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The Unsung Death of State Takeover Statutes: Edgar v. MITE Corp.

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CASENOTES

The Unsung Death of State Takeover Statutes: *Edgar v. MITE Corp.*¹—In response to the increased use of cash tender offers² as a method of achieving corporate takeovers during the 1960's,³ Congress enacted the Williams Act.⁴ In broad terms, the Williams Act was designed to protect investors by requiring full and fair disclosure of the terms of a tender offer.⁵ During the fifteen year period following congressional enactment of the Williams Act, no less than thirty-seven states also passed laws regulating corporate takeovers through tender offers.⁶ The simultaneous federal and state regulation of tender offers

¹ 102 S. Ct. 2629 (1982).

² The Williams Act does not define "tender offer" ("tender offer" and "takeover" are used interchangeably). A working definition of tender offer has been developed, however, by commentators. A tender offer is:

A public offer or solicitation by a company, an individual or a group of persons to purchase during a fixed period of time all or a portion of a class or classes of securities of a publicly held corporation at a specified price or upon specified terms for cash [cash tender offer] and/or securities [exchange offer].

E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973).

The Securities and Exchange Commission (SEC) has proposed a broad, two-pronged definition of tender offer. Securities Exchange Act Rel. No. 34-16385, 3 FED. SEC. L. REP. (CCH) ¶ 24,281A (November 29, 1979).

³ Senator Williams, the sponsor of the Act, introduced the bill on the Senate floor, stating: "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." 113 CONG. REC. 854 (1967).

⁴ The Williams Act, Pub. L. No. 90-439, 82 Stat. 454, adding new sections 13(d), 13(e) and 14(d)-(f) (1968) to the Securities and Exchange Act of 1934, codified as amended at 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f) (1976 & Supp. V 1981).

⁵ The Senate and House Reports explained: "This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make the decisions." S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813.

⁶ Thirty-seven states have enacted takeover legislation. See ALASKA STAT. §§ 45.57.010-.120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 36-457 to -468 (West Supp. 1982); DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); FLA. STAT. ANN. §§ 517.35-.363 (West Supp. 1978) (repealed 1979, West Supp. 1983); GA. CODE ANN. §§ 22-1901 to -1915 (1977 & Supp. 1982); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1982); ILL. ANN. STAT. ch. 121½, §§ 137.51-.70 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. §§ 23-2-3.1-1 to -3.1-11 (Burns Supp. 1982); IOWA CODE ANN. §§ 502.211-.215 (West Supp. 1982-1983); KAN. STAT. ANN. §§ 17-1276 to -1284 (1981); KY. REV. STAT. ANN. §§ 292.560-.991 (Bobbs-Merrill 1981 & Supp. 1982); LA. REV. STAT. ANN. §§ 51:1500-.1512 (West Supp. 1983); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (Supp. 1982-1983); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (Michie/Law Co-op. Supp. 1982); MICH. STAT. ANN. §§ 21.293(1)-(17) (Callaghan Supp. 1982-1983); MINN. STAT. ANN. § 80B.01-.13 (West Supp. 1982); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1982); MO. ANN. STAT. §§ 409.50-.565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78.376-.3778 (1979) (amended 1981); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (Cum. Supp. 1979); N.J. STAT. ANN. §§ 49:5-1 to :19 (West Supp. 1982-1983); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1982-1983); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. § 1707.041 (Baldwin 1979); PA. STAT. ANN. tit. 70, §§ 71-85

renders the state statutes susceptible to constitutional attack on preemption grounds. Moreover, the extraterritorial impact of state tender offer regulation brings the state statutes under fire as posing impermissible interferences in interstate commerce.

The potential for conflict between federal and state regulation manifests itself in the divergence between the approach adopted by the Williams Act and that adopted by many state statutes. In passing the Williams Act Congress adopted a "market approach" to investor protection.⁷ By emphasizing the requirement of full and fair disclosure of the terms of a tender offer, the Williams Act aids the shareholder in deciding whether to sell his stock to the tender offeror.⁸ In mandating disclosure, the Williams Act was intended to favor neither management of the target company nor the tender offeror.⁹ In contrast, existing state regulation frequently permits administrative inquiry into the substantive fairness of a tender offer, rather than merely the full and fair disclosure of its terms.¹⁰ Furthermore, state statutes tend to inhibit tender offers to a greater degree than federal regulation under the Williams Act.¹¹ Given both federal and state regulation of tender offers, there exists considerable and variant commentary analyzing the ability of state statutes to survive constitutional attacks founded on either a preemption or a commerce clause ground.¹²

(Purdon Supp. 1981-1982); S.C. CODE ANN. §§ 35-2-10 to -110 (Law Co-op. Supp. 1982); S.D. COMP. LAWS ANN. §§ 47-32-1 to -47 (Supp. 1982); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1982); UTAH CODE ANN. §§ 61-4-1 to -13 (1978 & Supp. 1981); VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982); WIS. STAT. ANN. §§ 552.01-.25 (West Special Pamphlet 1982); TEX. ADMIN. CODE FOR MINIMUM STANDARDS IN TENDER OFFERS tit. 7, § 129, reprinted in 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671-55,682.

⁷ Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). See *Kennecott Corp. v. Smith*, 637 F.2d 181, 187-88 (3d Cir. 1980) ("A primary purpose of the Williams Act, . . . is to ensure that full information is conveyed to the shareholders of a target company as soon as possible, so that they may exercise a knowledgeable and unfettered choice.").

⁸ *Kennecott Corp. v. Smith*, 637 F.2d at 187-88.

⁹ The House Report stated:

The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2611, 2813.

¹⁰ See *infra* notes 93-95 and accompanying text.

¹¹ Fischel, *Efficient Capital Market Theory, the Market for Corporate Control and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 28 (1978).

¹² The following articles and notes generally affirm the constitutionality of state business takeover regulation premised on a lack of preemption and/or a valid regulation of interstate commerce: Boehm, *State Interests and Interstate Commerce: A Look At The Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733 (1979); McCauliff, *Federalism And The Constitutionality Of State Takeover Statutes*, 67 VA. L. REV. 295 (1981); Sargent, *On The Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L. J. 689 (1981); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. 722 (1970); Comment, *Challenges to State Takeover Laws: Preemption and the Commerce Clause*, 64 MARQ. L. REV. 657 (1981) [hereinafter cited as Comment, *Challenges to State Takeover Laws*]; Note, *The Constitutionality Of State Takeover Statutes: A Response To Great Western*, 53 N.Y.U. L. REV.

Federal court decisions addressing the constitutionality of state takeover legislation are no less voluminous or discordant.¹³ In *Edgar v. MITE Corp.*¹⁴ the Supreme Court reached the merits of a constitutional challenge to a state business takeover statute for the first time.¹⁵

Plaintiff MITE Corporation, a Delaware corporation with its principal office in Connecticut, initiated a cash tender offer for all outstanding shares of Chicago Rivet and Machine Co., a publicly held Illinois corporation.¹⁶ MITE Corporation commenced its tender offer by filing with the Securities and Exchange Commission (the SEC) in compliance with the Williams Act.¹⁷ Concurrent with its SEC filing, MITE Corporation filed a complaint in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the Illinois Business Takeover Act was preempted by the Williams Act and that it violated the commerce clause.¹⁸ In addition to a declaratory judgment, MITE Corporation sought injunctive relief prohibiting the Illinois Secretary of State from enforcing the Illinois Act.¹⁹ Prior to any action by the district court in connection with the Illinois-based litigation, Chicago Rivet, the target company, attempted to invoke the provisions of the Pennsylvania Takeover Disclosure Law, but was unsuccessful.²⁰ The Secretary

872 (1978) [hereinafter cited as Note, *A Response to Great Western*]; Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979) [hereinafter cited as Note, *State Tender Offer Statutes Reconsidered*]; Note, *State Regulation of Tender Offers: How Much Is Constitutional?*, 33 BAYLOR L. REV. 657 (1981) [hereinafter cited as Note, *How Much is Constitutional?*].

The following articles and notes generally assert that state business takeover regulation is unconstitutional under a preemption and/or commerce clause analysis: E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL ch. 5 (1977); Langevoort, *State Tender-Offer Legislation: Interest, Effects and Political Competency*, 62 CORNELL L. REV. 213 (1977); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974) [hereinafter cited as Note, *Commerce Clause Limitations*]; Note, *The Effect Of The New SEC Rules On The Constitutionality Of State Takeover Statutes*, 8 FORD. URB. L.J. 913 (1979-1980) [hereinafter cited as Note, *New SEC Rules*].

The following articles advance the theory that generally business takeover statutes (whether federal or state) frustrate the effective functioning of the market, and, thus, operate as deterrents to takeover attempts: Fischel, *supra* note 11; Jarrell & Bradley, *The Economic Effects Of Federal And State Regulations Of Cash Tender Offers*, 23 J.L. & ECON. 371 (1980).

¹³ See *infra* notes 138-73 and accompanying text.

¹⁴ 102 S. Ct. 2629 (1982).

¹⁵ In 1979, The Court was presented with a similar constitutional challenge. *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). In that case, the Fifth Circuit Court of Appeals had held the Idaho takeover statute unconstitutional on both preemption and commerce clause grounds. *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978). The Supreme Court, however, reversed the court of appeals judgment for lack of proper venue without reaching the merits of the constitutional issues presented therein. *Leroy v. Great W. United Corp.*, 443 U.S. at 185-87.

¹⁶ 102 S. Ct. 2629, 2633 (1982).

¹⁷ *Id.*

¹⁸ *Id.* at 2634.

¹⁹ *Id.*

²⁰ *Id.* Chicago Rivet sought enforcement of the Pennsylvania Takeover Disclosure Law (PA STAT. ANN. tit 70, §§ 71-85 (Purdon Supp. 1982-1983)) against MITE's tender offer, claiming that Chicago Rivet maintained its principal place of business and substantial assets in Penn-

of State of Illinois and Chicago Rivet subsequently notified MITE Corporation that each intended to seek enforcement of the Illinois Act against MITE's tender offer, whereupon MITE Corporation pressed its request in district court for a preliminary injunction barring enforcement of the Illinois Act.²¹ The district court issued a preliminary injunction and subsequently entered a final judgment.²² The district court declared the Illinois Act null and void because it was preempted by the Williams Act and because it created an undue burden on interstate commerce in violation of the commerce clause.²³ Thus, the district court permanently enjoined enforcement of the Illinois Act against MITE Corporation.²⁴

On appeal by the Illinois Secretary of State, the United States Court of Appeals for the Seventh Circuit affirmed the holding of the district court.²⁵ After closely examining the legislative history of the Williams Act,²⁶ the Seventh Circuit rejected the argument that any and all state regulation of tender offers was preempted by the Williams Act.²⁷ It, nevertheless, held that the federal statute preempted the Illinois Act because investor protection by the Act's "benevolent bureaucracy" approach conflicted with the Williams Act's market approach of "unfettered choice by well-informed investors."²⁸ In particular, the court observed that four aspects of the Illinois Act clashed with the federal scheme. The Seventh Circuit found that the Illinois Act (1) substituted regulatory control for investor autonomy; (2) provided for hearings which may be indirectly instituted by management and were interminable in length; (3) provided other delays and mechanisms for delay which were grossly in excess of

sylvania. *MITE Corp. v. Dixon*, 633 F.2d 486, 489 (7th Cir. 1980). The Pennsylvania Securities Commission, however, determined that it would not enforce the Pennsylvania Act against MITE's proposed tender offer. *Id.* Therefore, the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order. *Id.*

²¹ *Edgar v. MITE Corp.*, 102 S. Ct. at 2634.

²² *MITE Corp. v. Dixon*, 633 F.2d 486, 490 (7th Cir. 1980), *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982). The opinion of the district court in *MITE Corp. v. Dixon* is not reported.

During the interim period between the issuance of the preliminary and permanent injunctions, Chicago Rivet made an offer to purchase 40% of its outstanding shares at a price \$2.00 per share in excess of MITE's published tender offer. *Edgar v. MITE Corp.*, 102 S. Ct. at 2634. Chicago Rivet's offer was exempt from the requirements of the Illinois Act pursuant to the issuer exemption. *Id.*

²³ *MITE Corp. v. Dixon*, 633 F.2d at 490, *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

²⁴ *Id.* Following the district court's final judgment, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and each party was given 30 days to examine the books and records of Chicago Rivet. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2634 (1982). MITE agreed to either make a tender offer of \$31.00 per share by March 12, 1979 (which Chicago Rivet agreed not to oppose) or to withdraw from the acquisition. *Id.* On March 2, 1979, MITE announced its decision not to make a tender offer. *Id.*

²⁵ *MITE Corp. v. Dixon*, 633 F.2d at 488, *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

²⁶ *Id.* at 490-98.

²⁷ *Id.* at 503.

