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CTS Corp. v. Dynamics Corporation of America

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Gruny - [illegible]

Curve lined with 86-71

If we Affirm, make clear we do so on authority of Edgar v. Mite Corp. CA7 (Posner) goes beyond Mite Corp in foreclosing state laws

See Ronald's helpful memo. Wms Act case

CA7 invalidated Indiana's "take-over" statute as preempted by Williams Act + a burden on interstate commerce.

In Edgar v. Mite Corp, 547 U.S. 642 the court invalidated a generally similar statute. I joined only the "commerce clause" basis of Mite Corp

PRELIMINARY MEMORANDUM

If other Justices show any interest I could Note this case, but I expect this will be affirmed.

September 29, 1986 Conference
Summer List 23 , Sheet 1

No. 86-97(curveline w/ No. 86-71)

INDIANA v. DYNAMICS CORP. OF AMER.(tender offeror)	Appeal from CA7 (Bauer, Cudahy, Posner) Federal/Civil	 Timely

1. SUMMARY: Appnts State of Indianda and CTS Corp., in two curvelined appeals, challenge CA7's decision ~~striking down~~ invalidating Indiana takeover statute on the grounds that it was preempted by the Williams Act and unconstitutional as an unreasonable burden on interstate commerce.

NOTE -- Ronald (see attached memo)

2. FACTS AND DECISION BELOW: Appee, Dynamics Corp., owned 9.6% of the common stock of appnt CTS. The relationship between appee and CTS was apparently a rocky one. CTS reportedly made some bad business decisions, prompting appee to attempt to wrest control of CTS from its existing management. To accomplish this, appee made a tender offer for an additional one million shares of common stock of CTS which would increase appee's percentage of ownership to 27.5%. By acquiring these additional shares, appee would then, presumably, have the voting power to elect its own slate of corporate directors.

A few days prior to appee's announcement of its tender offer, Indiana's Governor signed into law a new state corporation code. That code contains a provision called the "Control Share Chapter." Under this chapter, persons who wish to acquire "control shares" of a company,[1] are precluded from automatically voting these shares. Before these control shares can be voted, their purchaser must receive approval by the vote of two groups of shares: (1) a majority of all shares, excluding the control shares, must vote for granting voting rights; and (2) the same approval must be given by a vote of all "disinterested" shares, that is, the shares owned by management must be excluded.[2] A

Control Share Chapter

Definition

[1] "Control shares" are defined as any shares which, when added to an acquiring person's holdings of that stock, exceed one of the following thresholds: 20%, 33.3%, or 50%.

[2] There is a dispute between appnts and appee as to whether two majority votes are necessary to win voting rights for control shares. Appee contends that two voting groups must grant voting rights, that is, both the group containing only "disinterested shares" and the group which also includes shares owned by management. Appnts argue that only the "disinterested- (Footnote continued)

purchaser of control shares has two options to obtain the required vote of existing shareholders: If the purchaser files an "acquiring person statement" which contains disclosure information similar to that required by the Williams Act,[3] the purchaser then can request the company whose shares are being purchased to conduct a special shareholder election within 50 days of such request to determine whether the control shares will be given the vote. If the purchaser does not file a statement, the purchaser can be forced to wait until the next annual meeting to obtain the requisite votes, and before that time, management may redeem the shares. The control share chapter applies to companies that have: (1) 100 or more shareholders; (2) their principal offices, principal place of business or substantial assets in Indiana; and (3) either more than 10% of their shares owned by Idiana residents, or more than 10% of their shareholders reside in Indiana, or more than 10,000 of their shareholders reside in Indiana.

(Footnote 2 continued from previous page)
share" group need vote to approve voting rights. Both the DC and CA7 rejected appnts' limited reading of the statute. See CTS Juris. St. 5 n.3.

[3] The Wiliams Act requires disclosure to existing shareholders of such information as the identity of the tender offeror, the offeror's source of funds, the number of shares already owned by the offeror, and the offeror's intent to make any major changes in the corporate structure after the shares are purchased.

The Williams Act has three major compponents. First, the Act requires disclosure of the information just described. Second, the Act permits shareholders who tender shares pursuant to the tender offer to withdraw them within the first seven days of the offer or after 60 days if the offeror has not yet purchased them. Third, all shares tendered must be purchased for the same price, and if the offering is oversubscribed, the offeror must take shares from each tendering shareholder pro-rata. See Edgar v. MITE Corp., 457 U.S. 624, 632 (1982).

On the same day as it announced its tender offer, appee filed suit in DC alleging various federal and state claims against CTS. A few days later, CTS chose, as permitted by the new statute's terms, to be governed by the new control shares provision, described above, before appee's tender offer expired. Appee subsequently amended its complaint to challenge the constitutionality of the control share provision, relying upon this Court's decision in Edgar v. MITE Corp., 457 U.S. 624 (1982). Appee did not comply with the control share chapter.

The DC ruled in appee's favor, striking down the control share chapter on both preemption and Commerce Clause grounds. CA7 affirmed, ruling that the control share chapter was preempted by the Williams Act and unreasonably interfered with interstate commerce.[4] Concerning the preemption question, CA7 followed the preemption section of Edgar v. MITE Corp., written by JUSTICE WHITE and joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN. 457 U.S., at 630-40 (parts III and IV). Following this section of MITE, the first problem with the control share chapter, according to CA7, is that it imposes a 50-day delay on tender offers and makes it much more difficult for them to succeed. The preemption section in MITE found that the Illinois takeover statute at issue there allowed management of target companies to unreasonably delay consummation of a tender offer.

DC invalidates

[4] CA7's opinion dealt with a number of issues, including whether the Clayton Act was violated and whether CTS's management breached its fiduciary duty to its shareholders. I will address only those parts of the opinion dealing with the constitutional challenge of the control share chapter.

Here, CA7 concluded that no reasonable tender offeror would accept the tendered shares until such offeror knew that the acquired control shares would be afforded voting rights. Accordingly, the offeror would be forced to keep the offer open for 50 days rather than the 28 days usually required under the Williams Act regulation. App. to CTS' Juris. St. A-20. CA7 followed the overall premise of the preemption section in MITE: to wit, the Williams Act established a balance between tender offerors and target companies, and states cannot upset this balance by passing laws which unreasonably hinder the ability to effectuate tender offers. CA7 concluded that "[v]ery few tender offers could run the gauntlet that Indiana has set up." App. to CTS' Juris. St. A-23.

CA7 also ruled that the control share chapter violated the Commerce Clause, again relying upon MITE. In MITE, part VB, written by JUSTICE WHITE, was joined by THE CHIEF JUSTICE, JUSTICE POWELL, JUSTICE STEVENS, and JUSTICE O'CONNOR. The Court ruled in this part that the Illinois takeover statute failed the test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), that is, the burden imposed on interstate commerce was excessive compared to Illinois' interests served by the statute.[5] CA7 stated that

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[5] The Illinois statute struck down in MITE had a somewhat similar jurisdictional scheme. Illinois' takeover statute applied to all companies which met two of the following three conditions: "the corporation [had] its principal executive office in Illinois', [was] organized under Illinois law, or [had] at least 10% of its stated capital and paid-in surplus represented in Illinois." MITE, 457 U.S., 642. Under both the Illinois scheme or Indiana's scheme, most of the ownership of a company covered by either statute could be located outside the state.

(Footnote continued)

Indiana had no interest in protecting non-residents from "being stampeded to tender their shares" to an acquiring company like appee. App. to CTS Juris. St. A-25. Indiana's control share chapter impedes transactions between residents of other states, and, with virtually no compensating benefit, prevents non-residents from accepting tender offers from other non-residents. Id. CA7 also found that the control share chapter impedes important interstate commerce in "corporate control." Id., at A-26.[6]

3. CONTENTIONS: Preemption. Appnts assert that there has been confusion in the lower courts dealing with state takeover regulation after MITE. According to appnt CTS, some CA's,

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(Footnote 5 continued from previous page)
In light of this fact, the Court in MITE concluded that Illinois' takeover statute unreasonably burdened interstate commerce for the following reasons: Illinois had too much power to control extrajurisdictional transactions; the statute's provision allowing the Illinois Secretary of State to, in effect, veto a proposed tender offer placed too great a burden on the tender offer process; Illinois had no legitimate interest in protecting non-resident shareholders; the statute was one-sided in that the target corporation was free to purchase its own shares irrespective of the statute; and the purported benefits to target company shareholders afforded by the statute duplicated those protections afforded by the Williams Act. 457 U.S., at 643-45. The Court also rejected Illinois' argument that the statute merely allowed Illinois to govern the internal affairs of corporations incorporated under its laws. The Court reasoned that the statute would apply to tender offers involving companies with only 10% of the outstanding shares held by Illinois residents, thus, the statute could regulate primarily non-Illinois companies. Id., at 645-46.

[6] CA7 reasoned, citing MITE at 643 (opinion of the Court), that an interstate market in corporate control exists whereby a corporation's assets are employed in the most efficient manner possible by allowing persons from all over the country to purchase control of a company and put the assets of that company to their most efficient use.

such as CA8 in National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (1982), have followed both the preemption and Commerce Clause analysis of MITE. Some of the same CAs and other CAs, however, have narrowly read MITE, or rejected the preemption part of the opinion. E.g., Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 913 (CA8 1984); Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1034, 1036 (CA1 1982). In L.P. Acquisition Co. v. Tyson, 772 F.2d 201 (1985), appnt CTS argues, CA6 held that MITE did not invalidate the Michigan Takeover Act, yet that same CA had earlier held the same Michigan act to be unconstitutional as applied to an interstate tender offer in Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 567-68 (1982). Appee disagrees with appnts' reading of the cases and asserts that since MITE, lower courts have uniformly struck down statutes similar to the Illinois act struck down in MITE.[7] Moreover, the cases addressing control-share statutes similar to the one at issue here have also uniformly held that they are unconstitutional under MITE. E.g., Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (CA6 1986)(reported at Fed. Sec. L. Rep. (CCH) ¶92,800).

Appnts claim that Indiana's control share chapter does not conflict with the Williams Act. The Williams Act amended the Securities Act of 1934, which contains the provision that nothing within that Act is to prevent state regulation in this area so long as there is no direct conflict with any provision of that

[7] Citing, inter alia, Martin-Marietta and National City Lines, supra.

Act.[8] Appnts attempt to refute the preemption part of MITE by arguing that the Williams Act does not force states to adopt a position of neutrality in regulating tender offers. Even if it does, Indiana's control share chapter withstands such scrutiny because it does no more than regulate voting rights of shares already acquired. As such, the control share chapter is no different than a number of other common state corporation laws which allow cumulative voting, provision for costly redemption rights for minority shareholders, and the requirement that all mergers and major structural changes in a corporate structure be approved by a supermajority. The control share chapter has nothing to do with the the actual purchase and sale of securities in tender offer situations, the concern of the Williams Act. It is entirely possible, moreover, by conditioning purchase of shares under a tender offer on the approval of voting rights, to easily comply with both the Williams Act and the control share chapter.

Appee responds that there is indeed a direct conflict between the Williams Act and the control share chapter. Appee notes the added-delay problem addressed by CA7. See supra. On this point, appee states that if management can somehow delay a tender offer just ten more days past the 50 day period within which management must call a special election, then, under the

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8 "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 of the rules and regulations thereunder." 15 U.S.C. § 78bb(a).

Williams Act, tendering shareholders obtain withdrawal rights which, if exercised, will completely frustrate a tender offer. Appee also states that its appeal challenges only the application of the control share chapter to appee's tender offer, i.e., an as-applied challenge. Accordingly, in this particular case, since appnt CTS adopted the control share chapter after appee had already made its tender offer, appee, in this case, could not comply with the control share chapter even though appee was complying with the Williams Act and its regs. Appee also disagree with appnts' contention that the control share chapter is an innocuous regulation of voting rights, and argues that the chapter has a direct and substantial impact on tender offers.

Commerce Clause. Appnts argue that the control share chapter is non-discriminatory, and advances a number of legitimate state interests including: protecting existing shareholders from domination by a new shareholder; allowing existing shareholders to decide whether a major change in voting control of the company is in their best interests; and the ability to obtain shareholder approval 50 days after an offer may stem protracted takeover battles between the tender offeror and management of the target company. The control share chapter applies only to Indiana corporations, appnts argue, and poses no risk of conflicting with the regulation of other states. Moreover, Indiana is not required to develop the most economically efficient regulation of takeovers of Indiana corporations, as CA7 suggests. Economic analysis cannot be used as a substitute for fundamental principles of federalism.

Appee notes that the articulated purpose of the control share chapter is to keep West Coast and East Coast firms from acquiring Indiana corporations.[9] Control share chapter regulation is emerging as the most popular means by which states are attempting to discourage takeovers of domestic corporations after MITE was decided. Such regulation does indeed discriminate against interstate commerce, because, as a practical matter, given the distribution of wealth in this country, most tender offers for Indiana corporations will come from out-of-state bidders. Accordingly, the control share chapter is designed to prevent the shift of corporate control from Indiana companies to non-state entities. Appee argues that laws limiting tender offers are different from other state laws which allow shareholder votes on such major changes as mergers. Such changes affect corporate structure. By contrast, tender offers alone do not involve any change in the internal affairs of a company.

Appee also argues against plenary review by this Court. Appee argues that the DC's decision was limited to the particular facts of this case; MITE is dispositive here and has provided clear guidance to the lower courts; moreover, appee would be seriously prejudiced by further delay in that any decision by this Court noting probable jurisdiction would likely preclude appee from voting its shares at CTS' 1987 annual meeting.

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[9] Quoting counsel of record for appnt CTS. Motion to Dismiss 14.

4. DISCUSSION: I agree with appee's position that MITE has provided sufficient guidance to the lower courts. Contrary to appnts' assertions, there appears to be no divergence of views among the lower courts concerning MITE's application. Appnt CTS flatly asserted that CA6 in L.P. Acquisition Co. v. Tyson, 772 F.2d 201 (1985) did not invalidate the Michigan Takeover Act, but that CA6 had earlier held the same statute to be unconstitutional in Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (1982). This statement is wrong. CA6, in considering whether a preliminary injunction should be granted, did grant such an injunction based upon MITE's Commerce Clause analysis. CA6 did not, however, uphold the Michigan statute's constitutionality in L.P. Acquisition. CA6 held that the statute, as applied, did not violate the Commerce Clause.[10] CA6, nevertheless, still relied upon the preemption section in MITE and enjoined enforcement of the statute. 772 F.2d, at 209.

Both appnts make much of CA8's statement in Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (1984), concerning the preemption section in MITE, that "the Court has not definitively resolved whether the view of Justices Powell and Stevens, the view of Justices White, Burger and Blackmun, or some other analysis should apply." Id., at 913. CA8 noted, however, that it had

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10 The provision of the Michigan statute upheld in L.P. Acquisition required similar disclosure as the Williams Act, but the securities at issue in that case were not registered, and, therefore, the disclosure requirements of the Williams Act were inapplicable. 772 F.2d, at 206.

earlier relied upon MITE to strike down Missouri's takeover statute. National City Lines v. LLC Corp., 687 F.2d 1122 (1982). In Cardiff, CA8 merely upheld additional disclosure requirements imposed on tender offerors in Minnesota. The following explanation of the additional requirements by CA8 shows why Minnesota's regulation of tender offers is consistent with MITE:

> "The additional disclosures are primarily concerned with the impacts of the proposed takeover on Minnesota residents, including employees and suppliers. While the state may not use the statute as a protectionist measure, it may require the offeror to inform Minnesota stockholders as to the impacts on the state or its residents of the takeover, so that they can consider these factors as an element in their decision to retain their stock or to sell it." 751 F.2d, at 912.

CA8 struck down, on preemption grounds, some parts of Minnesota statute which it found to be too vague or broad. Id., at 914. And it upheld the state commissioner's authority to suspend a tender offer, but only "so long as he restricts himself to deciding whether sufficient facts have been disclosed to comply with the specific disclosures required by the statute." Id. In short, the additional regulation imposed by Minnesota on tender offers is minimal.

The last case relied upon by appnts to show confusion among the lower courts is Agency Rent-A-Car, Inc. v. Connoly, 686 F.2d 1029 (1982). CA1 in Connoly, however, merely upheld the imposition of a sanction for violating Massachusetts' takeover statute. The appellant in Connoly did not argue that the Massachusetts statute itself violated the Commerce Clause or was preempted by the Williams Act. Id., at 1036. Again, there is lit-

tle basis to sustain the argument that Connoly is inconsistent with MITE.

The only CA cited by either party, other than CA7 in this case, addressing a state statute similar to the control share chapter here is CA6 in Fleet Aerospace Corp. v. Halderman, 796 F.2d 135 (1986). CA6 followed both MITE's preemption parts as well as the Commerce Clause section. Given the consistency with which MITE is being applied so far, there is no need, in my view, to reconsider MITE at this time, and I recommend that CA7's decision be affirmed.

CA7's opinion, however, followed both MITE's preemption parts as well as the Commerce Clause section. To avoid CA7's decision being read as extending MITE, this Court may wish to affirm, citing MITE, to indicate that any affirmance by this Court goes no farther than the Court has already stated in MITE. In any event, I do not believe this case warrants noting probable jurisdiction.

5. RECOMMENDATION: I recommend affirm, citing MITE.

There is a motion to affirm.

September 8, 1986 Westfall Opin in petn.

rjm 09/09/86 Cume lis
listed with 86-97

SUPPLEMENT TO POOL MEMORANDUM

To: Mr. Justice Powell September 9, 1986

From: Ronald

Nos. 86-71, CTS v. Dynamics Corp., and -97, Indiana v. Dynamics Corp.

In this case, the memo-writer, a clerk for Justice White, recommends "summary affirmance" of a CA7 opinion by Posner striking down an Indiana statute regulating hostile takeovers. Judge Posner's opinion relied on Justice White's plurality opinion in Edgar v. MITE Corp., 457 U.S. 624 (1982), to invalidate the statute on both preemption and commerce clause grounds.

NOTE-- Ronald

You disagreed with Justice White's preemption analysis when MITE was decided. See 457 U.S., at 646-47. Because that analysis did not gain a Court, I assume you do not feel bound by it. Thus, the only basis on which you would support the decision below would be the commerce clause analysis. You did join part of Justice White's commerce clause analysis, but noted that your agreement rested on a belief that his "reasoning leaves some room for state regulation of tender offers. ... Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as of capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State."

The statute in this case differs slightly from the statute in MITE. The Indiana statute regulates only Indiana companies. See Pool Memo, at 3. Apparently, it is designed to protect these companies from takeovers by East and West Coast firms. Because this seems very close to the motives you described as legitimate in your separate opinion in MITE, this case seems to present a substantial question for you, if not for the Court.

Admittedly, there are several arguments against plenary review. The lower courts do not appear to be struggling. The Court split badly in MITE, and may do the same here. On the other hand, most of the split in MITE seems attributable to the

mootness problem. This appears to be the rare case in this area in which mootness is not an issue.

Accordingly, I recommend NOTE.

Court ......CA. - 7 .... Voted on ...., 19..... SEP 29 1986

Argued ...., 19...... Assigned ...., 19...... No. 86-97

Submitted ...., 19...... Announced ...., 19...... Vide 86-71

INDIANA, Appellant

vs.

DYNAMICS CORPORATION OF AMERICA, ET AL.

07/22/86 - Appeal *Flagged for [illegible]*

Note Consolidate with 86-71

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, Ch. J.													
Brennan, J.													
White, J.								*[illegible]*					
Marshall, J.													
Blackmun, J.													
Powell, J.													
Stevens, J.													
O'Connor, J.													
Scalia, J.													

19017-9-86

February 6, 1987

CTS GINA-POW

86-71 CTS v. DYNAMICS CORP.

86-97 INDIANA v. DYNAMICS CORPORATION (CA7)

MEMO TO FILE:

In Edgar v. MITE CORP., 457 U.S. 625, 643-644, we invalidated an Illinois statute that regulated interstate tender offers on the ground that the statute imposed a burden on interstate commerce for which (even as applied to Illinois corporations) there were no valid or "legitimate local interests". I only joined Part I (that stated the case) and Part V-B, and filed a brief concurring opinion at p. 646. I still adhere to my view that the Williams Act has become an economic disaster - a view that increasingly is being held by responsible economists. Indeed, hearings are now pending in the Congress to consider appropriate means of curbing takeover bids, and the bypassing in effect of antitrust laws.

As noted above, I joined Part V-B of MITE because the Court recognized that states do have an interest, and that the state interest must be "weighed" against the effect on interstate commerce. Justice White's opinion stated:

> "The Illinois Act is also unconstitutional under the test of Pike v. Bruce Church for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the state."

The Court's opinion then went on to conclude that the "local interests" served by the Illinois act were not sufficient to outweigh the adverse effect on interstate commerce.

As the SG's brief points out, the present case is viewed as involving a "second-generation statute" designed to avoid the infirmatives identified by the Court in MITE. A common theme of the new statutes is that, rather than proporting to regulate takeover bidders' activities as such, these statutes invoke the state's authority to regulate corporate structure and shareholders rights.

The Indiana Statute at issue in this case is called the "Controlled Share Acquisition Chapter" (the Indiana Statute). It prevents a shareholder of an Indiana corporation - regardless of where the shareholder lives - from conveying his voting rights [pursuant to a tender offer] to a buyer, wherever the buyer may be situated, in an acquisition unless two shareholder votes approved the conveyance. This statement is too general to indicate the

complexity of the Indiana Law. It is summarized by the SG as follows:

> "The central feature of the Indiana Chapter is an express restraint on certain transfers of the voting rights of such shares: the approval of 'disinterested' shareholders is required before a willing seller may sell his voting rights to a willing purchaser in a transaction that meets the definition of 'control share acquisition.' As a practical matter, in all cases in which the buyer's objective is in fact 'control,' the Indiana Chapter makes that approval a precondition to the sale of the shares themselves."

The DC invalidated the statute as violative of both the Supremancy Clause and the Commerce Clause. The Court of Appeals (Judge Posner) affirmed, concluding that the statute was a "transparent" attempt to circumvent the Williams Act. CA7, in deciding the Commerce Clause issue, did proport to weigh the local benefits provided by the statute against the burden it placed on interstate commerce. The SG urges that we affirm but only on the Commerce Clause ground. Indeed, the SG recognizes the importance of a state's interest and criticized the Court's opinion in MITE as having given too little weight to these interests:

> "The United States believes that the language with which the Court in MITE rejected [the arguments with respect to state interest] was too broad. Prescribing rules governing corporate 'internal affairs' and protecting the rights of shareholders are both valid and important activities of a chartering state." See P. 11, 12 of the SG's brief.

* * *

My brief concurring opinion in MITE summarizes my basic objections to the Williams Act and particularly the way it has been applied so expansively. But MITE is "the law", and I would find it difficult to sustain the complex Indiana Statute in light of the reasoning of the Court's opinion in MITE. If my law clerk has any ideas in this respect, they would be more than a little welcomed!

LFP, JR.

Curve lined with Ind. v. Dynamics Corp 86-97

See the "flagged" case next

PRELIMINARY MEMORANDUM

September 29, 1986 Conference
Summer List 23 , Sheet 1

No. 86-71

CTS CORP.(tender offeree) Appeal from CA7 (Bauer Cudahy, Posner)

v.

DYNAMICS CORP. OF AMER.(tender offeror) Timely

This appeal is curvelined with No. 86-97, Indiana v. Dynamics Corp. of America. The issue is whether an Indiana statute regulating tender offers is preempted by the Williams Act and unreasonably burdens interstate commerce.

~~Deny~~ D -- Note -- Ronald (See my memo attached to 86-97)

5. RECOMMENDATION: For reasons stated in the Preliminary Memorandum in No. 86-97, I recommend affirm, citing Edgar v. MITE Corp., 457 U.S. 624 (1982).

There is a motion to affirm.

September 8, 1986 Westfall Opin in petn.

File (See my notes)

rjm 02/11/87 Reviewed 2/15. Excellent memo on this extraordinarily complex Ind. statute intended to regulate "tender offers" more carefully than the Wm. Act. CA7 (Posner & Easterbrook who favor tender offers) invalidated statute, holding that it was preempted by Wm Act and also violated the Commerce Clause. CA7 relied on BRW's plurality op. in MITE.

1. Ronald clearly would Reverse on preemption issue. He thinks MITE is distinguishable. p13

2. Ronald would tentatively Reverse also on the Commerce Clause, applying the balancing test of Pike. pp 22-24

I would like to agree with Ronald & this thorough memo.

BENCH MEMORANDUM

To: Justice Powell February 11, 1987

From: Ronald

Nos. 86-71, CTS v. Dynamics Corp.; -97, Indiana v. Dynamics Corp.

Cert to CA7 (Bauer, Cudahy, Posner)

Set for oral argument Monday, March 2 (3d case)

See comparison with merger statutes - 16 (Read Ind. Brief on this)

QUESTIONS PRESENTED: Whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is preempted by the Williams Act or unconstitutional under the Commerce Clause.

I. STATUTORY BACKGROUND

The Indiana Control Share Statute probably is the most sophisticated of the second generation state takeover statutes

Ask: Any leg. pending in Congress? Any Reports?

designed to avoid the impact of the Court's decision in Edgar v. MITE Corp., 457 U.S. 624 (1982). Because of its complexity, I think it is useful to discuss the statute, and its practical effect, at some length before turning to the difficult legal questions the statute raises. Because the statute has not been construed by any state court, and because the district court unconscionably failed to notify the Indiana Attorney General that it was considering invalidating the statute, see 28 U.S.C. §2403(b), there is some uncertainty as to the meaning of the statute.

The statute was signed on March 4, 1986. It applies to any corporation incorporated in Indiana if it has (1) 100 or more shareholders; and (2) its principal place of business or substantial assets in Indiana; and (3) more than 10% of its shareholders resident in Indiana, or more than 10% of its shares owned by Indiana residents in Indiana, or more than 10,000 shareholders resident in Indiana. Starting August 1, 1987, it will apply to all such corporations unless they specifically opt out. [It applied in this case because CTS specifically opted in.] The management of the corporation has the power to opt in or out.

The law regulates acquisitions of "control shares," which it defines (with several irrelevant exceptions, see §23-1-42-2) as acquisitions that put the purchaser over the 20% threshold, the 33% threshold, or the 50% threshold. When an entity acquires "control shares," he does not obtain the voting rights normally associated with those shares unless the shareholders vote to give voting power. If the acquiror (1) files an "acquiring person statement" with the corporation, (2) requests a share-

[Handwritten margin note: The statute applies to Ind. corps with its principal place of bus. in Ind, & with more than 10% of its shares owned by residents. Applies unless mgt. "opts" out.]

[Handwritten margin note: Three thresholds]

holder meeting, and (3) offers to pay for the meeting, the management must hold a meeting within 50 days. [If the acquiror does not fulfill these requirements, the voting rights of the control shares will be considered at the next regularly scheduled shareholder meeting.] At the meeting, the shareholders will vote to determine whether the control shares should receive voting rights. The statute describing the voting procedures is ambiguous in an important respect:

> "[The resolution granting voting rights] must be approved by:
>
> (1) Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a); and
>
> (2) Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares." Ind. Code Ann. §23-1-42-9(b), reprinted in App. to Juris. Statement of CTS pp. A184-A185.

The statute defines interested shares as those held by management, inside directors, or the acquiror. It is clear that paragraph (2) contemplates a vote by all disinterested shareowners. There is some dispute as to whether paragraph (1) requires a separate vote of all shares. When Indiana finally was notified of the litigation, it argued to the lower courts that paragraph (1) contemplates a separate vote only if the transaction would "result in the changes described in §23-1-38-4." See Brief of Indiana at 29 n*. [That section describes major corporate changes like mergers, that traditionally require votes of all shareholders.] The SG, see Brief for the United States at 5

ambiguous - with Indiana differing from SG & the lower cts as to what this means. Ronald Hunter Ind probably is right, but if this becomes imp. we ~~[struck out]~~ could certify a Q to Ind S/Ct

and nn. 6-7, and the lower courts, concluded that the statute requires separate votes. This question turns on whether the italicized clause ("if the proposed ... IC 23-1-38-4(a)") modifies the more distant clause "Each group entitled to vote separately" or the nearer clause "with the holders ... of a class being entitled to vote as a separate group." If it modifies the former clause, there is no paragraph (1) vote unless the transaction would cause such a change (which it usually would not). If it modifies the latter clause, there always will be a separate vote, and the clause determines only the manner of taking the vote. Because there is no comma before the italicized clause, I find it more natural to take it as modifying the immediately preceding words, as the SG does. On the other hand, the similarity of language about classes of shares in paragraph (1) and paragraph (2) suggests that Indiana's interpretation is correct, i.e., that the clause is mere boilerplate describing the manner of taking the vote. In any event, I am convinced that there is sufficient ambiguity on this point that the Indiana courts are entitled to a chance to examine the question, if it matters. [If the question is dispositive, it could be certified to the Indiana Supreme Court. See Ind. Code Ann. §33-2-4-1; Ind. App. R. 15(N); 17 Wright, Miller & Cooper §4248 (1978).]

