Idaho statute analyzed in Great Western and the Delaware statute examined in Dart. The defendant, the Commissioner of the Pennsylvania Securities Commission, argued that the Pennsylvania statute protected investors and served to regulate the internal affairs of domestic corporations.107 However, the court found the purported local benefits which the statute provided were

97. Id. at 939.
98. Id. at 939-40.
102. See Dart, 462 F. Supp. at 11.
103. Id.
104. Id. at 13-14.
105. Id. at 12.
outweighed by the burdens imposed on interstate commerce: the statute's potential to cause delay in the tender offer process, its application to nonresident shareholders, and the risk of conflict with other state tender offer legislation. 108

Most of the state takeover statutes created after the adoption of the Williams Act generally applied to transactions between the tender offeror and the target company's shareholders if the target corporation fit the statute's definition of a local enterprise. 109 The effect of most of the statutes' broad definitions of a local enterprise was to extend the regulation of such statutes to transactions which took place wholly outside the boundaries of the particular state. The extra-territorial effect of these statutes, together with other unconstitutional provisions contained in them, resulted in the invalidation of many of these statutes by federal courts. 110 The Supreme Court eventually addressed, but did not resolve, the tension between federal and state power resulting from the enactment of state takeover legislation.

V. EDGAR v. MITE CORP.

MITE Corp. and its wholly-owned subsidiary, MITE Holdings, Inc., were Delaware corporations with their principal offices in Connecticut. 111 Chicago Rivet & Machine Co. was a publicly held Illinois corporation. 112 MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet at a premium over the prevailing market price. 113 Apparently knowing its tender offer did not comply

108. Id. at 789-92.
109. See, e.g., ILL. REV. STAT. ch. 121 1/2, para. 137.52-10 (1979) (repealed 1983). "Target company" means:

a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a take-over offer is held of record by security-holders located in this State as determined by post office address as shown on the records of the issuer, or (2) which meets any two of the following conditions: (a) has its principal executive office in this State; (b) is organized under the laws of this State; (c) has at least 10% of its stated capital and paid-in surplus represented in this State.

112. Id. at 627.
113. Id. at 628. Chicago Rivet had 866,262 shares of publicly traded common stock outstanding and 2,181 shareholders of record, 589 of whom were Illinois residents, collectively owning 377,395 common shares. MITE Corp. v. Dixon, 633 F.2d 486, 488 (7th Cir. 1980).
with the Illinois Business Take-Over Act, MITE sought a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the commerce clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act. The preliminary injunction was issued. The district court then entered final judgment declaring the Illinois Act was preempted by the Williams Act.

The United States Court of Appeals for the Seventh Circuit affirmed. The Supreme Court noted probable jurisdiction, and affirmed.

A. RELEVANT PORTIONS OF THE "ILLINOIS BUSINESS TAKE-OVER ACT"

The Illinois Business Take-Over Act required a tender offeror to notify the Secretary of State and the target company of its

114. ILL. REV. STAT. ch. 121 1/2, paras. 137.51 to 137.70 (1979).
115. MITE, 457 U.S. at 628.
116. Id.
117. Id. at 629.
118. Id. Accordingly, the district court permanently enjoined enforcement of the Illinois statute against MITE. Id.
119. MITE Corp. v. Dixon, 633 F.2d 486, 503 (7th Cir. 1980). The appellate court agreed with the district court that several provisions of the Illinois Act were preempted by the Williams Act and the Illinois Act unduly burdened interstate commerce. See MITE, 633 F.2d at 502-03.
121. Edgar v. MITE Corp., 457 U.S. 624, 630 (1982). In making its decision, the Supreme Court reviewed the relevant portions of the Illinois Business Take-Over Act in light of the commerce clause and the preemption doctrine, which is implicit in the supremacy clause. Id. at 634-46.
122. ILL. REV. STAT. ch. 121 1/2, paras. 137.51 to 137.70 (1979) (repealed 1983).
123. "Offeror" means "a person who makes or in any way participates in making a take-over offer, and includes all affiliates of that person." Id. at para. 137.52-5. "Person" means "a natural person, corporation, association, partnership, trust, group, syndicate or other entity." Id. at 137.52-6. "Take-over offer" means:

[T]he offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition the offeror would be, directly or indirectly, a beneficial owner of more than 5% of the class of the outstanding equity securities of the target company which is the subject of the take-over offer.

Id. at para. 137.52-9.
124. For a definition of "target company," see supra note 109.
intent to make a tender offer, and the terms of the offer, twenty
days before the offer became effective.\(^\text{125}\) During that time the
offeror could not communicate its offer to the shareholders, but the
target company was free to disseminate information to its share-
holders concerning the impending offer.\(^\text{126}\) The Act also required
any takeover offer to be registered with the Secretary of State.\(^\text{127}\)

The Illinois Act allowed the Secretary of State to call a hearing
with respect to any tender offer subject to the Act; and the offer
could not proceed until the hearing was completed.\(^\text{128}\) The secretary
could call a hearing at any time prior to the commencement of the
offer, and the Act provided no deadline for completion of the
hearing.\(^\text{129}\) Incumbent management was also entitled to request a
hearing, and again, if the Secretary of State deemed the hearing
necessary, the offer could not proceed until the hearing was com-
pleted.\(^\text{130}\)

The Illinois Act also required the Secretary of State to deny the
registration of a takeover offer if the Secretary found that the offer
"fail[ed] to provide full and fair disclosure to the offerees . . . or
that the take-over [was] inequitable. . . ."\(^\text{131}\)

B. THE DECISION OF THE UNITED STATES SUPREME COURT

1. Preemption analysis

The Court focused its inquiry on whether the Illinois Act
frustrated the objectives of the Williams Act.\(^\text{132}\) It first recognized

\(^{125}\) Id. at para. 137.54(E).

\(^{126}\) Ill. Rev. Stat. ch. 121 1/2, para. 137.54(A), (B), (E) (1979) (repealed
1983) (as interpreted in Edgar v. MITE Corp., 457 U.S. 624, 634-35 (1982)).

\(^{127}\) The offeror was required to provide the Secretary with a disclosure

\(^{128}\) Id. at para. 137.57(A), (B).

\(^{129}\) See id. at para. 137.57(C), (D).

\(^{130}\) See id. at para. 137.57(A), (B). The Secretary of State "shall" call a
hearing if the Secretary deems it necessary or if within 15 business days after the
date of filing the registration statement a written request for a hearing is submitted
to the Secretary:

by a person or persons who are located in this State as determined by post
office address as shown on the records of the target company and who
hold of record or beneficially, or both, at least 10% of the outstanding
shares of any class of equity securities which is the subject of the take-
over offer.

Id. at para. 137.57 (A).

\(^{131}\) Id. at para. 137.57(E) (emphasis added).

that, in adopting the Williams Act, Congress intended to protect investors. The Court went on to state that "it [was] also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder." The Court indicated that Congress' policy of "evenhandedness ..." represented a conviction that neither side in the contest should be extended additional advantages vis-à-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice."

Next, the Court examined the validity of the "20-day precommencement notification requirement" contained in the Act. Recognizing that this provision delayed the commencement of the tender offer, contrary to Congress' intentions, the Court stated that "the precommencement notification provision frustrates the objectives of the Williams Act." Scrutinizing the hearing provision of the Illinois Act, which effectively gave the Secretary of State and incumbent management the power to delay a tender offer, the Court concluded that "[t]he potential for delay upset the balance struck by Congress by favoring management at the expense of stockholders."

133. Id. at 633.
134. Id. (emphasis added).
135. Id. (quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 31 (1977)).
136. Id. at 633-34 (emphasis and footnote added).
137. See Ill. Rev. Stat. ch. 121 1/2, para. 137.54(E) (1979) (repealed 1983) for this provision. The Court stated: [B]y providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.

MITE, 457 U.S. at 635 (footnote omitted).
138. Delay, according to the Securities and Exchange Commission, allows a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) acquire other companies to produce an antitrust violation should the tender offer succeed; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer.

Id. at 638 n.10.
139. Id. at 635.
141. MITE, 457 U.S. at 639.
142. Id.
Finally, the Court reviewed the conclusion of the Court of Appeals that the Illinois Act was preempted by the Williams Act to the extent it allowed the Secretary of State to pass judgment on the substantive fairness of a tender offer. The Court agreed with the Court of Appeals that the Williams Act and its legislative history indicate Congress intended for investors to retain the right to make their own decisions regarding whether to tender their shares. In summation, the Court quoted the Seventh Circuit: ""The state . . . offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.""

2. Commerce clause analysis

The Supreme Court in *MITE* stated that the Illinois Act violated the commerce clause for two reasons. First, unless its terms were satisfied, the Act directly regulated and prevented interstate tender offers which generated interstate monetary transactions. Second, the burden imposed upon commerce was excessive in light of the local interests the Act purported to promote.