²⁸ *Id.* at 494.

those deemed by Congress appropriate for the protection of investors; and (4) provided for a lengthy pre-commencement notification delay, a requirement specifically rejected by Congress.²⁹ In dicta, the Seventh Circuit indicated that there may be valid state regulation which is supplementary and not contradictory to the Williams Act and its purposes.³⁰ The Illinois statute did not, however, rise to such a status.³¹ In addition to holding that the Illinois Act was preempted by the Williams Act, the Seventh Circuit held that the Illinois Act was invalid under the commerce clause.³² The basis of the court's holding was its application of the test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*³³ According to the Seventh Circuit, the *Pike* test requires that where a state indirectly regulates interstate commerce, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute.³⁴ The Seventh Circuit found the Illinois Act substantially obstructed interstate commerce without countervailing local benefit.³⁵

In *Edgar v. MITE Corp.*, the Supreme Court held that the Illinois Act constituted an indirect, yet impermissible, regulation of interstate commerce, thus affirming the Seventh Circuit's decision.³⁶ In so holding, the majority examined the benefits and burdens of the Illinois Act.³⁷ It then applied the *Pike* test and found that the Illinois Act "impose[d] a substantial burden on interstate commerce which outweigh[ed] its putative local benefits."³⁸ The Supreme Court's commerce clause holding was based on the state's indirect regulation of interstate commerce;³⁹ like the Seventh Circuit, the Supreme Court did not find a direct, and hence *prima facie* impermissible, regulation of interstate commerce.⁴⁰ In contrast to the Seventh Circuit's decision, however, the Supreme Court's majority holding did not declare the Illinois Act unconstitutional under the supremacy clause.⁴¹

The Supreme Court's decision in *Edgar v. MITE Corp.* will have a great impact on state tender offer regulation. This casenote will evaluate the nature of the role, if any, left by *MITE* for the states in the area of business takeover regulation. Part I of this casenote will review the statutory and judicial background of the *MITE* decision. First, the basic provisions of the Williams Act will be reviewed. Next, the theoretical justification for state jurisdiction in the field of business takeover regulation will be explored and the substance of

²⁹ *Id.* at 498-99.

³⁰ *Id.* at 503.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 500-02 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

³⁴ *Id.* at 500.

³⁵ *Id.* at 502.

³⁶ *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2641-43 (1982).

³⁷ *Id.* at 2641-42.

³⁸ *Id.* at 2642-43.

³⁹ *Id.* at 2641-43.

⁴⁰ See *infra* notes 209-32 and accompanying text.

⁴¹ See *infra* notes 242-57 and accompanying text.

state regulatory schemes will be outlined. Then, this casenote will examine pre-*MITE* judicial response to state business takeover statutes. Finally, the proposed Uniform Take-Over Act, the response of the North American Securities Administrators Association to pre-*MITE* judicial invalidation of state business takeover statutes, will be considered. After reviewing the historical backdrop to the *MITE* decision, part II of this casenote will take a closer look at the holding of *MITE*. Then, following a critique of that holding in part III, this casenote concludes in part IV that in *MITE* the Supreme Court effectively, although not explicitly, destroyed the states' ability to regulate business takeover attempts which are subject to regulation under the Williams Act.

I. PRE-*MITE* REGULATION OF TENDER OFFERS: STATUTORY AND JUDICIAL CLIMATE

A. *The Federal Approach: The Williams Act*

The Williams Act is a federal securities statute designed to protect investors who are confronted with a tender offer.⁴² Courts generally interpret the Act as embodying a market approach to investor protection.⁴³ The Act is structured to provide disclosure of relevant information to the investor by allowing both the offeror and the target company's management the opportunity to present their arguments fully and then to permit the investor to make his own choice.⁴⁴ Although the primary focus of the Act is disclosure, it also contains procedural rules designed to insure the fair treatment of a target company's shareholders once the tender offer proceeds.⁴⁵

Disclosure requirements are triggered in two circumstances. First, any person who acquires five percent or more of any class of equity securities of a company registered under the Securities Exchange Act of 1934 must file a schedule with the SEC, the relevant exchange, and the target company within ten days of reaching the five percent ownership level.⁴⁶ The schedule must include the amount and the source of funds used for the purchase, the filer's

⁴² See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977). See also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (purpose of Williams Act is to insure that shareholders confronted with a cash tender offer will not be required to respond without adequate information regarding qualification and intention of the offering party).

⁴³ See *supra* notes 5, 7 and 9. While the neutrality of the Williams Act, as between incumbent management and tender offeror, is widely recognized, the position of the SEC may be more aligned with the interests of the tender offeror. In labelling the SEC as "pro-takeover," one commentator pointed to the SEC-promulgated rule requiring corporations to disclose shark repellent amendments in their proxy statements. Boehm, *supra* note 12, at 660 (referring to SEC, Securities Exchange Act Rel. No. 34-15230 [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,748 (October 13, 1978)). Indeed, the SEC asserted that it will review all measures "designed to make the subject company unattractive as a potential target." *Id.* at ¶ 80,985.

⁴⁴ *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1276-77 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

⁴⁵ 15 U.S.C. § 78m(d) (1976 & Supp. V 1981). See 17 C.F.R. § 240.14d-6-.14d-7 (1982) for regulations promulgated under this section.

⁴⁶ 15 U.S.C. § 78m(d) (Supp. V 1981). See 17 C.F.R. § 240.13d-1(a) (1982).

identity and the extent of his holdings in the target company.⁴⁷ In addition, the acquirer must state the purpose of the purchase(s) and must reveal any plans the acquirer might have for major changes in the structure or operation of the company.⁴⁸ Second, the Act requires that those persons making a tender offer for a class of equity securities registered under the 1934 Act must file a disclosure document with the SEC, as well as any solicitation materials prepared in connection with the tender offer, if the tender offer would result in such person becoming the owner of more than five percent of that class of security.⁴⁹ This additional schedule provides for the disclosure of the acquirer's past transactions with the target company, and any other material information about the offeror.⁵⁰ The material facts include any possible antitrust or legal conflicts which might arise as a result of the tender offer.⁵¹ Portions of this additional filing are required to be sent to both the target company and its shareholders.⁵² The date of commencement of a tender offer, which triggers the required filing of the disclosure document is defined by an SEC rule which became effective in January, 1980.⁵³ Pursuant to this new rule, the public announcement by an offeror through a press release, newspaper advertisement or public statement which identifies the offeror, the target company, the offering price, and the number of shares constitutes the commencement of a tender offer.⁵⁴

In addition to disclosure requirements, the Williams Act includes procedural rules intended to protect target company shareholders once a tender offer goes forward.⁵⁵ The shareholder must be given a fifteen-day withdrawal period after acceptance of the offer.⁵⁶ Furthermore, a shareholder may withdraw if the offeror does not purchase the shares within sixty days from the date of the original tender offer.⁵⁷ If the aggregate number of shares tendered is greater than the number of shares desired by the offeror, the Act requires a pro-rata purchase of the shares tendered during the first ten days of the offer.⁵⁸ Any change in the terms of the offer, most notably the price, must be applied to

⁴⁷ 15 U.S.C. § 78m(d) (Supp. V 1981). See 17 C.F.R. § 240.13d-101 (1982).

⁴⁸ *Id.*

⁴⁹ 15 U.S.C. § 78n(d)(1) (1976). See 17 C.F.R. § 240.14d-3 (1982).

⁵⁰ 17 C.F.R. § 240.14d-100 (1982).

⁵¹ See *id.* § (5).

⁵² 15 U.S.C. § 78n(d) (1976). See 17 C.F.R. § 240.14d-3 (1982).

⁵³ 17 C.F.R. § 240.14d-2 (1982).

⁵⁴ 17 C.F.R. § 240.14d-2(b) (1982). This new definition of "commencement" of a tender offer produced a direct conflict with the recurrent state statute provisions requiring notification and waiting periods prior to the "commencement" of a tender offer. See Note, *A Response To Great Western*, *supra* note 12, at 880. See also Note, *New SEC Rules*, *supra* note 12, at 931 (glaring conflict between state advance notice provisions and new SEC rule on commencement of tender offer). It should be noted, however, that this rule was not in effect at the outset of the *MITE* controversy and hence is not relevant to the *MITE* decision.

⁵⁵ 15 U.S.C. § 78n(d) (1976).

⁵⁶ 17 C.F.R. § 240.14d-7(a)(1) (1982). The Williams Act initially provided for a seven-day withdrawal period (15 U.S.C. § 78n(d)(5) (1976)).

⁵⁷ 15 U.S.C. § 78n(d)(5) (1976).

⁵⁸ 15 U.S.C. § 78(d)(6) (1976). See 17 C.F.R. § 240.14d-8 (1982).

all tendering shareholders, even after they have tendered their shares.⁵⁹ Finally, the Act contains broad anti-fraud provisions.⁶⁰

The Williams Act, coupled with the SEC rules promulgated thereunder, is a comprehensive federal regulatory scheme. But because only tender offers for 1934 Act reporting companies are subject to the Williams Act requirements, not all tender offers are regulated by the federal scheme.⁶¹ Nevertheless, tender offers which come within the purview of the Williams Act are subject to broad disclosure, procedural and anti-fraud rules.

B. State Regulation: Jurisdictional Foundation and Statutory Schemes

1. Jurisdictional Foundation

In addition to the federal regulatory scheme, thirty-seven states also attempted to regulate tender offers by statute.⁶² The primary theoretical foundation for state jurisdiction in the field of business takeover regulation is the "internal affairs" doctrine. Traditionally, the internal affairs of a corporation are regulated by the state of incorporation.⁶³ A chartering state's right to regulate is based on the legal fiction that there is a contract between the corporation and the state granting the charter.⁶⁴ Thus, because of the states' traditional interest in the internal affairs of a corporation, state statutes generally govern shareholders' liability, validity of stock issues, ability to merge and effect other organic changes, election of directors, voting trusts and voting agreements, dividends, relative rights of shareholders, and duties of officers, directors, and controlling shareholders to the corporation and to its shareholders.⁶⁵ Proponents of the internal affairs doctrine as a legitimate jurisdictional base for state tender offer regulation argue that a successful tender offer will effect a change in corporate control, as well as in the make-up of the directors and their

⁵⁹ 15 U.S. § 78n(d)(7) (1976).

⁶⁰ 15 U.S.C. § 78n(e) (1976). For an analysis of a tender offeror's standing to sue under Regulation 14(e) (17 C.F.R. § 240.14e-1 to -3 (1982)), see Note, *Standing Under Section 14(e) Of The Securities Exchange Act Of 1934: May A Tender Offeror Sue For Injunctive Relief?*, 8 FORDHAM URB. L.J. 405 (1979-1980).

⁶¹ The Williams Act covers only tender offers made for equity securities of a company registered pursuant to the Securities Exchange Act of 1934. Any security traded on a national securities exchange must be registered pursuant to section 12(a) of the 1934 Act. 15 U.S.C. § 78l(a)(1976). In addition, section 12(g)(1) of the 1934 Act requires registration of any company with over one million dollars in assets and over 750 shareholders of a class of equity securities. 15 U.S.C. § 78l(g) (1976). The SEC has issued a rule which exempts issuers from filing pursuant to section 12(g) if on the last day of the most recent fiscal year, the issuer had total assets not exceeding three million dollars. 2 FED. SEC. L. REP. (CCH) ¶ 23, 292.

⁶² See *supra* note 6.

⁶³ Note, *A Response To Great Western*, *supra* note 12, at 931.

⁶⁴ *Id.* at 932.

⁶⁵ Shipman, *supra* note 12, at 742. See also, e.g., MODEL BUSINESS CORPORATION ACT, ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION (1979), § 25 (Liability of Subscribers and Shareholders), § 33 (Voting of Shares), § 34 (Voting Trusts and Agreements Among Shareholders), § 36 (Number and Election of Directors), and §§ 71-77 (Merger and Consolidation).

governing policies.⁶⁶ It is further argued under the internal affairs doctrine that a chartering state should regulate tender offers because a successful tender offer may diminish the influence of certain shareholders.⁶⁷ Proponents of the doctrine recognize, however, that it does not neatly apply in all respects to tender offer regulation.⁶⁸ For example, the corporate action which contractually binds all shareholders in corporate structural changes such as mergers, consolidations and liquidations is noticeably absent from the circumstances surrounding a tender offer.⁶⁹ Yet, these proponents of state business takeover statutes do not feel that tender offers are so different from other matters affecting the internal affairs of corporations that they are not properly subject to state regulation.⁷⁰

A second justification offered to support state tender offer regulation is protection of resident security holders. In fostering this protective goal, state tender offer statutes arguably are like state blue sky laws.⁷¹ This policy justification is weak, however, as the state interest underlying business takeover statutes is distinguishable from that underlying state blue sky laws.⁷² The jurisdictional base for blue sky laws is limited to shareholder situs within the state.⁷³ The Supreme Court has held that the purpose of blue sky laws is the prevention of fraud in the sale and disposition of securities sold or affected in the state.⁷⁴ In dismissing the effect of blue sky laws on interstate commerce, the Supreme Court observed that, in its opinion, such laws affected interstate commerce only incidentally.⁷⁵ Blue sky laws touch the securities only after they were in the hands of resident dealers.⁷⁶ In contrast, state business takeover statutes apply of necessity to securities both within and without the state.⁷⁷ Thus, courts have viewed the rationale underlying the Supreme Court's acceptance of state blue sky laws as inapplicable to state business takeover laws.⁷⁸

A final and often advanced justification for state involvement in the tender offer area is the so-called "laboratory argument." Advocates of state tender offer regulation maintain that the state provides a valuable laboratory for the institution and trial of regulation of securities.⁷⁹ This laboratory analysis,

⁶⁶ See, e.g., Shipman, *supra* note 12, at 744.