We could certify Q to Ind. S/Ct

II. PROCEDURAL HISTORY

CTS is an Indiana corporation with sufficient business in Indiana to be covered by the statute. CTS has only one class of common stock. On March 10, 1986, CTS stock was selling on the New York Stock Exchange at $36 a share. On that date, Dynamics,

which then owned 9.6% of CTS's common stock, made a cash tender offer for 1 million shares, which would give Dynamics 27.5% of CTS's common stock. The offer complied with the various provisions of the Williams Act.

On the same day, Dynamics filed suit in NDIll, challenging CTS's proxy solicitations for CTS's upcoming shareholder meeting. Shortly thereafter, CTS opted into the newly passed Control Share Statute. At that point, Dynamics amended its complaint to challenge the constitutionality of the Control Share Statute. Without notifying the State, as it was required to do by 28 U.S.C. §2403(b), the DC held the statute preempted by the Williams Act and unconstitutional under the Commerce Clause.

On appeal, CA7 affirmed. First, CA7 held that the statute was preempted by the Williams Act. In CA7's view, the statute effectively required tender offers to be held open for 50 days. Because the Williams Act allows tender offers to be closed after 28 days, CA7 believed the state statute conflicted with the federal law. CA7 noted that it had doubts that the Williams Act was intended to preempt state laws like this one, but felt compelled to reach this result in light of the plurality opinion in MITE.

Second, CA7 held that the statute violated the Commerce Clause. On this point, CA7 relied heavily on the economic reasoning of Judge Posner. He agrees with the view posited by Easterbrook and Fischel in a leading Harv. L. Rev. article, that tender offers are uniformly good for the economy. In his view, "the efficiency with which [corporate assets] are employed ...

depends on the market for corporate control--an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute.". Under Judge Posner's economic theory, the benefits to Indiana citizens are "trivial or even negative." Thus, he found the statute to violate the Commerce Clause.

no benefits to Ind. citizens

Probable jurisdiction was noted by yourself and the three Justices who did not vote on the merits in MITE--THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE MARSHALL (who joined 3).

It is my understanding that the case is not moot because the lower courts enjoined application of the statute. Thus, Dynamics has been able to vote its shares; if the case were reversed, Dynamics would lose voting rights until it complied with the statute. Considering the difficulties encountered in MITE, you might nail this down at oral argument.

not moot

III. PREEMPTION

In MITE, a 3-2 plurality concluded that the Williams Act preempted an Illinois takeover statute (JUSTICE WHITE, joined by CHIEF JUSTICE BURGER and JUSTICE BLACKMUN; you and JUSTICE STEVENS disagreed). I agree with your view in MITE that the Williams Act does not preempt statutes in this area. In any event, this statute--drafted to evade the strictures of the MITE plurality--arguably is not preempted even under the analysis of JUSTICE WHITE's plurality opinion. [As your file memo notes, the SG agrees with this analysis. See Brief for the United States 8-9.]

Ind. statute arguably is not preempted even under BRW's analysis in Mite

The first argument appts make for the statute is that §28 of the Securities Exchange Act of 1934 expressly preserved such statutes. That section provides:

> "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).

I am unpersuaded. On its face, this section preserves only "jurisdiction" of State "securities commissions." This seems to have little to do with this case.

I am persuaded, however, by a related argument. Congress has legislated quite extensively in the securities field. That fed securities legislation has purposefully left to the States quite a bit of power to regulate various aspects of corporate governance. One hardly could argue that Congress has intended to preempt the Model Business Corporations Act. The line between those things Congress purposefully has left to the States and those things Congress has taken over is quite narrow. Thus, I would not be persuaded that Congress intended to preempt laws in the corporate governance area unless the conflict were clear.

States have regulatory power. Congress has not intended to preempt the Model Business Corp. Act.

The MITE plurality reviewed the legislative history of the Williams Act and concluded that Congress chose a line of neutrality between tender offerors and incumbent management. From this point, the plurality reasoned that any state law substantially impeding tender offers was preempted. As the fine brief for appt Indiana demonstrates, this conclusion is doubtful. It is indeed clear that Congress itself did not wish to favor management over offerors. The two strongest statements in the leg-

Indiana Brief is excellent

islative history are (1) Senator Williams explained that "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 Cong. Rec. 24664 (1967) (quoted in MITE, 457 U.S., at 633). (2) The Senate Report stated "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." S. Rep. No. 90-550, p. 3 (1967) (quoted in MITE, 457 U.S., at 633).

For two reasons, this legislative history is not dispositive. First, it only indicates that Congress did not itself intend to upset the policy of neutrality. It was enough to serve the federal interest--fair trading in the national securities markets--to ensure that misleading nondisclosure did not allow massive fraudulent transactions. There is nothing to indicate that Congress intended to prevent the states from stepping in to deal with matters like "entrenched but inefficient management." It seems to me that legal redress for ineffective corporate management traditionally is sought under state law. There is no reason to believe that Congress did not intend to allow the states to act to limit coercive tender offers. See MITE, 457 U.S., at 646-647 (your opinion); id., at 655 (opinion of JUSTICE STEVENS).

Second, if it indicates anything, the legislative history indicates a policy of neutrality only between management and tender offerors. The Williams Act was not neutral with respect to shareholders; it was specifically designed to help them. See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29-30 (1977)

("The Senate Report expressed the purpose as 'plac[ing] investors on an equal footing with the takeover bidder,' Senate Report 4, without favoring either the tender offeror or existing management"). The statute in this case is not clearly designed to favor management. *Certainly not!* Rather, it arguably is designed to protect shareholders from the "prisoners' dilemma" presented by two-tier tender offers, which coerce shareholders to tender, even if they doubt the tender offer is in the corporation's best interest. Thus, it does not interfere with the supposed balancing between the management and the offeror; it merely extends congressional efforts to aid unprotected investors.

Even granting the plurality's conclusion, I doubt that this statute substantially hinders the Williams Act. The MITE plurality noted three ways in which the statute in that case hindered the purposes of the Williams Act. This *Ind.* statute, with some success, has been drafted in an attempt to evade these concerns. The first defect in the MITE statute was that it provided for a 20-day precommencement period during which management could offer their side of the story to stockholders, but during which the offeror could not communicate with the shareholders. MITE, 457 U.S., at 634-635. The plurality ~~struck~~ *invalidated* this provision ~~down~~, because its clear purpose was to give management an edge in tender offers. The plurality noted that Congress expressly had deleted precommencement notice provisions from the Williams Act. The statute in this case evades this problem completely; it has no precommencement notice requirement. Moreover, the shareholders have equal access to materials from management and from the

[Margin notes:] Ronald doubts Ind. statute hinders Wms Act / a mistake / But Ind. statute has no pre-commencement notice requirement

offeror before they make their votes. Thus, unlike the statute in MITE, this statute does not bias the information shareholders receive.

Second, the MITE statute allowed tender offers to be barred for an unlimited time until the Secretary of State ruled on the fairness of the offer. The plurality noted the importance to the Williams Act system of swift timetables for tender offers: the Williams Act requires that such offers be kept open for 28-60 days. The statute in this case does a fair job of evading this problem. It requires a meeting to be held within 50 days of the offer--within the statutory Williams Act period. Of course, if the offer could not proceed until after the vote, the statute would effectively slow offers by 22 days (the excess of 50 days over the Williams Act 28-day minimum period, which apparently is now standard in the industry). But Indiana and CTS persuasively argue that offerors could engage in conditional offers: they could purchase the shares on day 28, subject to returning them if they lost the shareholder vote. Of course, this delays by 22 days the period during which offerors can use the power they obtain from their takeover, but so do numerous clearly legitimate methods like cumulative voting and staggered directorships. Because the statute allows offers to be consummated on day 28, and because voting power vests, if at all, on day 50 (still within the Williams Act time frame), I am inclined to think that the statute does not delay tender offers so substantially as to be preempted, even under the MITE plurality's analysis.

[There is a problem with this argument, that turns on matters of Indiana law that I have not run to ground. According to the Control Share Statute, the principal vote is to be a vote of disinterested shareholders. If the offeror already has purchased all the shares of those who tendered, the only remaining shares not owned by the management or by the offeror will be the shares of those who declined to tender. These shareholders are not likely to vote for the offeror. If the vote were taken on this basis, the conditional tender offer would be completely ineffective; no such offer would be likely to acquire voting rights.

But it is not at all clear whether tendered shares will be deemed owned by the offeror or by the prior owners. Indiana law provides that voting rights at the meeting are determined by ownership of the shares on the record date. See Brief for Indiana at 71. Under Indiana law, the target management sets the record date. By delaying the record date beyond the 28-day window, management might delay the offeror's share purchases: if it purchased shares before the record date, it would be depriving itself of the votes it would need to get voting rights. On the other hand, if the purchase took place after the record date, the shareholders who subsequently tendered--presumptively favorably inclined to the offeror--would still be able to vote.

I doubt that management frequently will abuse the power to set the record date to affect voting rights at the meeting. Under the Control Shares Act, management must act as soon as is "reasonably practicable" to send notice to all "record" share-

holders. From this I infer that the record date must pass before the notice is sent. It seems to me that management would violate the Indiana law if they delayed the record date substantially. Moreover, as a practical matter, it seems unlikely that the record date for a large corporation could be set less than 22 days before the meeting. It must take a substantial amount of time to come up with a list of shareholders. Thus, I tentatively am inclined to conclude that tendered shares probably will be voted at the meeting by the original shareholders--likely to be favorable to the offeror. If this is so, I think the "conditional tender offer" is a feasible option that doe not impose an untoward burden on tender offers, though it may delay exercise of the power acquired in tender offers, and prevent tender offers that shareholders do not desire. In any event, this opportunity for abuse of power does not seem sufficiently realized to justify facial invalidation of the statute. Of course, you should take these conclusions with the knowledge that I have absolutely no practical experience in this area.]

Ronald is correct

"conditional tender offer"

Management —

Third, the MITE statute allowed the state Secretary of State to pass on the substantive fairness of the offer. The plurality concluded that this violated the Williams Act precept of investor autonomy. On this score, the statute in this case is clearly satisfactory, because it allows the Act to be evaluated only by disinterested shareholders.

Ind. does not have

As a final point on the preemption analysis, you will recall that the Act arguably calls for a vote by all shareholders. If, as seems likely, management own more shares before the

record date than offerors, this vote would make the Act more favorable to management. But I doubt that this makes a significant difference. The MITE plurality was concerned about investor autonomy. If the statute allows all shareholders to vote, it does not seem to be grossly unfair. After all, the tender offer will affect the value of the interested shares, as well as the rights of the disinterested shares. In this respect, the bill resembles provisions of the Model Business Corporation Act, which sometimes require votes by disinterested shareholders (or directors) and sometimes supermajority votes of all shareholders. Legislative judgment as to the appropriate group to be allowed to vote seems beyond our review.

In sum, I recommend that you vote that the Williams Act does not preempt the Indiana Statute. The statute hinders tender offers in two ways: it delays exercise of voting rights 22 days beyond the minimum period set by the Williams Act; and it effectively bars tender offers that independent shareholders find unacceptable. These effects do not seem to me to produce a substantial conflict with the Williams Act, even under the analysis of the MITE plurality. In light of this country's long tradition of state regulation of corporate governance, and your federalism concerns, I cannot recommend that you find preemption, though I expect some Justices will. I have written at length to provide current documentation of the strength of your position in MITE, and to articulate distinctions that could be drawn between this statute and MITE.

Ronald finds no preemption

helpful + persuasive

IV. COMMERCE CLAUSE

> "This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 2084 (1986).

If the statute is not struck down under this almost per se rule, the statute is then tested under the balancing test articulated by Justice Stewart in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). I address the different inquiries seriatim.

A. Direct and Discriminatory Regulation of Interstate Commerce

1. Direct Regulation.--It is difficult to know what types of "direct regulation" the rule invalidates. Obviously the phrase cannot be taken at face value. The modern definition of interstate commerce includes the most mundane transactions, like the loaf of bread I bought yesterday. Yet surely a state would not violate the commerce clause if it directly regulated the price at which bread could be sold within its borders. I would formulate this test as proscribing regulations that have serious effects on transactions so unconnected with the State that the State has no power to regulate them. [A recent, and persuasive, law review article characterizes this rule as a structural rule prohibiting extraterritorial regulation, rather than a feature of the Commerce Clause alone. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1092, 1280 (1986).]

In MITE, JUSTICE WHITE, joined by CHIEF JUSTICE BURGER, JUSTICE STEVENS & JUSTICE O'CONNOR, concluded that the Illinois

statute in that case was unconstitutional because it directly regulated interstate commerce. 457 U.S., at 641-643. Because you did not join these pages of the opinion, they were not an opinion of the Court. The *MITE* plurality made several negative comments about the statute before it, most of which have no force in this case. First, it noted that the statute affected an offer to purchase shares from shareholders living outside Ilinois. Second, the statute would apply even if the corporation were not incorporated in Illinois. Third, other States could enact similar statutes, creating a risk of inconsistent regulation.

I address the last point first. The statute here regulates only Indiana corportations. Thus, there is no risk of inconsistent regulation. Similarly, on its face, the statute in this case affects only the voting rights of corporations incorporated in Indiana. Thus, the statute has no direct effect on transactions, but only on shares of entities that the State itself has called into being. I find that nexus sufficiently strong that the statute should not be invalidated without examination under the *Pike* balancing test. This idea finds strong support in the "internal affairs" doctrine. The Court firmly has upheld the power of States to regulate a variety of corporate activities, wherever they are taken, so long as the corporation is incorporated in the State that seeks to apply its law. The theory of these cases is that, in purchasing stock of the State's corporation, the acquirer "impliedly agree[s] that in respect of its internal affairs the company [is] to be governed by the laws

of [that] state," Rogers v. Guaranty Trust Co., 288 U.S. 123, 129 (1933).

Appee contends that such cases are inapposite, because they involved regulations of the attributes of shares. By contrast, the statute in this case, in practical effect, regulates a particular transaction. I am unpersuaded by this point. Frankly, I see little difference between this statute and an unquestionably valid statute that precludes mergers from taking place without a shareholder vote. Indiana points out that, if it cannot regulate tender offers, the protection it offers minority shareholders from mergers is dissipated; once the offeror has voting rights, he has the power to force a merger. In my view, the line between regulating "internal affairs" and "directly regulating" transactions always will be narrow. It seems unwise to ~~strike down~~ invalidate such regulations as per se invalid; if the Court is going to invalidate statutes because of their "practical" effects rather than their actual provisions, it seems to me it should do so at the balancing stage, where all the effects--both positive and negative--can be considered. So long as the State can implement the regulation by affecting the voting characteristics of shares of the State's corporations, the statute should not be struck down as "directly regulating" interstate commerce.

Compare with merger statutes

2. Discrimination--The second question under the per se inquiry is whether the statute discriminates against out-of-state economic interests. The arguments on this point are clear, but the result is subject to reasonable doubt. Appees argue that the statute was enacted to prevent takeovers of Indiana firms by

East Coast firms that would move the assets out of Indiana. Common sense suggests that this is not at all implausible. But firm support for this argument is scanty. The record contains no legislative history, other than a newspaper interview with one of the attorneys for appellant CTS, who suggested that this was the purpose of the statute. Moreover, the terms of the statute do not support this characterization. On its face, the statute applies to anyone who acquires an Indiana corporation, whether the offeror is from Indiana or not. Similarly, the statute applies regardless of whether the principal place of business is Indiana, or whether there is evidence that the offeror plans to move business out of Indiana. Thus, Indiana argues that the statute is an evenhanded effort to better the governance of corporations incorporated in Indiana. Of course, appee rebuts this argument by pointing out that, as a matter of fact, almost all takeovers covered by the statute would be initiated by out-of-state entities, and directed at entities whose businesses are conducted in Indiana. Thus, the practical effect of the statute probably is to slow the transfer of assets out of Indiana.

[Handwritten margin note: applies to tender offerors in Ind. as well as out of state ones. Thus, no discrim.]

[Handwritten margin note: yet]

But it is not clear that even this is a discriminatory purpose. Indiana argues that its intent is to build a better corporate climate in Indiana. Protection from hostile takeovers might encourage businesses to come to Indiana. In short, Indiana has no intent to harm businesses in other states; it seeks only to better business in its State. On balance, I am inclined to find Indiana's purpose insufficiently discriminatory to justify *per se* invalidity. I must say, however, that the practical ef-

fect of the statute is troubling. But, as I noted earlier, I think such practical effects should be considered at the balancing stage.

I recommend that you vote here, as you implicitly did in MITE, to say that the statute is not invalid per se. On its face, it regulates voting rights in shares created by Indiana; such regulation is not so unconnected with Indiana to be obviously unconstitutional. Similarly, I do not think the statute is so discriminatory as to be unconstitutional. It is troubling that the practical effect of the statute may be to deter the flow of assets from Indiana to the Coasts. But absent any discrimination that appears on the face of the statute or necessarily inheres in the terms of the statute, the burden on interstate commerce probably is better addressed by the Pike balancing test.

not invalid per se

?

We should apply Pike "balancing test"

B. BALANCING under Pike (I voted wrongly) LFP

In MITE, the Court (JUSTICE WHITE, joined by yourself, CHIEF JUSTICE BURGER, JUSTICE STEVENS, and JUSTICE O'CONNOR) invalidated the Illinois statute because the burdens it imposed on interstate commerce were greater than the local interests served by the statute. The burden in that case was similar in kind to the burden in this case: the statute hindered the completion of tender offers. The only legitimate benefit of the statute was protecing local investors. "[T]he State has no legitimate interest in protecting nonresident shareholders." 457 U.S., at 644. Moreover, the statute furthered that interest only contingently, because it provided no significant protection for shareholders beyond the protections of the Williams Act. The Court then re-

jected application of the internal affairs doctrine--which allows States to regulate the internal affairs of local corporations--for two reasons. First, the Court concluded: "Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." *Id.*, at 645. Second, the Act applied to corporations that were not incorporated in Illinois. "Illinois has no interest in regulating the internal affairs of foreign corporations." You concurred, noting a State's interest in promoting local business.

I think the balancing is close in this case. Two points are relevant to the balancing that are not apparent from *MITE*. First, "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (your plurality opinion). Regulation of voting rights of shares indisputably has been a matter for state law. Depending on how you view this case, this concern may be implicated. Second, Congress has acted quite broadly in the securities area, left this portion of the law untouched, and explicitly preserved a broad place for state regulations in similar areas. In my view, this weakens the inference that the State has done something unconstitutional under the dormant Commerce Clause.

I now turn to the actual balancing. The burden in this case is quite significant, although it is less than the burden in *MITE*. The statute unquestionably slows the course of tender offers, allowing management more time to communicate their view-

point to shareholders before the offeror actually gets control of the company. But the burden is much less than the burden in MITE. As I explained in my discussion of preemption, the statute does not delay transactions as much as the statute in MITE. Moreover, it is more carefully tailored to apply only to Indiana corporations. Thus, there is no risk of inconsistent regulation. Also, burdened corporations easily can evade the law by opting out, or by reincorporating in other states.

Perhaps a more serious problem is that, as a practical matter, the statute affects mostly "out-of-state transactions" and burdens mostly out-of-state entities (East Coast offerors). But Taken alone, this problem is insufficient to justify invalidation of the statute, see Exxon v. Maryland, 437 U.S. 117 (1978). But, coupled with the statute's hindrance of tender offers, the statute places quite a substantial damper on interstate commerce.

On the other side, the benefits to the State in this case are more significant than the benefits in MITE. In the view of the Indiana legislature, two-tier tender offers are inherently coercive and deprive independent shareholders of a fair right to voluntarily decide to sell their shares. As one clerk puts it, the statute effectively institutes collective bargaining for shareholders. I believe that Indiana has a legitimate interest in protecting the shareholders of Indiana corporations--wherever they reside--from being coerced into selling their shares. Although you could doubt the wisdom of Indiana's choice, there recently has been a substantial debate in Harv.L.Rev. and Yale L.J. about the economic benefits of hostile takeovers. It would be

impossible to say conclusively that Indiana's statute has not bestowed a significant benefit on those shareholders. If Indiana has a significant interest in protecting nonresident shareholders of Indiana corporations, this benefit should weigh quite heavily in the balance.

Unfortunately, the MITE Court did say: "Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S., at 644. But this statement was made in the context of a statute that could apply to foreign corporations. Moreover, I believe it proves too much. As I explained earlier, the Court has given the States considerable latitude in regulating corporate mergers, even when the assets of the corporation are out-of-state. The difference here is that the transaction does not actually involve the corporation; it involves an out-of-state shareholder and an offeror. But, as I noted above, if the State cannot regulate this transaction, it effectively cannot regulate the back-end of the deal at which the corporations are merged and nontendering shareholders are frozen out. Thus, it seems to me that it is too facile to rely simply on the residence of the shareholder. If it is an Indiana corporation, Indiana has an interest in regulating major corporate changes. A takeover is a major corporate change, even if it is effected by transactions not with the corporation, but with individual shareholders.

A related benefit of the statute, adverted to in your MITE opinion, is that it improves the Indiana business climate. The Indiana legislature has concluded that this statute will in-

Yes

But statute there was different

leeway regulating mergers

crease the stability of corporations incorporated under its laws. Increased stability might encourage entrepeneurs starting businesses to move to Indiana. It also might increase the prospects for local businesses. Again, I think this also is a substantial interest. Moreover, there is nothing in MITE to the contrary. I caution, however, that it is difficult to distinguish this interest from a discriminatory intent to keep assets in Indiana. As I noted earlier, you could draw the line between whether Indiana actively desires to harm out of state businesses, or whether she simply wishes to aid local businesses.

If you balance the burden on tender offers against the local benefits to the Indiana business climate, I am inclined to think the statute would be invalid. But if you also consider the benefits to shareholders in Indiana corporations, I think the statute should be upheld. It is hard to consider this a legitimate interest in light of the strong language in MITE, but your concurring opinion softens the blow of that language substantially. Moreover, the differing context of this case can be used to justify considering these benefits.

At the heart of the case is your evaluation of the "internal affairs" doctrine. If you think State corporate governance should be limited strictly to laws that affect the attributes of shares and transactions by the corporation itself, you will find that Indiana has overstepped its bounds. On the other hand, if you think States legitimately can act to protect shareholders from being coerced in ways that effect major corporate changes, you will find the law satisfactory. On balance, in

the absence of congressional action, I am inclined to favor a broad scope for State corporate governance. Thus, I recommend that you conclude that the statute is valid under the balancing test.

V. CONCLUSION

1. I recommend that you adhere to the view that you expressed in MITE, that the Williams Act does not preempt state laws that hinder tender offers. Also, even under the reasoning of the MITE plurality, there are good arguments for upholding the statute.

2. I recommend that you decline here, as you did in MITE, to invalidate the statute at the per se stage of Commerce Clause analysis. By limiting its direct regulation to voting rights in the shares of corporations it has created, Indiana has restrained itself within the legitimate sphere of its activity. Similarly, there is nothing on the face of the statute that is discriminatory.

3. I tentatively recommend that you uphold the statute under the balancing test of Pike. The burdens on tender offers are quite significant. But this is only because the Indiana legislature believes unregulated tender offers are coercive. This is a reasonable conclusion that arguably protects shareholders in Indiana corporations and that improves the prospects for businesses incorporated under Indiana law. I think Indiana has a legitimate interest in regulating this aspect of Indiana corporate affairs.

I recommend that you vote to reverse the judgment of CA7.

If any doubt, I'll send memo

86-71 CTS v. Dynamics
(Ind. Take-over case)

Parties agreement has settled some things, and parties agree as to what they will do depending on out-come of case.

1. If we Affirm (invalidate Act)
Dynamics will continue to exercise uninhibitedly the voting of shares it purchased last Spring (27.5%) In other words, Dynamics wins.

2. If we Reverse (uphold Act)
Dynamics then must submit to a shareholder vote under the Act. Mgt. of CTS has agreed, however, to recommend to its shareholders that they vote in favor of voting rts. for Dynamics.

But no one knows what out-come of such a vote would be.

Both parties & Ind AG say not moot.

86-71 CTS v. Dynamics Corp
86-97 Ind v. Dynamics "

Cose case: Reverse

1. Unique, 2nd generation State statute regulating Ind corps with 10% or more of shareholders resident in Ind., or more than 10% of shares owned by residents

2. State interests are strong
Purpose is to protect shareholders by providing procedures when a tender offer is made.

MITE is different

3. No preemption - very different from Wms Act

~~4. Not a burden on Commerce~~

4. Commerce Clause [balancing test under Pike]
(a) Corps are creation of a State
(b) State law determines voting rights: e.g. elections, mergers, sale of assets, liquidation
(c) Classes of stock
(d) Blue Sky Laws

In the end, the stockholders control

5. Statute is optional. Bd of Directors may "opt" to be covered.

mergers (ask Ind. AG)

File
L.F.P.

Notes 2/15

86-71 CTS v. Dynamics Corp. } CA7 (Posner)
86-97 Ind. v. Dynamics Corp. }

Not a Rest

1. The case. Involves validity of Ind.'s "second generation" statute regulating tender offers. The statute is too complex to summarize, and is different from the Ill statute in MITE. But neither the DC nor CA7 found the differences significant. CA7 held that the statute (i) was preempted by Williams Act, and (ii) burdened interstate commerce. MITE was relied upon by CA7, though the SG in this case - while supporting affirmance - thinks MITE is distinguishable (as do I).

2. Preemption. The Ind. statute is not invalid per se. [Same] The state interests are important. The Statute applies only to Ind. corps with more than 10% of stockholders resident in Ind. or where more than 10% of shares are owned by residents. Generally, when one acquires "control shares" he does not acquire voting rights until the shareholders vote to give voting rights.

Ind. statute therefore is different from that in MITE.

I'd find no preemption

SG agrees no preemption but finds violation of Commerce Clause

3. Commerce Clause. Again no per se burden [Same] on interstate. Pike "balancing test" applies, and have language in MITE lends support to CA7's view that the state interests are not substantial enough to outweigh the burden on commerce.

But state interests are not insubstantial. States traditionally have had extensive authority to regulate domestic corporations: e.g. (i) classes of shareholders; (ii) voting rts & preference as to

I think Ind's statute is beneficial

Reread

86-71 CTS v. DYNAMICS CORP.
86-97 INDIANA v. DYNAMICS CORP. } Wms Act case — Argued 3/2/87

(I'd like to uphold Ind. statute — though this will not be easy. I do not think, though, that MITE is controlling)

WHR

Strain (for appellant CTS corp - former clerk of)

The Ind. take-over statute ~~is~~ is to ~~[illegible]~~ provide same rights to shareholders that they have in a merger.

Corps are exclusive creations of State law.

Pritchard (for appellant - State of Ind)

No experience under Ind. statute.

The findings of CA7 are speculative.

Nothing in statute delays the offer & nothing that prevents offer from being accepted immediately.

Sachnoff (appellees)

Relies heavily on Wms Act.

Purpose of Wms Act is to protect shareholders

No tender offerer will make an offer under Ind. statute. Too many mine fields.

Argues (not persuasively) that ~~[illegible]~~ invalidating Ind statute ~~[illegible]~~ will not affect mergers, ?? sale of assets, liquidation, cumulative voting

Sachnoff (cont.)

(9th ? write, talk to SOC. She has some persuasive arguments as to importance of state ~~[illegible]~~ interest in regulating corps.

S.O'C. referred to Exxon v Md & suggested it may be analogous as to Commerce Clause

6-3

No. 86-71 CTS v. Dynamics Corp. Conf. 3/4/87

The Chief Justice Pass on 1st vote. Reverse

SEC says not preempted by Wms Act.
but SEC says there is a Commerce Clause
preemption.

Wms Act requires "equality". This
statute does create a significant
impediment.

States do have authority to regulate
corps. But this statute was
intended.

Justice Brennan Reverse

Wms Act does not preempt.
A tender offeror can comply with both
Wms Act & State law.