A tender offer for the stock of a publicly held corporation is ordinarily communicated "by the use of the mails or other means of interstate commerce" to shareholders throughout the United States and outside the United States. The Court recognized that the use of these interstate facilities by offerees in accepting the offer would also result in transactions occurring across state lines. In fact, the Court stated that ""[t]hese transactions would themselves be interstate commerce."

Unless the provisions of the Illinois Act were met, the Act prevented MITE from making its offer to the target company's shareholders residing in Illinois and other states. The Act applied

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143. *Id.*
144. *Id.*
145. *Id.* at 640 (quoting *MITE Corp. v. Dixon*, 633 F.2d 486, 494 (7th Cir. 1980)).
147. *Id.*
148. *Id.*
149. *Id.* at 641.
150. *Id.* at 642.
152. The provisions of the Act were not met by MITE. *Id.* at 628.
153. The target company was Chicago Rivet & Machine Co.
154. See ILL. REV. STAT. ch. 121 1/2, para. 137.54 (1979) (repealed 1983) (registration requirements).
to every tender offer for a corporation satisfying any two of the following requirements: 155 (1) the corporation had its principal executive office in Illinois; (2) the corporation was organized under the laws of the State of Illinois; or (3) the corporation had at least ten percent of its stated capital and paid-in surplus represented in Illinois. This meant the Act could have applied to a proposed tender offer which would not have effected a single Illinois shareholder. 156 Therefore, the Court held the statute was a direct restraint on interstate commerce and had a “sweeping extra-territorial effect.” 157

The Court also held the Act unconstitutional under the Pike balancing test. 158 The most obvious burden the Court found the Illinois Act to impose on interstate commerce was the “nationwide reach” which, if the statute was upheld, would give Illinois the power to regulate tender offers involving no Illinois residents. 159 In the words of the Court: “The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium.” 160

After examining the burdens the Illinois Act imposed upon interstate commerce, the Court examined the purported benefits. Secretary of State Edgar claimed the Illinois Act furthered two legitimate local interests. 161 He argued that Illinois, by enacting this legislation, sought to protect resident holders of equity securities, and that the Act merely regulated the internal affairs of Illinois corporations in which the State had a legitimate interest. 162 The Court held these purported interests were insufficient to outweigh the burdens which the Illinois Act imposed on interstate commerce. 163 Reasserting the fact that the Illinois Act had a seriously burdensome effect on out-of-state transactions, the Court stated that “there [was] nothing to be weighed in the balance to sustain the law.” 164

The Court also rejected the state’s “internal affairs” argument. 165 According to the Court, that argument was of little use to
the state in the context of tender offers. 166 "Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." 167 The assertion that the "internal affairs" doctrine is a justification for the Illinois Act seems increasingly absurd 168 in light of the fact that the Act applied to tender offers for any corporation of which ten percent of the outstanding shares were held by Illinois residents. 169 The Court finally held that the Illinois Act imposed substantial burdens on interstate commerce which were not outweighed by any significant local benefits, and accordingly held the Act invalid 170 under the commerce clause. 171

C. POST-MITE DEVELOPMENTS IN STATE REGULATION

Since the United States Supreme Court's decision in MITE, state legislatures have responded by adopting new takeover legislation designed to avoid the unconstitutional effects of certain provisions in the Illinois Business Take-over Act. 172 States which have enacted post-MITE takeover statutes include Maryland, 173 Pennsylvania, 174 recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders ..." since a corporation could encounter conflicting demands if its internal affairs were regulated by more than one state. Id. at 645. See Restatement (Second) of Conflict of Laws § 302 comment b (1971).

166. MITE, 457 U.S. at 645.
167. Id.
168. See id. at 645.
171. MITE, 457 U.S. at 646.
173. As observed by one set of commentators:
Maryland has amended its General Corporation Law to adopt a fair price/supremajority vote requirement, for interested mergers, the 'effect' of which is applicable to Maryland corporations unless they act affirmatively by an 80% stockholder vote (including a 1/3 class vote of disinterested stockholders) to eliminate the provision.
Sparks, Hamermesh, Nachbar, Grimm and Houghton, State Law Considerations in Undertaking Acquisitions: Delaware, 1 ACQUISITIONS AND MERGERS 1987: TACTICS,
New York, Ohio, and Indiana. Since the enactment of these

TECHNIQUES AND RECENT DEVELOPMENTS 437, 497-98 (Prac. L. Inst.)[hereinafter ACQUISITIONS]. See Md. CORPS. & Ass'Ns CODE ANN. §§ 1-102(a), 3-601 to 3-603 (1985 & Supp. 1986). Maryland's statute is of the type known as a "fair price statute." Such a statute is designed to give minority shareholders a reasonable or fair price for their holdings. For a detailed description of this type of statute and a list of states that have adopted such legislation, see R. WINTER, STATE TAKEOVER STATUTES AND POISON PILLS § 4, at 41 (1988) [hereinafter WINTER].

174. The Pennsylvania Act is described as follows:
In December of 1983 Pennsylvania adopted a measure apparently designed to curtail 'greenmail' (the purchase of a large block of stock in a target company's securities in an attempt to coerce management into repurchasing the shares at a premium) and discourage partial tender offers. Under the Pennsylvania law, once a stockholder purchases 30% of the shares of a publicly traded corporation, the other stockholders can require the 30% stockholder to purchase their shares at a 'fair value' determined by the Pennsylvania courts. (The law does not have an opt-out provision for companies who don't desire the protection afforded by the law.) This statute falls within a constitutional 'grey area,' as it burdens the right of third parties to accumulate stock but invokes a remedy akin to that in traditional state law appraisal statutes.

The Pennsylvania act also provides that directors and officers in discharging their duties may consider the best interests of the corporation and the effects of any action on employees, customers and suppliers, communities in which the corporation is located 'and all other pertinent factors.' This language, aimed at trying a board's defensive actions to issues of local 'social responsibility,' is an apparent effort to overcome MITE by emphasizing the 'nexus' between local and state concerns and the operation of the corporation.

175. The New York Act is described as follows:
On December 16, 1985, Governor Cuomo signed into law a bill amending the Business Corporation Law (the 'BCL') of New York. Governor Cuomo stated that the law is 'aimed at abuses in certain takeovers, but isn't designed to protect entrenched management.' The Wall Street Journal, Dec. 17, 1985, at 39. In particular, the statute is aimed at impeding highly leveraged takeovers in which acquirors use high-yield, high-risk junk securities to gain control of a corporation and then pay the costs of merger using the target corporation's own assets.
ACQUISITIONS at 499. See N.Y. BUS. CORP. LAW § 912 (McKinney 1986). New York's statute is of the type known as a "business combination statute." This type of statute places limitations on how and when an offeror can merge or combine with the target. For a detailed description of such legislation and a list of states
post-MITE takeover statutes, the Supreme Court has examined the Indiana statute,\textsuperscript{178} again bringing the issue of the constitutional viability of such statutes into question.

VI. POST-MITE JUDICIAL DECISIONS: CHALLENGES TO STATE TAKEOVER LEGISLATION IN LIGHT OF THE SUPREME COURT’S DECISION

After the Supreme Court’s decision in \textit{MITE}, but before \textit{CTS}, several states enacted tender offer legislation designed to avoid the constitutional infirmities of the Illinois statute.\textsuperscript{179} As a result, lower federal courts again were called upon to resolve claims that state legislation conflicted with federal law.\textsuperscript{180} Several courts relied upon \textit{MITE} in invalidating the first generation statutes\textsuperscript{181} they examined.\textsuperscript{182} Second generation statutes\textsuperscript{183} attempted to control the tender offer process by regulating the internal affairs of domestic corporations,\textsuperscript{184} a goal which seemingly was within the bounds of the commerce clause.\textsuperscript{185} However, the lower federal court decisions following \textit{MITE} that have adopted a “business combination statute,” see \textit{Winter}, supra note 173, § 3, at 27.


177. The Indiana Control Shares Acquisition Act, \textit{Ind. Code Ann.} §§ 23-1-42-1 to 23-1-42-11 (West Supp. 1987), is discussed in the following text of this note. For a detailed description of “control share acquisition” statutes and a list of states that have adopted such legislation, see \textit{Winter}, supra note 173, § 2, at 15. A detailed discussion of all types of state anti-takeover legislation is beyond the scope of this article. For a good discussion of state legislation, see \textit{Hook}, \textit{What is Wrong with Takeover Legislation}, 8 N. Ill. U.L. Rev. 293, 312-22 (1988).