⁶⁷ *Id.* at 744-45.

⁶⁸ *Id.* at 744.

⁶⁹ *Id.*

⁷⁰ *Id.* at 744-45.

⁷¹ Wilner & Landy, *supra* note 12, at 16.

⁷² See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

⁷³ *Id.*

⁷⁴ Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 564 (1917).

⁷⁵ Hall v. Geiger-Jones, 242 U.S. at 559.

⁷⁶ *Id.*

⁷⁷ Wilner & Landy, *supra* note 12, at 16.

⁷⁸ See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

⁷⁹ See, e.g., Shipman, *supra* note 12, at 760.

however, has limitations. Courts are cautious in relying on it, and in so doing stress the importance of non-interference by the states in areas that touch the nation as a whole.⁸⁰

In summary, the most sound reasoning put forth to explain the propriety of state business takeover statutes is that tender offers so involve the internal affairs of a corporation that the chartering state has a legitimate interest in regulating such offers. Moreover, the not insignificant number of proponents of state business takeover statutes support their positions principally on the internal affairs doctrine.⁸¹ While other justifications for state involvement in the area have been advanced,⁸² they are merely supplementary. Classifying tender offers as an internal corporate affairs matter, then, is critical to a finding that state regulation of tender offers is constitutionally permissible.

2. Statutory Schemes

Thirty-seven states have attempted to regulate tender offers by statute.⁸³ While varying significantly in content and complexity, these state business takeover statutes possess certain common characteristics.⁸⁴ Each state statute addresses most, if not all, of the following key issues: jurisdiction, disclosure requirements, waiting periods, state regulatory authority involvement, fairness determinations, exemptions, uniform treatment of stockholders, pro rata take-up, price increases, injunctive relief, and civil and criminal liability.⁸⁵

Jurisdiction of state business takeover statutes is generally invoked on the basis of a combination of several factors. A statute's application will depend on whether the target company is incorporated within the state, has its principal place of business in the state, and/or has substantial assets in the state.⁸⁶ The provisions of the Illinois Act, for example, are applicable to any tender offer for

⁸⁰ Justice Brandeis cautioned that such experimentation should be without risk to the rest of the country. *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1287 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (citing *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932): "The states in our federal system have long served as laboratories of social experiment—free, within limits to evolve strategies of their own to meet pressing problems. State prerogatives, however, must remain necessarily circumscribed by the unifying requirements of the national authority as fixed in the Constitution."). *MITE Corp. v. Dixon*, 633 F.2d 486, 488 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

⁸¹ *See, e.g., McCauliff, supra note 12, at 304; Sargent, supra note 12, at 724; Shipman, supra note 12, at 750. See also infra note 82.*

⁸² There is a school of thought which advocates regulation, not by the state of incorporation, but rather by the state where the target company's principal place of business is located (Note, *How Much is Constitutional?*, *supra note 12, at 672*) or that such states should have rights in addition to those of the state of incorporation. (Boehm, *supra note 12, at 757; Shipman, supra note 12, at 753-54.*) The theory behind such a jurisdictional base is that the state where the business is located has the greatest interest in the affairs of the corporation.

⁸³ *See supra note 6.*

⁸⁴ Note, *A Response To Great Western, supra note 12, at 880-81.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 881.

which two or more of the following conditions are met: (1) the corporation has its principal executive offices in Illinois, (2) is organized under Illinois laws, or (3) has ten percent of its stated capital and paid-in surplus represented in Illinois.⁸⁷ Many states use the Illinois criteria,⁸⁸ although jurisdiction based on assets located in the state may require more than the minimal ten percent of capital and paid-in surplus contained in the Illinois Act.⁸⁹

Another feature common to numerous state statutes is a pre-commencement notification provision⁹⁰ similar to that of the Illinois Act challenged in *MITE*. The Illinois Act provision required the offeror to notify the target company and the state securities authority of its intent to make an offer and the material terms of such offer twenty business days prior to its effective date.⁹¹ During the twenty-day period before the offer was allowed to proceed, the target company could disseminate information to its shareholders concerning the offer, while the offeror was barred from any such communication.⁹²

Many state statutes also address the role of the state administrative authority in regulating tender offers. The extent of state authority involvement, however, varies from state to state. In some states, statutes limit hearings to determination of whether the standard of "full and fair disclosure" has been met by the tender offeror,⁹³ while in others, the state security department is authorized to conduct substantive hearings on the fairness of proposed tender offers.⁹⁴ The Illinois Act, for example, confers power on the Secretary of State to call a hearing with respect to any tender offer subject to the Act.⁹⁵ Furthermore, it gives ten percent shareholders of the target company the right to require the Secretary to call a hearing upon their request.⁹⁶ The offer may not commence until the hearing is completed; however, there is no deadline for its completion.⁹⁷ The Illinois Act mandates that the Secretary of State deny registration of a takeover if he finds that it "fails to provide full and fair disclosure or that the takeover is inequitable."⁹⁸ In addition to providing for a

⁸⁷ ILL. REV. STAT., ch. 121 1/2, § 137.52-10 (Smith-Hurd Supp. 1982-1983).

⁸⁸ See Note, *A Response To Great Western*, *supra* note 12, at 882.

⁸⁹ See, e.g., N.J. STAT. ANN. § 49:5-2.m (West Supp. 1982-1983) (New Jersey Corporation Takeover Bid Disclosure Law regulates tender offers for any target company which is organized under the laws of New Jersey, has its principal place of business in the state or a "substantial portion of its total assets" in New Jersey).

⁹⁰ See, e.g., *id.* § 49:5-3.a; IDAHO CODE § 30-1503(4) (Supp. 1982). Colorado mandates a ten-day waiting period. COLO. REV. STAT. § 11-51.5-104(1) (Supp. 1982).

⁹¹ ILL. REV. STAT., ch. 121 1/2, §§ 137.54.B, 137.54.E (Smith-Hurd Supp. 1982-1983).

⁹² *Id.* § 137.54.A. It should be noted that these pre-commencement notification provisions have been preempted by SEC rules promulgated after the commencement of the *MITE* controversy. See *supra* notes 53 — 54 and accompanying text. See *infra* note 291.

⁹³ See, e.g., OHIO REV. CODE ANN. § 1707.041(B)(4) (1979).

⁹⁴ See, e.g., N.J. STAT. ANN. § 49:5-4 (West Supp. 1982-1983).

⁹⁵ ILL. REV. STAT. ANN., ch. 121 1/2, § 137.57.A (Smith-Hurd Supp. 1982-1983).

⁹⁶ *Id.*

⁹⁷ *Id.* § 137.57.

⁹⁸ *Id.* § 137.57.E.

hearing, some states also detail the inquiries to be made by the state regulatory authority.⁹⁹ The hearing provision of the New Jersey Corporation Takeover Bid Disclosure Law,¹⁰⁰ for example, was interpreted by the New Jersey state securities bureau chief to permit inquiry into the financial condition of the offeror, the effect of the acquisition on the financial stability of the offeror, the fairness of the terms of the offer, the plans of the offeror, if any, to alter the target company's business or corporate structure (including plans to close the target's New Jersey operations) and the economic integrity of those who would control the target company if the offer were successful.¹⁰¹

Exemptions from regulation by the various state statutes are numerous and, again, are varied.¹⁰² The most controversial recurring provision is the "friendly offer exemption," which exempts from coverage a tender offer approved by incumbent management.¹⁰³ Other transactions frequently exempted by state statutes are offers made by an issuer to acquire its own shares,¹⁰⁴ offers exempted by rule or order of state securities authorities,¹⁰⁵ offers that would result in the acquisition of less than two percent of any class of the target's equity securities,¹⁰⁶ ordinary brokers' transactions¹⁰⁷ and certain registered exchange offers.¹⁰⁸

Many state business takeover statutes also contain procedural rules on uniform treatment of stockholders, pro-rata take-up and price increases. Once a takeover bid is allowed to proceed, these rules become operative. Some state statutes follow the federal approach,¹⁰⁹ requiring a ten-day pro-rata purchase period,¹¹⁰ while others provide a longer period.¹¹¹ Similarly, some states¹¹² extend the right of withdrawal past the fifteen days mandated by federal regulations.¹¹³ With respect to price increases which occur over the course of the

⁹⁹ See, e.g., N.J. STAT. ANN. § 49:5-4 (West Supp. 1982-1983).

¹⁰⁰ *Id.*

¹⁰¹ *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1215 (D.N.J. 1981).

¹⁰² Wilner & Landy have identified fourteen specific types of exemptions in state business takeover statutes. Wilner & Landy, *supra* note 12, at 5-8.

¹⁰³ *Id.* at 6. One survey, which reviewed the twenty-three state business takeover statutes in existence at the end of 1976, found that all but four of the then existing statutes contained some form of friendly offer exemption. Langevoort, *supra* note 12, at 225. See, e.g., OHIO REV. CODE ANN. § 1701.041(A)(1)(d) (Baldwin 1982).

¹⁰⁴ Wilner & Landy, *supra* note 12, at 6. See, e.g., ILL. REV. STAT. ANN., ch. 121 1/2, § 137.52-9(4) (Smith-Hurd Supp. 1982-1983). Federal regulations also exempt such transactions by virtue of the definition of "bidder," which excludes the issuer. 17 C.F.R. § 240.14d-1(b)(1) (1982).

¹⁰⁵ Wilner & Landy, *supra* note 12, at 6.

¹⁰⁶ See, e.g., COLO. REV. STAT., § 11.51.5-102(5)(a) (Supp. 1982).

¹⁰⁷ Wilner & Landy, *supra* note 12, at 7.

¹⁰⁸ *Id.*

¹⁰⁹ 15 U.S.C. § 78n(d)(6) (1976). See 17 C.F.R. § 240.14d-8 (1982).

¹¹⁰ See, e.g., S.D. COMP. LAW ANN. § 47-32-34 (Supp. 1982).

¹¹¹ See, e.g., MASS. GEN. LAWS ANN. ch. 110C, § 7 (Michie Law Co-op Supp. 1982) (requirement of pro-rata take-up is applicable during the entire tender offer).

¹¹² See, e.g., *id.* (securities may be withdrawn up to five days prior to announced termination date of the tender offer).

¹¹³ 17 C.F.R. § 240.14d-7 (1982).

tender offer, state statutes generally conform to the Williams Act approach¹¹⁴ — giving to all shareholders tendering their shares the right to the increased price.¹¹⁵ Enforcement sanctions in the state statutes typically provide for injunctive relief.¹¹⁶

Finally, there is a novel approach adopted by some states to regulate a “creeping tender offer.”¹¹⁷ “Creeping tender offer” is a term coined to describe the gradual accumulation of shares at market price through open market purchases.¹¹⁸ The Massachusetts provisions governing creeping tender offers, for instance, prohibit the owner of five percent of any class of equity securities, any of which have been purchased in the previous year, from making a takeover bid if the offeror did not publicly announce his intent to gain control of the target company.¹¹⁹ Practically speaking, if a tender offeror has not announced his “intent to control,”¹²⁰ he will be barred from making a tender offer for one year after his intention is made public.¹²¹ At present, creeping tender offers are not regulated by the Williams Act.

In summary, state business takeover statutes are detailed and comprehensive. While the state regulatory schemes follow the general outline of the Williams Act in most respects, they extend investor protections further than does the Williams Act. Moreover, certain state provisions, most notably those permitting or requiring state regulatory authority to conduct hearings on proposed tender offers, differ significantly from the federal requirements. Hence, the dual regulation of tender offers is an area ripe for conflict.

C. *Pre-MITE Judicial Response to State Business Takeover Statutes*

1. Preemption

When confronted with a constitutional attack on a state business takeover statute, the courts generally have applied a preemption analysis first.¹²² The

¹¹⁴ 15 U.S.C. § 78n(d)(7) (1982).

¹¹⁵ See, e.g., IDAHO CODE § 30-1506(3) (1980).

¹¹⁶ See, e.g., *id.* § 30-1509.

¹¹⁷ See, e.g., MASS. GEN. LAWS ANN. ch. 110C, § 3 (Michie Law Co-op. Supp. 1982); VA CODE § 13.1-529(b)(iii) (Supp. 1982).