States create & regulate corps
Ind. is free to provide voting
rights as it wants to.

If law is unwise, Ind. will
suffer.

Bill read long statement I'll borrow if I write

Justice White Affirm

On either or both grounds.

Agree with Posner.

Not enthusiastic.

Justice Marshall Reverse

Justice Blackmun Aff'm

~~[illegible]~~ Ill statute is different from Ill act.

Agrees no preemption — as SG says.

Also agree with SG on commerce clause.

Justice Powell Aff'm

See my notes.

JUSTICE STEVENS Affirm

~~[illegible]~~ No preemption but agree with S G on Commerce clause issue.

It is a close case.

JUSTICE O'CONNOR Reverse

No preemption by Wms Act

Nor ~~[illegible]~~ is there a significant burden on Commerce.

There are burdens & benefits

Agree with L.F.P.

JUSTICE SCALIA

Wm Act preemption is not even close — no conflict.

~~E~~ Even under negative commerce clause, would not engage in ~~any~~ any balancing.

State ~~[illegible]~~ control over corps is plenary

SEP 29 1986

Court CA - 7 Voted on ...., 19....

Argued ...., 19.... Assigned ...., 19.... No. 86-71

Submitted ...., 19.... Announced ...., 19.... Vide 86-97

CTS CORPORATION, Appellant

vs.

DYNAMICS CORPORATION OF AMERICA, ET AL.

07/21/86 - Appeal

Note & consolidate with 86-97

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, Ch. J.				✓	[illegible]								
Brennan, J.				✓									
White, J.							✓						
Marshall, J.						Join 3							
Blackmun, J.							✓						
Powell, J.				✓									
Stevens, J.							✓						
O'Connor, J.							✓						
Scalia, J.													

rjm 03/04/87

Fill

A partner may transfer her interest but the transferee has no right to participate in the mgt. without

To: JUSTICE POWELL
From: Ronald
Re: No. 86-97, CTS v. Dynamics Corp.

You asked for a paragraph about the partnership laws relevant to this case. §27 of the Uniform Partnership Act provides that when a partner conveys his interest to another entity, the receiving entity has no right "against the other partners in the absence of agreement ... to interfere in the management or administration of the partnership business affairs." 6 ULA, at 353. Similarly, §702 of the Revised Uniform Limited Partnership Act provides that "[a]n assignment [of a partnership interest] entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled." §704 provides that such an assignee can become a limited partner if (i) the limited partnership certificate [the analogue to articles of incorporation] so provides, or (ii) all other partners consent.

I find these provisions relevant because, like the Indiana law at issue in this case, they are instances where states have enacted laws that deprive transferred shares in business entities of any power to direct the business of the entity. Of course they are not determinative, because the Uniform Acts do not have the discriminatory impact on interstate commerce that the Indiana Act does.

Interest on Overdue Taxes To Stay 9% Next Quarter

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—The Internal Revenue Service said the annual interest rate it charges on overdue taxes will remain at 9% in the second quarter.

The rate the IRS pays on overdue refunds will be unchanged at 8%. Both rates are set quarterly according to the "federal short-term rate," which is based on the average market yield on U.S. obligations outstanding with remaining maturities of three years or less. The rate is determined in the first month of the quarter before it takes effect.

Under the new tax law, the rate on underpayments is set at the federal short-term rate plus three percentage points, while the refund rate equals the rate plus two points. Previously, both rates were pegged to the prime, or base, rate and set semiannually.

The penalty rate for underpayments of personal estimated taxes will remain at 9% through June 30.

restructure in order to compete effectively" overseas. That argument is likely to be a central theme as Congress wrestles with antitrust issues.

Mr. Rule said the state guidelines are "less an enforcement document than a political document," adding that political considerations "are much more blatant" in the state guidelines than in any issued by federal agencies.

"I think we're doing what the law requires," Mr. Rule said. He acknowledged that the number of federal enforcement cases regarding mergers has declined since the late 1970s, but said the decrease occurred largely because "we have made clear what the standards are."

ITT Wins Air Force Job

WASHINGTON—ITT Corp. received a $189.1 million Air Force contract for electronic equipment for B-52 aircraft.

Grace Sets At $560 M For 4th Q

By MICHAEL
Staff Reporter of THE W

NEW YORK—W.R
a $560 million loss fo
reflecting asset write
pense of corporate st
said it plans to shed its a
cal business.

In the quarter, the div
company said it took a re
lion for a 40% cut in emp
million provision for the p
agricultural chemical op

Grace's loss compared
$44.7 million, or 41 cent
year-earlier quarter.

The write-downs in
were partially offset by
million from divesting it
taurant and retail oper
5.3% to $1.06 billion fr
lion.

J. Peter Grace, ch
and chief executive offi
year the most turbul
with the company.
which two of the co
businesses operate—f
resources—experienc
that were worse in 19
the history of those in
has interests in spe
consumer products.

The company
chemical business,
gen and phosphate f
tax loss of $84.1 m
million charge refl
on divestment and
pected until the di

For the year, th
$472.3 million, co

State Attorneys General Set Guidelines Meant to Slow Pace of Major Takeovers

By ANDY PASZTOR
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—In an unusual attack on the Reagan administration's antitrust-enforcement policies, the National Association of Attorneys General unanimously adopted merger guidelines intended to slow the pace of major corporate takeovers.

The move, announced by a bipartisan group of eight attorneys general representing every region of the country, indicates the extent of state opposition to the administration's generally hands-off approach to merger enforcement. It also sets the stage for a more aggressive and better coordinated effort by states to challenge merger proposals in court.

The guidelines aren't binding and don't provide states with new authority to challenge corporate takeovers. But the state action is likely to boost the prospects of legislation on Capitol Hill to restrict certain takeovers, while fueling congressional efforts to prod federal agencies to challenge more mergers.

The guidelines also pose a potential political embarrassment for officials at the Justice Department and the Federal Trade Commission. Both agencies strongly objected to the guidelines, asserting that they were legally flawed and amounted to a political statement that would harm, rather than protect, consumers.

But California Attorney General John Van de Kamp said the administration's free-market policies and "the lack of firm and fair enforcement" at the federal level have "left a vacuum into which we have had to move."

The guidelines define relevant geographic and product markets in a more limited way than the Justice Department and the FTC. That will make it more likely that the analysis of a given merger will show a significantly higher market-share estimate for the merged company. A higher market share would make the merger a more likely target for antitrust action.

The states also intend to pay less attention to projected efficiencies stemming from mergers, while placing greater weight on the possibilities of collusion among competitors and barriers to entry by other companies.

Corporate lawyers planning mergers "are going to be reading these guidelines," Mr. Van de Kamp said, and "they're going to have to take us into account."

The guidelines will serve "as a catalyst, a spur to increase enforcement" of antitrust laws, said New York Attorney General Robert Abrams, a persistent critic of the administration and, like Mr. Van de Kamp, a Democrat. Attacking what he called the federal government's "anything goes" policy toward mergers, Mr. Abrams asserted that many of the billion-dollar mergers approved in recent years "would never have passed muster under any other administration, be it Republican or Democrat."

The other states represented at yesterday's news conference were Ohio, Montana, Arkansas, Texas, Oregon and Pennsylvania, the last two of which have Republican attorneys general.

The announcement came amid a new wave of big merger proposals, including Chrysler Corp.'s $1.1 billion bid to acquire American Motors Corp. and USAir Group Inc.'s $1.59 billion offer for Piedmont Aviation Inc. Meanwhile, a Senate Judiciary subcommittee today is scheduled to open a round of hearings on increased concentration in the airline, cable television, steel and other industries.

Charles Rule, acting head of the Justice Department's Antitrust Division, said in an interview that the state action threatens to "restrict the ability of U.S. companies to

THE WALL STREET JOURNAL.

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Arbitragers Are Baffled by Bids That Often Fail To Materialize

HEARD ON THE STREET

By RANDALL SMITH

Sometimes a takeover bid isn't really a bid.

A spate of conditional acquisition proposals in the past year has confounded Wall Street arbitragers, who have lost money betting on "bids" proposed—but never formally made—for such companies as USX Corp., Lucky Stores Inc. and Borg-Warner Corp.

Here is an example of what happens:

Last Nov. 25, Borg-Warner directors received a letter from Minneapolis investor Irwin Jacobs, who together with Minstar Inc. controlled 7.7% of the plastics, car parts and chemicals concern and proposed to buy the rest for $43 to $48 a share.

Although the figures he used were quite specific, Mr. Jacobs said he wanted to see the books before negotiating a friendly acquisition. Even though his letter didn't constitute a formal offer, it was referred to in news stories as a "bid" or an "offer," and the stock rose $1.375, to $39, in response.

But the gulf between the stock price and the figures cited by Mr. Jacobs reflected skepticism that such a bid would really arrive. The letter was viewed as a move to hasten a restructuring, or to spark a bid by another Borg holder, GAF Corp.

Since then the company largely has ignored Mr. Jacobs, who threatened a hostile tender offer Feb. 19, and the stock has lagged behind the market.

Such tactics are "in vogue," because they are "a cost efficient way of stirring up the stew," said Arthur Fleischer, a merger lawyer at Fried Frank Harris Shriver & Jacobson.

"What is a postage stamp, 22 cents?" he said. "You can cause a lot of consequences to a company by simply sending a letter. Basically, you may—but not necessarily—put the company in play," he said.

Lawrence Schloss, a mergers executive at Donaldson, Lufkin & Jenrette, said of those who make the proposals: "Some are your basic greenmail artists. Some are bona fide buyers who see value but really don't have the appropriate information to make an offer. And some are a combination of the two."

In an interview, Mr. Jacobs said he didn't write the letter merely to stir the stew or put Borg-Warner in play, and said the company has agreed to talk to him. "Don't assume nothing is happening. Don't assume we're just sitting here waiting for the phone to ring," he added.

But he acknowledged that disclosure of a proposal may put pressure on a company to deal with a suitor. "I think people who are running certain companies pay more attention to what Wall Street says sometimes. And if no one knows anything, then there's no pressure (for the company) to say anything."

In a typical pattern, an investor will buy a 5% stake, try to get arbitragers to buy shares, and then make a bid "proposal" to focus attention on the potential values. Mr. Schloss said that target companies must usually hire investment bankers to evaluate the proposal. "They have a fiduciary obligation to see if it's real and then respond."

Once in play, the target company may negotiate with the "bidder," seek a rescuing suitor, or execute a restructuring to boost the stock price. Plenty of takeover attempts turn into mergers or leveraged buyouts through just such a process.

"Maybe it's a way of starting talks with management. It works if you can find weak management that perceives itself as

Please Turn to Page 35, Column 3

How Some Highly Conditional 'Bids' Fared

BIDDER / TARGET COMPANY	'BID'[1] DATE[2]	STOCK'S INITIAL REACTION[3]	OUTCOME
TWA/Carl Icahn **USAir Group**	$52 3/4/87	+5⅝ to 49⅛	Bid, seen a ploy to get USAir to buy TWA, is shelved Monday with USAir at 45¼; closed Wed. at 44½
Columbia Ventures **Harnischfeger**	$19 2/23/87	+½ to 18¼	Harnischfeger rejects bid Feb. 26 with stock at 18⅝; closed Wed. at 17⅝
Irwin Jacobs **Borg-Warner**	$43-$48 11/25/86	+1⅜ to 39	Borg-Warner ignores Jacobs; stock lags market, closed Wed. at 41¼
Carl Icahn **USX**	$31 10/6/86	+1⅛ to 27⅜	'Bid' expires Oct. 22 and stock later falls to 20; closed Wed. at 27⅞
Asher Edelman **Lucky Stores**	$35 9/24/86	+1¾ to 36	Lucky rejects bid and restructures; stock slumps to 26; standstill pact reached March 6; closed Wed. at 31½
Belzberg family **Ashland Oil**	$60 3/26/86	+2⅜ to 54⅝	Bid 'deadline' passes, Ashland buys back Belzberg stake at 51; stock slips below 47, rebounds to 63⅛ Wed.

[1]Per share [2]Announced or disclosed [3]On first trading day bid was known

U.S. Wheat Has Little Appeal for Soviets

By JEAN MARIE BROWN
Staff Reporter of THE WALL STREET JOURNAL

U.S. farmers and farmland investors looking for a lift in wheat prices this year won't get any help from Moscow.

The Soviet Union, usually the second-largest purchaser of U.S. farm products after Japan or the Common Market, is likely decade became increasingly dependent on Soviet purchases as other markets dried up. Moscow's foray into world grain markets in the 1970s touched off a boom in East-West commerce that peaked two years ago, when the Soviets purchased a record $2.7 billion of U.S. grain.

That year, 17% of all U.S. wheat ex- technological improvements have slashed Soviet grain import needs some 13% this year, the Agriculture Department says. In 1985, the Soviets began a major push to better coordinate the use of fertilizer, chemicals and equipment on their best land. Partly because of that push, last year's grain crop was the best in eight

File (Imp)

rjm 03/18/87

To: Justice Powell
From: Ronald
Re: Mootness of No. 86-71, CTS v. Dynamics Corp.

On March 16, 1987, the parties filed a letter to the Clerk dated March 13, 1987, from the attorney for appellant. The letter is a joint representation from appellant, appellee, and the State of Indiana that (i) the parties have settled a variety of matters related to this suit, and that (ii) the case is not moot. If the Court were to affirm, Dynamics would continue its unhindered exercise of voting rights in the CTS shares it purchased last spring. If the Court reverses, Dynamics must submit to a vote that will determine whether Dynamics retains voting rights in those shares. Because the Court's judgment will affect these voting rights, I agree that the case is not moot. Other Justices may suggest the case is moot for two reasons. I summarize these arguments below:

1. CTS's management has agreed that, if the Court reverses, it will recommend to its shareholders that they vote to grant voting rights to Dynamics. See ¶12 of the Settlement Agreement. Accordingly, one might argue, it is a "sure thing" that Dynamics will get voting rights, and thus that the Court's judgment will have no effect and that the case is moot. I disagree. The vote will be by independent shareholders; neither management nor Dynamics will participate. We should not hold--as a matter of law--that the result of the vote is preordained simply because management has instructed shareholders to vote in a particular way.

2. There is some question under Indiana law whether the vote is necessary. If the vote is unnecessary regardless of this

Court's judgment, the case is moot. The argument that the vote is unnecessary--even if the Act is constitutional--goes as follows. Pursuant to the settlement agreement, CTS will opt out of the Act. See ¶15(c). If CTS is no longer governed by the Act, it now is governed by preexisting Indiana corporate law. Under that law, every share is entitled to vote. Thus, if CTS opts out of the Act before this Court's judgment, the vote will be unnecessary as a matter of Indiana law. The problem with this argument is that it rests on a doubtful point of Indiana law. There is no authoritative interpretation of the Act on this point. The parties, including the Attorney General of Indiana agree that:

> "[U]nder the settlement agreement and the statute, the 'opt-out' has no legal effect on [Dynamics'] right to vote the 'control shares' it acquired in 1986, which are the subject of this appeal. The 'opt-out' has only prospective effect, applying to shares [Dynamics] may buy in the future, because IND. CODE §23-1-42-5 provides that the Chapter applies unless the articles of incorporation or by-laws provided that the chapter does not apply before the control share acquisition occurs. In this case, at the time of the acquisition of the 'control shares' in 1986, the statute did apply." Letter, at 1-2.

Whatever the merits of this legal argument, I doubt that the Court should dismiss an argued case as moot, based on its second-guessing of the opinion of the Indiana Attorney General on this point.

lfp/ss 03/18/87 CTS1 SALLY-POW

MEMORANDUM

TO: Ronald DATE: March 18, 1987

FROM: Lewis F. Powell, Jr.

86-71 CTS v. Dynamics Corp.
86-97 Indiana v. Dynamics Corp.

I have now reread the Commerce Clause argument in our draft, and understand your concern. There is the ambiguity and even inconsistency in our Commerce Clause cases that you identify. I commend your effort to shed some light generally on this opaque area, but think it is inadvisable to undertake this. In a word, I think it necessary to rewrite this section, and also substantially to reduce it. Otherwise, we may lose - as well as confuse - our readers - even Justices and law clerks here.

Without devoting a good deal more time to this case now, I cannot give you a specific outline. My primary suggestion is that you adopt the Commerce Clause arguments, with appropriate reframing, contained in the briefs of the State and CTS. Both are well written by counsel. Indiana quite wisely engaged Winthrop, Stimson to write its brief, an old-line Wall Street firm that has specialized in corporation law. It may also have had a good deal of experience with takeovers. The CTS Corporation's brief apparently was written by Jim Strain who formerly clerked for Chief Justice

Rehnquist. Both briefs were filed on the same day (December 4). There may have been collaboration, as arguments of the Commerce Clause issue are parallel to a considerable extent. It is well to remember that the other five Justices who voted with us presumably were influenced by the arguments in these two briefs.

Both of these briefs emphasize that the Indiana statute does not discriminate against interstate commerce. I think this is a good starting point and an important argument. We could omit pages 35-43. I found these interesting and perceptive, but review of Commerce Clause cases is unnecessary, and we must shorten our opinion.

Although you are right that I have approved of the balancing test articulated in Pike, I think there is some merit to arguing first that in the absence of discrimination, and the presence of the traditional and unchallenged right of a state to regulate the governance of its own corporations, we do not need to reach the Pike balancing test.

Then, of course, we would go on to say - as you have - that any "burdens" that may be imposed on interstate commerce are outweighed by the traditional right of a state to protect the legitimate interests of shareholders - not the corporate entity itself. Of course, what benefits a corporation normally will benefit its shareholders. Some take-vers do indeed benefit both.

I would avoid the use of the term "burden" to the extent this properly can be done in light of its use in Pike. I note that Jim Strain's brief speaks affirmatively of balancing "interests" rather than "burdens". See pp. 37, 38. The primary purpose of the Indiana statute - as is stated in one of the briefs, as I recall, is to protect the shareholders of Indiana corporations by allowing a majority of disinterested shareholders to make the decision whether the acquisition of control by a different entity would be in its best interest.

I do agree that it is necessary to identify the "burden" perceived by CA7, and to demonstrate that the Indiana regulation is not in any way comparable to the types of burdens identified in other Commerce Clause cases. It results in no conflicts between state laws, and is limited to the imposition of regulations that will be relatively ease for tender offering corporations to comply with if their offers are agruably beneficial to the Indiana corporation and its shareholders. It is not easy to see any "burden" other than possible delay in bringing a tender offer to fruition - hardly a significant burden on a reasonable and beneficial tender proposal.

And at the proper place, of course, we should emphasize - as you have - the extent to which the state of incorporation traditionally has regulated what its corporations and shareholders may do. You have mentioned some of

the more important things. You mentioned what the Model Code requires, for approval of a merger. Virginia required, as did many other states, a two-thirds vote on a merger. In addition, the state prescribes the requisite vote on a sale of all corporate assets and a liquidation.

You have emphasized the Uniform Partnership Act. I do not think it is quite as relevant as you do, and suggest that - primarily in the interest of economy of space - you address it in a footnote as a relevant parallel.

* * *

I am reluctant, Ronald, to give you such limited guidance. Having worked with you now since our "great opinion" in Kelly, I have no doubt that you can do a second draft that will be both shorter and more persuasive than the first. If I could have this by Saturday a.m., I will get it back to you before the arguments commence.

L.F.P., Jr.

ss

rjm 03/19/87

To: Justice Powell
From: Ronald
Re: No. 86-71, CTS v. Dynamics Corp.

Here is a new draft opinion in this case. I am much happier with this draft. The Commerce Clause section is more than a third shorter--ten pages. You will note that much of it is simply reorganization of points made in the early draft. I note below several comments about this draft, mostly (1) items that easily could be omitted or (2) were included for questionable reasons.

1. At pages 37-40 I discuss the State's longstanding power in corporate governance. In response to your comments, I have beefed this section up considerably. In particular, you may be concerned about my citation of the CHIEF's dissenting opinion in Bellotti (a case in which you wrote for the Court). I gather you agree with the point for which I am citing him. Moreover, his opinion is rather a locus classicus on this issue. I am sure he would appreciate the citation. If you are troubled, omit it.

2. On pages 39-40, I discuss common corporate laws that hinder interstate commerce. Your annotations on my earlier effort suggested citations to provisions governing liquidation, etc. I have focused on the merger provisions for two reasons. First, these provisions are almost universal; it is my impression that enactment of the others is a bit more spotty. Second, the merger provisions seem more relevant to a discussion of two-tier tender offers, that normally are followed by a merger of the two corporations. Further discussion might tend to lose our (tiring)

reader. If you want me to expand still more, I have at hand all of the Model Acts and can add the materials on the other provisions at will.

3. Your comments on my prior draft indicated some diffidence about my emphasis on the uniform partnership provisions. Because I am inclined to believe these are the best precedent for the Court's decision, I have left this segment in, see pages 41-42. As you know, syndicated partnerships bear an increasing portion of interstate investment in this country. Thus, this provision is not at all an oddity, but something that affects important business transactions every day. If you remain unimpressed, it easily can be condensed to a footnote. I recognize that my judgment may be influenced by my interest in partnership law.

4. On pages 43-44 I discuss the two ways in which the Act furthers State interests. Your annotations to my first effort in this case indicated skepticism as to the power of the State's second interest: promoting corporate stability. I think it would be difficult to make this interest seem powerful without substantial expansion. If you are unimpressed, we easily could drop it, subject to a few conforming changes (for places where we refer to the State's interests, etc.. I think the State's interest in protecting shareholders is clearly adequate to support the judgment in this case.

Yes

5. On pages 47-48, after holding that the Act is supported by Indiana's interest in regulating nonresident shareholders of Indiana corporations, I rely on the fallback position that the Act always affects a number of resident shareholders. I think this is a rather good point, but it may be taken to suggest that our holding is limited to statutes with similar provisions. If you want a broader opinion, this paragraph should be omitted.

6. You questioned my frequent use of the word "entity." This word does not appear in the statute, but was my choice to represent both persons and corporations. In this draft I have used "businesses" to reduce use of the word "entity." If you dislike the word "entity," it is of course easy for me to remove it entirely.

7. I consciously have quoted two other opinions with which you disagreed. As you noted, I quote Commonwealth Edison Co. v. Montana (from which you dissented) on page 36. The opinion I quote was for the Court; I assume you agree with the quoted point. I also quote in this draft--at page 46--JUSTICE BRENNAN's concurring opinion in Kassel. There is of course some tension between his views on this point and yours, but, as tempered, I think you will agree with the statement in the text. I thought the quote would please JUSTICE BRENNAN and help secure his join in this case.

Cheers. I hope this draft does not call for so much coffee as the last one.

Great!

lfp/ss 03/20/87 CTSM SALLY-POW

MEMORANDUM

TO: Ronald DATE: March 20, 1987

FROM: Lewis F. Powell, Jr.

86-71 CTS Corp. v. Dynamics

With various interruptions, I have spent most of the afternoon on Part III of our draft. I agree with you that the new analysis is substantially more coherent than Pike balancing would be. I do think Part III needs some careful editing, and some reduction in length. I have attempted some of this, but there may be a further need to see that our argument flows smoothly.

I now comment on the points in your memo.

1. Subject to my editing, pages 37-40 are fine. I like the cite to Belotti.

2. My editing responds, I think, to your comments.

3. I continue to think the discussion of the uniform partnership provisions should be in a footnote. I agree that they are helpful but including them in the text that focuses on corporations and their governance, the partnership provisions seem a bit incongruous. They will be equally helpful in a footnote.

4. I agree that reference to the number of resident shareholders is a good point. I would leave it in the opinion.

5. I have no objection to quoting Commonwealth Edison v. Montana or Kassell.

6. I make a couple of additional points:

(a) As you know, tender offers come in various forms and combinations. A high percentage are cash offers, and the average stockholder is likely to be interested only in whether he is going to make a quick and substantial profit. The tender offer also may be a combination of stock and cash or convertible bonds or debentures and cash, or only of securities. I think we should recognize this in a note and perhaps add in the note a statement to the effect that Indiana's provision for a shareholder vote will be protective primarily where the offer is in the form of securities in the offering company, rather than all cash.

(b) It would be a mistake to overemphasize the "coercive" type of takeover bid. My guess is that the percentage that really are coercive is relatively small.

(c) We say very little in direct response to the opinion of CA7. It has been some while since I read the opinion. It is important for us to be fair to it. I assume that the arguments being made by Dynamics are those relied on principally by CA7.

* * *

As we are headed into two weeks of argument, I would like to have an opportunity to take a second look at Part III before the Monday arguments commence. Then, you

can move the opinion through the usual process in our Chambers with the view to circulating a first draft by the end of next week.

* * *

As you can see from some of my scribbles, perhaps I did not drink enough copy!

L.F.P., Jr.

ss

Jenny - Put on Top in Front of my Book.

File

March 23, 1987

No. 86-71, CTS v. Dynamics Corp.

On March 18, the Clerk received a letter from the attorney for appellant in this case. The letter is a joint representation from appellant, appellee, and the State of Indiana that (i) the parties have settled a variety of matters related to this suit, and that (ii) the case is not moot. I do not believe the case is moot. If the Court were to affirm, Dynamics would continue its unhindered exercise of voting rights in the CTS shares it purchased last spring. If the Court reverses, the situation is more complicated. The parties, including the Indiana Attorney General, agree that the Indiana Control

See next pg

See n in my Opinion

If we reverse:

Share Acquisitions Chapter will require a vote by CTS's shareholders to determine whether Dynamics is entitled to vote its shares. See Letter, at 1-2. If Dynamics should happen to lose that vote, it would lose those voting rights. In my view, it is enough to keep this case from becoming moot that Dynamics must submit to a vote to retain those voting rights.

This Court is holding No. 86-344, Ohio v. Fleet Aerospace Corporation, for this case. Counsel in No. 344 have filed a motion suggesting that we should dismiss this case in light of possible mootness, and grant plenary review in their case. Because I do not believe this case is moot, I will vote to deny that motion.

Will circulate a memo if anyone is in doubt.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 27, 1986

Re: 86-71) CTS Corp v. Dynamic Corp of America
86-97) Indiana v. Dynamics Corp. of America

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1987

CTS Corp. v. Dynamics Corp. of America, No. 86-71
Indiana v. Dynamics Corp. of America, No. 86-97

Dear Lewis,

I am in general agreement with your fine opinion in this complicated case, but wonder if you would consider a slight change in tone. The opinion is of course a departure from recent dormant Commerce Clause analysis in that it does not utilize a balancing approach under Pike v. Bruce Church, Inc. While I think that this departure is appropriate in the area of state corporate goverance matters, I am concerned that the opinion might be read to sanction forsaking balancing analysis whenever state regulation seeks to further traditional local interests. As your opinion in Kassel makes clear, however, even traditional health and safety regulation is subject to balancing analysis. 450 U.S., at 670.

I wonder, therefore, if you would consider some suggestions that might serve to underscore that this case deals with an area of regulation that is unique, in that the regulated parties are purely creatures of the state. Along these lines, I would like to propose the following modifications:

1. Page 18, third sentence in section C. Delete the portion of the sentence beginning with "traditional," and substitute "fact that State regulation of corporate governance is regulation of entities whose very existence and attributes are a product of State law." OK

2. Page 20, first paragraph. Delete the last two sentences and substitute: "A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring

that investors in such corporations have an effective voice in corporate affairs." The first sentence of the next paragraph would then read: "There can be no doubt that the Act reflects these concerns."

My problems with this passage as it now stands are that: (1) it could be read to suggest that the burdens imposed by regulation of matters "traditionally of local interest and concern" are irrelevant, and (2) it cites Kassel as support for the proposition that corporate governance is a traditional local concern, but Kassel says that the traditional character of State regulation does not insulate it from Commerce Clause balancing.

3. Page 22, last sentence continuing on to page 23. Delete this sentence and substitute: "The very commodity that is traded in the securities market is one whose characteristics are defined by State law. Similarly, the very commodity that is traded in the "market for corporate control" -- the corporation -- is one that owes its existence and attributes to State law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done." The paragraph would then end with your current last sentence in the first paragraph on page 23.

My aim in suggesting this passage is to underscore the fact that the markets involved in this case are those featuring resources defined by the State. Given Judge Posner's emphasis below on the "market for corporate control," as well as the extensive literature on this concept, I also think that it might be useful to comment on why any decrease in activity in this market, in addition to the securities market, would create no Commerce Clause problem.