180. See, e.g., \textit{Mesa Petroleum Co. v. Cities Serv. Co.}, 715 F.2d 1425 (10th Cir. 1983); \textit{Telvest, Inc. v. Bradshaw}, 697 F.2d 576 (4th Cir. 1983); \textit{Martin-Marietta Corp. v. Bendix Corp.}, 690 F.2d 558 (6th Cir. 1982); \textit{National City Lines, Inc. v. LLC Corp.}, 687 F.2d 1122 (8th Cir. 1982).

181. First generation statutes are those which were enacted prior to the \textit{MITE} decision. 182. See supra note 180 and accompanying text. 183. Those state takeover statutes enacted after \textit{MITE}. 184. See \textit{Second Generation, supra} note 179, at 242. 185. See \textit{Second Generation, supra} note 179, at 212.
seemed to remove much hope for first generation statutes, and later
cast doubt on the validity of second generation statutes.

One of the federal appellate court decisions which was most
outspoken about the constitutional invalidity of the first generation
state statute it examined was National City Lines, Inc. v. LLC
Corp. In National City, the Eighth Circuit held the Missouri
Takeover Bid Disclosure Act unconstitutional under the commerce
clause and the supremacy clause. The court held that because
“there [were] no significant distinctions between the Illinois and
Missouri Takeover Acts,” the Missouri Act was invalid under the
MITE decision.

The court also examined the statute to determine if it stood “as
an obstacle to the accomplishment and execution of the full purposes
and objectives of Congress,” and therefore whether the statute
was preempted by the Williams Act. The court found that not
only did the Missouri statute frustrate the purposes and objectives
of the Williams Act, but it also directly conflicted with applicable
federal statutes and regulations. The specific provisions of the
Missouri statute which the court examined were those providing for
a twenty-day waiting period after the offeror filed detailed disclosure
statements both with the state and the target company, a hearing on
the adequacy of the disclosures in the registration statement, and a
period during which tendering shareholders might withdraw their
shares which was in excess of the period provided by the Williams
Act. The court held the Missouri Act discriminated against tender
offerors in favor of management and basically disrupted “the
neutrality essential to the proper operation of the market approach
of protecting investors utilized by the Williams Act.”

The decision of the United States Court of Appeals for the Sixth
Circuit in Martin-Marietta Corp. v. Bendix Corp. also cast consid-
erable doubt on the constitutionality of first generation statutes.
Although supremacy clause challenges were made to the Michigan

186. 687 F.2d 1122 (8th Cir. 1982).
187. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1134-35 (8th Cir.
1982).
188. Id. at 1128.
189. Id. at 1128-29 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
190. Id. at 1129.
191. Id. at 1132.
192. National City, 687 F.2d at 1130-32.
193. Id. at 1133.
194. Id.
195. 690 F.2d 558 (6th Cir. 1982).
statute examined in this case, the court addressed only the commerce clause issue. The court found the Michigan statute indirectly burdened interstate commerce because it defeated the tender offers of nonresidents when their tenders were necessary to provide a sufficient number of shares to satisfy the tender offer. Following the approach taken by the Supreme Court in MITE, the court weighed the burdens imposed upon interstate commerce by the Michigan statute against the local benefits which the statute provided. The court held that to the extent the Michigan statute interfered with nationwide tender offers and indirectly burdened interstate commerce, it violated the commerce clause.

The Virginia Take-Over Bid Disclosure Act, which contained provisions regulating "creeping tender offers," was examined by the Fourth Circuit in Telvest, Inc. v. Bradshaw. The court, concentrating mainly on the statute's extra-territorial effect and the burdens which the statute imposed on interstate commerce, determined that the provisions of the statute violated the commerce clause. The court indicated that the broad applicability of the Virginia Act and the resulting burden on interstate commerce were still not offset by the local benefits provided by the statute. The court stated: "[T]he Virginia statute, unlike the Illinois statute considered in MITE, is limited to Virginia companies. It is, however, not limited to transactions between residents of Virginia . . . ." The court explained that although the burden imposed on interstate commerce by the Virginia Act was not as significant as the burden imposed by the Illinois statute, the Virginia Act was invalid because the burdens it imposed were not outweighed by its benefits.

197. Id. at 565.
198. Id. at 567.
199. Id. at 565-69.
200. Id. at 568.
202. 697 F.2d 576 (4th Cir. 1983).
204. See id. at 579-82.
205. Id. at 579-80.
206. Id. at 582.
The *MITE* decision, and the lower federal court decisions that followed it, essentially quieted most of the disputes concerning the constitutionality of first generation state takeover legislation. However, the *MITE* decision began to be applied to second generation statutes when challenges were made against such statutes in the federal courts.\textsuperscript{207} Again, most courts used the *MITE* analysis to invalidate these statutes.\textsuperscript{208} However, the Supreme Court once again addressed the purported conflict between state and federal takeover laws in *CTS Corp. v. Dynamics Corp. of America*.\textsuperscript{209} *CTS* arguably has incorrectly improved the constitutional outlook for second generation state takeover legislation.

\textbf{VII. *CTS Corp. v. Dynamics Corp. of America*}

The object of dispute in *CTS Corp. v. Dynamics Corp. of America*\textsuperscript{210} was Indiana’s Control Shares Acquisition Act.\textsuperscript{211} Dynamics Corporation of America owned 9.6\% of the common stock of *CTS* Corporation.\textsuperscript{212} Six days after the Indiana Act became effective, Dynamics announced a tender offer for one million shares in *CTS*, acquisition of which would have escalated Dynamics’ ownership interest in *CTS* to 27.5\%.\textsuperscript{213} Subsequently, the board of directors of *CTS* elected to be governed by the provisions of the Act.\textsuperscript{214}

\textsuperscript{207} See infra note 208.
\textsuperscript{209} 107 S. Ct. 1637 (1987).
\textsuperscript{210} 107 S. Ct. 1637 (1987).
\textsuperscript{212} CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987).
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id. See Ind. Code Ann.} § 23-1-17-3 (West Supp. 1988) (application requirements for Indiana corporations).
Dynamics alleged that the Indiana Act was preempted by the Williams Act,215 and violated the commerce clause216 of the United States Constitution.217 Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Indiana Act.218

A. THE INDIANA CONTROL SHARES ACQUISITION ACT

The Indiana Act applies to what it terms “control shares”219 of “issuing public corporations.”220 The Act defines three ownership levels, which represent threshold percentage values by which to gauge the number of shares of a target company held by a tender offeror.221 By definition, the shares acquired by a tender offeror which would bring the percentage of the tender offeror’s holdings in the target company across any of the three threshold levels do not have voting rights.222 Instead, these shares must have voting rights conferred

216. U.S. CONST. art. I, § 8, cl. 3.
217. CTS, 107 S. Ct. at 1642.
218. Id. at 1642.
219. “Control Shares” are defined as
shares that, except for this chapter, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as part of a group), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:

(1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power.
(2) One-third (1/3) or more but less than a majority of all voting power.
(3) A majority or more of all voting power.

220. “Issuing public corporation” means
a corporation that has: (1) one hundred (100) or more shareholders; (2) its principal place of business, its principal office, or substantial assets within Indiana; and (3) either: (A) more than ten percent (10%) of its shareholders resident in Indiana; (B) more than ten percent (10%) of its shares owned by Indiana residents; or (C) ten thousand (10,000) shareholders resident in Indiana.

222. Id.
upon them by the target company's shareholders to be valuable as a means to obtain control of the target company.  

Tender offerors acquiring control shares only gain voting rights "to the extent granted by resolution approved by the shareholders of the issuing public corporation." Section 9 of the Act requires a majority vote of all "disinterested shareholders" holding the particular class of stock, which is the object of the tender offer, for passage of such a resolution. "The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the preexisting disinterested share-

223. See infra note 229.  
224. Having control of a corporation effectively requires having a majority of voting rights. Thus, without voting rights, shares of stock are essentially worthless to the tender offeror. See CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1642 (1987).  
226. "Interested shares" are:  
The shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors: (1) An acquiring person or member of a group with respect to a control share acquisition. (2) Any officer of the issuing public corporation. (3) Any employee of the issuing public corporation who is also a director of the corporation.  
228. CTS, 107 S. Ct. at 1641 (emphasis added).  
229. IND. CODE ANN. § 23-1-42-7 (West Supp. 1988) states:  
(a) If the acquiring person so requests at the time of delivery of an acquiring person statement [see below] and gives an undertaking to pay the corporation's expenses of a special meeting, within ten (10) days thereafter, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of considering the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition. (b) Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall be held within fifty (50) days after receipt by the issuing public corporation of the request. (c) If no request is made, the voting rights to be accorded the shares acquired in the control share acquisition shall be presented to the next special or annual meeting of shareholders. (d) If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, the special meeting must not be held sooner than thirty (30) days after receipt by the issuing public corporation of the acquiring person statement.  