¹¹⁸ FED. SEC. & L. REP. (BNA), No. 628, 11/11/81 at B-2. One court, borrowing from defendant's brief advanced the following definition:

A creeping tender offer is an acquisition strategy where, by achieving a substantial position in a company through open market purchases, an acquiring company can achieve a blocking position which enables them to purchase the remaining shares by tender or exchange offer at a cost that would be substantially less than if a formal tender offer had been made earlier.

Televest, Inc. v. Bradshaw (E.D. Va. September 29, 1982), [current] FED. SEC. L. REP. (CCH) ¶ 99,044.

¹¹⁹ MASS. GEN. LAWS ANN. ch. 110C, § 3 (Michie Law Co-op. Supp. 1982).

¹²⁰ For a discussion of the standard of “intent to control,” see *The Massachusetts Corporate Take-Over Statute*, J. SMITH & Z. CAVITCH, MASSACHUSETTS CORPORATION LAW ch. 14A, 14A-31 (1982).

¹²¹ For a case litigating the matter, see *Agency Rent-a-Car, Inc. v. Spencer Cos.*, 686 F.2d 1029 (1st Cir. 1982).

¹²² See, e.g., *MITE Corp. v. Dixon*, 633 F.2d 486, 490 (7th Cir. 1980), *aff'd sub nom.*

preemption doctrine, founded on the supremacy clause of the Constitution, applies in at least three contexts.¹²³ First, preemption may occur because a state's statute comes into direct conflict with a federal law. In such cases, where compliance with both a federal and a state regulation is an impossibility, it is well-settled that the state statute is void to the extent of the conflict.¹²⁴ Second, preemption also may occur at the express direction of Congress,¹²⁵ because federal regulation represents a pervasive scheme,¹²⁶ or because federal interest in the subject matter is so dominant as to dictate supremacy of the federal regulation.¹²⁷ Finally, a state statute may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹²⁸

Prior to *MITE*, challenges mounted against state business takeover statutes were not based on the impossibility of complying with both state and federal regulations.¹²⁹ Neither was it strongly argued that Congress intended to occupy the entire field.¹³⁰ Indeed, parties and commentators alike usually con-

Edgar v. MITE Corp., 102 S. Ct. 2629 (1982).

¹²³ U.S. CONST. art. VI, cl. 2 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 the 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.

Id.

¹²⁴ See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

¹²⁵ See *id.* at 142 (preemption of state regulatory power when the nature of the regulated subject matter permits no other conclusion or where Congress has unmistakably so ordained). See also Jones v. Rath Packing Co., 430 U.S. 519, 530-32 (1976) (Federal Meat Inspection Act expressly preempts certain standards which are in addition to or different than those of the Act).

¹²⁶ See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (United States Warehouse Act eliminated dual regulation and substituted regulation by a single agency to achieve fair and uniform business practices). See also Hines v. Davidowitz, 312 U.S. 52, 74 (1941). (Federal Alien Registration Act of 1940 provided a "single integrated and all-embracing system" and preempted state law).

¹²⁷ See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639-40 (1973) (city ordinance limiting hours of air traffic preempted by need for uniform and exclusive system of federal regulation to fulfill congressional objectives under Federal Aviation Act).

¹²⁸ Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

¹²⁹ See Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1275 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

¹³⁰ The savings clause of section 28(a) of the Williams Act reads: "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1976). There has been debate as to whether this savings clause was intended to apply only to state blue sky laws, or whether it was also designed to sanction a form of state business takeover statute which had been passed in a sole state nearly simultaneously with the Williams Act. (Virginia enacted the first state business takeover statute just four months prior to the passage of the Williams Act. VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982)). Despite this debate, section 28(a) is generally interpreted broadly. Thus, the section is viewed as reserving to states some powers in securities regulation beyond the blue sky area. For instance, the Brief for the United States Amicus Curiae for MITE Corporation summarized the position of the Department of

cede that Congress did not intend to occupy the entire field.¹³¹ Rather, the heart of the preemption debate is whether a particular state's business takeover statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"¹³² in its adoption of the Williams Act.¹³³

The interpretation of the legislative intent underlying the Williams Act is necessarily the focal point of the preemption discussion. Cases and commentators split on this subject based on their analyses of the Supreme Court's decision in *Piper v. Chris-Craft Industries, Inc.*¹³⁴ In *Piper*, the Court addressed whether an unsuccessful tender offeror had an implied cause of action for damages under the Williams Act provision adding section 14(e) to the Securities and Exchange Act of 1934.¹³⁵ In holding that no such private right of action existed, the Supreme Court stated that the sole purpose of the Williams Act was the protection of investors confronted with a tender offer.¹³⁶ This statement forms the foundation of the defense articulated by protectors of state business takeover statutes.¹³⁷ In contrast, those who advocate preemption of existing state business takeover statutes do so on the premise that these state statutes, as presently constituted, frustrate the Williams Act's policy of neutrality towards incumbent management and the offeror. Such proponents of preemption argue that a state takeover statute is a powerful tool in the hands of management which aids in the defeat of a tender offer.¹³⁸ This position was espoused by the Seventh Circuit in *MITE Corp. v. Dixon*, where it stated that

Justice:

We do not, of course, contend that the federal government has occupied the entire field of securities regulation or that the states have no role to play . . . Thus, the Illinois statute is not invalid simply because it regulates tender offers, but rather because it regulates them in a way that conflicts with the Williams Act and frustrates the accomplishment of its objectives.

Brief for the United States Amicus Curiae at 10, *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982). 6 SECURITIES REGULATION SERIES (BNA), No. 3 1981/1982 Term, at 50.

¹³¹ The Supreme Court has noted that section 28(a) of the Securities and Exchange Act of 1934 "was plainly intended to protect, rather than to limit, state authority," *Leroy v. Great W. United Corp.* 443 U.S. 173, 182 (1979), and further that "[c]ongress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation." *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 137 (1973).

¹³² *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹³³ *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1275 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

¹³⁴ 430 U.S. 1 (1977) (sole purpose of Williams Act was the protection of investors). *See, e.g., MITE Corp. v. Dixon*, 633 F.2d 486, 495 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); *see also, e.g., Note A Response to Great Western, supra* note 12, at 914-15.

¹³⁵ 430 U.S. 1, 4 (1977).

¹³⁶ *Id.* at 35.

¹³⁷ *See, e.g., MITE Corp. v. Dixon*, 633 F.2d 486, 495-96, 495 n.21 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982). *See also, e.g., Sargent, supra* note 12, at 713 (departure from neutrality would not, according to this school of thought, necessarily create a basis for preemption).

¹³⁸ *MITE Corp. v. Dixon*, 633 F.2d at 495, *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

the Illinois Act disrupted the neutrality essential to the proper operation of the Williams Act's federal market approach.¹³⁹

Many courts and commentators have deemed state business takeover statutes unconstitutional on preemption grounds.¹⁴⁰ No less than eleven state statutes have been preempted because they frustrate the market approach adopted by the Williams Act.¹⁴¹ The key element in the wave of preemption holdings and supporting commentaries is the potential for delay and frustration of a tender offer by incumbent management's defensive use of state business takeover statutes.¹⁴² The hearing requirement is the most offensive of the state statutory provisions.¹⁴³ Typical of the approach taken by courts in striking down these state statutes on preemption grounds was that taken by the federal district court in *Kennecott Corp. v. Smith*.¹⁴⁴ There the court held that the New Jersey corporate takeover law, which could be invoked unilaterally by target management, aided incumbent management and prevented or impeded investors from exercising their right to accept a favorable tender offer.¹⁴⁵ Furthermore, the *Kennecott* court opined, the provisions of the New Jersey statute delayed and obstructed tender offers, substituted state regulatory view of the offer for the informed judgment of shareholders, burdened offerors with unnecessary and improper disclosure requirements and delayed completion of an offer through proration and withdrawal provisions which conflicted with the Williams Act.¹⁴⁶

A few courts have upheld and commentators supported state business takeover statutes in the face of preemption attacks.¹⁴⁷ The basic premise of

¹³⁹ *Id.* (citing *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982)).

¹⁴⁰ See articles and notes cited *supra* note 12.

¹⁴¹ See *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (New Jersey); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982) (Illinois); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (Idaho); *Canadian Pac. Enters., Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981) (Ohio); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania); *Kelly ex rel. McLaughlin v. Beta-X Corp.*, 302 N.W.2d 596 (Mich. Ct. App. 1981) (Michigan); *Natomas Co. v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981) (Nevada); *Seagram & Sons, Inc. v. Marley*, [current] FED. SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. 1981) (Oklahoma); *Dart Indus., Inc. v. Conrad*, 452 F. Supp. 1 (S. D. Ind. 1980) (Delaware); *Hi-Shear Indus., Inc. v. Campbell* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. 1980) (South Carolina); *Hi-Shear Indus., Inc. v. Neiditz* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,805 (D. Conn. 1980) (Connecticut); *Brascan Ltd. v. Lassiter*, [current] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. 1979) (Louisiana).

¹⁴² See, e.g., *MITE Corp. v. Dixon*, 633 F.2d at 493 (7th Cir. 1980), *aff'd sub nom.* *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

¹⁴³ *Id.*

¹⁴⁴ 507 F. Supp. 1206 (D.N.J. 1981).

¹⁴⁵ *Id.* at 1218.

¹⁴⁶ *Id.*

¹⁴⁷ *Strode v. Esmark, Inc.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd in part and rev'd in part*, 639 S.W.2d 768 (Ky. 1982); *Televest, Inc. v. Bradshaw*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,154 (E.D. Va. 1979), *vacated* 618

those who assert the constitutionality of state tender offer regulation is that the Williams Act neutrality argument advanced by the preemptionists goes beyond the Supreme Court's opinion in *Piper v. Chris-Craft Industries, Inc.*¹⁴⁸ In support of their position, state statute advocates point to the Court's language in *Piper* which identified the policy of neutrality as a characteristic, but not a purpose, of the Williams Act.¹⁴⁹ Thus, they argue, in the absence of a direct conflict, state statutes are not constitutionally infirm simply because they employ techniques different from those in the federal scheme.¹⁵⁰ The proponents of this position are, however, in the minority.¹⁵¹ The trend prior to the Supreme Court's decision in *MITE* was to strike down state business takeover legislation on, *inter alia*, preemption grounds.¹⁵²

2. Commerce Clause

Courts faced with constitutional challenges to state business takeover statutes turned to the commerce clause issues following completion of a preemption analysis. The commerce clause permits only incidental state regulation of interstate commerce; direct regulation is prohibited.¹⁵³ That regulation of tender offers has at least some impact on interstate commerce is indisputable. Courts addressing this issue focus on the incidental, rather than the direct, state regulation of interstate commerce.¹⁵⁴ Within the area of incidental regulation the commerce clause requires the state interests served by the state's interference in interstate commerce to be legitimate,¹⁵⁵ and to outweigh the burdens imposed on interstate commerce.¹⁵⁶ State regulations not meeting these standards are constitutionally impermissible.

F.2d 1029 (4th Cir. 1980). (But see *infra* note 281 and accompanying text for further developments in these cases). See also Boehm, *supra* note 12, at 747-52; Sargent, *supra* note 12, at 703-20.

¹⁴⁸ 430 U.S.1 (1970).

¹⁴⁹ *Id.* at 29 ("Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go to . . . the purpose of the legislation . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose — the protection of investors.").

¹⁵⁰ *Televest, Inc. v. Bradshaw*, 618 F.2d 1029, 1035-36 (4th Cir. 1980).

¹⁵¹ See Sargent, *supra* note 12, at 713, & nn.160-61.

¹⁵² See *supra* note 141. See also Sargent, *supra* note 12, at 713 (most courts prior to *MITE* found that one or more state statutes provisions created an obstacle to the accomplishment of congressional purpose).

¹⁵³ See *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199-200 (1925) (commerce clause invalidation of North Dakota statute which asserted control over the trading of wheat, 90% of which was destined for interstate shipment). In that case the Court differentiated between indirect and direct regulation of interstate commerce and said of the latter: "a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose for which it is enacted."

¹⁵⁴ See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); see also e.g., *MITE Corp. v. Dixon*, 633 F.2d 486,500-02 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

¹⁵⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143-44 (1970).

¹⁵⁶ *Id.* at 145-46.

The jurisdictional base, a key element of state business takeover statutes, was the focus of considerable court examination. Courts consistently attacked the broad extraterritorial reach of the state statutes and invalidated the statutes on the basis of their "global" impact.¹⁵⁷ The heart of the lower courts' commerce clause holdings was the failure of these state statutes to satisfy the test first enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*,¹⁵⁸ which requires the balancing of benefits of the state regulation with the burdens it imposes on interstate commerce.¹⁵⁹ In the courts' view, the burdens the statutes placed on interstate commerce were of great consequence. Repeatedly, courts identified the magnitude of the transactions which would be blocked by the state business takeover statutes. Thus, in *Great Western United Corp. v. Kidwell*,¹⁶⁰ the Fifth Circuit found that enforcement of the Idaho statute "not only had a substantial impact on interstate commerce, [but] it stopped over 31 million dollars in interstate commerce."¹⁶¹ Similarly, the application of the Delaware Act in *Dart Industries, Inc. v. Conrad*¹⁶² was found to delay the transaction so as to stop over 215 million dollars in transactions, "thereby interrupting the free flow of interstate commerce."¹⁶³ The lower court decisions consistently relied on the dollar value of the tender offer as a barometer of state interference with interstate commerce.