I hope that you may find these suggestions helpful. Their wording is of course for you finally to

determine. Again, let me congratulate you on an excellent job on what will be a most important opinion.

Sincerely

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 30, 1987

86-71 - CTS Corporation v. Dynamics Corporation of America
86-97 - Indiana v. Dynamics Corporation of America

Dear Lewis,

I shall, in due course, circulate a dissent in these cases.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 31, 1987

No. 86-71) _CTS Corporation_ v. _Dynamics_
) _Corporation of America_, _et_
) _al_.
)
) _Indiana_ v. _Dynamics_
) _Corporation_
No. 86-97) _of America_, _et_ _al_.

Dear Lewis,

Please join me.

Sincerely,

Bill

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 31, 1987

No. 86-71) CTS Corporation v. Dynamics
) Corporation of America, et
) al.
)
) Indiana v. Dynamics
) Corporation
No. 86-97) of America, et al.

Dear Lewis,

I'm happy to enclose my join. Thank you very much for your favorable consideration of my suggestions.

Sincerely,

Bill

Justice Powell

Enclosure

March 31, 1987

86-71 CTS Corporation v. Dynamics Corporation

Dear Bill:

This is to thank you for your letter suggesting changes in the 1st draft of my opinion in this case.

As you will note from the 2nd draft being circulated this morning, I have incorporated all of your changes. They are well written, and in my view strengthen the opinion.

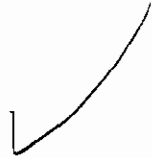
Sincerely,

Justice Brennan

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



March 31, 1987

Re: No. 86-71) CTS Corporation v. Dynamics Corporation of America
)
86-97) Indiana v. Dynamics Corporation of America

Dear Lewis,

Please join me.

Sincerely,

WEB

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 31, 1987

Re: Nos. 86-71 and 97 - CTS Corporation and Indiana v. Dynamics Corporation of America

Dear Lewis:

Please join me.

Sincerely,

T.M.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 31, 1987

Re: 86-71 and 86-97 - CTS Corp. and
Indiana v. Dynamics Corp. of America

Dear Lewis:

I will await the dissent.

Respectfully,

John

Justice Powell

Copies to the Conference

Lineup included.
✓ Lineup still to be added. Please send lineup to me when available.

13 1987 -2 PM

Another copy of page proof of syllabus as approved to show—
— Lineup, which has now been added.
— Additional changes in syllabus.

FRANK D. WAGNER
Reporter of Decisions
17002-12-86

NOTE: Where it is feas[...] is being done in connection [...]ed. The syllabus constitutes n[...]re-pared by the Reporter of [...] See United States v. Detroit L[...]

SUPREME COURT OF THE UNITED STATES

Syllabus

CTS CORP. *v.* DYNAMICS CORPORATION OF AMERICA ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86–71. Argued March 2, 1987—Decided April ——, 1987*

The federal Williams Act and implementing regulations govern hostile corporate stock tender offers by requiring, *inter alia,* that offers remain open for at least 20 business days. An Indiana Act applies to certain business corporations chartered in Indiana that have specified levels of shares or shareholders within the State and that opt into the Act's protection. The Indiana Act provides that the acquisition of "control shares" in such a corporation—shares that, but for the Act, would bring the acquiring entity's voting power to or above certain threshold levels—does not include voting rights unless a majority of all pre-existing disinterested shareholders so agree at their next regularly scheduled meeting. However, the stock acquiror can require a special meeting within 50 days by following specified procedures. Appellee Dynamics Corporation announced a tender offer that would have raised its ownership interest in CTS Corporation above the Indiana Act's threshold. Dynamics also filed suit in Federal District Court alleging federal securities violations by CTS. After CTS opted into the Indiana Act, Dynamics amended its complaint to challenge the Act's validity. The District Court granted Dynamics' motion for declaratory relief, ruling that the Act is pre-empted by the Williams Act and violates the Commerce Clause. The Court of Appeals affirmed, adopting the holding of the plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624, that the Williams Act pre-empts state statutes that upset the balance between target company management and a tender offeror. The court based its pre-emption finding on the view that the Indiana Act, in effect, imposes at

*Together with No. 86–97, *Indiana* v. *Dynamics Corporation of America, et al.*, also on appeal from the same court.

least a 50-day delay on the consummation of tender offers and that this conflicts with the minimum 20-day hold-open period under the Williams Act. The court also held that the state Act violates the Commerce Clause since it deprives nonresidents of the valued opportunity to accept tender offers from other nonresidents, and that it violates the conflict-of-laws "internal affairs" doctrine in that it has a direct, intended, and substantial effect on the interstate market in securities and corporate control.

Held:

1. The Indiana Act is consistent with the provisions and purposes of the Williams Act and is not pre-empted thereby. Pp. 7–15.

(a) The Indiana Act protects independent shareholders from the coercive aspects of tender offers by allowing then to vote as a group, and thereby furthers the Williams Act's basic purpose of placing investors on an equal footing with takeover bidders. Moreover, the Indiana Act avoids the problems the plurality discussed in *MITE*, since it does not give either management or the offeror an advantage in communicating with shareholders, nor impose an indefinite delay on offers, nor allow the state government to interpose its views of fairness between willing buyers and sellers. Thus, the Act satisfies even the *MITE* plurality's broad interpretation of the Williams Act. Pp. 10–13.

(b) The possibility that the Indiana Act will delay some tender offers does not mandate pre-emption. The state Act neither imposes an absolute 50-day delay on the consummation of tender offers nor precludes offerors from purchasing shares as soon as federal law permits. If an adverse shareholder vote is feared, the tender offer can be conditioned on the shares' receiving voting rights within a specified period. Furthermore, even assuming that the Indiana Act does impose some additional delay, the *MITE* plurality found only that "unreasonable" delays conflict with the Williams Act. Here, it cannot be said that a 50-day delay is unreasonable since that period falls within a 60-day maximum period Congress established for tender offers. If the Williams Act were construed to pre-empt any state statute that caused delays, it would preempt a variety of state corporate laws of hitherto unquestioned validity. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all such state laws, it would have said so. Pp. 13–15.

2. The Indiana Act does not violate the Commerce Clause. The Act's limited effect on interstate commerce is justified by the State's interests in defining attributes of its corporations' shares and in protecting shareholders. Pp. 15–23.

(a) The Act does not discriminate against interstate commerce since it has the same effect on tender offers whether or not the offeror is an

Indiana domiciliary or resident. That the Act might apply most often to out-of-state entities who launch most hostile tender offers is irrelevant, since a claim of discrimination is not established by the mere fact that the burden of a state regulation falls on some interstate companies. Pp. 16–17.

(b) The Act does not create an impermissible risk of inconsistent regulation of tender offers by different States. It simply and evenhandedly exercises the State's firmly established authority to define the voting rights of shareholders in Indiana corporations, and thus subjects such corporations to the law of only one State. Pp. 17–18.

(c) The Court of Appeals' holding that the Act unconstitutionally hinders tender offers ignores the fact that a State, in its role as overseer of corporate governance, enacts laws that necessarily affect certain aspects of interstate commerce, particularly with respect to corporations with shareholders in other States. A State has interests in promoting stable relationships among parties involved in its corporations and in ensuring that investors have an effective voice in corporate affairs. The Indiana Act validly furthers these interests by allowing shareholders collectively to determine whether the takeover is advantageous to them. The argument that Indiana has no legitimate interest in protecting nonresident shareholders is unavailing, since the Act applies only to corporations incorporated in Indiana that have a substantial number of shareholders in the State. Pp. 18–22.

(d) Even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause. The Act does not prohibit any resident or nonresident from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. The Commerce Clause does not protect the particular structure or methods of operation in a market. Pp. 22–23.

794 F. 2d 250, reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 9, 1987

Re: 86-71 and 86-97 - CTS Corp. and
Indiana v. Dynamics Corp. of America

Dear Byron:

Plese join me in Part II of your dissent.

Respectfully,

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Scalia**

Circulated: APR 14 1987

Recirculated: ____________

no response necessary

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 86-71 AND 86-97

CTS CORPORATION, APPELLANT
86-71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86-97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ——, 1987]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join Parts I, IIIA, and IIIB of the Court's opinion. However, having found, as those Parts do, that the Indiana Control Share Acquisitions Chapter neither "discriminates against interstate commerce," *ante*, at ——, nor "create[s] an impermissible risk of inconsistent regulation by different States," *id.*, at ——, I would conclude without further analysis that it is not invalid under the dormant Commerce Clause. While it has become standard practice at least since *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), to consider, in addition to these factors, whether the burden on commerce imposed by a state statute "is clearly excessive in relation to the putative local benefits," *id.*, at 142, such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all. This case is a good illustration of the point. Whether "[t]he primary purpose of the Act is to protect shareholders of Indiana corporations," *ante*, at ——, or to protect incumbent management seems to me a highly debatable question, but it is extraordinary to think that the con-

stitutionality of the Act should depend on the answer. Nothing in the Constitution says that the protection of entrenched management is any less important a "putative local benefit" than the protection of entrenched shareholders, and I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other objective—or the ultimate (and most ineffable) judgment as to whether, given importance-level x, and effectiveness-level y, the worth of the statute is "outweighed" by impact-on-commerce z.

One commentator has suggested that, at least much of the time, we do not in fact mean what we say when we declare that statutes which neither discriminate against commerce nor present a threat of multiple and inconsistent burdens might nonetheless be unconstitutional under a "balancing" test. See Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). If he is not correct, he ought to be. As long as a state's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for Congress to prescribe its invalidity.

I also agree with the Court that the Indiana control shares act is not preempted by the Williams Act, but I reach that conclusion without entering into the debate over the purposes of the two statutes. The Williams Act is governed by the antipreemption provision of the Securities Exchange Act of 1934, 15 U. S. C. § 78bb(a), which provides that nothing it contains "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." Unless it serves no function, that language forecloses preemption on the basis of conflict-

ing "purpose" as opposed to conflicting "provision." Even if it does not have literal application to the present case (because, perhaps, the Indiana agency responsible for securities matters has no enforcement responsibility with regard to this legislation), it nonetheless refutes the proposition that Congress meant the Williams Act to displace *all* state laws with conflicting purpose. And if any are to survive, surely the states' corporation codes are among them. It would be peculiar to hold that Indiana could have pursued the purpose at issue here through its blue-sky laws, but cannot pursue it through the state's even more sacrosanct authority over the structure of domestic corporations. Prescribing voting rights for the governance of state-chartered companies is a traditional state function with which the federal Congress has never, to my knowledge, intentionally interfered. I would require far more evidence than is available here to find implicit preemption of that function by a federal statute whose provisions concededly do not conflict with the state law.

I do not share the Court's apparent high estimation of the beneficence of the state statute at issue here. But a law can be both economic folly and constitutional. The Indiana Control Shares Acquisition Chapter is at least the latter. I therefore concur in the judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 16, 1987

Re: No. 86-71) CTS Corp. v. Dynamics Corp. of America
No. 86-97) Indiana v. Dynamics Corp. of America

Dear Byron:

Please join me in Part II of your dissent.

Sincerely,

Justice White

cc: The Conference

lfp/ss 04/20/87

86-71, CTS v. Dynamics Corp.

This case is here from the Court of Appeals for the Seventh Circuit. The case presents two questions as to the validity of Indiana's Control Share Acquisition Act: first, whether the federal Williams Act preempts the Indiana law; second, whether the state law violates the dormant Commerce Clause.

The Indiana Act applies to tender offers. It limits the voting rights that an entity gains when it purchases a specified percentage of the shares of an Indiana corporation. It provides that the purchaser does not acquire voting rights unless the remaining shareholders vote to grant such ~~voting~~ rights.

Appellee, Dynamics Corporation, made a tender offer for 18% of the shares of appellant CTS, a Corporation of Indiana. When CTS invoked the provisions of the Indiana Act, Dynamics sought, and obtained, an injunction from a Federal District Court in Illinois. That court concluded that the Indiana law is preempted by the Williams Act and also violates the Commerce Clause. The Court of Appeals affirmed.

For the reasons

For the reasons stated in an opinion filed today with the clerk, we reverse. We hold that the Indiana Act does not conflict with any express provision of the Williams Act; nor does it undermine the basic purposes of the Williams Act. Similarly, we conclude the Indiana law does not violate the Commerce Clause.

This state statute applies evenhandedly to tender offers, whether they are initiated by residents of Indiana, or residents of other states. Also, because it applies only to the governance of Indiana corporations, there is little or no risk of inconsistent regulation by other states.

JUSTICE SCALIA has filed an opinion concurring in part and concurring in the judgment. JUSTICE WHITE has filed a dissenting opinion, in part of which JUSTICES BLACKMUN and STEVENS have joined.

86-71 CTS v. Dynamics Corp. (Ronald)

LFP for the Court 3/9/87
- 1st draft 3/26/87
- 2nd draft 3/31/87
- 3rd draft 4/2/87
- 4th draft 4/17/87
  - Joined by SOC 3/27/87
  - WJB 3/31/87
  - CJ 3/31/87
  - TM 3/31/87

BRW dissenting
- 1st draft 4/8/87
- 2nd draft 4/17/87
  - JPS joins Part II 4/9/87
  - HAB joins Part II 4/16/87

AS concurring in part and concurring in the judgment
- 1st draft 4/14/87
- 2nd draft 4/16/87

BRW will dissent 3/30/87
JPS awaiting dissent 3/31/87

Justices Uphold States' Curbs On Takeovers

Backing of Indiana Statute, In 6-3 Vote, Could Deal Blow to Hostile Bidders

The Supreme Court for the first time upheld state regulation of corporate takeovers.

By a 6-3 vote, the high court upheld an Indiana law that gives shareholders in companies organized in Indiana the right to decide whether an investor who buys a substantial or majority interest may vote those shares.

The high court ruled that the Indiana law is a legitimate attempt to set condi-

This article was written by Stephen Wermiel and Bruce Ingersoll in Washington, and James B. Stewart in New York.

tions for companies incorporated in the state and to protect the interests of shareholders in those companies. The court said the law neither conflicts with federal securities law or the Securities and Exchange Commission's rules governing tender offers, nor unduly interferes with interstate corporate transactions.

Major Setback for Takeovers

Takeover experts said the court's ruling could deal a serious blow to hostile takeovers and called it the most important takeover decision in years.

The decision has "enormous implications," said Arthur Fleischer, a partner at Fried, Frank, Harris, Shriver & Jacobson in New York. He noted that by approving the 50-day delay in the Indiana law, the court has thrown a wrench into takeover planning. "Time is a bidder's most strategic consideration," he said, since it allows the target to muster its defenses, mount a defensive recapitalization or seek a rescuer.

Martin Lipton, a leading takeover defense lawyer and partner in Wachtell, Lipton, Rosen & Katz, described the court's ruling as a "keystone case that comes along once every few years." He said the case makes "crystal clear" that the states "have the right to deal with coercive tactics by raiders."

Mr. Lipton said he anticipates a rush by other states to enact similar legislation. He said he wouldn't be surprised to see 30 to 40 states with similar statutes within 18 months.

The Supreme Court made no mention of the Ivan F. Boesky insider-trading scandal, but takeover lawyers said that the widespread public perception of abuses associated with hostile takeovers undoubtedly contributed to a climate in which judges are likely to look with favor on legislative efforts to regulate takeovers.

The ruling is an important victory for the states, which have been wrestling for years with different ways to regulate tender offers and protect shareholders in the current corporate takeover climate.

"This is really exciting for states to have this kind of vindication after all these years of being cuffed around by the courts, SEC and Wall Street attorneys representing the raiders," said Randall Schumann, general counsel for the Wisconsin securities commissioner's office and chairman of the North American Securities Administrators Association's tender-offer committee.

More Laws Expected

The ruling, which rejected the SEC's position that the Indiana law was invalid, is certain to spur other states to pass similar takeover laws. "Of course, you'll see a flurry of states copying the Indiana statute," said James Treadway, a Washington lawyer and former SEC commissioner.

Whether and to what extent states may regulate takeovers has been a hotly contested legal issue ever since Virginia passed the first state tender offer law in 1968. By 1982, 37 states had adopted tender offer laws. But that year, the Supreme Court struck down Illinois's law as unconstitutional in a ruling that cast doubt on the validity of the laws of all 37 states.

Since 1982, more than a dozen states have adopted what are known as second-generation takeover laws, attempting to regulate tender offers within the limits of the high court ruling. Among these are Ohio, New York, Minnesota and Wisconsin. Some of the new laws are similar to Indiana's. Many other states, according to Mr. Schumann, have put the issue on hold to await the Supreme Court ruling in the Indiana case.

The real question, said Mr. Treadway, is whether Delaware follows Indiana's lead, since many major companies are incorporated in Delaware.

Delaware's Legislature isn't currently considering adopting such a change in its takeover laws, according to Lewis S. Black, a Wilmington attorney and a member of the state bar's corporate law section. "We try to keep Delaware's corporation laws state of the art, so if this is a good change, we'll take a look at it," he said.

Lawyers said they expect Delaware to act quickly to amend its takeover legislation. The existing Delaware statute has been routinely struck down as unconstitutional in takeover-related litigation, and has had little practical impact on takeovers.

Ohio has a statute similar to Indiana's,

Please Turn to Page 26, Column 1

Continued From Page 2

and it is now expected to survive any legal challenges. Last year, after Sir James Goldsmith abandoned his hostile takeover bid for Goodyear Tire & Rubber Co., he cited the Ohio anti-takeover legislation as one of the main reasons for dropping his quest for the company.

New York's takeover statute, also viewed as an important effort to deter hostile takeovers, is significantly different from the Indiana and Ohio models, lawyers said. But its chances of surviving any constitutional challenge seem to have been enhanced by the court's broad language approving state regulatory efforts.

The Indiana law reviewed by the high court was passed in March 1986. The provision at issue in the case regulates the purchase of "control" shares, defined as enough shares to give an investor at least a 20% stake in a company, or to increase the investor's share to 33%, or to 50%.

When an investor buys "control" shares, those shares can only be voted after approval by a majority of "disinterested" shareholders, those who aren't officers or inside directors of the company. The law says the buyer of the shares may insist that a shareholders' meeting be called within 50 days to decide whether the shares may be voted.

Challenge to Law

The Indiana takeover law was challenged by Dynamics Corp. of America, which in March 1986 announced a tender offer for one million shares outstanding of CTS Corp. Dynamics had a 9.6% share at the time, and the tender offer increased its stake to 27.5%.

Shortly after announcing the tender offer, Dynamics also challenged the constitutionality of the Indiana law in federal court, and a federal judge struck down the law in April 1986. A federal appeals court in Chicago also found the law unconstitutional in a May 1986 decision.

While the case was pending in the Supreme Court, CTS announced last month that it had reached an agreement that allowed Dynamics to acquire as much as

Justices Back State Takeover Curbs In Possible Blow to Hostile Bidders

35% of CTS shares and to have three seats on its seven-member board. The Supreme Court said yesterday that the agreement didn't make the case moot.

The high court ruling, written by Justice Lewis Powell, said the Indiana law differed from the one Illinois invalidated in 1982. The Illinois law, the court said, favored management against corporate raiders by allowing indefinite delays of tender offers and by giving management an advantage in sending its views to shareholders. The Indiana law, the court said, "protects the independent shareholder" against both sides.

John Pritchard, a New York securities lawyer who represented Indiana in the Supreme Court, said a principal reason the Indiana law was upheld is that "the state is using the system of corporate governance for affecting the tender offer process rather than regulating the process, itself."

The organization and governing of corporations are traditionally matters of state law in the U.S., but the regulation of interstate commerce is spelled out in the Constitution as a subject of federal law.

Justice Powell acknowledged that the Indiana law affects interstate commerce, but said the effect is "limited." He said the law doesn't prevent or unduly delay any tender offers. "It only provides regulatory procedures designed for the better protection of the corporations' shareholders," he said.

The SEC had argued in a friend-of-the-court brief that the Indiana law is unconstitutional. Because it restrains the voting rights of some shareholders, the SEC argued, it interferes with interstate business transactions.

While state regulators touted the ruling yesterday as a victory for states' rights, Louis Cohen, deputy U.S. solicitor general and an author of the SEC's brief, said it was just the latest step in the battle between offensive and defensive corporate strategies. "This is an important victory for the defensive side," he said, "but history suggests the offensive side will figure out a way to counter it and the pendulum will swing back."

Daniel Goelzer, SEC general counsel, said, "At minimum, the effect will be to slow down acquisitions." He said that while the SEC voted to oppose the Indiana law, "In a broad sense, we have felt state law may be able to address (takeover) problems and we have been slow to recommend that Congress get into the area."

"I don't see this as calling for some SEC regulatory response. I think the question will be debated in Congress whether this increases or reduces the need for further federal regulation," he added.

The Securities Industry Association said in a statement, "It appears to us that the states have now been given a green light to undermine" a 1968 federal law that regulates tender offers. The association said, "State anti-takeover bills essentially preempt shareholders from making their own decisions regarding the type of protection, if any, they believe is necessitated by today's takeover environment."

Justice Byron White dissented from yesterday's ruling, joined by Justices Harry Blackmun and John Stevens. The Indiana law, they said, "will predictably foreclose completely some tender offers."

Grand Jury Materials

The justices also ruled, 6-3, that a federal prosecutor who handles a criminal case and grand jury inquiry may use the same secret grand jury records in conducting a government civil investigation of the same dispute.

The ruling is a significant victory for the Reagan administration, after a major setback on the use of grand jury materials in a 1983 Supreme Court ruling. In 1983, the high court ruled that lawyers handling civil cases in the Justice Department needed a court order to gain access to secret grand jury evidence. Justice Department officials complained that the 1983 ruling hampered their investigative efforts.

In yesterday's ruling, department antitrust lawyers sought access to grand jury records from a criminal investigation of alleged price-fixing in the sale of tallow to a foreign government by three as yet unidentified U.S. corporations. Tallow is an animal byproduct used to make soap, animal feed and lubricants.

The criminal investigation lasted from 1982 to 1984 when the grand jury was discharged without any indictments. In June 1984, the lawyers who had handled the criminal case launched a civil antitrust investigation. A federal district court in New York permitted department lawyers access to the grand jury files; but a federal appeals court, also in New York, denied the request for the records.

In an opinion written by Justice Stevens, the Supreme Court ruled that the federal rules on the secrecy of grand jury materials simply prevent disclosure to "others" but don't prohibit use by the same lawyers for a civil lawsuit.

Justice William Brennan, joined by Justices Blackmun and Thurgood Marshall, dissented. Justice Byron White didn't participate in the case and offered no explanation for his absence.

HIGH COURT BACKS STATE ON CURBING HOSTILE TAKEOVER

Law Limiting Voting Rights of Those Seeking Companies Upheld in 6-3 Ruling

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, April 21 — In an important victory for companies seeking protection from takeovers, the Supreme Court for the first time today upheld a state law restricting hostile offers for companies incorporated in that state.

Reversing a Federal appellate decision, the Court ruled that the 1986 Indiana law, which resembles laws in Ohio, Pennsylvania and several other states, violated neither the Federal Williams Act of 1968, which regulates tender offers, nor the Commerce Clause of the Constitution, which bans state obstruction of interstate commerce.

Method Frequently Used

A tender offer — a public offer to buy shares at a specified price — is frequently used in hostile takeovers because it does not require management approval.

Martin Lipton, a New York lawyer specializing in takeovers and in defending against them, said today that "it's clearly a landmark decision" likely to "result in 30 or 40 states adopting legislation, and when that happens, I think it will have a significant deterrent effect on the junk bond, bust-up takeover."

The Indiana law, upheld by the Justices today by 6 to 3, could deny voting rights to those making tender offers or to any investors who increase their holdings above certain levels. To vote, they would need the approval of a majority of disinterested shareholders — excluding the bidders and the company's management — to grant such rights. Bidders want to vote their shares on corporate developments; otherwise they cannot exercise control.

The law allows management to wait 50 days after a bid is made to schedule such a vote.

More Guarded Assessment

Louis R. Cohen, the main author of a Justice Department brief in the case, was more guarded than Mr. Lipton in assessing the importance of the decision.

"This is a significant victory for the defensive side in the takeover fight, but there will be counterattacks from the offensive side and the pendulum may swing back," Mr. Cohen said. His brief

Indiana Takeover Curb Is Upheld by High Court

Continued From Page 1

argued on behalf of the Government and the Securities and Exchange Commission that the Indiana law was unconstitutional in interfering with interstate commerce in corporate shares.

The decision came in a case in which the CTS Corporation of Elkhart, Ind., sought to use the Indiana law to thwart a hostile tender offer started in March 1986 by the Dynamics Corporation of America, which has its headquarters in Greenwich, Conn. The dispute was settled in part while the case was pending, so the main significance of today's decision is as a precedent.

The majority opinion of Justice Lewis F. Powell Jr. strongly affirmed "the longstanding prevalence of state regulation" of corporations and the voting rights of shareholders. It also asserted that not all takeovers are good for "shareholders collectively" and that Federal law did not require that they be facilitated.

"There is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in more effective management or otherwise be beneficial to shareholders," he said in a footnote.

Previously, Lower Federal courts almost uniformly struck down laws such as Indiana's and some other state curbs on hostile takeovers. In 1982 the Supreme Court struck down an Illinois law that, it said today, was far more tilted in favor of incumbent managements than the 1986 Indiana law.

Incorporated in State

The Indiana law applies to corporations that are incorporated in that state, that have substantial assets there and substantial numbers of shareholders who live there. The law does allow companies in this category to exempt themselves from its coverage, so that it would be no obstacle to companies that wanted to be taken over.

The law's effect, Justice Powell said, is "to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders," excluding incumbent management.

The law affects any entity that acquires shares that would bring its voting power in the corporation above any of three thresholds — one-fifth, one-third or one-half of all voting shares. It would be denied voting rights unless a majority of disinterested shareholders voted to give it such rights.

The vote of disinterested shareholders must take place either at the next regular shareholder meeting or, at the option of the bidder and at its expense, at a special meeting that incumbent management must schedule within 50 days.

After CTS invoked the Indiana law to thwart the Dynamics tender offer in March 1986, Dynamics urged a Federal District Court successfully to strike the law down as contrary to the Williams Act, which is the Federal law regulating tender offers, and as an unconstitutional restraint on interstate commerce.

In today's decision, CTS Corp. v. Dynamics Corp., No. 86-71 and 86-97, Justice Powell seemed to cast doubt on the view of a plurality of three Justices in the 1982 case that the Williams Act pre-empts all state statutes that upset the balance between a target management and the maker of a tender offer.

Dissent by White

Justice Byron R. White dissented, asserting that the Indiana law "will predictably . . foreclose . . completely some tender offers." He said it "undermines the policy of the Williams Act by effectively preventing minority shareholders, in some circumstances, by acting in their own best interests by selling their stock," and amounted to the kind of state "economic protectionism" burdening interstate commerce that the Constitution was designed to outlaw.

Justices Harry A. Blackmun and John Paul Stevens joined Justuce White's dissent on the interstate commerce point but not on the Williams Act point.

Justice Antonin Scalia joined the majority opinion in part but said: "I do not share the Court's apparent high estimation of the beneficence of the state statute at issue here. But a law can be both economic folly and constitutional. The Indiana Control Shares Acquisition Chapter is at least the latter."

CTX v Dynamics
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Ronald to note
then file

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Indiana takeover law upheld

High court ruling may validate Minnesota law

Associated Press

Washington, D.C.
The Supreme Court gave states considerable power Tuesday to regulate hostile corporate takeovers.

By a 6-3 vote, the justices said an Indiana law placing restraints on tender offers does not interfere unlawfully with interstate commerce.

"To the limited extent that the (law) affects interstate commerce, this is justified by the state's interests in defining the attributes of shares in its corporations and in protecting shareholders," Justice Lewis Powell wrote for the court.

Minnesota officials said the ruling should vindicate the state's own anti-takeover law, which had been challenged on constitutional grounds. More than 30 states have anti-takeover statutes.

"It's clearly a landmark decision," said Martin Lipton, a New York lawyer specializing in takeovers. "This is a clear recognition by the Supreme Court that corporate raiders have developed coercive tactics and that states have the right . . . to deal with those tactics."

Takeover artist T. Boone Pickens called it a sad day for shareholders. "This will give states a freer hand to entrench management," he said.

The court ruled in favor of CTS Corp. of Elkhart, Ind., in its bid to ward off a takeover by Dynamics Corporation of America, based in Connecticut. Dynamics owned 9.6 percent of CTS common stock when it made a tender offer in March 1986 for a million shares, which would bring its holdings to 27.5 percent.