An "acquiring person statement" is described as follows:  
Any person who proposes to make or has made a control share acquisition may at the person's election deliver an acquiring person statement to the
holders.” Thus, control shares carry no voting rights, are not useful as a means to obtain control and, therefore, are essentially worthless to the offeror who acquired the shares as a means to obtain control.

B. THE DECISION OF THE UNITED STATES SUPREME COURT

1. Preemption analysis

The Supreme Court began its analysis by adopting the test that a state statute is preempted only “where compliance with both

issuing public corporation at the issuing public corporation’s principal office. The acquiring person statement must set forth all of the following: (1) The identity of the acquiring person and each other member of any group of which the person is a part for the purposes of determining control shares. (2) A statement that the acquiring person statement is given pursuant to this chapter. (3) The number of shares of the issuing public corporation owned (directly or indirectly) by the acquiring person and each other member of the group. (4) The range of voting power under which the control share acquisition falls or would, if consummated, fall. (5) If the control share acquisition has not taken place: (A) a description in reasonable detail of the terms of the proposed control share acquisition; and (B) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.


230. See supra note 219.
231. See supra note 224.
232. Both the district court and the court of appeals held the Indiana Act invalid. Each court examined the validity of the Act through a two-step constitutional analysis. The first step of the analysis involved an examination of the Act under the supremacy clause of the United States Constitution. This step was taken to determine whether the Indiana Act was preempted by the Williams Act. The second step was an examination of the Act under the commerce clause. These steps also represent the same basic analysis which the Supreme Court in MITE used to examine the Illinois Act and, as will be seen, the Supreme Court in CTS used to examine the Indiana Act.

Examining the issue of whether the Indiana Act was preempted by the Williams Act, the district court recognized that voting rights “are an integral part of the ownership interest purchased along with a stock certificate.” Dynamics Corp. of America v. CTS Corp., 637 F. Supp. 389, 398 (N.D. Ill. 1986) [hereinafter Dynamics]. The court indicated that “[b]y limiting the rights that a tender offeror can purchase in a control acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms as much as would
federal and state regulations is a physical impossibility . . . ,' or

a direct prohibition on control acquisition.' Id. at 398. The district court stated
that the Indiana Act conflicts with the Williams Act by effectively giving manage-
ment the right to make the decision whether or not to sell shares, and therefore
tipping the balance between management and the tender offer or in favor of
management and to the detriment of stockholders. Id. at 398-99. The district court
consequently found that the Indiana Act was unconstitutional as applied to the
facts of this case. Id. at 399-400.

The district court also examined the Act within the context of the commerce
clause of the United States Constitution. Id. at 400-06. The court stated that by
limiting the rights that a tender offeror can purchase in a control acquisition, the
Indiana Act deters tender offers and thereby burdens interstate commerce as much
as if the statute blocked the transaction altogether. Dynamics, 637 F. Supp. at 402.
The court then proceeded to hold that the burdens that the Act placed upon
interstate commerce were not outweighed by local benefits. Id. at 403-05. The court
concluded that the Act also did not pass constitutional muster under the commerce
clause. Id. at 406.

Like the district court, the court of appeals determined that the Indiana Act
was preempted by the Williams Act. Dynamics Corp. of America v. CTS Corp.,
794 F.2d 250, 263 (7th Cir. 1986) [hereinafter Dynamics II]. The court of appeals
also found the Act unconstitutional under the commerce clause, holding that the
Indiana Act placed a significant burden on interstate stock transactions. Id. at 264.

Both Indiana, as an intervening party, and CTS filed jurisdictional statements
with the Supreme Court of the United States, following disposition of the case by
the Court of Appeals. CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637,
1644 (1987) [hereinafter CTS]. The Supreme Court noted probable jurisdiction.
CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 258 (1986) (noting probable
jurisdiction under 28 U.S.C. § 1254(2) (1982)).

233. For recent Supreme Court cases discussing the constitutional doctrine of
Arbitration Act preempted provision of California labor law which stated that wage
collection actions may be maintained without regard to existence of any private
agreement to arbitrate); Caterpillar, Inc. v. Williams, 107 S. Ct. 2425 (1987)
(employee's complaint asserting breach of individual employment contracts was not
completely preempted by Federal labor law); Fort Halifax Packing Co., Inc. v.
Coyne, 107 S. Ct. 2211 (1987) (Maine statute requiring employees to provide one
time severance payment to employees was not preempted by ERISA or NLRA);
(employee's state law claim may be preempted by Labor Management Relations
asserting improper processing of claim for benefits under an ERISA-regulated
program was preempted by federal law); Metropolitan Life Ins. Co. v. Taylor, 107
S. Ct. 1542 (1987) (employee's common law tort claim preempted by ERISA);
statutes did not preempt California Coastal Commission from imposing a permit
requirement on operation of unpatented mining claim in national forest); Interna-
Vermont Nuisance law when Vermont landowners brought suit against operator of
where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 234

In its analysis, the Court focused extensively on the differences between the Illinois statute in MITE and the Indiana Act, and how it felt the constitutional shortcomings in the Illinois statute had been avoided by the Indiana legislature. 235

In MITE, the overriding concern was that the Illinois statute favored management against offerors to the shareholders' disadvantage. 236 By contrast, the statute [in CTS] protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "plac[ing] investors on an equal footing with the takeover bidder." 237 The Court stated that the Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers are disadvantaged because of their lack of knowledge concerning those offers. 238 The Court reasoned that the Indiana Act, which allows shareholders to vote as a group, 239 protects those individuals from "the coercive aspects of some tender offers." 240

However, the Court failed to fully analyze the impact of the "voting group" requirement of the Act. While allowing shareholders to vote as a group offers them some protection against being inadequately informed about a tender offer, the concept of the "voting group" has two inherent weaknesses: (1) it protects the interest of the group at the expense of the individual shareholder's interest, and (2) it gives incumbent management an unfair advantage vis-à-vis the tender offeror.

An examination of the legislative history of the Williams Act implicitly indicates Congress intended to protect the interests of


234. CTS, 107 S. Ct. at 1644 (citations omitted). See supra notes 37 and 38, and accompanying text.
235. CTS, 107 S. Ct. at 1645.
236. Id.
238. Id. at 1646.
240. CTS, 107 S. Ct. at 1646.
shareholders both as a group and as individuals.\textsuperscript{241} While shareholders' interests as group members may be similar to their individual interests, those interests are not identical. The individual shareholder, like all shareholders of a target company, needs complete information concerning a tender offer; however, the individual's interest in deciding whether to tender his or her own shares is unique. What may be beneficial for one shareholder may be detrimental to another. Therefore, individual shareholders should make the final determination of whether to tender their own shares.

The Indiana Act requires a majority vote of shareholders to confer voting rights upon "control shares."\textsuperscript{242} By definition, the tender offer is a device for obtaining control of a publicly held corporation.\textsuperscript{243} Without voting rights, shares of stock are essentially worthless to the tender offeror seeking to obtain control of a publicly held corporation.\textsuperscript{244} Consequently, the tender offeror must invoke his right to call a special meeting of shareholders, who will decide whether to confer voting rights upon the shares acquired, or to be acquired, by the tender offeror.\textsuperscript{245} Therefore, the group of shareholders effectively determines whether to tender shares. Thus, contrary to the intent of Congress in adopting the Williams Act,\textsuperscript{246} the rights and interests of the individual are lost among the interests of the group.

While undoubtedly helping to protect the interests of a majority of shareholders, the Act does a tremendous disservice to the interests of the individual shareholder because "it will effectively prevent an individual investor from selling his stock at a premium."\textsuperscript{247} By upholding the Indiana statute, the majority does that which the Court denounced in \textit{MITE}; it gives credence to state legislative action when "[t]he state ... offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress."\textsuperscript{248} In effect, the Supreme Court has

\begin{itemize}
\item \textsuperscript{242} \textit{Ind. Code Ann.} § 23-1-42-7 (West Supp. 1988).
\item \textsuperscript{243} \textit{See supra} note 1.
\item \textsuperscript{244} \textit{See Dynamics Corp. of America v. CTS Corp.}, 794 F.2d 250, 261 (7th Cir. 1986).
\item \textsuperscript{245} \textit{See Ind. Code Ann.} § 23-1-42-7 (West Supp. 1988).
\item \textsuperscript{246} \textit{See CTS}, 107 S. Ct. at 1655 (White, J., dissenting) (focusing on the rights of minority shareholders).
\item \textsuperscript{247} \textit{CTS}, 107 S. Ct. at 1654 (White, J., dissenting).
\item \textsuperscript{248} \textit{Edgar v. MITE Corp.}, 457 U.S. 624, 640 (quoting \textit{MITE Corp. v. Dixon}, 633 F.2d 486, 494 (7th Cir. 1980)).
\end{itemize}
given support to management's "no-lose" situation under the Indiana Act. If shareholders vote to confer voting rights upon shares acquired by a tender offeror, the management of the target company is in the same position as it would have been before passage of the Indiana Act—it would be confronted with the possibility of a successful tender offer. If shareholders vote not to confer voting rights, management is in a better position than it would have been before passage of the Act—there would be no possibility of a successful tender offer. Therefore, the Act benefits management at the expense of the tender offeror and individual shareholders—the tender offeror's position, in the scheme of the tender offer, was worsened by passage of the Act, and individual shareholders are required to submit to the will of the majority because of the Act. But for the "control shares" provision of the Act, incumbent management would not have an unfair advantage vis-à-vis the tender offeror and individual investors could determine whether to tender their shares with voting rights to the offeror.