In analyzing the burdens imposed by the state statutes, courts also addressed conflict of laws problems presented by multiple state regulation. While courts articulate concern over the possibility that a tender offeror may be required to comply with varying and perhaps conflicting state statutes,¹⁶⁴ this concern in and of itself is not responsible for the invalidation of the state statutes. Rather it has served to further the argument that the extraterritorial reach renders the statutes invalid.¹⁶⁵

Following an examination of the burdens imposed by the state statutes on interstate commerce, courts next scrutinize the state interests in regulating tender offers and the concurrent benefits thereof. The broad jurisdictional base of the statutes has been a critical flaw in arguments supporting the constitutional validity of the state statutes in the face of commerce clause challenges. The multi-pronged jurisdictional provisions of state statutes, such as that of Il-

¹⁵⁷ See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1281-82 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

¹⁵⁸ 397 U.S. 137 (1970).

¹⁵⁹ See, e.g., *MITE Corp., v. Dixon*, 633 F.2d 486, 500-02 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

¹⁶⁰ *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

¹⁶¹ *Id.* at 1284 (emphasis in original).

¹⁶² 462 F. Supp. 1 (S.D. Ind. 1978).

¹⁶³ *Id.* at 11.

¹⁶⁴ See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1284 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

¹⁶⁵ *Id.*

linois,¹⁶⁶ repeatedly have been held to be inconsistent with the internal affairs justification to the extent that the statutes attempt to govern corporations other than those chartered by the regulating state. Several lower courts have seized upon this inconsistency in invalidating state business takeover statutes under the commerce clause, stating that the broad extraterritorial reach of the jurisdictional base undermines the state's articulated interest in regulating the affairs of its domestic corporations.¹⁶⁷ The great majority of cases prior to *MITE* involved state statutes with an expansive jurisdictional base and, thus, courts did not focus on the merit of the internal affairs doctrine as a jurisdictional foundation for these statutes. To the extent that a state statute restricts its coverage to those corporations organized under its laws, however, there is limited pre-*MITE* authority sanctioning state regulation on an internal affairs theory.¹⁶⁸

In addition to examining the states' interests in corporate takeover regulation, courts have closely scrutinized the purported benefits of the state statutes. The courts, for the most part, have held that the additional benefits gained by the minimal increase in information and time, and other benefits, are "speculative."¹⁶⁹ In fact, one court noted that the additional disclosure required by a state statute might confuse, rather than aid, investors.¹⁷⁰ When coupled with the finding that states' interests are also parochial and protective in nature,¹⁷¹ the dubious increase in protection afforded investors has generally led courts to hold that the state statutes, as then constituted, do not pass muster under the *Pike* balancing test.¹⁷² One court in essence reached a direct commerce clause holding in declining to reach the *Pike* test because it found the statute did not "evenhandedly effectuate a legitimate local interest with only incidental effects on interstate commerce."¹⁷³

In sum, the federal courts prior to *MITE* consistently struck down existing state regulation of tender offers. Invalidation of state tender offer statutes was based for the most part on both preemption and commerce clause grounds. The emphasis of the lower court decisions, however, was overwhelmingly placed on the threshold question of preemption, rather than on the commerce

¹⁶⁶ ILL. REV. STAT., ch. 121 ½ § 137.52-10 (Smith-Hurd Supp. 1982-1983).

¹⁶⁷ See, e.g., *MITE Corp. v. Dixon*, 633 F.2d 486, 501-02 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 11 (S.D. Ind. 1978).

¹⁶⁸ *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338, 349 (Del. Ch. 1980).

¹⁶⁹ *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1285-86, *rev'd on grounds of improper venue sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *MITE Corp. v. Dixon*, 633 F.2d 486, 500 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978).

¹⁷⁰ See *Great W. United Corp. v. Kidwell*, 577 F.2d at 1285.

¹⁷¹ See, e.g., *id.* at 1282. The statutes are viewed by many as "thinly disguised attempts to protect incumbent management of local industries." E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 230 (1977).

¹⁷² See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d at 1286.

¹⁷³ *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1223 (3d Cir. 1980).

clause. The commerce clause holdings of the lower courts focused primarily on the extraterritorial jurisdiction of the state regulation. Absent a preemption holding many decisions, either implicitly or explicitly, left open the possibility of more narrowly drawn state statutes in the area of tender offer regulation.

D. *Proposed Uniform Take-Over Act*

In an attempt to respond to lower court invalidation of state business takeover statutes, the North American Securities Administrators Association, Inc. (NASAA) proposed the Uniform Take-Over Act (Uniform Act).¹⁷⁴ NASAA, an organization comprised of state securities officials from across the country, proposed the Uniform Act to provide a model which would foster uniformity in state regulation of securities while still providing an effective state presence.¹⁷⁵

The Uniform Act takes as its premise that the regulation of takeovers is properly and legitimately within the purview of the state's authority as a matter of corporate law.¹⁷⁶ Thus, of crucial import to the validity of the proposed Uniform Act is the legitimacy of the internal affairs doctrine. Indeed, the proposed Uniform Act attempts to avoid one of the fatal flaws of the Illinois Act — its broad extraterritorial impact — by restricting a state's jurisdiction to tender offers for shares of a company which is incorporated in the state adopting the Uniform Act.¹⁷⁷ Further, the proposed Uniform Act's jurisdictional section contains a discretionary provision which, if adopted, gives a state securities administrator the power to tailor further the Act's jurisdictional scope.¹⁷⁸ Pursuant to this provision, the administrator may specify additional criteria, such as a number or percentage of offerees residing in the state, which must be met before the Act's provisions will apply.¹⁷⁹ Thus, the NASAA proposal attempts to avoid the pitfalls of overly broad jurisdiction that had previously resulted in the invalidation of state business takeover statutes.

NASAA also addressed a second important and often constitutionally fatal group of provisions of state business takeover statutes — exemptions from the Act's requirements. Courts have viewed exemptions as important in discerning the evenhandedness of the state regulation. Thus, the drafters of the Uniform Act responded to judicial and scholarly criticism by omitting the "friendly offer" exemption.¹⁸⁰ This exemption, incorporated in many invalidated state business takeover statutes, excludes from coverage takeover bids approved by the management of the target corporation.¹⁸¹ While the "friendly offer" ex-

¹⁷⁴ *NASAA Tender Offer Proposals*, SEC. REG. & L. REP. (BNA), No. 626, 10/28/81, G-1 to G-6 [hereinafter cited as *NASAA Tender Offer Proposals*].

¹⁷⁵ *Id.* at G-1 (Report of the Tender Offer Committee of the NASAA).

¹⁷⁶ *Id.* (Report of the Tender Offer Committee of the NASAA).

¹⁷⁷ *Id.* at G-3 (Uniform Act, § 3(k)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at G-1 (Report of the Tender Offer Committee of the NASAA).

¹⁸¹ *See supra* text accompanying note 103.

emption was omitted from the NASAA proposal, certain other tender offers are eligible for exemption from the proposed legislation's requirements.¹⁸²

The proposed Uniform Act requires a registration statement from any person who makes a takeover offer which, if accepted, would result in the offeror becoming directly or indirectly the owner of more than five percent of a class of equity securities of a company.¹⁸³ The registration statement must make a full, fair and effective disclosure of all material facts necessary for a shareholder to make an informed decision concerning the takeover offer.¹⁸⁴ The disclosures required are detailed and are similar to those required on the federal level.¹⁸⁵ One additional element of the proposed Uniform Act's registration statement not required by federal regulation, however, is a description of any tender offer made by the offeror in the past five years and of any acquisition of another business made by the offeror in the last five years, as well as any material change in the organization or operation of such business.¹⁸⁶

In addition to the jurisdictional and disclosure provisions, the proposed Uniform Act contains a section governing enforcement of the Act's requirements through hearings and administrative action.¹⁸⁷ The major substantive difference between the hearing provisions in the Uniform Act and those in the various state statutes held to be preempted is the articulated goal of such hearings. The hearings conducted pursuant to the Uniform Act are to ensure only full and fair disclosure in complying with the Act's registration requirements,¹⁸⁸ whereas the invalidated state statute hearing provisions gave power to the regulatory authority to pass on the equitability of the tender offer.¹⁸⁹ The proposed Uniform Act's hearing period is limited to a maximum of sixty days. In addition, an order by the administrator barring the tendering of shares pursuant to an offer will automatically expire unless the administrator has determined non-compliance with the Uniform Act.¹⁹⁰ Upon an unfavorable outcome of a hearing, the state regulatory authority is required to

¹⁸² *NASAA Tender Offer Proposals*, *supra* note 174, at G-1 to -4 (Uniform Act, § 4). The following transactions are exempted from the registration requirements under the Uniform Act: (i) an offer made by an issuer to purchase its own equity securities, or the equity securities of a subsidiary at least two-thirds of which are owned by the issuer/bidder (§ 4(a)), (ii) purchases by a broker in customary brokerage functions (§ 4(b)), (iii) an offer to purchase the equity securities of a target having less than 100 shareholders (§ 4(c)), (iv) an offer which would result in less than two percent of the securities being acquired (§ 4(d)), (v) an offer which the state securities administrator exempts from coverage because it does not have the effect of changing or influencing the control of the company (§ 4(e)) and (vi) an offer which is subject to substantive federal agency review and which the state securities administrator determines meets the purposes of the Act (§ 4(f)). *Id.* at G-3 to -4.

¹⁸³ *Id.* at G-3 to -4 (Uniform Act, §§ 3(j), 5(a)).

¹⁸⁴ *Id.* at G-4 (Uniform Act, § 5(b)).

¹⁸⁵ Compare 17 C.F.R. § 240.14d-100 (1982) with *id.*

¹⁸⁶ *NASAA Tender Offer Proposals*, *supra* note 174, at G-4 (Uniform Act, § 5(b)(i)(10)).

¹⁸⁷ *Id.* at G-5 (Uniform Act, § 6).

¹⁸⁸ *Id.* (Uniform Act, § 7(b)).

¹⁸⁹ ILL. REV. STAT. ch. 121 ½, § 137.57.E (Smith-Hurd Supp. 1982-1983).

¹⁹⁰ *NASAA Tender Offer Proposals*, *supra* note 174, at G-5 (Uniform Act, § 7(b)).

issue an order containing findings of fact and conclusions of law prohibiting the purchase and payment for any equity securities tendered in response to the takeover offer, or conditioning any such purchase and payment upon changes or modifications in the registration statement.¹⁹¹ The administrator, reading between the lines of the proposed Uniform Act, thus has the power to block the tender offer.

The proposed Uniform Act is also applicable to tender offers not falling within the jurisdiction of the Williams Act.¹⁹² Non-Williams Act takeover offers are subject to the Uniform Act's registration requirements reviewed above, and also are subject to a minimum twenty-day period for holding the offer open,¹⁹³ withdrawal rights for fifteen days,¹⁹⁴ pro-rata purchase requirements when the offer is for less than all the shares of the corporation¹⁹⁵ and a requirement to pay an increased premium price to all shares tendered.¹⁹⁶ These procedural protections are similar to those provided by the Williams Act with respect to-tender offers for 1934 Act companies.¹⁹⁷

Finally, there are two notable areas where the Uniform Act's drafters have bowed to the federal scheme. First, the Uniform Act does not require proration, withdrawal and shareholder protections with respect to transactions subject to regulation by the Williams Act.¹⁹⁸ These omissions are designed to help NASAA's proposed Uniform Act escape the criticism leveled against invalidated state statutes that the additional protections granted by the state scheme are only speculative or marginal in nature.¹⁹⁹ Secondly, the Uniform Act's official text does not regulate the area of "creeping tender offers."²⁰⁰ The Tender Offer Committee of the NASAA has taken the position, however, that open market and privately negotiated transactions are not adequately regulated by the current federal system.²⁰¹ While the Committee has offered two unofficial provisions to be adopted by any state wishing to deal with this problem, the Committee explicitly advocates federal regulation of creeping tender offers.²⁰²

In sum, NASAA created the proposed Uniform Act in response to judicial antagonism to broad, sweeping state regulation of business takeovers. Nevertheless, the proposed legislation, drafted prior to the *MITE* decision, does more than simply fill the gap left by the Williams Act with respect to non-1934 Act

¹⁹¹ *Id.*

¹⁹² *Id.* (Uniform Act, § 8).

¹⁹³ *Id.* (Uniform Act, § 8(d)).

¹⁹⁴ *Id.* (Uniform Act, § 8(e)).