But a new Indiana law imposed a 50-day delay on such tender offers and, by allowing shareholders to vote as a

Takeovers continued on page 3M

Takeovers Continued from page 1M

group to block the merger, made it more difficult for takeovers to succeed. The law also made the target company less inviting because the acquirer could end up with nonvoting shares, stripping it of control.

The Seventh U.S. Circuit Court of Appeals said last year that the Indiana law interfered unlawfully with interstate commerce. And the Securities and Exchange Commission and the administration argued that the law interferes with federal regulation of the stock market.

But Powell said the law does not violate federal securities law because the purpose of the state law is to place the acquiring firm and a corporation's managers on equal footing.

"By allowing shareholders to vote as a group, the act protects them from the coercive aspects of some tender offers," Powell said. He added, "There is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result in more effective management or otherwise be beneficial to shareholders."

Powell also rejected arguments that states have no authority to protect nonresident shareholders. He said Indiana's law applies only to companies incorporated in Indiana and that have more than 10 percent of its shares owned by Indiana residents.

In a dissent, Justice Byron White noted that CTS stock is traded on the New York Stock Exchange and said the Indiana law "is directly regulating the purchase and sale of shares of stock in interstate commerce." He was joined by Justices Harry Blackmun and John Paul Stevens.

Minnesota Attorney General Hubert Humphrey III said the ruling should affirm the constitutionality of Minnesota law, which he said is similar to Indiana's. Humphrey had filed a brief with the Supreme Court supporting Indiana's case.

Like Indiana, Minnesota allows shareholders to vote as a group to block a merger before a tender offer can be made. The 1984 law requires a 20-day waiting period before a merger can be completed.

Robert Woods, a private attorney who unsuccessfully defended the statute in trying to fend off a 1985 takeover of Bloomington-based Van Dusen Air Inc., agreed with Humphrey. "As far as I'm concerned, it directly upholds the constitutionality of the Minnesota law," Woods said.

Woods lost when U.S. District Judge James Rosenbaum ruled against the statute. An appeal to the Eighth U.S. Circuit Court of Appeals was dismissed after the bidder, APL Limited Partnership of New York, sweetened its offer and Van Dusen accepted.

Another adverse ruling on the Minnesota law was delivered last year by U.S. District Judge Robert Renner when Coniston Partners of New York tried to take over Gelco Corp. of Eden Prairie. That appeal was dismissed when Coniston backed away.

Thus, the Minnesota law has had two negative decisions but no appeals case that might have settled the constitutional issue, said Alan Gilbert, the special assistant attorney general who argued those cases.

Woods said yesterday's ruling could end what he calls "opportunistic takeovers." He predicted that antitakeover laws will make hostile bids much more difficult, more costly and impossible to rush through before firms can build effective defenses.

Staff writer Joe Blade contributed to this report.

lfp/ss 03/18/87 Rider A, p. 22 (86-97)

97A SALLY-POW

Critical to an understanding of the Indiana statute is the fact that it addresses the internal affairs of Indiana corporations. It relates to corporate governance . The Chapter also furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder'". Piper v. Chris-Craft Industries, 430 U.S. 1, 30 (1977) (citation omitted)(quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967).[6]

lfp/ss 03/18/87 Rider A, p. 22 (86-97)

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Ltr

lfp/ss 03/20/87 Rider A, p. 43 (CTS Corp.)

CTS47 SALLY-POW

The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this specifically by affording, when a takeover offer is made, a majority of disinterested shareholders an opportunity to decide whether the resulting change in voting control of the corporation would be desirable as they perceive it. This is an opportunity afforded all shareholders who choose to take advantage of it. Also, as it relates to corporate governance, it is a traditional type action by the state of incorporation. Apart from the opportunity provided shareholders collectively to determine whether the take over is advantageous to their interests, the Act is designed to prevent hostile tender offers from coercing shareholders into tendering their shares. Respondent Dynamics argues that the prospect of coercive tender offers is illusory, and

that tender offers generally should be favored as they reallocate corporate assets into the hands of management who can use them most effectively. See generally Easterbrook and Fischell, The Proper Role of a Target's Management in Responding to a Tender Officer, 94 Harv. L. Rev. 1161 (1981).*

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*In this area generalizations usually require qualification. It may well be that a successful tender offer will result in more effective management or may have such other benefits as providing needed diversification. Yet, we know of no convincing evidence that the type of conglomerates that may result from repetitive take over offers are in fact more efficient or that the owners of shares in the resulting conglomerate are benefited.

Ronald

March 20, 1987

DYNA GINA-POW

86-71 CTS Corporation v. Dynamics Corporation

86-71 Rider A page 39

This of course is true with respect to corporations with shareholders in states other than the state of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many states and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential also as providing capital for new enterprises as well as capital for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation - except in the rarest situations - is organized under, and governed by, the laws of the state of its incorporation. These law govern ~~include~~ the voting rights of shareholders that directly ~~affect~~ apply to a variety of corporate transactions including takeover bids.

Ronald

lfp/ss 03/20/87 Rider A, p.40 (CTS Corp.)

CTSB SALLY-POW

Note to Ronald:

What do you think of a note along the following lines to be keyed to an appropriate place on page 40? You may add to this, and use Model Code terminology.

¶ The types of regulations that arguably, or clearly, may affect non-resident as well as resident shareholders of a corporation, include the following: Specified votes are required for the sale of all of the corporation's assets (Ronald, check this in the Model Code) and for a liquidation; the election of directors may be staggered over a period of years to prevent abrupt changes in management; various classes of stock may be created with differences in voting rights as to dividends and on liquidation; provisions may be made for ~~proportional representation~~ cumulative voting; restrictions

with respect to dividends may be adopted to assure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. Where the shares of a corporation are held in states other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Ronald

lfp/ss 03/20/87 Rider A, p. 43 (CTS Corp.)

CTS47 SALLY-POW

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lfp/ss 03/20/87 <u>Rider A, p. (CTS Corp.)</u>

CTSB SALLY-POW

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lfp/ss 03/27/86 Rider A, p. 21 (CTS Corp.)

CTS21 SALLY-POW

11. It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result is more effective management or otherwise be beneficial to shareholders. The divergent views in the literature - and even now being debated in the Congress - reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to

shareholders is simply a cash price substantially higher than the market price prior to the offer.

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lfp/ss 03/27/86 Rider A, p. 21 (CTS Corp.)

CTS21 SALLY-POW

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shareholders is simply a cash price substantially higher than the market price prior to the offer.

lfp/ss 03/27/86 Rider A, p. 22 (CTS Corp.)

CTS22 SALLY-POW

To the extent this Act may be viewed as effecting a change in the structure of the market for corporate shares, the Act pertains only to the governance of Indiana corporations - a right and responsibility traditionally left to the States.

Reviewed
3/17-78
L.F.P.

No. 86-71,

CTS Corporation v. Dynamics Corporation

March 16, 1987 draft

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code §§23-1-42-1 et seq. (1986), is preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law. That law included the Control Share Acquisitions Chapter (the

Ronald: Rather than Chapter, what about (Control Share Act or Act)?

Chapter) at issue in this case. After July 31, 1987, the Chapter automatically will apply to any corporation incorporated in Indiana, Ind. Code §23-1-17-3(a), unless it amends its articles of incorporation or bylaws to opt out of the Chapter, §23-1-42-5. Before that date, any Indiana corporation can opt into the Chapter by resolution of its board of directors. §23-1-17-3(b).

no ¶

The Chapter applies only to "issuing public corporations." The term "corporation" includes only corporations incorporated in Indiana. See §23-1-20-5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial

Control

assets within Indiana; and
(3) either:
(A) more than ten percent (10%) of its shareholders resident in Indiana;
(B) more than ten percent (10%) of its shares owned by Indiana residents; or
(C) ten thousand (10,000) shareholders resident in Indiana."

§23-1-42-4(a).

The focus of the Chapter is the acquisition of "control shares" in issuing public corporations. Under the Chapter, a "person" ~~a stockowner~~ acquires "control shares" whenever it acquires ~~purchases~~ shares that bring ~~its~~ interest in the corporation above any of three thresholds: 20%, 33 1/3%, or 50%. §23-1-42-1. A person ~~stockowner~~ who acquires control shares does not necessarily acquire the voting rights~~, normally associated with those shares~~. Rather, ~~Instead,~~ it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." §23-1-42-9. Section 9 requires a

Ronald - one may acquire shares w/o voting

majority vote of all disinterested[1] shareholders for passage of such a resolution. §23-1-42-9(b). The practical effect of this requirement is to condition

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[1]"Interested shares" are shares with respect to which the acquiror, an officer of the target corporation, or an inside director of the corporation "can exercise or direct the exercise of the voting power." §23-1-42-4. So long as the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Chapter; although the acquiror may own the shares on the date of the meeting, it will not "exercise ... the voting power" of the shares.

As a practical matter, it seems likely that the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR §240.14e-1(a). If the acquiror seeks an early resolution of the issue--as most acquirors will--the meeting required by Indiana Code §23-1-42-7 must be held no more than fifty calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. The Chapter specifically requires management to give notice of the meeting "as promptly as reasonably practicable ... to all shareholders of record as of the record date set for the meeting." §23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if they delayed setting the record date and sending notice until after twenty business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

acquisition of control of a corporation on approval of a majority of the preexisting disinterested shareholders.[2]

The shareholders decide whether to confer voting rights on the control shares at a specially called meeting of the

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[2]The United States and Appellee Dynamics Corporation suggest that the Chapter requires a second vote by all shareholders of record. Brief for the SEC and United States as Amicus Curiae 5, n. 6; Brief for Appellee Dynamics Corporation of America 3, n. 5. Intervenor Indiana disputes this interpretation of the Chapter. Brief of Intervenor-Appellant Indiana 29, n. *. The relevant paragraph of the Chapter provides:

> "[T]he resolution must be approved by:
>
> (1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code §23-1-38-4(a) [describing fundamental changes in corporate organization]." §23-1-42-9(b)(1).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

shareholders. By complying with the Chapter, the acquiror can force management of the target corporation to hold a special meeting to consider the issue within 50 days. To do so, it must deliver an acquiring person statement[3] and agree to pay the expenses of the meeting. §23-1-42-7. If the acquiror does not deliver such a statement, or if the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value. §23-1-42-10.

B

On March 10, 1986, Appellee Dynamics Corporation owned 9.6% of the common stock of Appellant CTS

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[3]An "acquiring person statement" is an information statement describing, inter alia, the identity of the acquiring person and the terms of the proposed acquisition. See §23-1-42-6.

Corporation. On that day, four days after the Chapter went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS up to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Chapter, see §23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Chapter is preempted by the Williams Act, 15 U.S.C. §§78m(d)-(e) & 78n(d)-(f), and violates the Commerce Clause, Art. I, §8,

cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Chapter. On April 9, the District Court ruled that the Chapter is preempted by the Williams Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in Edgar v. MITE Corp., 457 U.S. 624 (1982), the court concluded that the Chapter "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." Id., at 399. CTS moved for certification of the judgment on this claim as final under Fed. Rule Civ. Proc. 54(b). A week later, on April 16, the District Court certified this portion of the case as final. On the same day, it issued an opinion accepting

Dynamics' claim that the Chapter violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Chapter] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." _Id._, at 406.

CTS appealed the District Court's final holding on the Williams Act claim to the Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291; it appealed the Commerce Clause holding under §1292(a). Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23--23 days after Dynamics first contested application of the Chapter in the District Court--the Court of Appeals issued

a judgment affirming the District Court and an order stating that an opinion would issue later. The opinion was issued on May 28. 794 F. 2d 250.

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act preempts the Chapter. Like the District Court before it, the court looked first to JUSTICE WHITE's plurality opinion in Edgar v. MITE Corp., supra, in which three Justices concluded that the Williams Act preempts state statutes that upset the balance between target management and tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a

view, however, benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. ... But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward.

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 262-263.

Finally, the court addressed Dynamic's Commerce Clause challenge to the Chapter. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the court found the Chapter unconstitutional.

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. ...
>
> ... Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control--an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." Id., at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws ... designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." Ibid.

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana

> corporation .... But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial .... [T]hat the mode of regulation involves jiggering with the voting rights cannot take it outside the scope of judicial review under the commerce clause." Ibid.

Accordingly, the court affirmed the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U.S.C. §1254(2), 479 U.S. ___, and now reverse.[4]

II

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[4]On March 16, 1987, CTS and Dynamics settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we decided to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Chapter was preempted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Chapter. See Settlement Agreement, at 7, §12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Clerk of the United States Supreme Court (Mar. 13, 1987).

The first question in this case is whether the Williams Act preempts the Indiana Chapter. As we have stated ~~so~~ frequently, a state statute is preempted

> "'where compliance with both federal and state regulations is a physical impossibility ...,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ...." Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

Because it is ~~possible~~ entirely possible for entities to comply with both the Williams Act and the Indiana Chapter, the Chapter can be preempted only if it frustrates the purposes of the federal Williams Act.

A

Our discussion begins with a brief summary of the Williams Act. Th~~e Williams Act~~is was passed in 1968 in response to the increasing number of hostile tender

offers. Before passage of the Williams Act, these transactions were not coverd by the disclosure requirements of the federal securities laws." See <u>Piper v. Chris-Craft Industries, Inc.</u>, 430 U.S. 1, 22 (1977). The Williams Act, backed by regulations implemented by the Securities and Exchange Commission, imposes requirements in two basic areas. First, the Williams Act requires the offeror to file a statement disclosing a variety of information about the offer. See 15 U.S.C. §78n(d)(1); 17 CFR §240.14d-3 (1986). This statement must disclose information about the offeror's background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's

holdings in the target company. See 15 U.S.C. §78n(d)(1) (incorporating §78m(d)(1) by reference); 17 CFR §240.13d-1.

Second, the Williams Act and accompanying regulations have established ~~several~~ 6 procedural rules to govern tender offers. For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U.S.C. §78n(d)(5); 17 CFR §240.14d-7(a)(1). The offer must remain open for at least 20 business days. 17 CFR §240.14e-1(a). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U.S.C. §78n(d)(6). The offeror must pay the same price

for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. Id., §78n(d)(7).

B

As both of the courts below recognized, the Indiana Chapter resembles the Illinois statute that the Court considered in Edgar v. MITE Corp., 457 U.S. 624 (1982). It is helpful to summarize the features of that statute that motivated three Justices to find it preempted by the Williams Act. After reviewing the legislative history of the Williams Act, JUSTICE WHITE concluded that the Williams Act struck a careful balance between the interests of offerors and target companies and that any state statute that "upset" this balance was preempted by

the Williams Act. Id., at 632-634. JUSTICE WHITE then identified three features of the Illinois statute that he felt had upset this balance and brought the Illinois statute into conflict with the Williams Act.

First, JUSTICE WHITE noted that the Illinois statute provided for a 20-day precommencement period during which management could disseminate its views on the upcoming offer to shareholders. During that same period, offerors could not communicate their offers to shareholders. JUSTICE WHITE noted that Congress had deleted express precommencement notice provisions from the Williams Act, and concluded accordingly that the Illinois provision "frustrate[d] the objectives of the Williams Act," id., at 634. The provision provided "the target company with additional time within which to take steps to combat the

offer." This time was particularly valuable to management, because it provided "a powerful tool to combat tender offers" by biasing the information that would be before stockholders during the days before the offer became effective. Ibid.

The second feature of the Illinois statute ~~that JUSTICE WHITE~~ criticized was that it provided for a hearing on the offer without setting a "deadline for the completion of the hearing." Id., at 637. This permitted management, by insisting on a hearing, "to delay a tender offer indefinitely." Ibid. It was noted ~~JUSTICE WHITE noted~~ that "'delay can seriously impede a tender offer,'" ibid. (quoting Great Western United Corp. v. Kidwell, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover

offeror would be free to go forward without unreasonable delay," id., at 639. Accordingly, Justice White concluded that this provision, that allowed an indefinite delay, conflicted with the Williams Act.

The third feature of the Illinois statute that concerned the plurality was its provision that the fairness of tender offers would be reviewed by the Secretary of State of Illinois. Noting that "Congress intended for investors to be free to make their own decisions," he concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy--an approach quite in conflict with that adopted by Congress.'" Id., at 639-640 (quoting MITE Corp. v. Dixon, 633 F. 2d 486, 494 (CA7 1980)).

C

Intervenor Indiana asks us to reject the MITE plurality's conclusion that the Williams Act preempts state statutes that alter a balance of neutrality Congress may have struck when it passed the Williams Act. Brief of Intervenor-Appellant State of Indiana 45-46. Similarly, the United States has filed a brief as Amicus Curiae suggesting that the Williams Act "does not prohibit states from adopting laws that operate to favor [the takeover bidder or target management], unless those laws conflict with the Williams Act or the Commission's regulations under the Act." Brief for the Securities and Exchange Commission and the United States as Amicus Curiae 9. Because JUSTICE WHITE's MITE opinion on this point did not

represent the views of a majority of the whole Court,[5] we are not bound by its reasoning. But we see no reason to question that reasoning in this case, because we believe that the Indiana Chapter passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in MITE.

The overriding concern of the MITE plurality was investor autonomy. JUSTICE WHITE concluded that the

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[5]JUSTICE WHITE's opinion on the preemption issue, 457 U.S., at 630-640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See id., at 646-647 (POWELL, J., concurring in part) (concluding that the case was moot; addressing the merits because the Court concluded that the case was not moot; concluding that the Williams Act did not preempt the statute challenged in MITE); id., at 655 (STEVENS, J., concurring in part and concurring in the judgment) (concluding that the Williams Act did not preempt the statute challenged in MITE). Four Justices declined to address the question. See id., at 655 (O'CONNOR, J., concurring in part) (declining to reach the preemption question); id., at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting) (concluding that the case was moot; declining to reach the preemption question); id., at 667 (REHNQUIST, J., dissenting) (same).

Williams Act struck a delicate balance between offerors and incumbent management to protect the interests of the shareholders caught in the middle. ~~In JUSTICE WHITE's view,~~ the Illinois statute upset this balance by favoring incumbent management against offerors. By contrast, the statute now before the Court is not designed to favor managment against the offeror. Rather, it seeks to protect the independent shareholder against both of the contending parties. Thus, the Chapter furthers the basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" Piper v. Chris-Craft Industries, 430 U.S. 1, 30 (1977) (citation omitted)

(quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967)).[6]

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[6] Dynamics finds evidence of an intent to favor management in several features of the Chapter. First, Dynamics argues that the provision of the Act allowing management to opt into the Chapter grants management a strategic advantage. See Ind. Code § 23-1-17-3(b). Tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Chapter's requirements. But the provision allowing management to opt in is only a temporary provision for the first seventeen months after enactment of the Chapter. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Chapter did not apply automatically, but that corporations could choose to opt in during that period. It seems entirely reasonable to grant management the right to choose whether the Chapter should apply during this brief period.

Second, the Chapter imposes added expenses on the offeror, requiring the offeror, inter alia, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see §23-1-42-7. In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror--who has no official position with the corporation--desires a special meeting to be held, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Chapter increases their expense and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Chapter is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

The Indiana Chapter operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers are at a disadvantage. By allowing the independent shareholders to vote as a group, the Chapter protects shareholders from the coercive aspects of tender offers. If a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares--even if they doubt the tender offer is in the corporation's best interest--to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step."

SEC Exchange Act Release No. 21079 (June 21, 1984), CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916. See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum L. Rev. 249, 307-309 (1983). In such a situation, the shareholders as a group, acting in the corporation's best interest, would reject the offer, although individual shareholders would accept the offer. The desire of the Indiana legislature to protect shareholders from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers that statute's overriding goal of protecting shareholders.

Moreover, in implementing this goal, the statute avoids the problems JUSTICE WHITE discussed in MITE. First, unlike the MITE statute, the Indiana Chapter neither require precommencement notification of the

impending offer nor biases the information available to shareholders. ~~Second~~, the Chapter ~~does not~~ impose an indefinite delay on tender offers. ~~Nothing in the Chapter~~ prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR §240.14e-1(a) (1986). ~~Finally~~, the Chapter ~~does not~~ allow the State government to interpose its views of fairness between willing buyers and sellers of shares of the target company. ~~Instead~~, the Chapter allows shareholders to vote collectively on the merits of the offer.

The Court of Appeals held that the Chapter is preempted because of its view that the practical effect of the Chapter is to delay consummation of tender offers until fifty days after the commencement of the offer.

Like the Court of Appeals, Dynamics argues that no rational offeror would purchase shares until it gains assurance that those shares will carry voting rights. Because voting rights will not be conferred any sooner than a shareholder meeting fifty days after commencement of the offer, Dynamics concludes that the Chapter imposes a fifty-day delay. Dynamics relies heavily on the fact that this alleged fifty-day delay is about three weeks longer than the twenty-business-day period the SEC has established as the minimum period for which a tender offer may be held open. Ibid. This argument has several problems.

First, we disagree with the Court of Appeals' conclusion that the Chapter imposes a fifty-day delay on tender offers. Nothing on the face of the Chapter

precludes offerors from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Chapter, he can make a conditional tender offer, offering to accept shares subject to the condition that the shares receive voting rights within a certain period of time. The Williams Act clearly permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E.g., SEC Exchange Act Release No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758; MacFadden Holdings, Inc. v. JB Acquisition Corp., 802 F.2d 62, 70 (CA2 1986). There is no reason to doubt that this

type of conditional tender offer would be legitimate as well.[7]

~~Second~~ Moreover, nothing in MITE suggested that any delay imposed by state regulation, however short, would create a conflict with the Williams Act. ~~JUSTICE WHITE~~ The plurality opinion argued only that the offeror should "be free to go forward without unreasonable delay." 457 U.S., at 639 (emphasis added).

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[7]Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. If a majority of the target company's shareholders think the offer is attractive, it is likely that a majority will tender their shares on the twentieth business day, and that a majority of the target company's shareholders will vote to accord voting rights to the offeror so that the transaction can be consummated. Once the shares are tendered, the opportunities for incumbent management to defeat the tender offer by lobbying its own shareholders are ~~greatly reduced~~. ~~If incumbent management nevertheless respond by destroying the company's assets, that is a problem to be remedied under state law.~~ ~~Neither~~ The Williams Act ~~nor any other federal statute~~ does not protects shareholders from the mismanagement of corporate officers and directors. See Cort v. Ash, 422 U.S. 66, 84 (1975).

Moreover, in the unlikely event that management were to take action for the purpose of diminishing the value of the corporation's shares, it may incur liability under state law.

Ronald: As the reader may not recall the Act's provisions for a shareholder's meeting, add a sentence or two & refer back to ¶ that begins on p 5

In that case, ~~JUSTICE WHITE~~ the Court was confronted with an indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Chapter provides that full voting rights will be vested--if ~~ever~~ this is to occur--fifty days after commencement of the offer. This ~~fifty-day~~ period is within the sixty-day maximum period Congress established for tender offers in 15 U.S.C. §78n(d)(5). In light of the complexity of arranging shareholder meetings for large corporations, we do not believe that a fifty-day period would be unreasonable.

not clear.

Finally, we note that the Williams Act would preempt a ~~great~~ variety of state corporate laws of hitherto unquestioned validity if it were held to preempt any state statute that hinders the free exercise of power after a successful

tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corporation Act §37 (1969 draft); Revised Model Business Corporation Act §8.06 (1984 draft)[8]. By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay for years the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See Model Business Corporation Act §33, par. 4 (1969 draft); Revised Model

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[8] Every state except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corporation Act Annotated §8.06, p. 830 (Supp. 1986 to 3d ed.).

Business Corporation Act §7.28 (1984 draft).[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can further delay the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law.

9

> "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder ... to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Annotated §33, Par. 4 comment (2d ed. 1971).

Every state in this country permits cumulative voting. See 2 Model Business Corporation Act Annotated §7.28, pp. 675-677 (Supp. 1986 to 3d ed.).

537, 538-539 (1984). But the Williams Act certainly was not intended to preempt these traditional types of corporate laws.

In our view, the possibility that the Indiana Chapter will delay some tender offers is insufficient to infer a conclusion that the Williams Act preempts the Chapter. If Congress had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The Indiana Chapter is a rather novel type of corporate law, but there is no reason to assume that Congress intended it to be preempted. In our view, the regulatory conditions the Chapter places on tender offers are not inconsistent with either the text or the purposes of the Williams Act. Accordingly, we disagree with the Court of

We must not use the code word "burden" except when our Commerce Clause cases require it.

Ronald - Keep in mind that we have pending the Washington State commerce clause case in which I recused.

L.F.P. 3/18

Appeals' conclusion that the Williams Act preempts the Indiana Chapter.

As an alternative basis for its decision, the Court of Appeals held that the Chapter violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce ... among the several States ...." Art. I, §8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions that inhibit the free flow of trade between the States. E.g., Cooley v. Board of Wardens, 12 How. 299 (1852). The Court's interpretation of "these great

silences of the Constitution," *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation ~~has~~ have grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 441, n. 15 (1978).

Most of our recent cases have articulated a two-tier approach to Commerce Clause analysis. Some ~~of these cases~~ suggest that ~~some~~ certain types of regulation--usually described as regulation that "discriminates" against interstate commerce or that imposes more than an "incidental" burden on interstate commerce--will be found to violate the

Commerce Clause, un~~der a virtually per se rule of invalidity~~. Less burdensome regulations must be evaluated by balancing the benefits of the regulation against the burden it places on interstate commerce. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 106 S. Ct. 2080, 2084 (1986); *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456, 471 (1981); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371-372 (1976); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Other cases have suggested that a finding of discrimination does not necessarily lead to invalidation, but merely shifts the burden of proof to the State to justify its statute. E.g., *Maine* v. *Taylor*, 106 S. Ct. 2440, 2448 (1986);

Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352-353 (1977).

If anything is clear from these cases, it is that we have turned with increasing frequency to explaining our Commerce Clause decisions in terms of balancing. In fact, even the cases suggesting a per se rule of invalidity for certain types of regulation may rest on a conclusion that local benefits, however great, cannot justify those types of regulation. We do not undertake today to resolve the tension in these cases, because examination of the Indiana Chapter convinces us that this statute does not fall within the disfavored class of statutes that arguably are subject to a per se rule.

B

The first type of regulation that this Court recently has invalidated without discussion of the balancing analysis is a regulation that fails to regulate evenhandedly between in- and out-of-state entities. The Indiana Chapter passes this test. The alleged burden on interstate commerce is that the Chapter imposes an undue burden on entities that make hostile tender offers. To the extent the Chapter imposes a burden on such entities, it does so with equal force whether the offeror is from Indiana or not.

Dynamics contends that the statute is discriminatory because the burden falls principally on out-of-state entities. This argument rests on the contention that, as a practical matter, almost all hostile tender offers are launched by entities on the East Coast, conversely

Dynamics argues, very few hostile tender offers are made by entities situated in Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978). Rather, if a statute "regulates evenhandedly ... without regard to whether the [commerce comes] from outside the State," the unconstitutionality of the statute can be established only after consideration of the both the benefits and the burdens of the statute under the balancing analysis. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-472 (1981). See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981) (rejecting a claim of discrimination where

the "tax burden was borne according to the amount ... consumed and not according to any distinction between in-state and out-of-state consumers").

The second type of regulation that this Court recently has invalidated without reference to balancing ~~usually~~ has been described as a statute that imposes a "direct," or more than "incidental," burden on interstate commerce. See Brown-Forman Distillers Corporation v. New York State Liquor Authority, 106 S. Ct. 2080, 2084-2087 (1986); Edgar v. MITE Corp., 457 U.S. 624, 641-643 (1982) (plurality opinion of WHITE, J.). The distinctive problem with ~~those~~ statutes ~~was their~~ overriding regulation of transactions with which the State had no substantial nexus. In Brown-Forman, New York effectively had set the price that could be charged on sales of liquor outside New

Omit ?

York. In MITE, Illinois had prohibited, under certain circumstances, sales of shares in corporations not incorporated by Illinois. Cf. Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 775 (1945) (criticizing an Arizona statute because "[t]he practical effect of [the] regulation is to control train operations beyond the boundaries of the state").

This case does not present such a problem. The Indiana Chapter does not prohibit any transaction, whether it takes place in Indiana or elsewhere. Rather, it limits the acquisition of voting rights in shares acquired in certain transactions. Moreover, the Indiana Chapter applies only to corporations that are both incorporated by Indiana and maintain substantial contacts with Indiana. ?