Furthermore, the Indiana Act increases the financial burden of the tender offer on the offeror. For the sake of illustration, assume Company O (the tender offeror) "owns" 40% of Company T (the Indiana target company). Further assume that Company O desires to acquire 11% more of Company T's common stock and that Company T has 1,000,000 shares of common stock outstanding. Let $50 equal the per share price offered by Company O for the 11% of stock, and let $40 equal the market price per share of Company T's stock during the time of the tender offer. Company O now wishes to have voting rights conferred upon the 11% of Company T's stock to be acquired.

Before passage of the Act, Company O would have controlled Company T, after making the 11% acquisition, and would have expended $4,400,000 to gain that control. Because of the Act, Company O must obtain the vote of 51% of the disinterested shareholders, who own 49% of Company T's stock. If only 20% of the disinterested shareholders desire to confer voting rights, Company O will probably have to increase its offer from $50 per share to entice another 31% of the disinterested shareholders to confer rights and make a successful tender offer possible.

This example illustrates the magnitude of the added financial costs which the Act can impose upon a tender offeror. If Company

249. See supra note 219.
250. $4,400,000 = .11 x 1,000,000 x $40.
O has to increase its offering price to $55 per share to entice another 31% of disinterested shareholders to confer rights,\textsuperscript{251} its financial burden is increased by $1,650,000, simply because of the Act's operation.

Because of the aforementioned difficulties with the Act's "voting group" requirement, the Act tends to significantly tip the balance contemplated by Congress in favor of management, therefore contradicting Congress' intent in adopting the Williams Act.\textsuperscript{252} Moreover, the Court recognizes that because it is possible that voting rights will not be conferred under the Indiana Act until a shareholder meeting\textsuperscript{253} fifty days after commencement of the offer, some delay beyond the twenty-business-day period\textsuperscript{254} may occur.\textsuperscript{255} Delay enables the management of the target company to take action to make the corporation appear less attractive as a financial opportunity for the tender offeror.\textsuperscript{256} The Court, however, held: "In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the [Indiana] Act."\textsuperscript{257} In light of the difficulties with the Indiana Act's "voting group" provision and the chance for delay, management seems to have been so substantially favored by the Act that it should have been preempted by the Williams Act.

2. Commerce clause analysis

The Court next examined the Indiana Act under the commerce clause. It stated: "The principal objects of dormant commerce clause

\begin{footnotes}
\item[251] For the sake of simplicity, assume that 31% of the disinterested shareholders decide only to vote to confer rights, not to tender their shares, and that only 11% of the outstanding stock is actually tendered. Disinterested shareholders might be willing to vote to confer rights but unwilling to tender their shares because of the Indiana Act's dissenters' rights provision. Shareholders might vote to confer rights but not tender shares since, while they believe a successful offer will increase the value of their shares, they desire, for whatever reason, to retain those shares. The dissenters' rights provision of the Indiana Act would protect a shareholder in making this decision, since he would have dissenters' rights to receive the fair value of his shares if the offeror's control shares were accorded full voting rights and the offeror acquired a majority of all voting power. This assumes that the shareholder later changed his decision to retain his shares. (See Ind. Code Ann. §23-1-42-11 (West Supp. 1987)). However, if more shareholders decided to tender shares, the financial burden on Company O would be further increased.
\item[252] See text following note 291, infra.
\item[254] That period established by the SEC as the minimum period for which a tender offer must be held open. 17 C.F.R. § 240.14e-1(a) (1986).
\item[255] CTS, 107 S. Ct. at 1648.
\item[256] See supra note 138.
\item[257] CTS, 107 S. Ct. at 1648.
\end{footnotes}
The Court held that Indiana's interest in regulating its corporations is a legitimate state interest representing a local benefit. However, the *MITE* decision rejected the application of the "internal affairs" doctrine, which seems very similar to the state interest which the Supreme Court in *CTS* said serves to legitimize the Indiana Act. While discussing a purported conflict of laws problem, the Court maintained that a State has the authority to regulate domestic corporations, which includes the power to define the voting rights of shareholders. The Court then concluded that the Indiana Act does not create a "risk of inconsistent regulation by different states." However, the Court’s focus on the potential state law conflict disregards the underlying purpose of the Act to regulate tender offers, and fails to address the potential federal-state conflict between the Williams Act and Indiana’s statute.

Turning to the issue of shareholder autonomy, the Court concluded that "the possibility of coercion in some takeover bids offers additional justification for Indiana’s decision to promote the autonomy of independent shareholders." Arguably, however, the Indiana Act essentially destroys rather than promotes the "autonomy of independent shareholders." In light of this argument and the Court's rejection of the "internal affairs" doctrine in *MITE*, the Court’s justifications for the Indiana Act are illusory. Therefore, under the *Pike* test, the burden imposed on interstate commerce "is clearly excessive in relation to the putative local benefits." The burdens imposed upon interstate commerce and, more specifically,

258. *Id.*
259. *Id.* at 1649.
260. *Id.* at 1651-52.
263. *Id.*
264. *Id.* at 1651 (emphasis added).
265. *Id.*
266. The test states: "... Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation to the putative local benefits." *Pike* v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
267. *Id.*
the burdens imposed upon the national securities markets are not outweighed by these illusory benefits.

VIII. FROM MITE TO CTS: HAS THE SUPREME COURT IMPLIEDLY OVERRULED ITS DECISION IN MITE?

After scrutinizing the Supreme Court’s constitutional analysis of the state statutes presented for review in the MITE and CTS cases, a broader reading of both the statutes and the case opinions, in light of the Williams Act, reveals inconsistencies in the Court’s general approach to reaching its decisions. These inconsistencies become clear when the differences between the Illinois Act reviewed in MITE and the Indiana Act reviewed in CTS are explored.

The Illinois Business Take-Over Act examined in MITE focused primarily on providing shareholders with information concerning impending tender offers.\(^{268}\) In contrast to the Illinois Act, the Indiana Control Shares Acquisition Act essentially deprives individual shareholders of the right to sell their voting rights in a target company when a tender offeror purchases the shareholder’s stock.

Although the Illinois Act and the Indiana Act were very different,\(^{269}\) both statutes sought to regulate the tender offer process, and therefore should have been analyzed similarly by the Supreme Court. However, while the Court in both MITE and CTS focused on the underlying purpose of the Illinois and Indiana Acts, respectively, the Court focused on different purposes of the Williams Act in analyzing the two statutes. This difference in the Court’s approach explains, in large part, why the Illinois Act was invalidated and the Indiana Act upheld.

A. MITE

The plurality opinion in MITE was written by Justice White. His opinion focused on the disclosure requirements of the Williams Act and the Act’s purpose to protect the investor through such requirements.\(^{270}\) Justice White’s opinion also focused on another fundamental purpose of the Williams Act, to favor neither management nor the tender offeror, as well as Congress’ intent that takeover bids not be discouraged because they provide a beneficial check on inefficient management.\(^{271}\) Justice White placed considerable empha-

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268. See supra notes 123-25 and accompanying text.
269. See generally supra note 268 and accompanying text.
271. See id. at 633-34.
sis on his understanding that Congress intended for investors to make their own, informed decisions concerning tender offers. His opinion on the preemption issue, however, was joined only by Chief Justice Burger and Justice Blackmun.

B. CTS

The majority in CTS, which consisted of Chief Justice Rehnquist together with Justices Brennan, Marshall, O'Connor, and Powell, who wrote the majority opinion, did not focus on the disclosure requirements of the Williams Act and Congress' intent to favor neither management nor the tender offeror, as did the plurality in MITE. Rather, it focused primarily on the purpose of the Williams Act to protect investors, and on what the majority considered a protective aspect of the Indiana Act. This "protective aspect" of the Indiana Act is its provision which requires shareholders to vote as a group when presented with the prospect of a tender offer. The majority stated that by allowing shareholders to vote as a group, the Indiana Act protects them from the "coercive aspects" of certain tender offers. With respect to the issue of whether this provision of the Indiana Act conflicted with and was preempted by the Williams Act, the majority did not feel compelled to follow the reasoning of MITE since the plurality opinion did not represent the views of a majority of the Justices.