¹⁹⁵ *Id.* (Uniform Act, § 8(f)).

¹⁹⁶ *Id.* (Uniform Act, § 8(g)).

¹⁹⁷ See *supra* notes 55-60 and accompanying text.

¹⁹⁸ See *NASAA Tender Offer Proposals*, *supra* note 174, at G-5 (Uniform Act, § 8).

¹⁹⁹ See *supra* text accompanying notes 169-172.

²⁰⁰ See *supra* notes 117-21 and accompanying text.

²⁰¹ *NASAA Tender Offer Proposals*, *supra* note 174, at G-1 (Report of the Tender Offer Committee of the NASAA).

²⁰² *Id.* at G-1 to -2 (Report of the Tender Offer Committee of the NASAA).

companies. It also provides an additional level of shareholder protection, most notably in the form of a regulatory hearing which has the potential for blocking a tender offer.

E. Background Summary

A two tier set of regulations governing cash tender offers has emerged in the last fifteen years. On the federal level, Congress enacted the Williams Act, which, when coupled with SEC rules, is a comprehensive regulatory scheme designed to protect investors confronted with a tender offer. Similarly, states have acted to provide such protection. State business takeover statutes are founded primarily on the premise that a tender offer involves the internal affairs of a corporation and, hence, the chartering state has a legitimate interest in regulation of tender offers for domestic corporations.²⁰³ While these state statutes in certain respects differ significantly from the federal regulatory scheme, they in many ways parallel the Williams Act.²⁰⁴ Addressing the constitutionality of such state regulation of tender offers, federal courts prior to *MITE* consistently struck down existing state statutes, both on preemption and commerce clause grounds.²⁰⁵ Seeking to retain some state influence in this area, and in response to judicial invalidation of state business takeover regulation, NASAA proposed the Uniform Take-Over Act.²⁰⁶ So stood the tenuous status of state tender offer regulation prior to *MITE*.

II. THE *MITE* DECISION: A CLOSER LOOK

In *Edgar v. MITE Corp.*,²⁰⁷ Justice White delivered a five part opinion of which only two parts and one additional subpart commanded a majority of the Court. First, to reach the merits of the case, a majority of the justices held that the case was not moot.²⁰⁸ Then a different majority of justices affirmed the judgment of the Seventh Circuit and its holding that the Illinois Act imposed a substantial burden on interstate commerce which outweighed its putative local

²⁰³ See *supra* notes 63-82 and accompanying text.

²⁰⁴ See *supra* notes 83-121 and accompanying text.

²⁰⁵ See *supra* notes 122-73 and accompanying text.

²⁰⁶ See *supra* notes 174-202 and accompanying text.

²⁰⁷ 102 S. Ct. 2629 (1982).

²⁰⁸ *Id.* at 2635. A five justice majority joined in holding the case was not moot. (Justice White, joined by The Chief Justice and Justice Blackmun. *Id.* at 2633. Stevens, J., concurring. *Id.* at 2643-48. O'Connor, J., concurring. *Id.* at 2643.) The basis of this holding was that a reversal of the judgment of the district court would expose MITE to civil and criminal liability for making a tender offer in violation of the Illinois Act and that any such action would be foreclosed if the statute were held unconstitutional. *Id.* at 2635. The plurality opinion chose not to resolve the question of whether the preliminary injunction issued by the district court was a complete defense to civil or criminal penalties. *Id.* In so doing, the plurality opined that this important issue should be decided when and if the Secretary of State of Illinois initiates an action against MITE. *Id.* Justice Stevens conditioned his opinion on the merits on his determination that the preliminary injunction cannot be "construed as a grant of absolute immunity from enforcement of the Illinois statute." *Id.* at 2647. Justice Powell reached the merits despite his opinion that the case was moot. *Id.* at 2643.

benefits and was therefore invalid under the commerce clause.²⁰⁹ No majority of the Court, however, embraced the lower court's holding that several provisions of the Illinois Act were preempted by the Williams Act.²¹⁰

The Supreme Court held in *MITE* that the Illinois Act is unconstitutional because it failed to satisfy the balancing of benefits and burdens test set forth in *Pike v. Bruce Church, Inc.*²¹¹ In relying on the *Pike* test, the majority reiterated that even when a state indirectly regulates interstate commerce, the burden imposed on that commerce must not be excessive in relation to the local interests served by such regulation.²¹² The majority first identified the "most obvious" burden imposed by the Illinois Act on interstate commerce: the nationwide reach of the statute.²¹³ The statute, the majority observed, gave the Illinois Secretary of State the power to block a tender offer anywhere in the nation.²¹⁴ According to the majority, the exercise of such power could deprive shareholders of the opportunity to sell their shares at a premium,²¹⁵ as well as hinder economic efficiency and competition.²¹⁶

After identifying the substantial burden imposed by Illinois on interstate commerce, the majority next examined the two local interests advanced by Illinois in support of its regulation of tender offers.²¹⁷ The articulated interests were the protection of resident security holders and the regulation of the internal affairs of corporations incorporated in Illinois.²¹⁸ With respect to the first state interest, the majority acknowledged that a state has a legitimate interest in protecting local investors but emphatically held that states do not have any interest in protecting non-resident shareholders.²¹⁹ The statute, the majority observed, by potentially burdening transactions nationwide, extended its coverage to out of state shareholders.²²⁰ Moreover, the majority noted, the Illinois Act exempted from coverage a corporation's acquisition of its own shares.²²¹ This exemption, the majority stated, left shareholders with only the

²⁰⁹ *Id.* at 2643. Justice White, joined by The Chief Justice. *Id.* Powell, J., concurring. *Id.* Stevens, J., concurring. *Id.* at 2647-48. O'Connor, J., concurring. *Id.* at 2643.

²¹⁰ *Id.* Justices Stevens and O'Connor, despite their joining in Part I of the opinion, appear to be joining only the commerce clause, and not the preemption holding. *Id.* at 2643, 2647-48.

²¹¹ *Id.* at 2641-43 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Justice White is joined in this part of the opinion by The Chief Justice. Justices Stevens, Powell and O'Connor concurred in the holding of the statute's infirmity under the *Pike* test. (Powell, J., concurring. *Id.* at 2643. Stevens, J., concurring. *Id.* at 2647-48. O'Connor, J., concurring. *Id.* at 2643).

²¹² *Id.* at 2641.

²¹³ *Id.* at 2641-42.

²¹⁴ *Id.* at 2642.

²¹⁵ *Id.*

²¹⁶ *Id.* In so concluding, the majority relied on various economic analyses. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* ("Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.").

²²¹ *Id.*

protections provided by the federal securities laws with respect to such an acquisition.²²² In the majority's view, Illinois here undermined its justification for the burdens its statute imposed on interstate commerce because Illinois had previously asserted the inadequacies of the federal regulatory scheme.²²³

The majority then questioned Illinois' assertion that the Act substantially enhanced the shareholder protection afforded by the Williams Act.²²⁴ Adopting the Seventh Circuit's analysis, the majority found such additional state protections "speculative."²²⁵ Moreover, the majority stated that any potential additional benefits conferred by the statute were possibly outweighed by the risk that the tender offer would fail as a result of defensive tactics instituted by incumbent management.²²⁶

Finally, the *MITE* majority squarely rejected the second interest proffered by Illinois: regulation of the internal affairs of domestic corporations.²²⁷ The internal affairs doctrine, the majority opined, was a conflict of laws principle and as such was of "little use to the state in this context."²²⁸ Furthermore, the majority stated that transfers of stock by a stockholder to a third party did not themselves implicate the internal affairs of a corporation.²²⁹ Just as the majority had rejected Illinois' first articulated interest as speculative and inconsistent, the majority discounted Illinois' second interest due to its inconsistency.²³⁰ In so doing, the majority pointed out that the regulation of foreign corporations which are neither incorporated nor headquartered in Illinois was not supported by the internal affairs doctrine.²³¹ Thus, the majority held that the Illinois Act imposed an indirect but substantial burden on interstate commerce which outweigh its putative local benefits.²³² The majority opinion, however, constitutes but a small portion of the *Edgar v. MITE Corp.* decision. Justice White, as well as the concurring and dissenting justices, wrote significant additional opinions on the merits.

Justice White, author of the majority opinion which held that the Illinois Act was an indirect yet impermissible burden on interstate commerce under the *Pike* test, also found that the Illinois Act constituted a constitutionally prohibited direct regulation of interstate commerce.²³³ In this portion of his opin-

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 2642-43.

²²⁸ *Id.* at 2643.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* (The Illinois Act applies to tender offers for any corporation of which 10% of the outstanding shares are held by Illinois residents. ILL. REV. STAT., ch. 121 ½, § 137.52-10 (Supp. 1980)).

²³² *Edgar v. MITE Corp.*, 102 S. Ct. at 2643.

²³³ *Id.* at 2640-41. This Part V-A of the opinion was joined in by The Chief Justice, and concurred in by Justices Powell and O'Connor (Powell, J., concurring. *Id.* at 2643. O'Connor, J., concurring. *Id.*) This invalidation of the Act on the basis of a direct regulation of interstate

ion, Justice White distinguished tender offer regulation from state blue sky laws.²³⁴ He emphasized the interstate nature of the tender offers communicated by mails, and relied on *Shafer v. Farmers Grain Co.*²³⁵ to invalidate the Illinois Act as a direct regulation of interstate commerce.²³⁶ In addition, Justice White emphasized the "sweeping extraterritorial effect" of the Illinois Act.²³⁷ The statute, he pointed out, reached foreign corporations which might in fact have no shareholders located in the state.²³⁸ Such an assertion of extraterritorial jurisdiction, stated Justice White, was similar to the unconstitutional regulation of interstate commerce struck down in *Southern Pacific Co. v. Arizona*²³⁹ and *Shafer v. Heitner*²⁴⁰ by the Court.²⁴¹

The remaining substantive portions of Justice White's opinion contained a strong preemption attack, joined in by The Chief Justice and Justice Blackmun.²⁴² Justice White was persuaded that the intention of Congress in enacting the Williams Act was to regulate takeovers while maintaining a balance between the investor, management and the takeover bidder.²⁴³ The Illinois Act frustrated this congressional intent, opined Justice White, because it tipped the scales towards incumbent management.²⁴⁴ Specifically, Justice White found that the Illinois Act, in the provisions requiring a twenty-day pre-commencement notification provision and delaying the commencement of a tender offer pending completion of a hearing, provided incumbent management with a powerful tool to combat a tender offer.²⁴⁵ Thus, by favoring management at the expense of stockholders, the Illinois Act violated the balance struck by Congress.²⁴⁶

Central to Justice White's preemption holding was his interpretation of the legislative history of the Williams Act. He stressed that several times Congress rejected proposed provisions or amendments to the Williams Act which would have imposed a pre-commencement notification requirement similar to

commerce falls short of reaching a majority by one vote.

²³⁴ *Id.* at 2640-41.

²³⁵ 268 U.S. 189 (1925) (commerce clause invalidation of North Dakota statute which asserted control over the trading of wheat, 90% of which was destined for interstate shipment).

²³⁶ *Edgar v. MITE Corp.* 102 S. Ct. 2629, 2641 (1982).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 325 U.S. 761 (1945) (Arizona Train Limit Law restricting the number of cars on passenger and freight trains invalidated under the commerce clause because state interest in safety outweighed by national interest in free flow of commerce and need for uniformity of regulation).

²⁴⁰ 433 U.S. 186 (1977) (assertion of jurisdiction by state of Delaware on basis of statutory presence in state of capital stock owned by defendant did not establish constitutionally adequate "minimum contacts" to support state jurisdiction).

²⁴¹ *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2641 (1982).

²⁴² *Id.* at 2635-40.

²⁴³ *Id.* at 2636-37.

²⁴⁴ *Id.* at 2637-38.

²⁴⁵ *Id.* at 2637-39.

²⁴⁶ *Id.*

that contained in the Illinois Act.²⁴⁷ Similarly, Justice White noted that the potential for delay inherent in the Illinois Act's hearing provision upset the balance between offeror, management and shareholder, by favoring management at the expense of stockholders.²⁴⁸ With respect to the substantive hearing provisions of the Illinois Act, Justice White agreed with the Seventh Circuit that the state was protecting investors at the expense of their autonomy.²⁴⁹

Justices Powell, Stevens and O'Connor each wrote separate concurrences, while Justice Marshall, joined by Justice Brennan,²⁵⁰ and Justice Rehnquist²⁵¹ both wrote individual dissents. Justice Powell concurred with the majority of the Court in its holding that the Illinois Act failed to meet the *Pike* balancing test applicable to indirect state regulation of interstate commerce.²⁵² Justice Powell's concurrence was based on narrow grounds. He explicitly stated that he was joining in the opinion of the Court only because its reasoning "le[ft] some room for state regulation of tender offers."²⁵³ Justice Stevens joined the Court in its commerce clause invalidation of the Illinois Act under the *Pike* test, and also joined the section of Justice White's opinion which declared that the Act constituted a direct, and hence impermissible, restraint on interstate commerce.²⁵⁴ In his concurrence, however, Justice Stevens expressly rejected Justice White's preemption holding because he was not convinced that the congressional "policy of neutrality in its own legislation [was] tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management."²⁵⁵ Justice O'Connor affirmed the judgment of the Seventh Circuit, but only on the basis that portions of the Illinois Act were invalid under the commerce clause.²⁵⁶ She found, therefore, that it was unnecessary to reach the merits of the preemption issue.²⁵⁷

²⁴⁷ *Id.* at 2637-38 & n.11.