We have said this

Ronald: This is not clear. I suppose you refer to the requirements as to ownership of shares by Indiana residents

Omit?

Of course, many shareholders in Indiana corporations do not reside in Indiana, and many tender offerors do not reside in Indiana. To the extent the Chapter affects transactions between such parties, the Chapter has an extraterritorial effect. But the limitation of the statute to shares of corporations created by the State of Indiana distinguishes this case from MITE and gives the State a sufficient nexus to justify regulation in this area. In the past, we frequently have acknowledged that State regulation of multistate corporations properly may have an extraterritorial effect. E.g., Rogers v. Guaranty Trust Co., 288 U.S. 123, 129 (1933). We need not describe today the limits of this principle. We can conclude, however, that so long as a state regulation is limited to defining the attributes of shares in the state's own

and most of these

corporations, it is not a "direct" regulation of commerce that violates the Commerce Clause without recourse to the balancing analysis.

C

The classic articulation of the balancing test under the Commerce Clause states that a statute will not be invalidated "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). A review of the burdens and benefits associated with the Indiana Chapter convinces us that the Court of Appeals incorrectly concluded that the statute offends the Commerce Clause.

Indiana and CTS argue that the benefits of the Chapter come from its capacity to protect corporations

from coercive tender offers. There can be no doubt that Indiana has a legitimate, and indeed important, interest in providing a framework for governance of Indiana corporations that ensures fair and stable operation of those entities. Despite the broad reach of the federal securities laws, it is an accepted part of the business landscape in this country that it is the place of states to create corporations, to prescribe their powers, and to define the rights that may be acquired by purchasing their shares. Although the Indiana Chapter may seem novel, we think it is well within the legitimate reach of this state interest.

The Chapter furthers this interest in two related ways. First, as we have explained <u>supra</u>, at 22-25, the Chapter is designed to prevent hostile tender offers from

coercing shareholders into tendering their shares. By allowing shareholders to deliberate collectively about the merits of offers, the Chapter helps to ensure that coercion – express or implicit – will not subvert the efficient workings of the free marketplace. Second, the Chapter helps to prohibit involuntary changes in corporate management except in situations where the offeror has offered a sufficiently high price to convince the shareholders that the offeror can administer the corporation more beneficially than incumbent management. By increasing stability, the Chapter encourages business managers to eschew ephemeral profits in favor of long-term investments that will provide greater benefits to the local, and national, economy.

Dynamics responds to this point in several ways. First, Dynamics argues that the Chapter serves no useful function. Dynamics views the prospect of coercive tender offers as wholly illusory and contends that tender offers should be favored, because they reallocate corporate assets into the hands of the management who can use them most effectively. See generally Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

But Indiana's concern with coercive tender offers is not groundless. Indeed, it has been recognized by the Securities and Exchange Commission, see SEC Exchange Act Release No. 21079 (June 21, 1984), CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916, and by a number of scholarly commentators, see, e.g., Bradley & Rosenzweig, Defensive

Stock Repurchases, 99 Harv. L. Rev. 1377, 1412-1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L.J. 13, 20-22 (1985); Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307-309 (1983). The Constitution does not require the states to subscribe to any particular economic theory. In our view, the possibility of coercion is sufficiently real to justify the Chapter as a reasonable attempt to further these substantial state interests.

Second, Dynamics argues that this benefit cannot support the Chapter because the State "'has no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee Dynamics Corporation of America 21 (quoting Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)). Dynamics

relies heavily on the statement in MITE that "[i]nsofar as the ... law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S., at 644. But that comment was made in reference to a law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations. But the Indiana Chapter applies only to corporations incorporated in Indiana that maintain a substantial business presence in the State. We reject the contention that Indiana has no interest in protecting the shareholders of such corporations from coercive transactions in the shares of such corporations. In any event, unlike the Illinois statute invalidated in MITE, the Indiana Chapter applies only to corporations that have

what ? is there

a substantial number of shareholders in Indiana. See Indiana Code §23-1-42-4(a)(3). Thus, every application of the Indiana Chapter will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting. In sum, we conclude that the Chapter materially furthers Indiana's longstanding interest in promoting fair and stable commerce by Indiana corporations.

We now must consider whether the burdens the Chapter places on interstate commerce are clearly excessive in relation to these benefits. Dynamics argues that the Chapter's effects on tender offers tend to slow interstate commerce in three ways: by preventing out-of-state entities from taking control of Indiana corporations; by hindering interstate transactions between willing sellers

and purchasers; and by deterring the transfer of corporate assets out of Indiana. We may accept Dynamics' contentions that the Chapter will have these affects, and that the burdens will be borne for the most part by out-of-state entities. But we nevertheless do not believe Dynamics has established a violation of the Commerce Clause.

It is important to remember that the Chapter applies evenhandedly to residents and nonresidents. Thus, even if it were established that most tender offers covered by the Chapter happen to be made by out-of-state entities seeking to acquire control of assets presently in Indiana, that fact alone would not outweigh the benefits of the statute sufficiently to justify invalidation of the statute as a

violation of the Commerce Clause. See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473 (1981).

Also, much of the burden of the Chapter on commerce is not cognizable under the Commerce Clause. We firmly have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a ... market." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978). "[T]he power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce ... is deeply rooted in both our history and our law." H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949). The Chapter operates to increase the stability of Indiana corporations and to protect shareholders from coercion. The Commerce Clause

does not entitle entities to engage in transactions that a State has reasonably, and for nondiscriminatory reasons, found to be harmful to the local community.

It is conceded that Indiana legitimately could impose such a burden to protect shareholders residing in Indiana. By ~~the nature of things,~~ It would be ~~difficult~~ impracticable to provide for collective voting by shareholders without protecting both resident and nonresident shareholders. Because Indiana has limited application of the Chapter to corporations that have a substantial number of resident shareholders, the Chapter will not apply in cases where the burden falls wholly beyond the borders of the State. In any event, as we have explained *supra*, at 49, Indiana also has a legitimate interest in protecting nonresident shareholders in Indiana corporations. The burden of

requiring a collective vote to pass voting rights is not so clearly excessive to the benefit of deterring coercive transfers of the individual's shares that the Commerce Clause precludes state legislatures from allowing local corporations to govern themselves in this manner.

Second, Dynamics argues that the Chapter is not well-designed to further the interests in corporate management, because it burdens not only coercive tender offers, but fair and wholly beneficial offers as well. We fail to see a constitutional problem with this feature of the statute. The regulation burden is reasonably necessary to distinguish between good and bad offers. The Court's comments in Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917), apply here:

> "It burdens honest business, it is true, but burdens it only that under its forms dishonest

> business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its function. It costs something to be governed." Id., at 587.

In short, although the Chapter incidentally may burden beneficial transactions in interstate commerce, most of the burden will fall on coercive transactions that the State clearly has a right to prohibit. In this respect, the Chapter resembles many of the familiar provisions of State business laws. For example, many states require supermajority votes to approve certain important corporate actions. See, e.g., Model Business Corporation Act §73 (1969 draft) (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); Revised Model Business Corporation Act §11.03 (1984 draft) (same). State laws

Some states require 2/3rd vote also sale of assets regardless of where located; also liquidation

also frequently provide for "dissenters' rights" under which minority shareholders are entitled in certain circumstances to sell their shares to the corporation at fair market value. See, e.g., Model Business Corporation Act §§80-81 (1969 draft); Revised Model Business Corporation Act §13.02 (1984 draft).

Nor is it novel for the Chapter to provide that a purchaser of a share in a business can gain a right to control the business only with the consent of other owners. Section 27 of the Uniform Partnership Act provides: "A conveyance by a partner of his interest in the partnership does not ..., as against the other partners in the absence of agreement, entitle the assignee ... to interfere in the management or administration of the partnership business or affairs, or to require any

information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled." 6 U.L.A. 353 (1969). See Uniform Limited Partnership Act § 19 (1916 draft) (similar provisions for limited partnerships), 6 U.L.A. 603; Revised Uniform Limited Partnership Act §§702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986).[10]

All of these provisions share the potential to hinder out-of-state transactions in businesses organized under

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[10]The Uniform Partnership Act has been adopted by every state except Louisiana. 6 U.L.A., at 1 (Supp. 1986). The Uniform Limited Partnership Act was adopted by 43 states. 6 U.L.A., at 559. A total of 30 states have adopted the Revised Uniform Limited Partnership Act. 6 U.L.A., at 201 (1986 Supp.). The only states that have not adopted one of the Uniform Limited Partnership Acts are Kentucky, Louisiana, and Maine.

the laws of the enacting state. Yet there can be no question that these laws do not offend the Commerce Clause. Dynamics acknowledges the validity of these laws, but contends that the State has left the proper sphere of its power by attempting to regulate transactions among shareholders. In its view, Indiana's authority over corporations extends only to transactions of the corporation itself. This argument is belied by the provisions of the Uniform Partnership Act discussed above, that directly regulate the acquisition of voting rights by a purchase of a partnership interest from a partner. We see no reason to limit a state's power over business entities it creates to regulating the transactions of the entities themselves. If an entity can acquire a controlling interest in the shares by coercive means, it

can subvert the protections offered minority shareholders by more traditional provisions like supermajority voting requirements. The State has an important interest in ensuring that its corporations are fairly administered, and that the complexities of the associational form do not offer a shield for fraud to the detriment of the investor. The benefits the Chapter affords to this interest preclude us from finding the Chapter offensive to the Commerce Clause.[11]

IV

[11] CTS also contends that the Chapter does not violate the Commerce Clause--regardless of the burdens it imposes on interstate commerce--because a corporation's decision to be covered by the Chapter is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

On its face, the Indiana's Control Share Acquisitions Chapter evenhandedly describes the attributes of shares of Indiana corporations. The Chapter does not conflict with the purposes of the Williams Act, but helps to increase shareholder autonomy in the face of tender offers that many view as coercive. If the Indiana legislature has acted unwisely, and imposed an inefficient framework on corporate management, we may assume that the marketplace will cause investors to shift their funds to corporations incorporated in other States, or to opt out of the Chapter, and that directors will reincorporate their businesses under more efficient corporate laws in force in other States. The burdens the Chapter imposes on interstate commerce are not clearly excessive in relation to the State's interests in defining the shares of its

corporations and protecting shareholders in those corporations from fraud. State regulation of these matters has never been questioned by Congress. We do not think it offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

L.F.P.

3/20

No. 86-71,

CTS Corporation v. Dynamics Corporation

March 19, 1987 draft

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code §§23-1-42-1 et seq. (1986), is preempted by the Williams Act, 15 U.S.C. §§78m(d)-(e) & 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law. That law included the Control Share Acquisitions Chapter (the Act)

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at issue in this case. After July 31, 1987, the Act automatically will apply to any corporation incorporated in Indiana, Ind. Code §23-1-17-3(a), unless it amends its articles of incorporation or bylaws to opt out of the Act, §23-1-42-5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of directors. §23-1-17-3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only corporations incorporated in Indiana. See §23-1-20-5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
> (C) ten thousand (10,000) shareholders resident in Indiana."
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> §23-1-42-4(a).

The Act focuses on the acquisition of "control shares" in issuing public corporations. Under the Act, an entity acquires "control shares" whenever it acquires shares that bring its interest in the corporation above any of three thresholds: 20%, 33 1/3%, or 50%. §23-1-42-1. An entity that acquires control shares does not necessarily acquire the voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." §23-1-42-9. Section 9 requires a majority vote of all disinterested[1] shareholders for passage of

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[1]"Interested shares" are shares with respect to which the acquiror, an officer of the target corporation, or an inside director of the corporation "can exercise or direct the exercise of the voting power." §23-1-42-4. So long as the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise ... the voting (Footnote continued)

such a resolution. §23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the preexisting disinterested shareholders.[2]

(Footnote 1 continued from previous page)
power" of the shares.

As a practical matter, it seems likely that the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR §240.14e-1(a). If the acquiror seeks an early resolution of the issue--as most acquirors will--the meeting required by Indiana Code §23-1-42-7 must be held no more than fifty calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. The Act specifically requires management to give notice of the meeting "as promptly as reasonably practicable ... to all shareholders of record as of the record date set for the meeting." §23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if they delayed setting the record date and sending notice until after twenty business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2]The United States and Appellee Dynamics Corporation suggest that the Act requires a second vote by all shareholders of record. Brief for the SEC and United States as Amicus Curiae 5, n. 6; Brief for Appellee Dynamics Corporation of America 3, n. 5. Intervenor Indiana disputes this interpretation of the Act. Brief of Intervenor-Appellant Indiana 29, n. *. The relevant paragraph of the Act provides:

(Footnote continued)

The shareholders decide whether to confer rights on the control shares at the next meeting of the shareholders. By complying with the Act, the acquiror can require management of the corporation to hold a special meeting to consider the issue within 50 days. To do so, it must deliver an acquiring person statement[3] and agree

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(Footnote 2 continued from previous page)

> "[T]he resolution must be approved by:
>
> (1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code §23-1-38-4(a) [describing fundamental changes in corporate organization]." §23-1-42-9(b)(1).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

[3]An "acquiring person statement" is an information statement describing, _inter alia_, the identity of the
(Footnote continued)

to pay the expenses of the meeting. §23-1-42-7. If the acquiror does not deliver such a statement, or if the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value. §23-1-42-10.

B

On March 10, 1986, Appellee Dynamics Corporation owned 9.6% of the common stock of Appellant CTS Corporation. On that day, four days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS up to 27.5%.

(Footnote 3 continued from previous page)
acquiring person and the terms of the proposed acquisition. See §23-1-42-6.

Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see §23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is preempted by the Williams Act, 15 U.S.C. §§78m(d)-(e) & 78n(d)-(f), and violates the Commerce Clause, Art. I, §8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Act is preempted by the Williams Act and

granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in Edgar v. MITE Corp., 457 U.S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." Id., at 399. CTS moved for certification of the judgment on this claim as final under Fed. Rule Civ. Proc. 54(b). A week later, on April 16, the District Court certified this portion of the case as final. On the same day, it issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create

an impermissible indirect burden on interstate commerce." *Id.*, at 406.

CTS appealed the District Court's final holding on the Williams Act claim to the Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291; it appealed the Commerce Clause holding under §1292(a). Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23--23 days after Dynamics first contested application of the Act in the District Court--the Court of Appeals issued a judgment affirming the District Court and an order stating that an opinion would issue later. The opinion was issued on May 28. 794 F. 2d 250.

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined

Dynamics' claim that the Williams Act preempts the Act. The court looked first to JUSTICE WHITE's plurality opinion in _Edgar_ v. _MITE Corp._, _supra_, in which three Justices concluded that the Williams Act preempts state statutes that upset the balance between target management and tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however, benighted, that hostile takeovers are bad." _Id._, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile

> regulations. ... But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." Ibid.

Once the court had decided to apply the analysis of the MITE plurality, it found the case straightforward.

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." Id., at 262-263.

Finally, the court addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the court found the Act unconstitutional.

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake

> of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. ...
> ... Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control--an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." Id., at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws ... designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." Ibid.

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation .... But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial .... [T]hat the mode of regulation involves jiggering with the voting rights cannot take it outside the scope of judicial review under the commerce clause." Ibid.

Accordingly, the court affirmed the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U.S.C. §1254(2), 479 U.S. ___, and now reverse.[4]

II

The first question in this case is whether the Williams Act preempts the Indiana Act. As we have stated frequently, a state statute is preempted

[4]On March 16, 1987, CTS and Dynamics settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we decided to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was preempted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, §12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Clerk of the United States Supreme Court (Mar. 13, 1987).

> "'where compliance with both federal and state regulations is a physical impossibility ...,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ...." Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the Act can be preempted only if it frustrates the purposes of the federal Williams Act.

A

Our discussion begins with a brief summary of the Williams Act. It was passed in 1968 in response to the increasing number of hostile tender offers. Before passage of the Williams Act, these transactions were not covered by the disclosure requirements of the federal securities laws. See Piper v. Chris-Craft Industries,

Inc., 430 U.S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission, imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing a variety of information about the offer, including the offeror's background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U.S.C. §78n(d)(1) (incorporating §78m(d)(1) by reference); 17 CFR §240.13d-1, .14d-3 (1986).

Second, the Williams Act and accompanying regulations have established procedural rules to govern tender offers. For example, stockholders who tender their shares may

withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U.S.C. §78n(d)(5); 17 CFR §240.14d-7(a)(1). The offer must remain open for at least 20 business days. 17 CFR §240.14e-1(a). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U.S.C. §78n(d)(6). The offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. _Id._, §78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in Edgar v. MITE Corp., 457 U.S. 624 (1982). It is helpful to summarize the features of that statute that motivated JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), to find it preempted by the Williams Act. After reviewing the legislative history of the Williams Act, the plurality concluded that the Williams Act struck a careful balance between the interests of offerors and target companies and that any state statute that "upset" this balance was preempted by the Williams Act. Id., at 632-634. The plurality then identified three features of the Illinois statute that were thought to upset this balance and brought the Illinois statute into conflict with the Williams Act.

JUSTICE WHITE's opinion noted that the Illinois statute provided for a 20-day precommencement period during which management could disseminate its views on the upcoming offer to shareholders. During that same period, offerors could not communicate their offers to shareholders. Because Congress had deleted express precommencement notice provisions from the Williams Act, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act," id., at 634. The provision provided "the target company with additional time within which to take steps to combat the offer." This time was particularly valuable to management, because it provided "a powerful tool to combat tender offers" by biasing the information that would be before stockholders during the days before the offer became effective. Ibid.

The second feature of the Illinois statute criticized was that it provided for a hearing on the offer without setting a "deadline for the completion of the hearing." *Id.*, at 637. This permitted management, by insisting on a hearing, "to delay a tender offer indefinitely." *Ibid.* The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp. v. Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision, that allowed an indefinite delay, conflicted with the Williams Act. ~~The~~ [a] third [troublesome] feature of the Illinois statute ~~that concerned the plurality~~ [is] was its provision that the fairness of tender

offers would be reviewed by the Secretary of State of Illinois. Noting that "Congress intended for investors to be free to make their own decisions," ~~he~~ the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy--an approach quite in conflict with that adopted by Congress.'" Id., at 639-640 (quoting MITE Corp. v. Dixon, 633 F. 2d 486, 494 (CA7 1980)).

C

As the plurality opinion in MITE did not represent the views of a majority of the Court, [5] we are not bound

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[5] JUSTICE WHITE's opinion on the preemption issue, 457 U.S., at 630-640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See id., at 646-647 (POWELL, J., concurring in part) (concluding that the case was moot; addressing the merits because the Court concluded that the case was not moot; concluding that the Williams Act did not preempt the statute challenged in MITE); id., at 655 (STEVENS, J., concurring in part and concurring in (Footnote continued)

by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in MITE. As we explained supra, at 17-18, the overriding concern of the MITE plurality was that the Illinois statute considered in that case operated specifically to favor management against offerors. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the

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(Footnote 5 continued from previous page)
the judgment) (concluding that the Williams Act did not preempt the statute challenged in MITE). Four Justices declined to address the question. See id., at 655 (O'CONNOR, J., concurring in part) (declining to reach the preemption question); id., at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting) (concluding that the case was moot; declining to reach the preemption question); id., at 667 (REHNQUIST, J., dissenting) (same).

Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" Piper v. Chris-Craft Industries, 430 U.S. 1, 30 (1977) (citation omitted) (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967)).[6]

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act grants management a strategic advantage. See Ind. Code § 23-1-17-3(b). Tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first seventeen months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act did not apply automatically, but that corporations could choose to opt in during that period. It seems entirely reasonable to grant management the right to choose whether the Act should apply during this brief period.

The Act imposes some added expenses on the offeror, requiring it, inter alia, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see §23-1-42-7. In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror--who has no official position with the corporation--desires a special meeting to be held, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

(Footnote continued)

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of tender offers. If, for example, a successful tender offer may be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares--even if they doubt the tender offer is in the corporation's best interest--to protect themselves from being forced to sell

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(Footnote 6 continued from previous page)

Of course, by regulating tender offers, the Act increases their expense and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." SEC Exchange Act Release No. 21079 (June 21, 1984), CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916. See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum L. Rev. 249, 307-309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, would reject the offer, although individual shareholders would be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does

not conflict with the Williams Act. Rather, it furthers that statute's overriding goal of protecting shareholders.

Moreover, in implementing this goal, the statute avoids the problems the plurality discussed in MITE. Unlike the MITE statute, the Indiana Act neither require precommencement notification of the impending offer nor biases the information available to shareholders. Neither does the Act impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR §240.14e-1(a) (1986). Nor does the Act allow the State government to interpose its views of fairness between willing buyers and sellers of shares of the target

company. Rather, the Act allows shareholders to vote collectively on the merits of the offer.

D

The Court of Appeals held that the Act is preempted because of its view that the practical effect of the Act is to delay consummation of tender offers until fifty days after the commencement of the offer. As did the Court of Appeals, Dynamics argues that no rational offeror would purchase shares until it gains assurance that those shares will carry voting rights. Because voting rights may not be conferred any sooner than a shareholder meeting fifty days after commencement of the offer, Dynamics concludes that the Act imposes a fifty-day delay. This alleged fifty-day delay is about three weeks longer than the twenty-business-day period the SEC has established as the

minimum period for which a tender offer may be held open. Ibid. This argument has several problems.

We disagree with the Court of Appeals' conclusion that the Act necessarily imposes a fifty-day delay on tender offers. The provisions of the Act do not preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares subject to the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E.g., SEC Exchange Act Release No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758; MacFadden Holdings, Inc. v. JB Acquisition

Corp., 802 F.2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

Moreover, nothing in MITE suggested that any delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality opinion

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[7]Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. If a majority of the target company's shareholders think the offer is attractive, it is likely that a majority will tender their shares on the twentieth business day, and that a majority of the target company's shareholders will vote to accord voting rights to the offeror so that the transaction can be consummated. Once the shares are tendered, the opportunities for incumbent management to defeat the tender offer by lobbying its own shareholders are greatly reduced. Moreover, in the unlikely event that management were to take action for the purpose of diminishing the value of the corporation's shares, it may incur liability under state law. But this problem does not control our preemption analysis. Neither the Act nor any other federal statute protects shareholders from the mismanagement of corporate officers and directors. Cf. Cort v. Ash, 422 U.S. 66, 84 (1975).

argued only that the offeror should "be free to go forward without unreasonable delay." 457 U.S., at 639 (emphasis added). In that case, the Court was confronted with an indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested--if this is ever to occur--fifty days after commencement of the offer. This period is within the sixty-day maximum period Congress established for tender offers in 15 U.S.C. §78n(d)(5). In light of the complexity of arranging shareholder meetings for large corporations, we do not believe that a fifty-day period would be unreasonable.

Finally, we note that the Williams Act would preempt a variety of state corporate laws of hitherto unquestioned

validity if it were held to preempt any state statute that hinders the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corporation Act §37 (1969 draft); Revised Model Business Corporation Act §8.06 (1984 draft)[8]. By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay for years the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See Model Business

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[8]Every state except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corporation Act Annotated §8.06, p. 830 (Supp. 1986 to 3d ed.).

Corporation Act §33, par. 4 (1969 draft); Revised Model Business Corporation Act §7.28 (1984 draft).[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can further delay the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting

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> "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder ... to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Annotated §33, Par. 4 comment (2d ed. 1971).

Every state in this country permits cumulative voting. See 2 Model Business Corporation Act Annotated §7.28, pp. 675-677 (Supp. 1986 to 3d ed.).

Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538-539 (1984).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to infer a conclusion that the Williams Act preempts the Act. If Congress had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. In our view, the regulatory conditions the Act places on tender offers are not inconsistent with either the text or the purposes of the Williams Act. Accordingly, we disagree with the Court of Appeals' conclusion that the Williams Act preempts the Indiana Act.

III

Ronald - Part III would be more readable with a couple of sub-parts

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce ... among the several States ...." Art. I, §8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions that inhibit the free flow of trade between the States. E.g., Cooley v. Board of Wardens, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has

Ronald: since we emphasize absence of "discrimination", is there a better statement?

articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e.g., Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 441, n. 15 (1978).

It is clear, however, that the principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36-37 (1980); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). The Indiana Act is not such a statute. It has the same effects on tender offers whether the offeror resides in Indiana or not. Thus, it "visits its effects equally upon both interstate and local business," Lewis v. BT Investment Managers, Inc., supra, at 36.

Yes

good

Dynamics nevertheless contends that the statute is discriminatory because it will apply for the most part to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument--unsupported by any evidence in the record--avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978). See Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 471-472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly ... without regard to whether the [commerce] came from outside the

Altho I suggested this, our argument would be the same. Lets omit.

State"); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden was borne according to the amount ... consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state businesses than it does on similarly situated Indiana businesses, we reject the contention that the Act discriminates against interstate commerce.

This Court's recent Commerce Clause cases also have invalidated statutes that may disrupt interstate commerce by subjecting activities to inconsistent regulations. E.g., Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. ___, ___, 106 S. Ct. 2080, 2087 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642

(1982) (plurality opinion of WHITE, J.); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 671 (1981) (plurality opinion of POWELL, J.). See Southern Pacific Co. v. Arizona, 325 U.S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); Cooley v. Board of Wardens, 12 How. 299, 319 (1852) (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). ¶ The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corps, including the voting rights of shareholders. ~~It is entirely natural that voting rights should be determined~~ ~~to determine the voting rights of its domestic corps.~~

under the law of the incorporating state. Cf. Restatement (Second) of Conflict of Laws §304 (1969 draft) (concluding that the law of the incorporating state generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Regulation by the laws of the various states in which shareholders reside, or in which business is transacted, could lead to regulation so inconsistent as to stifle corporate interstate commerce utterly. Because the Act presents no such danger, it passes this test as well.

The Court of Appeals failed to appreciate the significance for Commerce Clause analysis of a State's traditional power to regulate corporate governance. As Chief Justice Marshall explained:

Daniel Webster: "Dartmouth is a small college" but there are those who love it"

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819).

See First National Bank of Boston v. Bellotti, 435 U.S. 765, 822-824 (1978) (REHNQUIST, J., dissenting). Every state ~~in this country~~ has enacted laws regulating corporate governance. By ~~prohibiting~~ certain transactions, and ~~regulating~~ others, such laws necessarily affect certain aspects of ~~impede transactions in~~ interstate commerce. For example, many states require supermajority votes to approve certain important corporate actions. See, e.g., Model Business Corporation Act §73 (1969 draft) (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); Revised Model Business

Corporation Act §11.03 (1984 draft) (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also ~~frequently~~ provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take specified actions are entitled to sell their shares to the corporation at fair market value. See, e.g., Model Business Corporation Act §§80-81 (1969 draft); Revised Model Business Corporation Act §13.02 (1984 draft). By ~~forcing~~ the corporation to purchase the shares of dissenting shareholders, these laws ~~make it less profitable for~~ corporations ~~to~~ engage in the specified transactions.

Ronald:
Inclined to put in a Note
and continue to talk about corporations

Nor is it novel for the Act to provide that a purchaser of a share in a business can gain a right to control the business only with the consent of other owners. Section 27 of the Uniform Partnership Act provides:

> "A conveyance by a partner of his interest in the partnership does not ..., as against the other partners in the absence of agreement, entitle the assignee ... to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled." 6 U.L.A. 353 (1969).

Ronald:
The
Under common law, a partner could not convey or transfer by gift or by will, his interest. Even death dissolved a partnership.

See Uniform Limited Partnership Act § 19 (1916 draft) (similar provisions for limited partnerships), 6 U.L.A.

The Partnership Act is a legislative recognition of the need to regulate the modern partnerships that were comparable in many ways to corps,

603; Revised Uniform Limited Partnership Act §§702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986).[10]

All of these provisions share with the Act the potential to hinder out-of-state transactions in businesses organized under the laws of the enacting state. Yet it never has been argued that these laws offend the Commerce Clause. It is an accepted part of the business landscape in this country that it is the place of states to create corporations, to prescribe their powers, and to define the rights that may be acquired by purchasing their shares. We have noted in the past that "a State's power

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[10]The Uniform Partnership Act has been adopted by every state except Louisiana. 6 U.L.A., at 1 (Supp. 1986). The Uniform Limited Partnership Act was adopted by 43 states. 6 U.L.A., at 559. A total of 30 states have adopted the Revised Uniform Limited Partnership Act. 6 U.L.A., at 201 (1986 Supp.). The only states that have not adopted one of the Uniform Limited Partnership Acts are Kentucky, Louisiana, and Maine.

to regulate commerce is never greater than in matters traditionally of local concern." Kassel v. Consolidated Freightways Corp., supra, at 670. ~~It is clear to us that~~ A State law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest or concern.