The majority in CTS indicated it believed the predominant concern of the MITE plurality was that the Illinois Act operated to favor management vis-à-vis offerors, to the detriment of shareholders. However, the majority proceeded to state that the Indiana Act was distinguishable from the Illinois Act in that it protects the independent shareholder against both management and the tender offeror. Although it properly recognized this protective aspect as a legitimate objective of the Indiana Act, the majority failed to consider whether management or the tender offeror is favored by

272. See id. at 639.
273. See id. at 626.
275. See CTS, 107 S. Ct. at 1646.
276. For the actual text of this provision see supra note 229.
277. CTS, 107 S. Ct. at 1646.
278. Id. at 1645.
279. Id.
280. Id.
the Indiana Act, and consequently whether Congress’ intent to favor neither management nor the tender offeror is therefore frustrated. By failing to adequately consider all of the objectives of Congress in adopting the Williams Act, the majority did not properly analyze the question of the constitutionality of the Indiana Act under the supremacy clause.

In upholding the Indiana Act as a result of a legitimate exercise of state power, the majority failed to consider whether the Act upset the balance between management and the tender offeror. The majority upheld the Indiana Act under the commerce clause; however, the legitimacy of any state power depends, in part, upon whether that power conflicts with any federal power as evidenced by federal law. Although a state may properly regulate tender offers to protect investors, the majority overemphasized the protective nature of the Indiana Act’s provision requiring shareholders to vote as a group, lost sight of the balance between management and the tender offeror and either discounted or ignored Justice White’s focus on this balance in his plurality opinion in *MITE*. By concentrating on the fact that the specific constitutional problems presented by the Illinois Act were avoided in enacting the Indiana Control Shares Acquisition Act, and on the view that the Indiana Act protects the “independent” shareholder against both the tender offeror and management,281 the majority essentially ignored the balance contemplated by Congress and presumed the balance was not upset.

The Indiana Act presents a serious problem involving the control of corporations which was not presented by the Illinois Act. Because the majority in *CTS* failed to focus on all of the purposes of the Williams Act in its analysis of the Indiana Act, it failed to recognize the problem. As recognized by Justice White’s dissenting opinion in *CTS*, the Indiana Act will, contrary to the purposes of the Williams Act, frustrate individual investment decisions and prevent individual shareholders from realizing the opportunity to sell shares at a premium over market price by removing voting rights from the individual’s shares in the context of a tender offer.282 Justice White’s dissent essentially addresses the effects of the problem which the majority failed to recognize and which will next be explored.

C. WHO HAS THE RIGHT TO SELL CONTROL IN A PUBLICLY-HELD CORPORATION?

A careful reading of the Williams Act and the Supreme Court’s decisions in *MITE* and *CTS* reveals a fundamental underlying as-

281. See *CTS*, 107 S. Ct. at 1645-46.
282. See *id.* at 1653-56.
sumption about who has the right to sell control in a publicly-held corporation. Both Congress, in adopting the Williams Act, and the plurality in *MITE* assumed the individual shareholder has the right to sell a pro rata amount of control in a corporation. However, by upholding the Indiana Act in *CTS*, the majority disregarded this assumption. This oversight was in large part a function of the *CTS* majority's failure to focus on all of the purposes of the Williams Act, especially the maintenance of the balance between the interests of management and the tender offeror. The assumption by both Congress and the Supreme Court in *MITE* was that control of a publicly-held corporation is a property right of the individual shareholder; the Supreme Court in *CTS* considered control to be a corporate asset.

1. **"Control" as a property right of the individual shareholder**

   The Williams Act is centered around disclosure requirements designed to furnish individual investors with adequate information to allow them to determine whether to tender their shares. Implicit in the purpose for these requirements is the assumption that individual shareholders have a right to sell shares with voting rights, which enables them to sell a pro rata amount of "control" to a tender offeror. Control is a function of the ownership of stock with voting rights. To be able to obtain control and therefore effectuate the primary purpose of a tender offer, a tender offeror must acquire shares which have voting rights. With this understanding, the assumption that Congress intended the individual shareholder to be able to tender shares with voting rights is not difficult to accept.

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283. See supra notes 47-49 and accompanying text.

284. One commentator has defined "control" as "the capacity to choose directors." Berle, "Control" in Corporate Law, 58 COLUM. L. REV. 1212 (1958) [hereinafter Berle]. For a more recent commentary on the notion of corporate control, see Bayne, A Philosophy of Corporate Control, 112 U. PA. L. REV. 22 (1963).


286. For authority which supports the contention that a purpose of Congress in enacting legislation can be inferred from the particular statute, see Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). See generally Goldstein v. California, 412 U.S. 546 (1973). Although the Williams Act does not explicitly recognize the right of the individual investor to sell a proportionate amount of control in a corporation, the Act does recognize the right of the individual shareholder to make an informed decision concerning whether or not to tender his or her shares. See supra notes 41-43 and accompanying text. Without the right to sell voting rights with shares, the
A failure to accept this assumption necessarily renders the individual's decision valueless and is tantamount to disregarding Congress' clear intent to allow the individual to make his or her own choice.

Justice White's plurality opinion in *MITE* recognizes Congress' intent for investors to make their own decisions concerning whether to tender shares. Implicit in this notion is the assumption that individual investors have the right to sell a proportionate amount of control in a particular corporation along with the shares themselves. The opinion provides no indication that the individual shareholders, as opposed to a group of shareholders, do not have a right to sell voting rights along with their shares. Moreover, the opinion is consistent with and supports the existence of this right.

2. "Control' as a "corporate asset"

The Indiana Act's main provision, the "control shares" section, effectively eliminates the right of individual shareholders to sell a proportionate amount of control along with their shares by removing voting rights from shares subject to it. Instead of giving the individual shareholder the right to "sell control," the Indiana Act confers this right upon shareholders as a group.

In *MITE*, the plurality at least implicitly held that the individual shareholder has a right to sell a pro rata amount of control in a publicly-held corporation, based on the number of shares that he or she owns. Another view regards control as an asset which is owned by the corporation. This view holds that shareholders as a group, or a majority of shareholders, own the right to sell control. Indeed, this is an interpretation which the majority in *CTS* seems to have implicitly adopted by upholding the Indiana Act.

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right to tender shares would be meaningless, since voting rights are necessary for a tender offeror to obtain and exercise control. Therefore, the right of the individual shareholder to tender shares with voting rights is implicit in the Williams Act.


288. See supra note 219.

289. Once a determination is made by shareholders as a group that control should be sold (that voting rights should be conferred upon control shares), all shareholders need not tender their shares. All shareholders, however, do have dissenters' rights to receive the fair value of their shares. *IND. CODE ANN.* § 23-1-42-11 (West Supp. 1988).

290. See *Berle*, supra note 284, at 1220-22. Under this view, any value associated with control belongs to the corporation rather than the shareholders. *Id.* at 1221. Voting power is part of the corporate mechanism to be exercised "for the benefit of the entire corporation." *Id.* at 1222.
In doing so, the majority essentially held that a state has the power to determine whether individual shareholders, or shareholders as a group, should have the right to sell control.\textsuperscript{291} By upholding the Indiana Act, the majority indicates that a state may take the right to sell control from individual shareholders and give that right to shareholders as a group. Legislation such as the Indiana Act thwarts the potential success of certain tender offers by precluding the tender offeror from obtaining voting rights and contravenes the policy of the Williams Act. The ultimate effect of the Court’s decision in \textit{CTS} is to give management an initial advantage in control contests by allowing states to give a majority of shareholders, rather than individuals, the right to determine whether to sell control.

By taking the right to sell control from the individual and giving that right to the group, states can increase the burden on the tender offeror, and therefore favor management. The tender offeror is required to convince a majority of disinterested shareholders to sell control, rather than simply to acquire a majority of all outstanding shares. In all tender offer situations, except those in which the offeror desires to buy all outstanding shares, Indiana-type legislation requires the offeror to somehow convince more shareholders to sell control than legislation giving the individual the right to sell control.\textsuperscript{292} Indiana-type legislation therefore gives management an initial advantage in most control contests.

By dramatically changing its general approach to the question of the constitutionality of state takeover legislation, the Supreme Court may have also changed the outcome of the \textit{CTS} case. Had the Court taken the approach of the \textit{MITE} plurality, it may have held the Indiana Act invalid in \textit{CTS}. By following the \textit{MITE} plurality’s approach, the majority in \textit{CTS} may have realized that the Indiana Act favors management and eliminates the right of the individual to tender his or her shares with voting rights.