²⁴⁸ *Id.* at 2639.

²⁴⁹ *Id.* at 2639-40.

²⁵⁰ Justice Marshall, joined by Justice Brennan, dissented from the majority on the basis that the case did not present a live controversy and hence was moot. *Id.* at 2648 (Marshall, J., dissenting). Contrary to both the majority's reservation of the issue of the effectiveness of the preliminary injunction issued by the district court and Justice Stevens' finding that the preliminary injunction did not permanently protect MITE (*see supra* note 208), Justice Marshall stated that the preliminary injunction would constitute a complete defense to any actions against MITE. *Edgar v. MITE Corp.*, 102 S. Ct. at 2648. (Marshall, J., dissenting).

²⁵¹ Justice Rehnquist agreed with Justice Marshall that the case presented no justiciable controversy, but for a different reason. *Id.* at 2652 (Rehnquist, J., dissenting). According to Justice Rehnquist, MITE Corp. no longer needed the protection of the injunction issued in the case. *Id.* at 2353 (Rehnquist, J., dissenting). Furthermore, the possibility of a future enforcement action is insufficient, in Justice Rehnquist's opinion, to keep the controversy alive. *Id.* (Rehnquist, J., dissenting).

²⁵² *Id.* at 2643.

²⁵³ *Id.*

²⁵⁴ *Id.* at 2647-48.

²⁵⁵ *Id.* at 2648.

²⁵⁶ *Id.* Justice O'Connor joined in Parts I, II and V of Justice White's opinion (O'Connor, J., concurring. *Id.* at 2643.).

²⁵⁷ *Id.*

In review, a five member majority of the Court²⁵⁸ held that the case was not moot. A different five member majority²⁵⁹ embraced the opinion of the Court that the Illinois Act was invalid under the commerce clause because the local interest served by the statute did not outweigh the burdens it imposed on interstate commerce. The portion of Justice White's commerce clause opinion finding that there was a direct and unconstitutional interference with interstate commerce mustered a plurality, but failed to command a majority of the members of the Court. The three concurring justices, who completed the majority holding the statute was unconstitutional as an indirect interference in interstate commerce, all joined for individually articulated reasons. Justice Blackmun, who did not write any opinion, joined all but the portions of Justice White's opinion which declared the Illinois Act unconstitutional as both a direct and an indirect interference in interstate commerce. Finally, because the three dissenters did not reach the merits, their views on the majority's opinion are unknown.²⁶⁰ Thus, while there was achieved a majority rendering an opinion which invalidated the Illinois Act on narrow commerce clause grounds, the opinion of the Court in *Edgar v. MITE Corp.* did not explicitly and definitively decide the fate of remaining or future state tender offer regulation. As will be developed below, however, the opinion of the Court provided the lower courts with the weapon necessary to destroy the future of state regulation of tender offers within the scope of the Williams Act.

III. CRITIQUE OF *MITE*

The opinion of the Court in *Edgar v. MITE Corp.* was vastly different than the outcome foreshadowed by the lower court decisions. The Illinois Business Take-Over Act was found constitutionally infirm through the application of the subjective balancing test of *Pike v. Bruce Church, Inc.*²⁶¹ Lower court decisions, however, gave at least equal if not greater weight to invalidation of state business takeover statutes on preemption rather than commerce clause grounds.²⁶² Similarly, an overwhelming number of commentators argued for preemption of the statutes.²⁶³ It is, therefore, important to examine the opinion of the Supreme Court with a critical eye to both its inclusions and exclusions.

The absence of any preemption holding by the Supreme Court is, indeed, surprising in light of the lower court trend.²⁶⁴ There are at least two possible explanations for the Supreme Court's failure to indorse the preemption position. First, Justice White's reliance on the subjective interpretation of legislative

²⁵⁸ See *supra* note 208.

²⁵⁹ See *supra* note 209.

²⁶⁰ *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2648-54 (1982).

²⁶¹ *Id.* at 2643.

²⁶² See *supra* notes 138-46 and accompanying text.

²⁶³ See *supra* note 12.

²⁶⁴ See *supra* notes 138-46 and accompanying text.

history of the Williams Act²⁶⁵ may shed light on the Court's unwillingness to join him in preempting all state business takeover regulation. A second and much more convincing explanation is the Burger Court's well-known receptivity to state interests. The general direction of the Burger Court decisions has indicated a shift from a federal leaning towards a state-directed doctrine.²⁶⁶ The failure of Justice White to attract a majority on his preemption holding may, at first blush, be interpreted as a signal that the Supreme Court did not foreclose state involvement in the area of tender offer regulation. The absence of a majority consensus on the preemption issue presented in *MITE*, however, must be juxtaposed with the remaining portions of the opinion.

The foundation of the Supreme Court's opinion was that the Illinois Act was an unconstitutionally burdensome indirect regulation of interstate commerce under the *Pike v. Bruce Church, Inc.* balancing test.²⁶⁷ A close examination of the majority opinion reveals, however, that the state's proffered interests were in fact rejected, rather than balanced, against the countervailing benefits of the Illinois Act. The first of Illinois' asserted interests was identified as the protection of resident security holders.²⁶⁸ While Justice White conceded that the protection of local investors was clearly a legitimate state interest, he stated that "[i]nsofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law."²⁶⁹ Implicit in this pronouncement, which appears to be a carryover from Justice White's direct commerce clause holding, is a finding that no incidental regulation of out-of-state transactions is permissible. This is tantamount to saying that there may be no

²⁶⁵ The Chief Justice warned in *Piper* that "[R]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (1977). Despite The Chief Justice's language in *Piper*, he joined Justice White's entire opinion, including the preemption holding which relied heavily on interpretation of legislative history. *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2635-43 (1982).

²⁶⁶ As one commentator suggests: "[f]ederal-directed preemption dominated the Court's jurisprudence in the 1950's and the early 1960's, but . . . several recent decisions of the Burger Court presage a return to the state-directed preemption doctrine. This doctrinal inconsistency merely manifests the Court's vacillating perspective on federalism." Note, *The Preemption Doctrine: Shifting Perspectives On Federalism And the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975).

See also *A Response to Great Western*, *supra* note 12, for an opinion that there are "signals from the Burger Court that suggest solicitude toward state interests and that recognize the complementary nature of federal and state securities regulation." *Id.* at 872.

See also Wilner & Landy, *supra* note 12, for a discussion of the shifting nature of the Court's preemption actions: "During the 1930's the Court required a showing that Congress expressly intended to occupy a field. . . . Starting in the 1940's the Court began to infer a congressional intent from the pervasiveness of federal legislation." Most recently, the Court appears to be shifting back to requiring a direct showing of congressional intent, which may be evidenced by the statutory language or legislative purpose." *Id.* at 24 n.135. *But see* *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014, 3031 (1982) (Federal Home Loan Bank Board "due-on-sale" regulations preempt conflicting state limitations on "due-on-sale" practices).

²⁶⁷ 397 U.S. 137 (1970).

²⁶⁸ *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (1982).

²⁶⁹ *Id.*

tender offer regulation by the states. Yet this portion of the opinion purports to be a subjective test, applied on a case by case basis.

Other passages of the majority opinion are much less decisive than the above cited declaration, leaving unsettled the threshold issue of whether any state regulation of tender offers would be permissible. For instance, the majority opinion's emphasis on the inadequacy and speculative nature of the protections extended by the Illinois Act to resident security holders²⁷⁰ suggests, albeit most faintly, that provisions different than those in the Illinois Act might be tolerated. Furthermore, the majority targeted the Illinois Act's friendly offer exemption as a fatal inconsistency in Illinois' assertion that the Act was designed to provide additional shareholder protection.²⁷¹ The question of whether statutes excluding such an exemption might be acceptable is left unanswered. A crucial issue not clearly disposed of by the majority holding, then, is whether there may be *any* out-of-state impact coincident with a state's regulation of tender offers. If not, the very nature of a tender offer precludes any state presence in the field.

Continuing its application of the *Pike* balancing test, the majority identified Illinois' second defense: that it had an interest in regulating the internal affairs of a corporation incorporated under its laws.²⁷² The majority correctly pointed out the inconsistency in justifying the statute on these grounds when, in fact, the Illinois Act applied to tender offers for any corporation in which ten percent of the outstanding shares were held by Illinois residents.²⁷³ In addition, however, the majority opinion perfunctorily dismissed the corporate internal affairs doctrine as a "conflict of laws principle."²⁷⁴ This statement overlooked the initial and crucial inquiry into what matters constitute the "internal affairs" of a corporation. The opinion continued, however, by stating that "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."²⁷⁵ The cornerstone of state jurisdiction in the field of takeover regulation is thus destroyed by one sentence in the majority opinion. This rejection of the internal affairs doctrine was considerably more resounding than that in the Seventh Circuit's holding.²⁷⁶ There, the court did not summarily reject the internal affairs argument, but rather focused on the global impact of the Illinois Act.²⁷⁷ Finally, in stating that Illinois did not have an interest in regulating the internal affairs of foreign corporations, the opinion does not take notice of the fact that Chicago Rivet, the target company in *MITE*, was an Illinois corporation.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 2643.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *MITE Corp. v. Dixon*, 633 F.2d 486, 501 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

²⁷⁷ *Id.*

The Supreme Court's use of the *Pike* balancing test, rather than a less flexible standard such as preemption, suggests that, indeed, there may be state tender offer statutes which will escape constitutional invalidation. The *MITE* decision, however, supports this conclusion only by virtue of the slim majority created by Justice Powell's concurrence. Justice Powell, the only member of the Court who squarely addressed whether the *MITE* opinion permitted any tender offer regulation by the states, concurred on the sole ground that the majority opinion left some room for state involvement in the area. Moreover, this implicit suggestion read by Justice Powell into the majority's use of the *Pike* balancing test is largely undercut by the actual language of the majority opinion.²⁷⁸ Further dashing the hopes of state statute advocates, the other two concurring justices, Justices Stevens and O'Connor, both joined the direct and indirect commerce clause holdings in Justice White's opinion, thereby precluding, in their opinions, any state regulation in the field.

While the Illinois Act was struck down by the Supreme Court in *MITE*, there are thirty-five remaining state statutes²⁷⁹ whose constitutional validity must be examined in light of *Edgar v. MITE Corp.* At a minimum, the *MITE* holding drastically curtails the permissible jurisdictional base of state business takeover statutes. On this basis alone, many existing state statutes will fall in the face of constitutional challenges founded on commerce clause grounds.²⁸⁰ The curiously compromised majority holding in *Edgar v. MITE Corp.*, combined with the absence of opinions on the merits by the three dissenters, is not, however, conclusive as to the future of state business takeover regulation. The Supreme Court rendered a decision which grants the lower courts considerable flexibility, but no clear guidance, for evaluating the constitutional status of remaining and future state statutes.

IV. THE FUTURE OF STATE REGULATION OF TENDER OFFERS: IMPACT OF *MITE*

Judicial response to state business takeover statutes in the wake of *MITE* demonstrates that the courts are continuing to apply the commerce clause analysis to the detriment of the state statutes. Courts applying *MITE* to invalidate state business takeover statutes on commerce clause grounds focus on the broad extraterritorial reach of the statutes²⁸¹ and the speculative protections

²⁷⁸ See *supra* text accompanying notes 211-232.

²⁷⁹ See *supra* note 6.

²⁸⁰ Typically, the state statutes contain severability clauses. See, e.g., N.J. STAT. ANN. 49:5-18 (West Supp. 1982-1983). The issue of severability was not, however, addressed in *MITE*, nor has it been litigated in the wake of the *MITE* holding.