The Act furthers this concern in two related ways. First, as we have explained supra, at 22-25, the Act is designed to prevent hostile tender offers from coercing shareholders into tendering their shares. By allowing shareholders to deliberate collectively ~~about~~ as to the merits of offers, the Act helps to ensure that coercion--express or implicit--will not subvert the efficient workings of the free marketplace. Second, the Act helps to prohibit

Rider A

a substitute from here to p 45

See my Rule.

involuntary changes in corporate management except in situations where the offeror has offered a sufficiently ~~high~~ attractive price to convince the shareholders that the offeror can administer the corporation more beneficially than incumbent management. By increasing stability, the Act encourages business managers to eschew ephemeral profits in favor of long-term investments that will provide greater benefits to the ~~local, and national,~~ economy.

Dynamics responds to this point in several ways. ~~First, Dynamics argues that the Act serves no useful function.~~ Dynamics views the prospect of coercive tender offers as wholly illusory and contends that tender offers should be favored, because they may reallocate corporate assets into the hands of the management who can use them most effectively. See generally Easterbrook & Fischel,

Some do not have this purpose

The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981).

But Indiana's concern with coercive tender offers is not groundless. Indeed, it has been recognized by the Securities and Exchange Commission, see SEC Exchange Act Release No. 21079 (June 21, 1984), CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916, and by a number of scholarly commentators, see, e.g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412-1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L.J. 13, 20-22 (1985); Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307-309 (1983). The Constitution does not require the states to subscribe to any particular economic theory. We are not

inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," Kassel v. Consolidated Freightways Corp., supra, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some take-over bids is a further reason for a State to enact even-handed protective laws.

In any event, Dynamics argues that the State "'has no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)). Dynamics relies heavily on the statement by the plurality in MITE that "[i]nsofar as the ... law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S., at 644.

But that comment was made in reference to the Ill. law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations. But the Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in protecting the shareholders of such corporations from coercive transactions in the shares of such corporations. Moreover, unlike the Illinois statute invalidated in MITE, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Indiana Code §23-1-42-4(a)(3). Thus, every application of the Indiana Act will

affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. But even if true, this would not be of great concern under the Commerce Clause. The Commerce Clause does not entitle entities to engage in transactions that a State has reasonably, and for nondiscriminatory reasons, found to be harmful. The Act's effects arise not from discrimination, but from the alterations Indiana has made in the available methods of gaining control of Indiana corporations. We firmly have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a ... market." Exxon Corp. v. Governor of Maryland, 437 U.S.

117, 127 (1978). Moreover, the Indiana statute is designed to promote stable management of Indiana corporations and to protect shareholders in those corporations from coercion. "[T]he power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce ... is deeply rooted in both our history and our law." H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949). We cannot agree that the Act is so ineffective in accomplishing its purposes that it offends the Commerce Clause.[11]

IV

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[11]CTS also contends that the Act does not violate the Commerce Clause--regardless of the burdens it imposes on interstate commerce--because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the attributes of shares of Indiana corporations. The Act does not conflict with the purposes of the Williams Act, ~~but helps to increase shareholder autonomy in the face of tender offers~~ that ~~many view as coercive.~~ If the Indiana legislature has acted unwisely, ~~and imposed an inefficient framework~~ on ~~corporate management~~, we may assume that the marketplace will cause investors to shift their funds to corporations incorporated in other States, or to opt out of the Act, and that directors will reincorporate their businesses under ~~more efficient~~ corporate laws ~~in force in~~ other States. The Act's affects on interstate commerce are justified by the State's interests in defining the attributes of shares in its corporations and protecting

shareholders in those corporations from fraud. Congress has never questioned the need for state regulation of these matters. Nor do we think it offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Reviewed L.F.P 3/21

Ronald: This is fine. Most of my editing is minor. Lets move this through our regular procedure. I'll next see a chambers

No. 86-71

CTS Corporation v. Dynamics Corporation

March 21, 1987 draft

draft unless Leslie suggest major substantive changes 3/21/87 4.30 PM

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code §§23-1-42-1 et seq. (1986), is preempted by the Williams Act, 15 U.S.C. §§78m(d)-(e) & 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law. That law included the Control Share Acquisitions Chapter (the Act)

at issue in this case. After July 31, 1987, the Act automatically will apply to any corporation incorporated in Indiana, Ind. Code §23-1-17-3(a), unless it amends its articles of incorporation or bylaws to opt out of the Act, §23-1-42-5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of directors. §23-1-17-3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only corporations incorporated in Indiana. See §23-1-20-5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
> (C) ten thousand (10,000) shareholders resident in Indiana."
>
> §23-1-42-4(a).

The Act focuses on the acquisition of "control shares" in issuing public corporations. Under the Act, an entity acquires "control shares" whenever it acquires shares that bring its interest in the corporation above any of three thresholds: 20%, 33 1/3%, or 50%. §23-1-42-1. An entity that acquires control shares does not necessarily acquire the voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." §23-1-42-9. Section 9 requires a majority vote of all disinterested[1] shareholders for passage of

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[1]"Interested shares" are shares with respect to which the acquiror, an officer of the target corporation, or an inside director of the corporation "can exercise or direct the exercise of the voting power." §23-1-42-4. So long as the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise ... the voting

(Footnote continued)

such a resolution. §23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the preexisting disinterested shareholders.[2]

(Footnote 1 continued from previous page)
power" of the shares.

As a practical matter, it seems likely that the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR §240.14e-1(a). If the acquiror seeks an early resolution of the issue--as most acquirors will--the meeting required by Indiana Code §23-1-42-7 must be held no more than fifty calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. The Act specifically requires management to give notice of the meeting "as promptly as reasonably practicable ... to all shareholders of record as of the record date set for the meeting." §23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if they delayed setting the record date and sending notice until after twenty business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2]The United States and Appellee Dynamics Corporation suggest that the Act requires a second vote by all shareholders of record. Brief for the SEC and United States as Amicus Curiae 5, n. 6; Brief for Appellee Dynamics Corporation of America 3, n. 5. Intervenor Indiana disputes this interpretation of the Act. Brief of Intervenor-Appellant Indiana 29, n. *. The relevant paragraph of the Act provides:

(Footnote continued)

The shareholders decide whether to confer rights on the control shares at the next meeting of the shareholders. By complying with the Act, the acquiror can require management of the corporation to hold a special meeting to consider the issue within 50 days. To do so, it must deliver an acquiring person statement[3] and agree

(Footnote 2 continued from previous page)

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code §23-1-38-4(a) [describing fundamental changes in corporate organization]." §23-1-42-9(b)(1).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

[3]An "acquiring person statement" is an information statement describing, _inter alia_, the identity of the

(Footnote continued)

to pay the expenses of the meeting. §23-1-42-7. If the acquiror does not deliver such a statement, or if the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value. §23-1-42-10.

B

On March 10, 1986, Appellee Dynamics Corporation owned 9.6% of the common stock of Appellant CTS Corporation. On that day, four days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS up to 27.5%.

(Footnote 3 continued from previous page) acquiring person and the terms of the proposed acquisition. See §23-1-42-6.

Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see §23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is preempted by the Williams Act, 15 U.S.C. §§78m(d)-(e) & 78n(d)-(f), and violates the Commerce Clause, Art. I, §8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Act is preempted by the Williams Act and

granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in Edgar v. MITE Corp., 457 U.S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." Id., at 399. CTS moved for certification of the judgment on this claim as final under Fed. Rule Civ. Proc. 54(b). A week later, on April 16, the District Court certified this portion of the case as final. On the same day, it issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create

an impermissible indirect burden on interstate commerce." *Id.*, at 406.

CTS appealed the District Court's final holding on the Williams Act claim to the Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291; it appealed the Commerce Clause holding under §1292(a). Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23--23 days after Dynamics first contested application of the Act in the District Court--the Court of Appeals issued a judgment affirming the District Court and an order stating that an opinion would issue later. The opinion was issued on May 28. 794 F. 2d 250.

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined

Dynamics' claim that the Williams Act preempts the Act. The court looked first to JUSTICE WHITE's plurality opinion in Edgar v. MITE Corp., supra, in which three Justices concluded that the Williams Act preempts state statutes that upset the balance between target management and tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however, benighted, that hostile takeovers are bad." Id., at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile

> regulations. ... But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." Ibid.

Once the court had decided to apply the analysis of the MITE plurality, it found the case straightforward.

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." Id., at 262-263.

Finally, the court addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the court found the Act unconstitutional.

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake

> of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. ...
>
> ... Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control--an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." Id., at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws ... designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." Ibid.

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation .... But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial .... [T]hat the mode of regulation involves jiggering with the voting rights cannot take it outside the scope of judicial review under the commerce clause." Ibid.

Accordingly, the court affirmed the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U.S.C. §1254(2), 479 U.S. ___, and now reverse.[4]

II

The first question in this case is whether the Williams Act preempts the Indiana Act. As we have stated frequently, a state statute is preempted

[4] On March 16, 1987, CTS and Dynamics settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we decided to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was preempted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, §12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Clerk of the United States Supreme Court (Mar. 13, 1987).

> "'where compliance with both federal and state regulations is a physical impossibility ...,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ...." Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the Act can be preempted only if it frustrates the purposes of the federal Williams Act.

A

Our discussion begins with a brief summary of the Williams Act. It was passed in 1968 in response to the increasing number of hostile tender offers. Before passage of the Williams Act, these transactions were not covered by the disclosure requirements of the federal securities laws. See Piper v. Chris-Craft Industries,

Inc., 430 U.S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission, imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing a variety of information about the offer, including the offeror's background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U.S.C. §78n(d)(1) (incorporating §78m(d)(1) by reference); 17 CFR §240.13d-1, .14d-3 (1986).

Second, the Williams Act and accompanying regulations have established procedural rules to govern tender offers. For example, stockholders who tender their shares may

withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U.S.C. §78n(d)(5); 17 CFR §240.14d-7(a)(1). The offer must remain open for at least 20 business days. 17 CFR §240.14e-1(a). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U.S.C. §78n(d)(6). The offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. *Id.*, §78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in Edgar v. MITE Corp., 457 U.S. 624 (1982). It is helpful to summarize the features of that statute that motivated JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), to find it preempted by the Williams Act. After reviewing the legislative history of the Williams Act, the plurality concluded that the Williams Act struck a careful balance between the interests of offerors and target companies and that any state statute that "upset" this balance was preempted by the Williams Act. Id., at 632-634. The plurality then identified three features of the Illinois statute that were thought to upset this balance and brought the Illinois statute into conflict with the Williams Act.

JUSTICE WHITE's opinion noted that the Illinois statute provided for a 20-day precommencement period during which management could disseminate its views on the upcoming offer to shareholders. During that same period, offerors could not communicate their offers to shareholders. Because Congress had deleted express precommencement notice provisions from the Williams Act, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act," id., at 634. The provision provided "the target company with additional time within which to take steps to combat the offer." This time was particularly valuable to management, because it provided "a powerful tool to combat tender offers" by biasing the information that would be before stockholders during the days before the offer became effective. Ibid.

Ronald - what could offerors do during this period?

The second feature of the Illinois statute criticized was that it provided for a hearing on the offer without setting a "deadline for the completion of the hearing." *Id.*, at 637. This permitted management, by insisting on a hearing, "to delay a tender offer indefinitely." *Ibid.* The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp. v. Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision, that allowed an indefinite delay, conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its provision that the fairness of tender offers would be

reviewed by the Secretary of State of Illinois. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy--an approach quite in conflict with that adopted by Congress.'" Id., at 639-640 (quoting MITE Corp. v. Dixon, 633 F. 2d 486, 494 (CA7 1980)).

C

As the plurality opinion in MITE did not represent the views of a majority of the Court, [5] we are not bound

[5] JUSTICE WHITE's opinion on the preemption issue, 457 U.S., at 630-640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See id., at 646-647 (POWELL, J., concurring in part) (concluding that the case was moot; addressing the merits because the Court concluded that the case was not moot; concluding that the Williams Act did not preempt the statute challenged in MITE); id., at 655 (STEVENS, J., concurring in part and concurring in the judgment) (concluding that the Williams Act did not preempt the statute challenged in MITE). Four Justices declined to address the question. See id., at 655
(Footnote continued)

by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in MITE. As we explained supra, at 17-18, the overriding concern of the MITE plurality was that the Illinois statute considered in that case operated to favor management against offerors. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing

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(Footnote 5 continued from previous page)
(O'CONNOR, J., concurring in part) (declining to reach the preemption question); id., at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting) (concluding that the case was moot; declining to reach the preemption question); id., at 667 (REHNQUIST, J., dissenting) (same).

with the takeover bidder,'" Piper v. Chris-Craft Industries, 430 U.S. 1, 30 (1977) (citation omitted) (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967)).[6]

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[6]Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act grants management a strategic advantage. See Ind. Code § 23-1-17-3(b). Tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first seventeen months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act did not apply automatically, but that corporations could choose to opt in during that period. It seems entirely reasonable to grant management the right to choose whether the Act should apply during this brief period.

The Act imposes some added expenses on the offeror, requiring it, inter alia, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see §23-1-42-7. In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror--who has no official position with the corporation--desires a special meeting to be held, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act increases their expense and thus deters them somewhat, but this type of reasonable regulation does not alter the

(Footnote continued)

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of tender offers. If, for example, a successful tender offer may be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares--even if they doubt the tender offer is in the corporation's best interest--to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains:

(Footnote 6 continued from previous page)
balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

"The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." SEC Exchange Act Release No. 21079 (June 21, 1984), CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916. See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum L. Rev. 249, 307-309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, would reject the offer, although individual shareholders ~~would~~ may be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers that statute's overriding goal of protecting shareholders.

Moreover, in implementing this goal, the statute avoids the problems the plurality discussed in MITE. Unlike the MITE statute, the Indiana Act neither require precommencement notification of the impending offer nor biases the information available to shareholders. Neither does the Act impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR §240.14e-1(a) (1986). Nor does the Act allow the State government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows shareholders to vote collectively on the merits of the offer.

D

The Court of Appeals held that the Act is preempted because of its view that the practical effect of the Act is to delay consummation of tender offers until fifty days after the commencement of the offer. As did the Court of Appeals, Dynamics argues that no rational offeror would purchase shares until it gains assurance that those shares will carry voting rights. Because voting rights may not be conferred any sooner than a shareholder meeting fifty days after commencement of the offer, Dynamics concludes that the Act imposes a fifty-day delay. This alleged fifty-day delay is about three weeks longer than the twenty-business-day period the SEC has established as the minimum period for which a tender offer may be held open. *Ibid*. This argument has several problems.

We disagree with the Court of Appeals' conclusion that the Act necessarily imposes a fifty-day delay on tender offers. The provisions of the Act do not preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares subject to the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E.g., SEC Exchange Act Release No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758; MacFadden Holdings, Inc. v. JB Acquisition Corp., 802 F.2d 62, 70 (CA2 1986). There is no reason to

doubt that this type of conditional tender offer would be legitimate as well.[7]

Moreover, nothing in MITE suggested that any delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality opinion argued only that the offeror should "be free to go forward

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[7]Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. If a majority of the target company's shareholders think the offer is attractive, it is likely that a majority will tender their shares on the twentieth business day, and that a majority of the target company's shareholders will vote to accord voting rights to the offeror so that the transaction can be consummated. Once the shares are tendered, the opportunities for incumbent management to defeat the tender offer by lobbying its own shareholders are greatly reduced. Moreover, in the unlikely event that management were to take action for the purpose of diminishing the value of the corporation's shares, it may incur liability under state law. But this problem does not control our preemption analysis. Neither the Act nor any other federal statute ~~protects shareholders~~ from the mismanagement of corporate officers and directors. Cf. Cort v. Ash, 422 U.S. 66, 84 (1975).

can assure that shareholders may not suffer

without <u>unreasonable</u> delay." 457 U.S., at 639 (emphasis added). In that case, the Court was confronted with an indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested--if this is ever to occur--fifty days after commencement of the offer. This period is within the sixty-day maximum period Congress established for tender offers in 15 U.S.C. §78n(d)(5). In light of the complexity of arranging shareholder meetings for large corporations, we do not believe that a fifty-day period would be unreasonable.

Finally, we note that the Williams Act would preempt a variety of state corporate laws of hitherto unquestioned validity if it were held to preempt any state statute that

~~hinders~~ may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corporation Act §37 (1969 draft); Revised Model Business Corporation Act §8.06 (1984 draft)[8]. By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay ~~for years~~ the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See Model Business Corporation Act §33, par. 4 (1969 draft); Revised Model

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[8]Every state except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corporation Act Annotated §8.06, p. 830 (Supp. 1986 to 3d ed.).

Business Corporation Act §7.28 (1984 draft).[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can further delay the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538-539 (1984).

9

> "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder ... to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Annotated §33, Par. 4 comment (2d ed. 1971).

Every state in this country permits cumulative

(Footnote continued)

Ronald - We could cite a case saying absent explicit language, there is a presumption vs preemption

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to infer a conclusion that the Williams Act preempts the Act. If Congress had intended to preempt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. In our view, the regulatory conditions the Act places on tender offers are not inconsistent with either the text or the purposes of the Williams Act. Accordingly, we disagree with the Court of Appeals' conclusion that the Williams Act preempts the Indiana Act.

III

(Footnote 9 continued from previous page)
voting. See 2 Model Business Corporation Act Annotated §7.28, pp. 675-677 (Supp. 1986 to 3d ed.).

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce ... among the several States ...." Art. I, §8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions directed against commerce between the States. E.g., Cooley v. Board of Wardens, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has

articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e.g., Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 441, n. 15 (1978).

A

It is clear, however, that the principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36-37 (1980); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender

offers whether the offeror is a domiciliary or resident of ~~resides in Indiana~~ or not. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply for the most part to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456, 471-472

(1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly ... without regard to whether the [commerce] came from outside the State"); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden was borne according to the amount ... consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate

commerce by subjecting activities to inconsistent regulations. E.g., Brown-Forman Distillers Corporation v. New York State Liquor Authority, 476 U.S. ___, ___, 106 S. Ct. 2080, 2087 (1986); Edgar v. MITE Corp., 457 U.S. 624, 642 (1982) (plurality opinion of WHITE, J.); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 671 (1981) (plurality opinion of POWELL, J.). See Southern Pacific Co. v. Arizona, 325 U.S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); Cooley v. Board of Wardens, 12 How. 299, 319 (1852) (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no

such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including definition of the voting rights of shareholders. See Restatement (Second) of Conflict of Laws §304 (1969 draft) (concluding that the law of the incorporating state generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different states.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its ~~analysis~~ view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the traditional power of a State to regulate corporate governance. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819).

See First National Bank of Boston v. Bellotti, 435 U.S. 765, 822-824 (1978) (REHNQUIST, J., dissenting). Every

state in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in states other than the state of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many states and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation--except in the

rarest situations--is organized under, and governed by, the laws of the state of its incorporation.

These regulations, that normally include the voting rights of shareholders, directly may affect a variety of corporate transactions. For example, recognizing the important changes that mergers work in the shareholders' interests in corporation, many states require supermajority votes to approve mergers. See, e.g., Model Business Corporation Act §73 (1969 draft) (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); Revised Model Business Corporation Act §11.03 (1984 draft) (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for

"dissenters' rights" under which minority shareholders who disagree with corporate decisions to take specified actions are entitled to sell their shares to the corporation at fair market value. See, e.g., Model Business Corporation Act §§80-81 (1969 draft); Revised Model Business Corporation Act §13.02 (1984 draft). By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

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[10]Other common regulations that may affect both nonresident and resident shareholders of a corporation include the following. Specified votes may be required for the sale of all of the corporation's assets. See Model Business Corporation Act § 79 (1969 draft) (MBCA); Revised Model Business Corporation Act §12.02 (1984 draft) (RMBCA). The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA §37; RMBCA §8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA §15; RMBCA §6.01(c). Provisions may be made for cumulative voting. See MBCA §33, par. 4; RMBCA §7.28, note 9, _supra_. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to

(Footnote continued)

It thus is an accepted part of the business landscape in this country for states to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. We have noted in the past that "a State's power to regulate commerce is never greater than in matters traditionally of local concern." Kassel v. Consolidated Freightways Corp.,

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(Footnote 10 continued from previous page)
liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA §45 (noting that a corporation's articles of incorporations can restrict payment of dividends); RMBCA §6.40 (same). Where the shares of a corporation are held in states other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act §27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603; Revised Uniform Limited Partnership Act §§702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions--in force in the great majority of the States in this Country--bear a striking resemblance to the Act at issue in this case.

supra, at 670. A State law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest or concern.

There can be no doubt that the Act furthers this interest. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this specifically by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation would be desirable as they perceive it. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing

shareholders collectively to determine whether the take over is advantageous to their interests may be especially beneficial by preventing hostile tender offers from coercing shareholders into tendering their shares.

Respondent Dynamics responds by arguing that the prospect of coercive tender offers is illusory and that tender offers generally should be favored, because they reallocate corporate assets into the hands of management who can use them most effectively. See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). But Indiana's concern with coercive tender offers is not groundless. Indeed, ~~it~~ there has been recognized by the Securities and Exchange Commission, see SEC Exchange Act Release No. 21079 (June 21, 1984), CCH

Fed. Sec. Law Rep. ¶83,637, p. 86,916, and by a number of scholarly commentators, see, e.g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412-1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L.J. 13, 20-22 (1985); Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307-309 (1983). The Constitution does not require the states to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," Kassel v. Consolidated Freightways Corp., supra, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some takeover bids offers

additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State "'has no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting Edgar v. MITE Corp., 457 U.S. 624, 644 (1982)). Dynamics relies heavily on the statement by the MITE Court that "[i]nsofar as the ... law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations. But the Act applies only to corporations incorporated in Indiana. We

reject the contention that Indiana has no interest in protecting the shareholders of its corporations from coercive transactions in the shares of those corporations. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in <u>MITE</u>, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Indiana Code §23-1-42-4(a)(3). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on ~~Dynamics'~~ its contention that the Act will

limit the number of successful tender offers. There is little evidence that this will occur. But even if true this would not substantially affect our Commerce Clause analysis. The Commerce Clause does not entitle entities to engage in transactions that a State ~~has~~ reasonably, and for nondiscriminatory reasons, found ~~to be harmful~~. We reiterate ~~the fac~~t that ~~the~~ Act does not prohibit any entity--resident or nonresident--from purchasing shares in Indiana corporations. ~~It only changes the procedures for gaining control of those corporations.~~ We ~~firmly~~ have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a ... market." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978). Indiana has changed the structure of this market to further substantial reasons traditionally

left to the States. Accordingly, even if the Act should decrease the number of successful tender offers in Indiana, they would not offend the Commerce Clause.[11]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. It was adopted for the legitimate state purpose of protecting the interests of shareholders in Indiana corporations. If the Indiana legislature has acted unwisely, and imposed an

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[11]CTS also contends that the Act does not violate the Commerce Clause--regardless of any burdens it may impose on interstate commerce--because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

Ronald - ... explicitly provided? ... helpful ... as they have a right to do.

inefficient framework on corporate management, we may assume that Indiana will bear the burden: the marketplace may cause investors to shift their funds to corporations incorporated in other States; investors [shareholders] may vote to remove their corporations from the coverage of the Act, see Ind. Code §23-1-42-5; directors may reincorporate their businesses under the corporate laws of other States. To the limited extent the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think it offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

Ronald: How about my suggested Note as to effect of take-overs? CA7 seemed to think they invariably are beneficial?

It is so ordered.

03/25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: ____________

Recirculated: ____________

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 86–71 AND 86–97

CTS CORPORATION, APPELLANT
86–71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86–97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23–1–42–1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23–1–17–1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act) at issue in this case. Beginning on August 1, 1987, the Act automatically will apply to any corporation incorporated in Indiana, § 23–1–17–3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23–1–42–5. Before that date, any Indiana corporation can opt into the

Act by resolution of its board of directors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only corporations incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
> (C) ten thousand (10,000) shareholders resident in Indiana."
> § 23–1–42–4(a).

The Act focuses on the acquisition of "control shares" in issuing public corporations. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. Under the Act, an entity that acquires control shares does not necessarily acquire the voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of

[1] "Interested shares" are shares with respect to which the acquiror, an officer of the target corporation, or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. So long as the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

stock for passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

As a practical matter, it seems likely that the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act, see § 23-1-42-7, must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. The Act specifically requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if they delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2] The United States and Appellee Dynamics Corporation suggest that the Act requires a second vote by *all* shareholders of record. Brief for the Securities and Exchange Commission and United States as Amicus Curiae 5 and n. 6; Brief for Appellee Dynamics Corporation of America 2-3 and n. 5. Intervenor Indiana disputes this interpretation of the Act. Brief of Intervenor-Appellant Indiana 29, n. *. The relevant paragraph of the Act provides:

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code § 23-1-38-4(a) [describing fundamental changes in corporate organization]." § 23-1-42-9(b).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially-scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days, if it files an "acquiring person statement,"[3], requests the meeting, and agrees to pay the expenses of the meeting, see § 23–1–42–7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value. § 23–1–42–10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the sharesanytime after 60 days after the acquiror's last acquisition. § 23–1–42–10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS up to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23–1–17–3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dy-

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person, and the terms and extent of the proposed acquisition. See § 23–1–42–6.

namics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court, ruling that the Williams Act preempts the Indiana Act, 637 F. Supp. 389, granted Dynamics' motion for declaratory relief. Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 16, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit under 28 U. S. C. § 1291. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affiriming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act preempts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams

Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. . . .
>
> . . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of In-

> diana is not authorized to opt out of, as in effect it has done in this statute." *Id.*, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.*:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation . . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial . . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently,

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[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we decided to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, para. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing a variety of information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR § 240.13d-1, .14d-3 (1986).

Second, the Williams Act and accompanying regulations establishes procedural rules to govern tender offers. For

example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d-7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). The offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality) concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was preempted by the Williams Act. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Willaims Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality Congress had determined that the potentially adverse consequences of such a provision on

shareholders should be avoided, Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act," *Ibid.* The second feature of the Illinois statute criticized was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its ~~provision~~ requirement that the fairness of tender offers would be reviewed by the Secretary of State of Illinois. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, , *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its

[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part) (concluding that the case was moot; addressing the merits because the Court concluded that the case was not moot; concluding that the Williams Act did not pre-empt the statute challenged in *MITE*); *id.*, at 655 (STEVENS, J., concurring in part and concurring in the judgment) (concluding that the Williams Act did not pre-empt the statute challenged in *MITE*). Four Justices declined to address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part) (declining to reach the pre-emption question); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting) (concluding that the case was moot; de-

reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, see *supra*, at 17–18, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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clining to reach the pre-emption question); *id.*, at 667 (REHNQUIST, J., dissenting) (same).

[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act grants management a strategic advantage, see 23–1–17–3(b), because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act did not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23–1–42–7(a). In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting to be held, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act increases their expense and thus deters them somewhat, but this type of reasonable regulation

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, a successful tender offer may be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Release No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 Colum L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, would reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not

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does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to vote collectively on the merits of the offer.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because voting rights may not be conferred any sooner than a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay that conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers. The provisions of the Act do not preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares subject to the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E. g., Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Release No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶ 24,284I, p. 17,758, *quoted in MacFadden*

Holdings, Inc. v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). In light of the complexity of arranging shareholder meetings for large corporations, we do not believe that a 50-day delay would be unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were held to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) (hereinafter MBCA); Re-

[7] Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

vised Model Business Corp. Act § 8.06 (1984 draft) (hereinafter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, *Deflecting Takeovers: Charter and By-Law Techniques*, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to infer a conclusion that the Williams Act pre-empts the Act. If Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are not inconsistent with either the text or the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

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[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Annotated § 8.06, p. 830 (3d ed., Supp. 1986).

[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Ann. § 33, Par. 4 comment (2d ed. 1971).

Every State in this country permits cumulative voting. See 2 Model Business Corporation Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ." Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. E. g., *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e. g., *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e. g., *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). On its face, it is clear that the Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply for the most part to out-of-

state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. E. g., *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, 12 How., at 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana

Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the definition of the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1969 draft) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the traditional power of a State to regulate corporate governance. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to

corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the laws of the State of its incorporation.