The majority in \textit{CTS} should have followed the approach of the \textit{MITE} plurality, recognized the problems presented by the Indiana Act, and held it invalid. In upholding the Indiana Act, the Court gave judicial support to legislation which favors management in control contests, frustrates individual investment decisions and specifically precludes individual shareholders from realizing the opportunity to sell shares at a premium by removing voting rights from the individual’s shares.\textsuperscript{293} Although \textit{CTS} did not expressly overrule

\textsuperscript{291} See \textit{CTS}, 107 S. Ct. at 1652.
\textsuperscript{292} See \textit{supra} notes 250-51 and accompanying text.
\textsuperscript{293} See generally \textit{supra} note 291 and accompanying text.
MITE, CTS seriously limits the application of MITE. Because of the CTS majority’s unwillingness to follow the MITE plurality’s approach, the applicability of MITE seems to be limited to state legislation which substantially burdens interstate commerce. Since state legislatures are unlikely to include MITE-like provisions in takeover legislation, MITE seems to have very limited applicability in challenges to state statutes. Therefore, CTS represents the dominant case law to be applied in challenges to state takeover legislation.

IX. DELAWARE LEGISLATION—ANOTHER GENERATION?

In the aftermath of CTS, Delaware has enacted new takeover legislation. Delaware has long been known for the expertise of its legislature, judiciary and bar association in the area of corporate law. It is the state to which other states look for new developments in the corporate legal arena. Often, decisions of Delaware courts give guidance to and are followed by courts in other states. Corporate law developments in Delaware are important because they often represent future developments in other jurisdictions.

A. SECTION 203

After the Supreme Court in CTS upheld the constitutionality of the Indiana statute, the Delaware legislature was quick to enact new takeover legislation. Section 203 is designed to place a three-year restriction on business combinations between certain acquiring corporations and the acquired Delaware corporation. The statute places limitations not on the tender offer process (like the Indiana statute), but on the permissible actions of an acquiring stockholder after stock of the target has been purchased. The term “business combination” is broadly defined, and includes a merger, consolidation, sale, lease, exchange, mortgage, pledge and transfer. Specifically, the statute applies to “interested stockholders,” who are defined as persons owning 15% or more of the outstanding voting stock of the target corporation.

296. See DEL. CODE ANN. tit. 8, § 203(c)(5) (1988). Section 203 explicitly excludes certain persons from the definition of “interested shareholders” when they met specific criteria prior to December 23, 1987. See id. The term “own” includes beneficial ownership of such stock, the right to acquire it, the right to
The statute does allow certain business combinations during the normal three-year period of restriction if any of three requirements are met: (1) prior to the date when the acquiring stockholder became an interested stockholder, the board of directors of the target approved the business combination or the transaction making the stockholder an interested stockholder; (2) after such transaction the interested stockholder owned at least 85% of the stock of the target; or (3) on or after such date the business combination is approved by the board, and by the affirmative vote of at least 66.7% of the outstanding stock not owned by the interested stockholder.297

The statute also lists certain circumstances in which the restrictions of § 203 will not apply, including (1) when the directors or stockholders of the target decide to opt out of the statutory scheme,298 (2) when the target corporation does not have a class of voting stock listed on a national exchange, or authorized for quotation in the quotation system of a registered national securities association or held by more than 2,000 stockholders of record,299 and (3) when a stockholder inadvertently becomes an interested shareholder, and soon thereafter divests himself of the shares which caused him to become an interested shareholder.300

B. JUDICIAL DECISIONS ADDRESSING THE CONSTITUTIONALITY OF §203

Considering the relatively short history of § 203, it has not taken long for Delaware’s legislative response to CTS to meet with challenge from those persons to whom it applies.301 In BNS, Inc. v.
Koppers Co., Inc.,\textsuperscript{302} BNS sought a preliminary injunction\textsuperscript{303} and a declaration that § 203 was unconstitutional.\textsuperscript{304} In Koppers, the court examined BNS' probability for success on the merits through an analysis of the constitutionality of § 203, in light of the Williams Act and CTS. In its analysis, the court first recognized that § 203 "implicate[s] Williams Act policies."\textsuperscript{305} The court then indicated that the purpose of § 203 is to protect shareholders from certain hostile tender offers.\textsuperscript{306} It next stated that Delaware has a legitimate interest in regulating tender offers, "despite the significant influence such regulation has over the transfer of securities and the so-called market for corporate control."\textsuperscript{307} The court explained that the issue in these post-CTS cases is "what degree of restriction of tender offers is constitutional."\textsuperscript{308}

In addressing this issue, the court indicated that statutes which have a serious potential to limit successful tender offers do not conflict with the purposes of the Williams Act if beneficial yet hostile offers still "have a meaningful opportunity for success."\textsuperscript{309} This is true even if the statute creates substantial imbalance between brought suit in federal district court.

Black & Decker argued that the statute stood as a substantial roadblock to its merger plan, which was the sole purpose of its tender offer. \textit{Id.} at 98,147. American Standard argued an injunction should not be granted because the plaintiffs had no standing and failed to show they would suffer irreparable harm. \textit{Id.} Black & Decker further argued that the confusion about the constitutionality of § 203 in the market might cause its tender offer to fail. \textit{Id.}

Although the court in \textit{American Standard} found that Black & Decker had standing, \textit{Id.} at 98,149, it denied the plaintiffs' motion for a preliminary injunction. \textit{Id.} at 98,152. Black & Decker's financing for the tender offer had been conditioned upon its obtaining a majority of the stock of American Standard. \textit{Id.} at 98,150. Therefore, the court found that "with or without Section 203, the Plaintiffs' ... position would be exactly the same." \textit{Id.} Furthermore, the court indicated that the plaintiffs failed to show that if the motion for an injunction were granted, other variables contributing to confusion in the market would not also hamper the success of the tender offer. \textit{Id.} at 98,151. For such reasons, the court held that Black & Decker failed to prove sufficient potential for irreparable harm, and declined to reach the question of its probability for success on the merits. \textit{Id.} at 98,152.

\textsuperscript{302} Fed. Sec. L. Rep. (CCH) ¶ 93,730 (April 1, 1988).
\textsuperscript{303} \textit{See Koppers,} Fed. Sec. L. Rep. (CCH) at 98,396.
\textsuperscript{304} \textit{Id.} at 98,394.
\textsuperscript{305} \textit{Id.} at 98,400.
\textsuperscript{306} \textit{See id.}
\textsuperscript{307} \textit{Id.} at 98,401.
\textsuperscript{308} \textit{Koppers,} Fed. Sec. L. Rep. (CCH) at 98,401.
\textsuperscript{309} \textit{Id.}
management and the tender offeror. The court explained that, as was the case in CTS, the statute is preempted by the Williams Act only if it frustrates "the full purposes and objectives of Congress."

In its application of the analysis of the Supreme Court in CTS, the court in Koppers found that § 203 favors incumbent management. However, the court stated, "while the statute does give target management an advantage in fighting an unwanted takeover, CTS suggests that incidentally pro-management measures undertaken to benefit shareholders do not offend Williams Act policies. The court recognized that although the trend of state legislatures to entrust the interests of shareholders to management has been seriously criticized, such entrustment is the "norm in current corporate law." The court then concluded that "notwithstanding the pro-management tilt of the Delaware statute," § 203 is probably constitutional under the supremacy clause. Because BNS failed to establish a probability of success, the court denied its motion for a preliminary injunction.