²⁸¹ *Televest, Inc. v. Bradshaw* (E.D. Va. September 29, 1982), [current] FED. SEC. L. REP. (CCH) ¶ 99,044 (court noted that the Virginia statute, applicable to only Virginia corporations, nonetheless affected a domestic corporation 40% of whose shareholders were non-residents of Virginia). *Id.* at ¶ 99,044; *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 566 (6th Cir. 1982) (court noted that nearly ninety-five percent of shareholders of target corporation were non-residents of state of Missouri); *Esmark, Inc. v. Strode*, 639 S.W.2d 768, 744 (Ky. Sup. Ct.) (in case involving corporation where over one-half of shareholders were out-of-state residents,

they afford.²⁸² One court simply invoked the *MITE* commerce clause standard without considering the merits of the individual case presented.²⁸³ Reaction to the absence of a preemption holding in *MITE* is mixed. While most of the decisions cast their holdings in commerce clause terms,²⁸⁴ one court relied heavily, although not exclusively, on preemption grounds, despite the absence of a preemption holding in *MITE*.²⁸⁵

There is a pervading tone in both pre- and post-*MITE* decisions that underscores the courts' anathema to any interference in the nationwide tender offer mechanism. The Seventh Circuit in *MITE* pointed out that the blocking of the tender offer under consideration meant the failure of a twenty-three million dollar transaction in interstate commerce.²⁸⁶ In the wake of *MITE*, courts are continuing to emphasize the nationwide impact of a state's business takeover statute.²⁸⁷

The blanket rejection of the internal affairs doctrine as a justification for state business takeover statutes is perhaps the most devastating blow dealt to the future of state tender offer regulation. In subsequent litigation, states may attempt to advance with greater vigor alternative bases of jurisdiction. The other jurisdictional theory with any force is that a host state has a valid interest in the affairs of corporations conducting business in the state.²⁸⁸ This argument, however, so emphasizes the protective aspects of state jurisdiction that the argument is of little value.²⁸⁹ In addition, the continued emphasis on the nationwide character of a tender offer highlights the strength of the interstate commerce analysis.²⁹⁰ It is, thus, the author's opinion that existing state tender offer statutes will not survive *MITE* and its implications as to the validity of state jurisdiction in the area. It is nevertheless important to apply the *MITE* decision to the remaining provisions of the proposed Uniform Act, in order to

court held that Kentucky had no legitimate state interest in protecting shareholders who do not live in the state).

²⁸² *Televest, Inc. v. Bradshaw*, [current] FED. SEC. L. REP. (CCH) at ¶ 94,973 (purported protections of the Virginia statute are too speculative to sustain the statute in the instant case).

²⁸³ *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1124, 1131 (8th Cir. 1982).

²⁸⁴ See *supra* note 281. See also, *Mesa Petroleum Co. v. Cities Service Co.* (W.D. Okla. December 21, 1982), [current] FED. SEC. L. REP. (CCH) ¶ 99,064 (court invoked *MITE* language emphasizing nationwide impact of statute and declared Oklahoma statute unconstitutional on a motion for summary judgment).

²⁸⁵ *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1131 (8th Cir. 1982).

²⁸⁶ *MITE Corp. v. Dixon*, 633 F.2d 486, 502 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

²⁸⁷ See *supra* note 281.

²⁸⁸ See *supra* note 82.

²⁸⁹ See, e.g., *Boehm, supra* note 12, at 757 ("[A] realistic view is that the dominant state interest is in the preservation of independent economic entities.").

²⁹⁰ To date, application of the *MITE* decision has resulted in invalidation of the state statutes in all but one of the cases. The First Circuit remanded consideration of the Massachusetts statute in light of the *MITE* opinion. *Agency Rent-a-Car, Inc. v. Spencer Cos.*, 686 F.2d 1029 (1st Cir. 1982).

evaluate the advisability of a state's attempting to restructure its business takeover statute to withstand constitutional challenge.²⁹¹

The friendly offer exemption is rightfully excluded from the proposed Act, as it exhibits a decidedly pro-management bent and leaves the statute vulnerable to an attack similar to that articulated by Justice White with respect to the Illinois Act's exemption.²⁹² While some criticism has been leveled at certain state statutes exemptions because they appear to target only large companies,²⁹³ the exemption for tender offers for companies with less than one hundred shareholders is justifiable. There does not appear to be anything inherently wrong or discriminatory in a state's focusing its resources on larger companies. Indeed, this approach may be supported upon the theory that the burden on small companies would be too great as compared to the benefits such regulation would bring.

Two other exemptions, however, may not be dismissed so easily. The vesting of discretionary power in the state securities administrator to exempt an offer if not made with the purpose or effect of changing or influencing control of the subject company is one such provision.²⁹⁴ Arguably, the exemption may be defended on the ground that a change in control does involve the internal affairs of a corporation, if indeed there is any life left in the internal affairs justification. The exemption implies, however, that the state may use its discretion to come to the aid of incumbent management. It appears, for instance, that a friendly tender offer may be structured so as not to change "control" of the corporation, thus avoiding the Act's provisions. State business takeover statutes, if the courts are to permit them at all, must be precisely and narrowly drawn. This exemption should therefore be excluded.

A final noteworthy exemption is that granting immunity from the registration requirements of the Act if an offer is subject to review by a federal agency and if the state securities administrator determines that the purposes of the

²⁹¹ In analyzing the ability of a state statute to withstand constitutional challenges in the future, one important caveat must be entered. Past action by the SEC demonstrates its proclivity to further occupy the field of tender offer regulation. The SEC admitted that its introduction of new rules in 1980 was designed to produce a conflict with state pre-commencement notification and waiting period provisions "so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist." Securities Exchange Act Release No. 34-16384 [1979-1980] FED. SEC. L. REP. (CCH) ¶ 82,254. The SEC acted in response to statutes similar in scope to the one struck down by the *MITE* Court and it is conceivable that the SEC would respond similarly to new and different state regulatory approaches. For instance, the area of creeping tender offers is not presently regulated at the federal level. SEC General Counsel Edward F. Greene stated that he opposed the Massachusetts-style takeover provisions in this area, and predicted that the SEC will get involved in regulating creeping tender offers. Special Report Vol. 14, SEC. REG. & L. REP. (BNA), 5/7/82, at 811. Thus, the future of state takeover regulation will be determined not only by its ability to survive *MITE*, but also will be subject to the continually expanding role of the SEC.

²⁹² *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2643 (1982).

²⁹³ Wilner & Landy, *supra* note 12, at 8.

²⁹⁴ *NASAA Tender Offer Proposals*, *supra* note 174, at G-4 (Uniform Act, § 4(e)).

Uniform Act are met thereby.²⁹⁵ At first blush, this exemption appears acceptable. If the language of the majority's commerce clause opinion is followed closely by other courts, however, this provision may lead to a dismissal of the state interest in protecting the investor. Specifically, the *MITE* majority held that the Illinois Act's reliance on the protection afforded by the Williams Act countered the Illinois defense that further investor protection was its goal.²⁹⁶ Again, following the strict and narrow path, such a questionable exemption should be excluded.

The Uniform Act's requirements with respect to disclosure are generally no more rigorous or salient than the Williams Act provisions. It, therefore, does not appear that investors are aided by any substantive disclosure not already provided by the federal scheme. In fact, the Uniform Act gives the state securities administrator the discretion to permit an offeror to file any statement filed with the SEC in lieu of the registration requirement specified by the Act.²⁹⁷ This demonstrates a further problem with the Uniform Act. While it does not conflict with or frustrate the Williams Act in its registration requirements, neither does it extend meaningful additional investor protection. At this juncture, then, there is little to be weighed against the burdens the statute would impose on interstate commerce.

One requirement of the Uniform Act, not contained in the Williams Act, is a description of the offeror's other tender offer activity within the last five years.²⁹⁸ While no such disclosure is called for by the federal scheme, there are no compelling arguments against such a requirement. There is some commentary to the effect that local shareholders may view with greater suspicion the activities of a corporate predator if its history reveals a pattern of raiding local companies and in many cases relocating the business.²⁹⁹ While such protectionism certainly would not be constitutionally tolerable on the part of a state, there is no constitutional prohibition against individual shareholders exercising these parochial interests independent of state action. In addition, there is limited evidence that those companies who characteristically participate in corporate takeovers actually have shown poor economic results.³⁰⁰ Consequently, it may be argued, a state has a legitimate right to mandate full disclosure of such activities. It is not arguable, however, that the single additional protection of this one disclosure constitutes a benefit which would serve to outweigh the statute's burdens.

²⁹⁵ *Id.* (Uniform Act, § 4(f)).

²⁹⁶ *Edgar v. MITE Corp.*, 102 S. Ct. 2629, 2642 (1982).

²⁹⁷ *NASAA Tender Offer Proposals*, *supra* note 174, at G-4 (Uniform Act, § 4(f)).

²⁹⁸ *Id.*

²⁹⁹ *See Boehm*, *supra* note 12, at 745-46.

³⁰⁰ Nordhaus, *The Vanity of the Takeover Game*, N.Y. TIMES, October 3, 1982, at F-3. Nordhaus conducted a study of the profitability of corporations who actively participate in takeovers. "The Vulture Fund" is a fictitious investment vehicle which on December 31, 1980 invested an equal amount of money in the following ten "acquisitive" companies: Du Pont, U.S. Steel, Connecticut General (Signa), Seagram, Freeport Minerals, Fluor, Nabisco, Stand-

The substantive review of tender offers by state regulatory authorities has generally been viewed by the preemptionists as the substitution of investor protection for investor autonomy.³⁰¹ While the Uniform Act avoids this pitfall, the hearing provisions nevertheless present grave questions on the Uniform Act's constitutional validity. In Justice White's preemption holding, the Illinois Act's hearing provisions were found objectionable because of the open-ended delays occasioned by the hearing provisions.³⁰² Under the Illinois Act, a hearing could be requested by ten percent of the target's shareholders, who were often members of management.³⁰³ In contrast, a hearing under the Uniform Act is commenced only in the discretion of the Administrator.³⁰⁴ The Uniform Act requires a hearing to begin within twenty-five days of the filing of a registration statement³⁰⁵ and any order of the administrator prohibiting the offeror from purchasing tendered shares expires on the earlier of thirty days from the completion of the hearing or sixty days after the filing of a registration statement. The delay in the execution of a tender offer is, therefore, not as potentially significant as that permitted in the Illinois Act. It may be argued, therefore, that the somewhat longer delays than those at the federal level will not automatically invalidate the Uniform Act on the basis of the holding in *MITE*. This argument is significantly weakened by *MITE*'s progeny, however, which continue to emphasize the nationwide character of a tender offer.³⁰⁶ One recent case where a state statute was invalidated involved a hearing provision which, like the Uniform Act, called for review of only full and fair disclosure, not the substantive fairness evaluation required by the Illinois Act.³⁰⁷ Furthermore, from a state's vantage point, it is obvious that a statute must have substantive enforcement provisions in order to have any effect. The Uniform Act has not, however, demonstrated any additional significant investor protection which would justify a state's right to block a tender offer governed by the Williams Act.

The Uniform Act may be a valid state statute to the extent that it regulates non-Williams Act transactions,³⁰⁸ with the exception of the creeping tender offer area. While there is still the unresolved threshold issue of incidental out-of-state regulation, there is a strong argument for the need to protect all investors. The cases and commentators have not, however, focused on this point. The Uniform Act, however, suffers from the result of careful attempts to draft a

ard Oil of Ohio, Smith Klein and American Express. Nordhaus finds that The Vulture Fund would have fallen 16.3% from the end of 1980 to September, 1982. This compares with a fall in the broad-gauged stock averages of only 4 to 9% over this same period.

³⁰¹ See, e.g., *MITE Corp. v. Dixon*, 633 F.2d 486, 494 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982).

³⁰² 102 S. Ct. at 2638-39.

³⁰³ ILL. STAT. ANN. ch. 121 ½, § 137.57.7 (Smith-Hurd Supp. 1982-1983).

³⁰⁴ *NASAA Tender Offer Proposals*, *supra* note 174, at G-5 (Uniform Act, § 7(a)).

³⁰⁵ *Id.* (Uniform Act, § 6).

³⁰⁶ See *supra* note 281.

³⁰⁷ *Esmark, Inc. v. Strode*, 639 S.W.2d 768, 773 (Ky. Sup. Ct. 1982).

³⁰⁸ See *supra* notes 192-97 and accompanying text.

statute which is meaningful, yet survives constitutional challenge. While the proposed Uniform Act presents a better case than existing state statutes, the NASAA has not succeeded in presenting the states with a statute which is either potent or constitutionally viable. Moreover, in the wake of *MITE*, it appears that such a statute cannot be drawn.

CONCLUSION

The Supreme Court's decision in *Edgar v. MITE Corp.* has provided the courts with a commerce clause holding to be applied in evaluating the constitutionality of state business takeover statutes. The Supreme Court did not reach a holding on the strong preemption arguments, but rather invalidated the Illinois Act based on its failure to provide benefits in excess of the burdens it imposed on interstate commerce. The splintered *MITE* decision neither clearly nor explicitly resolved the future of state tender offer regulation. The Supreme Court did, however, leave the courts with a great deal of flexibility. *MITE* has given the courts a powerful standard which will allow them to invalidate remaining state business takeover regulation. To date, courts generally have demonstrated that they will apply the *MITE* decision to strike down existing state regulation. Furthermore, a review of a carefully and narrowly drawn statute, such as the NASAA's Uniform Take-Over Act, demonstrates that, with the possible exception of non-Williams Act transactions, the states are powerless to enact meaningful, yet constitutionally permissible, tender offer legislation.

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