Another opportunity to examine the constitutionality of §203 came in RP Acquisition Corp. v. Staley Continental, Inc. Again, the tender offeror, in this case RP Acquisition Corporation ("RP"), conditioned its offer on § 203 being held invalid, since it desired to merge the target corporation, Staley, into one of its subsidiaries. Once again, the plaintiff sought a preliminary injunction against the enforcement of § 203. In analyzing the constitutionality of § 203 under the supremacy clause, the court discussed the purposes of the Williams Act. It indicated that the "paramount purpose" of the Act is shareholder protection. The court viewed the plurality opinion in MITE as

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310. See id.
311. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
312. For the court's four-step preemption analysis taken from the CTS decision, see Koppers, Fed. Sec. L. Rep. (CCH) at 98,401-02.
313. See id. at 98,402.
314. Id.
315. Id.
316. Koppers, Fed. Sec. L. Rep. (CCH) at 98,402. The court also found that § 203 did not violate the commerce clause. See id. at 98,404.
317. Id. at 98,404.
320. Id.
321. Id. at 98,574.
giving "vigorous and broad preemptive effect to the Williams Act's policy of offeror-management neutrality."\textsuperscript{322} Rather than determining what standard the Court in \textit{CTS} employed, the court in \textit{Staley} followed the "analytical path" mapped out in \textit{MITE}.\textsuperscript{323} The court explained the legitimate interests of the individual states in regulating tender offers, and then framed the preemption issue as being: "How far . . . the tender offer playing field [can] be tilted by a state in favor of the offeror or of management without running into Williams Act preemption."\textsuperscript{324}

The court indicated that § 203 provides shareholder protection, but recognized that "it also exercises substantial deterrent effects on tender offers."\textsuperscript{325} The court stated that §203 can prevent the acquiring person or entity from realizing economic benefit from a merger with the target corporation for a period of three years.\textsuperscript{326} Further, the court indicated that by limiting such beneficial mergers, the number of tender offers may be lowered.\textsuperscript{327} The court then found that the "crucial inquiry" is whether "hostile offers still have a meaningful opportunity for success despite the operation of Section 203."\textsuperscript{328}

In its attempt to resolve this issue, the court discussed the plaintiff's allegation that the 85% exception to the general rule of § 203(a) was illusory. The plaintiff argued that those making hostile offers have typically failed to reach this percentage level of ownership.\textsuperscript{329} However, the court found the plaintiff's argument and evidence unpersuasive, stating that "hostile tender offers retain a meaningful opportunity for success under the 85 percent exception."\textsuperscript{330} Finding that the 85% exception survived constitutional attack, the court did not analyze the other exceptions to the general rule of § 203(a).\textsuperscript{331} In concluding its analysis, the court compared the Indiana Statute examined in \textit{CTS} with § 203.\textsuperscript{332} The court found that the Delaware statute has a less deterrent effect on tender offers

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{322} \textit{Id.}
\item \textsuperscript{323} \textit{Id.}
\item \textsuperscript{324} \textit{Staley}, Fed. Sec. L. Rep. (CCH) at 98,575.
\item \textsuperscript{325} \textit{Id.}
\item \textsuperscript{326} \textit{See id.}
\item \textsuperscript{327} \textit{See id.}
\item \textsuperscript{328} \textit{Id. at} 98,575-76.
\item \textsuperscript{329} \textit{Staley}, Fed. Sec. L. Rep. (CCH) at 98,576.
\item \textsuperscript{330} \textit{Id. at} 98,577.
\item \textsuperscript{331} \textit{Id. at} 98,578.
\item \textsuperscript{332} \textit{Id.}
\end{enumerate}
\end{footnotesize}
than the Indiana Act,\textsuperscript{333} and held that the plaintiff failed to show § 203 is "most likely unconstitutional."\textsuperscript{334} Thus, the court denied the plaintiff's motion for a preliminary injunction.\textsuperscript{335}

Although § 203 does not directly burden the tender offer process itself, it certainly burdens the process on an indirect level. Certainly many, if not most, corporate tender offerors have as a primary goal of their tender offer a plan to merge or somehow consolidate with the target corporation. By substantially limiting the circumstances in which an interested shareholder can combine with the target, § 203 unquestionably deters some tender offers. The question is whether the deterrent effect of § 203 is impermissible.

By deterring tender offers, § 203 at the very least favors incumbent management somewhat more than the tender offeror. When the number of hostile tender offers with which management is confronted is smaller, fewer are the number of actions which management must take to repel such offers. Thus, the balance between the offeror and management, which Congress contemplated in enacting the Williams Act, is arguably upset by § 203. The potential to deprive numerous tender offers for Delaware corporations of a meaningful opportunity for success, although perhaps only indirectly, seems to indicate § 203 is unconstitutional.

However, regardless of the constitutionality of § 203, the \textit{Koppers} and \textit{Staley} cases illustrate an important problem. Both cases illuminate the utter lack of uniformity in this area of corporate law. For example, the court in \textit{Koppers} patterned its analysis on that of the Supreme Court in \textit{CTS}, while the same court, albeit a different judge, in \textit{Staley} relied heavily upon the analysis of the Supreme Court in \textit{MITE}. Indeed, in general, most judicial decisions concerning takeover legislation point to a critical need—the need for uniformity.

X. \textbf{A Proposal for Change: A Return to the Focus of the Williams Act}

Congress should reevaluate the Williams Act and amend the legislation to give the individual states and the Supreme Court direction with respect to the issue of who has the right to sell control. Congress should explicitly indicate either that the individual share-

\begin{footnotesize}
\textsuperscript{333} See id.
\textsuperscript{334} \textit{Staley}, Fed. Sec. L. Rep. (CCH) at 98,577. The court also found that § 203 did not violate the commerce clause. \textit{Id.} at 98,580.
\textsuperscript{335} \textit{Id.} at 98,581.
\end{footnotesize}
holder owns the right or that the several states have the power to assign and define the right to sell control. Generally, Congress should seriously consider the need for uniform legislation governing the tender offer. However, until Congress takes such action, if ever, states should very carefully consider the enactment of any legislation which would deprive the individual shareholder of the right to sell control (i.e., the Indiana Act), or temporarily deprive the offeror of the opportunity to merge with the target (i.e., the Delaware Act).

The United States Senate has drafted legislation designed to reform federal law governing tender offers. This proposed legislation includes a provision which would allow states to continue to regulate the internal affairs of their corporations. The Senate Bill further provides that the internal affairs of a corporation include matters relating to the voting rights of shareholders. Therefore, the proposed legislation would allow states to determine who has the right to sell control. However, the Senate Committee on Banking, Housing, and Urban Affairs has suggested that a bill to reform federal tender offer legislation should impose a requirement on publicly-held corporations that every share of voting securities have the same vote. Opponents of this proposal have argued that it would invalidate Indiana-type control share acquisition statutes despite CTS. Opponents have further argued that such a proposal would intrude upon the states' right to regulate the internal affairs of their corporations. Because of such concerns, the committee rejected the proposal and directed the SEC to study the impact of such suggested reform of federal law. Arguably, such proposal

338. Id.
339. See id.
340. S. REP. No. 265, 100th Cong., 1st Sess. 53 (1987). This report was a response to the Tender Offer Disclosure and Fairness Act of 1987, S. 1323, 100th Cong., 1st Sess. §§ 1-17 (1987), another proposed piece of legislation dealing with tender offers and amending the provisions of the Williams Act. This Senate Bill would amend the substantive and procedural provisions of the Williams Act to curb abuses of the tender offer process and to expand the protective nature of federal law. S. 1323, 100th Cong., 1st Sess. § 1(b) (1987). However, it does not provide any guidance concerning the proper roles of state and federal legislation governing tender offers. Senate Bill 1324 augments the provisions of the proposed Tender Offer Disclosure and Fairness Act of 1987 by expressly addressing the issue of the interrelationship of state and federal legislation.
342. Id.
343. Id.
would not affect the right of states to regulate the internal affairs of their corporations, and would nonetheless be justified by the need for uniform regulation of tender offers.

Although state takeover legislation of the type enacted by Indiana has been upheld by the Supreme Court, other states should fully consider its potential effects before enacting similar legislation. Potential shareholders may be unwilling to invest in a business incorporated in, or desiring to move its principal office to a state with similar legislation. Potential shareholders may be lost because they may be precluded from realizing the opportunity to sell their shares at a premium in the future. This is especially true if the business is part of an industry in which takeover attempts are prevalent. Such a business may be compelled to reconsider a decision to incorporate or locate in a state with Indiana-type legislation.

Ideally, states considering the enactment of takeover legislation should focus on potential provisions designed to: (1) provide protection for shareholders, by affording them complete information; (2) allow individuals to determine whether to tender their shares; (3) avoid any “delay” similar to that caused by the Indiana Act, by allowing the possibility of a successful tender offer at the end of the twenty-day period established by the SEC as the minimum period for which a tender offer must be held open; (4) generally balance the interests of incumbent management and the tender offeror while protecting the interests of shareholders; and (5) enable the tender offeror to merge with the target under less restrictive circumstances than those created by the Delaware Act.

XI. Conclusion

Congress, in adopting the Williams Act, intended to protect the individual shareholder in making a decision whether to tender shares with voting rights, while balancing the legitimate interests of incumbent management and tender offerors. The United States Supreme Court upset this balance by upholding Indiana’s Control Shares Acquisition Act. An analysis of the Act, in light of the supremacy clause and the commerce clause of the United States Constitution, indicates that the Act tips the balance contemplated by Congress in favor of incumbent management to the detriment of tender offerors and individual shareholders. In determining whether to adopt takeover legislation similar to that enacted by Indiana, a state’s legislature should carefully consider the potential negative effects of such

344. See supra note 46 and accompanying text.
legislation, which eliminates the right of individual shareholders to sell a pro rata amount of control with their shares.

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