These regulations, that normally include the voting rights of shareholders, may affect directly a variety of corporate transactions. For example, Recognizing the important changes that mergers work in the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e. g., MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take specified actions are entitled to sell their shares to the corporation at fair market value. See, e. g., MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

[10] Other common regulations that may affect both nonresident and resident shareholders of a corporation include the following. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differ-

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. We have noted in the past that "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel* v. *Consolidated Freightways Corp., supra,* at 670. A state law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest or concern.

There can be no doubt that the Act furthers this interest. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this specifically by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation would be desirable as they perceive it. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively

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ences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; *supra* n. 9. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States in this country—bear a striking resemblance to the Act at issue in this case.

to determine whether the takeover is advantageous to their interests may be especially beneficial by preventing hostile tender offers from coercing shareholders into tendering their shares. See *supra*, at 23–25.

Respondent Dynamics responds that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively. See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). But Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, e. g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309.[11] The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

[11] In this area, generalizations usually require qualification. It may well be that some successful tender offers will provide more effective management or other benefits such as needed diversification. Yet, the conflicting views in the literature reflect the reality of the situation—that all tender offers are not alike. There is no reason to believe that the type of conglomerate corporation that may result from repetitive takeovers necessarily will operate more efficiently or provide greater benefits to shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in protecting the shareholders of its corporations from coercive transactions in the shares of those corporations. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code §23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. The Commerce Clause does not entitle entities to engage in transactions that a State reasonably, and for nondiscriminatory reasons, has found not to be in the interest of shareholders of its corporations. We reiterate that this Act does not prohibit any entity—resident or nonresident—from purchasing shares in Indiana corporations, or from attempting thereby

to gain control. It only provides regulatory procedures for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. Indiana has changed the structure of this market to further substantial interests traditionally left to the States. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. It was adopted for the legitimate state purpose of protecting the interests of shareholders in Indiana corporations. If the Indiana legislature has acted unwisely, and imposed an inefficient framework on corporate management, we may assume that Indiana will bear the burden: the marketplace may cause investors to shift their funds to corporations incorporated in other States; shareholders may vote to remove their corporations from the coverage of the Act, as they have a right to do, see Ind. Code § 23-1-42-5 (Supp. 1986); or directors may reincorporate their businesses under the corporate laws of other States. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such

[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

(This is repetitious)

regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Ronald Mann
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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

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~~1st~~ DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 86-71 AND 86-97

CTS CORPORATION, APPELLANT
86-71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86-97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March ——, 1987]

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JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23-1-42-1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23-1-17-1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act) ~~at issue in this case~~. Beginning on August 1, 1987, the Act ~~automatically~~ will apply to any corporation incorporated in Indiana, § 23-1-17-3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23-1-42-5. Before that date, any Indiana corporation can opt into the

Act by resolution of its board of directors. § 23-1-17-3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only corporations incorporated in Indiana. See § 23-1-20-5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
> (C) ten thousand (10,000) shareholders resident in Indiana."
> § 23-1-42-4(a).

The Act focuses on the acquisition of "control shares" in issuing public corporations. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23-1-42-1. Under the Act, an entity that acquires control shares does not necessarily acquire the voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23-1-42-9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of

[1] "Interested shares" are shares with respect to which the acquiror, an officer of the target corporation, or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23-1-42-3. So long as the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

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stock for passage of such a resolution. § 23–1–42–9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

As a practical matter, it seems likely that the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act, see § 23–1–42–7, must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. The Act specifically requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23–1–42–8(a). It seems likely that management of the target corporation would violate this obligation if they delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2] The United States and Appellee Dynamics Corporation suggest that the Act requires a second vote by *all* shareholders of record. Brief for the Securities and Exchange Commission and United States as Amicus Curiae 5 and n. 6; Brief for Appellee Dynamics Corporation of America 2–3 and n. 5. Intervenor Indiana disputes this interpretation of the Act. Brief of Intervenor-Appellant Indiana 29, n. *. The relevant paragraph of the Act provides:

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code § 23–1–38–4(a) [describing fundamental changes in corporate organization]." § 23–1–42–9(b).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially-scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[3] requests the meeting, and agrees to pay the expenses of the meeting, see §23-1-42-7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value. §23-1-42-10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares anytime after 60 days after the acquiror's last acquisition. §23-1-42-10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS up to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see §23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§78m(d)-(e) and 78n(d)-(f), and violates the Commerce Clause, Art. I, §8, cl. 3. Dy-

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person, and the terms and extent of the proposed acquisition. See §23-1-42-6.

namics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court, ruling that the Williams Act preempts the Indiana Act, 637 F. Supp. 389, granted Dynamics' motion for declaratory relief. Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 16, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit under 28 U. S. C. § 1291. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act preempts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams

637 F. Supp. 389.

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Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. . . .
>
> . . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of In-

diana is not authorized to opt out of, as in effect it has done in this statute." *Id.*, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation . . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial . . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently,

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[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we ~~decided~~ were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, para. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

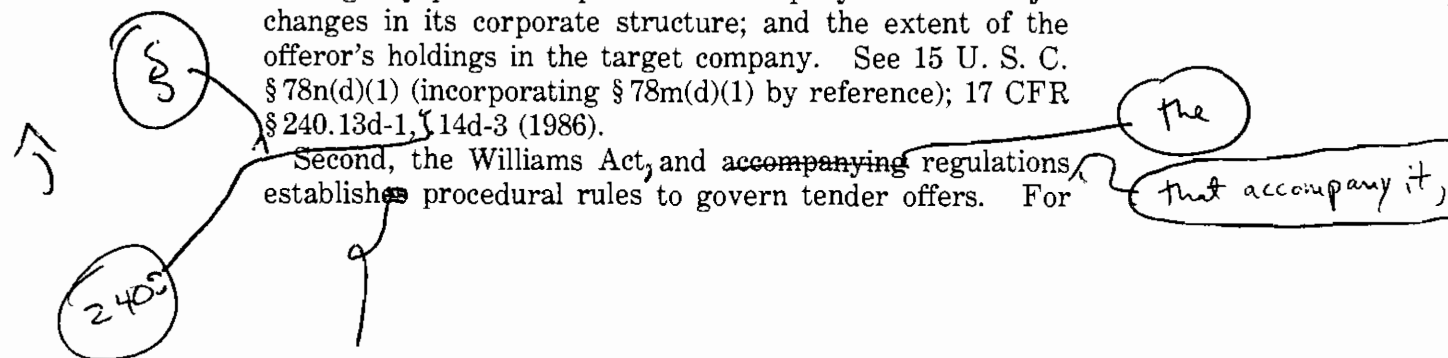
> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing a variety of information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR § 240.13d-1, 14d-3 (1986).

Second, the Williams Act and accompanying regulations establish procedural rules to govern tender offers. For



example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d-7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). The offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was preempted by the Williams Act. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on

shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second feature of the Illinois statute criticized was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its provision that the fairness of tender offers would be reviewed by the Secretary of State of Illinois. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its

[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part) (concluding that the case was moot; addressing the merits because the Court concluded that the case was not moot; concluding that the Williams Act did not pre-empt the statute challenged in *MITE*); *id.*, at 655 (STEVENS, J., concurring in part and concurring in the judgment) (concluding that the Williams Act did not pre-empt the statute challenged in *MITE*). Four Justices declined to address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part) (declining to reach the pre-emption question); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting) (concluding that the case was moot; de-

reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, see *supra*, at 17–18, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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clining to reach the pre-emption question); *id.*, at 667 (REHNQUIST, J., dissenting) (same).

[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act grants management a strategic advantage, see 23–1–17–3(b), because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act did not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23–1–42–7(a). In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting to be held, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act increases their expense and thus deters them somewhat, but this type of reasonable regulation

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, a successful tender offer may be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Release No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation,* 83 Colum L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, would reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not

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does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to vote collectively on the merits of the offer.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because voting rights may not be conferred any sooner than a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay, that conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers. The provisions of the Act do not preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares subject to the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E. g., Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Release No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶ 24,284I, p. 17,758, *quoted in MacFadden*

Holdings, Inc. v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). In light of the complexity of arranging shareholder meetings for large corporations, we do not believe that a 50-day delay would be unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were held to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) (hereinafter MBCA); Re-

[7] Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

vised Model Business Corp. Act § 8.06 (1984 draft) (hereinafter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, *Deflecting Takeovers: Charter and By-Law Techniques*, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to infer a conclusion that the Williams Act pre-empts the Act. If Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are not inconsistent with either the text or the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Annotated § 8.06, p. 830 (3d ed., Supp. 1986).

[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Ann. § 33, Par. 4 comment (2d ed. 1971).

Every State in this country permits cumulative voting. See 2 Model Business Corporation Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ." Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. E. g., *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e. g., *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e. g., *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986). On its face, it is clear that the Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply for the most part to out-of-

state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. E. g., *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, 12 How., at 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana

Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the definition of the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1969 draft) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the traditional power of a State to regulate corporate governance. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to

corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, ~~the laws~~ of the State of its incorporation.

These regulat~~ions, that normally include the voting rights of shareholders,~~ may affect directly a variety of corporate transactions. For example, ~~recognizing the important changes that mergers work in~~ the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e. g., MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take ~~specified~~ actions are entitled to sell their shares to the corporation at fair market value. See, e. g., MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

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[10] ~~Other~~ common regulations ~~that~~ may affect both nonresident and resident shareholders of a corporation ~~include the following.~~ Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differ-

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. We have noted in the past that "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 670. A state law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest or concern.

There can be no doubt that the Act furthers this interest. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this specifically by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation would be desirable as they perceive it. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively

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ences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; *supra* n. 9. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States in this country—bear a striking resemblance to the Act at issue in this case.

to determine whether the takeover is advantageous to their interests may be especially beneficial by preventing hostile tender offers from coercing shareholders into tendering their shares. See *supra*, at 23–25.

Respondent Dynamics responds that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively. See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). But Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, e. g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309.[11] The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

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[11] In this area, generalizations usually require qualification. It may well be that some successful tender offers will provide more effective management or other benefits such as needed diversification. Yet, the conflicting views in the literature reflect the reality of the situation—that all tender offers are not alike. There is no reason to believe that the type of conglomerate corporation that may result from repetitive takeovers necessarily will operate more efficiently or provide greater benefits to shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in protecting the shareholders of its corporations from coercive transactions in the shares of those corporations. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. The Commerce Clause does not entitle entities to engage in transactions that a State reasonably, and for nondiscriminatory reasons, has found not to be in the interest of shareholders of its corporations. We reiterate that this Act does not prohibit any entity—resident or nonresident—from purchasing shares in Indiana corporations, or from attempting thereby

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for

the voting autonomy granted by the Act.

to gain control. It only provides regulatory procedures for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland,* 437 U. S., at 127. Indiana has changed the structure of this market to further substantial interests traditionally left to the States. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. It was adopted for the legitimate state purpose of protecting the interests of shareholders in Indiana corporations. If the Indiana legislature has acted unwisely, and imposed an inefficient framework on corporate management, we may assume that Indiana will bear the burden: the marketplace may cause investors to shift their funds to corporations incorporated in other States; shareholders may vote to remove their corporations from the coverage of the Act, as they have a right to do, see Ind. Code § 23–1–42–5 (Supp. 1986); or directors may reincorporate their businesses under the corporate laws of other States. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such

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[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

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SUPREME COURT OF THE UNITED STATES

Nos. 86–71 AND 86–97

CTS CORPORATION, APPELLANT
86–71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86–97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23–1–42–1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23–1–17–1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23–1–17–3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23–1–42–5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

rectors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

> "a corporation that has:
>
> (1) one hundred (100) or more shareholders;
>
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
>
> (3) either:
>
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
>
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
>
> (C) ten thousand (10,000) shareholders resident in Indiana."
>
> § 23–1–42–4(a).

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of stock for

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[1] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the

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As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a) (1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for the Securities and Exchange Commission and United States as Amicus Curiae 5, and n. 6; Brief for Appellee Dynamics Corporation of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief of Intervenor-Appellant Indiana 29, n. *. The paragraph of the Act that governs this second vote provides:

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code § 23-1-38-4(a) [describing fundamental changes in corporate organization]." § 23-1-42-9(b)(1).

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transac-

shareholders, or at a specially-scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[3] requests the meeting, and agrees to pay the expenses of the meeting. See § 23-1-42-7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23-1-42-10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23-1-42-10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dy-

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tions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person, and the terms and extent of the proposed acquisition. See § 23-1-42-6.

namics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Williams Act preempts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 16, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit under 28 U. S. C. § 1291. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams

Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. . . .
>
> . . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of In-

diana is not authorized to opt out of, as in effect it has done in this statute." *Id.*, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation . . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial . . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently,

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[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, para. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d-1, 240.14d-3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers.

For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d-7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was preempted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on

shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even

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[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in the judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Release No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under ap-

plicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E. g., Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Release No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758, *quoted in MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to

doubt that this type of conditional tender offer would be legitimate as well.[7]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) (hereinafter MBCA); Revised Model Business Corp. Act § 8.06 (1984 draft) (hereinaf-

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[7] Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

ter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to infer a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

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[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Annotated § 8.06, p. 830 (3d ed., Supp. 1986).

[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Ann. § 33, Par. 4 comment (2d ed. 1971).

Every State permits cumulative voting. See 2 Model Business Corporation Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, e. g., *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e. g., *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e. g., *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state

entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. E. g., *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, 12 How., at 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana

Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1969 draft) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the traditional power of a State to regulate corporate governance. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to

corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, one law, traditionally the law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e. g., MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, e. g., MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

[10] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. We have noted in the past that "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 670. A state law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest and concern.

There can be no doubt that the Act reflects this concern. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial by preventing hostile

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§ 33, par. 4; RMBCA § 7.28; *supra*, n. 9. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States in this country—bear a striking resemblance to the Act at issue in this case.

tender offers from coercing shareholders into tendering their shares. See *supra,* at 12.

Respondent Dynamics responds that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[11] See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra,* at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, e. g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp., supra,* at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.,* 457

[11] In this area, generalizations usually require qualification. It may well be that some successful tender offers will provide more effective management or other benefits such as needed diversification. Yet, the conflicting views in the literature reflect the reality of the situation—that all tender offers are not alike. There is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers necessarily will operate more efficiently or provide greater benefits to shareholders.

U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.* But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from purchasing shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. Indiana has changed the structure of this market to further substan-

tial interests traditionally left to the States. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

03/26

Ronald Mann
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SUPREME COURT OF THE UNITED STATES

Nos. 86-71 AND 86-97

CTS CORPORATION, APPELLANT
86-71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86-97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ~~March~~ ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23-1-42-1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23-1-17-1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23-1-17-3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23-1-42-5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

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rectors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

> "a corporation that has:
>
> (1) one hundred (100) or more shareholders;
>
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
>
> (3) either:
>
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
>
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
>
> (C) ten thousand (10,000) shareholders resident in Indiana."
>
> § 23–1–42–4(a).

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of stock for

[1] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the

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As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a) (1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for the Securities and Exchange Commission and United States as Amicus Curiae 5, and n. 6; Brief for Appellee Dynamics Corporation of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief of Intervenor-Appellant Indiana 29, n. *. ~~The paragraph of the Act that governs this second vote~~ provides: § 23-42-9(b)(1)

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code § 23-1-38-4(a) [describing fundamental changes in corporate organization]." ~~§ 23-1-42-9(b)(1).~~

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions.

shareholders, or at a specially scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[3] requests the meeting, and agrees to pay the expenses of the meeting. See § 23-1-42-7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23-1-42-10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23-1-42-10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dy-

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tions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23-1-42-6.

namics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Williams Act preempts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 16, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion "that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit under 28 U. S. C. § 1291. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams

Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. . . .
>
> . . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of In-

diana is not authorized to opt out of, as in effect it has done in this statute." *Id.*, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation . . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial . . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently,

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[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, para. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d-1, 240.14d-3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers.

For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d-7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was preempted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on

shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.*, at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even

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[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in the judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting are fairly charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Release No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under ap-

plicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E. g., Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Release No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,2841, p. 17,758, *quoted in MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to

doubt that this type of conditional tender offer would be legitimate as well.[7]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) (hereinafter MBCA); Revised Model Business Corp. Act § 8.06 (1984 draft) (hereinaf-

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[7] Dynamics argues that conditional tender offers are not an adequate alternative, because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

ter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to ~~infer~~ require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

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[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Annotated § 8.06, p. 830 (3d ed., Supp. 1986).

[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Ann. § 33, Par. 4 comment (2d ed. 1971).

Every State permits cumulative voting. See 2 Model Business Corporation Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, e. g., *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e. g., *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e. g., *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state

entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination where the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. E. g., *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, 12 How., at 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana

Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1969 draft) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the ~~traditional power of a State to regulate corporate governance~~. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to

fact that State regulation of corporate governance is regulation of entities whose very existence and attributes are a product of State law.

corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, one law, traditionally the law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e. g., MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, e. g., MBCA § 80-81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

[10] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. We have noted in the past that "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 670. A state law that limits its reach to defining the attributes of shares in the enacting State's corporations is one that deals with a matter traditionally of local interest and concern.

There can be no doubt that the Act reflects this concern. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial by preventing hostile

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§ 33, par. 4; RMBCA § 7.28; *supra*, n. 9. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States in this country—bear a striking resemblance to the Act at issue in this case.

tender offers from coercing shareholders into tendering their shares. See *supra*, at 12.

Respondent Dynamics responds that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[11] See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, e. g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some take-over bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.*, 457

[11] In this area, generalizations usually require qualification. It may well be that some successful tender offers will provide more effective management or other benefits such as needed diversification. Yet, the conflicting views in the literature reflect the reality of the situation—that all tender offers are not alike. There is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers necessarily will operate more efficiently or provide greater benefits to shareholders.

U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23-1-42-4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from purchasing shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. Indiana has changed the structure of this market to further substan-

~~tial interests traditionally left to the Stat~~es. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

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[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

RIDER B to pp. 22-23 of first draft of CTS:

The very commodity that is traded in the securities market is one whose characteristics are defined by State law. Similarly, the very commodity that is traded in the "market for corporate control" -- the corporation -- is one that owes its existence and attributes to State law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: ____________

Recirculated: ____________

"PRECHECKED" BY Maureen, REPORTER OF DECISIONS OFFICE

MAR 31 1987 -9 00 AM

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SUPREME COURT OF THE UNITED STATES

Nos. 86-71 AND 86-97

CTS CORPORATION, APPELLANT
86-71 v.
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86-97 v.
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code §23-1-42-1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 15 U. S. C. §§78m(d)-(e) and 78n(d)-(f) or violates the Commerce Clause of the Federal Constitution, Art. I, §8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code §23-1-17-1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, §23-1-17-3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, §23-1-42-5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the

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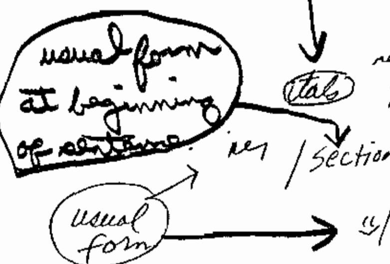
As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a) (1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.



[2] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for the Securities and Exchange Commission and United States as Amicus Curiae 5, and n. 6; Brief for Appellee Dynamics Corporation of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief of Intervenor-Appellant Indiana 29, n. *. §23-42-9(b)(1) provides:

"[T]he resolution must be approved by:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in Indiana Code §23-1-38-4(a) [describing fundamental changes in corporate organization]."

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

rectors. § 23-1-17-3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23-1-20-5. An "issuing public corporation" is defined as:

> "a corporation that has:
> (1) one hundred (100) or more shareholders;
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or
> (C) ten thousand (10,000) shareholders resident in Indiana."
>
> § 23-1-42-4(a).

Printer run-in

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23-1-42-1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23-1-42-9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of stock for

[1] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23-1-42-3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

shareholders, or at a specially scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[3] requests the meeting, and agrees to pay the expenses of the meeting. See § 23–1–42–7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23–1–42–10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23–1–42–10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23–1–17–3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f) (1982 ed. and Supp. III), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dynamics sought a temporary restraining order, a preliminary

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23–1–42–6.

injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Williams Act preempts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389. Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 10, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion that the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-

takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents. . . .
>
> . . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." *Id.*, at 264.

Cite to Pike intervenes.

794 F. 2d,

SEE STYLE MANUAL §1.42

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation. . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial. . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently, absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

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[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, at 7, para. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d-1, 240.14d-3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers. For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their

shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d-7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was preempted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of

the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" *ibid.* (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," *id.* at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the

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[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in the judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

MITE plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries,* 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see § 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia,* to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting fairly are charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

SEE STYLE MANUAL § 5.4

shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Release No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. Law Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the twentieth business day, the earliest day permitted under applicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares

of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. E. g., Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Release No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758, quoted in *MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

[7] Dynamics argues that conditional tender offers are not an adequate alternative because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) (hereinafter MBCA); Revised Model Business Corp. Act § 8.06 (1984 draft) (hereinafter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful

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tendered shares." Brief for Appellee Dynamics Corporation of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Annotated § 8.06, p. 830 (3d ed., Supp. 1986).

offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to

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[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." Model Business Corporation Act Ann. § 33, Par. 4 comment (2d ed. 1971). Every State permits cumulative voting. See 2 Model Business Corporation Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, e. g., *Cooley* v. *Board of Wardens*, 12 How. 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, e. g., *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, e. g., *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a

claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. E. g., *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, 12 How., at 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corpora-

tions, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1969 draft) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that State regulation of corporate governance is regulation of entities whose very existence and attributes are a product of State law. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded fre-

quently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, e. g., MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, e. g., MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

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[10] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; n. 9, *supra*. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Respondent Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management

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or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U.L.A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U.L.A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U.L.A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States—bear a striking resemblance to the Act at issue in this case.

who can use them most effectively.[11] See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, e. g., Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, *supra*, at 679 (BRENNAN, J., concurring in the judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting nonresident shareholders.'" Brief for Appellee 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-

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[11] It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result is more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23-1-42-4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by State law. Similarly, the very commodity that is

traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to State law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

04/02

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

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SUPREME COURT OF THE UNITED STATES

Nos. 86-71 AND 86-97

CTS CORPORATION, APPELLANT
86-71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86-97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23-1-42-1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 82 Stat. 454, as amended, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f) (1982 ed. and Supp. III), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23-1-17-1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23-1-17-3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23-1-42-5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

rectors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

"a corporation that has:

"(1) one hundred (100) or more shareholders;

"(2) its principal place of business, its principal office, or substantial assets within Indiana; and

"(3) either:

"(A) more than ten percent (10%) of its shareholders resident in Indiana;

"(B) more than ten percent (10%) of its shares owned by Indiana residents; or

"(C) ten thousand (10,000) shareholders resident in Indiana." § 23–1–42–4(a).

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of stock for

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[1] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e–1(a)

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[2]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially scheduled meeting. The acquiror can require management of the corporation to hold

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(1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[2] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for Securities and Exchange Commission and United States as *Amici Curiae* 5, and n. 6; Brief for Appellee Dynamics Corp. of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief for Intervenor-Appellant Indiana 29, n. Section 23-1-42-9(b)(1) provides:

"[T]he resolution must be approved by:

"(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in [Indiana Code § 23-1-38-4(a) (describing fundamental changes in corporate organization)]."

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

such a special meeting within 50 days if it files an "acquiring person statement,"[3] requests the meeting, and agrees to pay the expenses of the meeting. See § 23–1–42–7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23–1–42–10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23–1–42–10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23–1–17–3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f) (1982 ed. and Supp. III), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled

[3] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23–1–42–6.

that the Williams Act pre-empts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389 (ND Ill. 1986). Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 17, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion that "the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents.
>
> ". . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." 794 F. 2d, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that

the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation. . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial. . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[4]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently, absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime &*

[4] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, p. 7, par. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

> *Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d–1, 240.14d–3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers. For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d–7(a)(1)

(1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was pre-empted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management

"'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" 457 U. S., at 637 (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," 457 U. S., at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to

[5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see § 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana Legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting fairly are charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Rel. No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the 20th business day, the earliest day permitted under applicable federal regulations, see 17 CFR §240.14e–1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e–1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. *E. g.*, Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Rel. No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶ 24,284I, p. 17,758, quoted in *MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

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[7] Dynamics argues that conditional tender offers are not an adequate alternative because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corp. of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) in 3 Model Business Corp. Act Ann. (2d ed. 1971) (hereinafter MBCA); American Bar Foundation, Revised Model Business Corp. Act § 8.06 (1984 draft) (1985) (hereinafter RMBCA).[8] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly

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may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

[8] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Ann. § 8.06, p. 830 (3d ed., Supp. 1986).

provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[9] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been

[9] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." 1 Model Business Corp. Act Ann. § 33, par. 4 comment (2d ed. 1971). Every State permits cumulative voting. See 2 Model Business Corp. Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, *e. g.*, *Cooley* v. *Board of Wardens*, 12 How. * 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, *e. g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126

(1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. *E. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, *supra*, at * 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws

§ 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essen-

tial for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, *e. g.*, MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, *e. g.*, MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[10]

[10] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; n. 9, *supra*. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Appellee Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[11] See generally

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the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U. L. A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U. L. A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U. L. A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States—bear a striking resemblance to the Act at issue in this case.

[11] It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one

Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, *e. g.*, Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S., at 679 (BRENNAN, J., concurring in judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting the nonresident shareholders.'" Brief for Appellee Dynamics Corp. of America 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state

doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result is more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.* But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonres-

idents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[12]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

[12] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

04/02

Ronald Mann
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Changes on 2, 9 (Footnotes Renumbered Throughout)

SUPREME COURT OF THE UNITED STATES

Nos. 86–71 AND 86–97

CTS CORPORATION, APPELLANT
86–71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86–97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23–1–42–1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 82 Stat. 454, as amended, 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f) (1982 ed. and Supp. III), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23–1–17–1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23–1–17–3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23–1–42–5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

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rectors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

"a corporation that has:

"(1) one hundred (100) or more shareholders;

"(2) its principal place of business, its principal office, or substantial assets within Indiana; and

"(3) either:

"(A) more than ten percent (10%) of its shareholders resident in Indiana;

"(B) more than ten percent (10%) of its shares owned by Indiana residents; or

"(C) ten thousand (10,000) shareholders resident in Indiana." § 23–1–42–4(a).

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[1] shareholders holding each class of stock for

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[1] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e–1(a)

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[3]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially scheduled meeting. The acquiror can require management of the corporation to hold

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(1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[3] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for Securities and Exchange Commission and United States as *Amici Curiae* 5, and n. 6; Brief for Appellee Dynamics Corp. of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief for Intervenor-Appellant Indiana 29, n. Section 23-1-42-9(b)(1) provides:

"[T]he resolution must be approved by:

"(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in [Indiana Code § 23-1-38-4(a) (describing fundamental changes in corporate organization)]."

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transactions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

such a special meeting within 50 days if it files an "acquiring person statement,"[4] requests the meeting, and agrees to pay the expenses of the meeting. See § 23-1-42-7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23-1-42-10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23-1-42-10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f) (1982 ed. and Supp. III), and violates the Commerce Clause, Art. I, § 8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled

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[4] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23-1-42-6.

that the Williams Act pre-empts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389 (ND Ill. 1986). Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 17, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion that "the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams Act, concluding instead that the Williams Act was "an antitakeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents.
>
> ". . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute." 794 F. 2d, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that

the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation. . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial. . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[5]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently, absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime &*

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[5] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, p. 7, par. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

> *Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d–1, 240.14d–3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers. For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d–7(a)(1)

(1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e-1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was pre-empted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the potentially adverse consequences of such a provision on shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management

"'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" 457 U. S., at 637 (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," 457 U. S., at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

6 As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[5] we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to

6 [5] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in judgment). Four Justices did not address the question. See *id.*, at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[6]

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

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[6] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see § 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana Legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting fairly are charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Rel. No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the 20th business day, the earliest day permitted under applicable federal regulations, see 17 CFR § 240.14e–1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e–1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. *E. g.*, Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Rel. No. 34–16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758, quoted in *MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802 F. 2d 62, 70 (CA2 1986). There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[7]

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[7] Dynamics argues that conditional tender offers are not an adequate alternative because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corp. of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) in 3 Model Business Corp. Act Ann. (2d ed. 1971) (hereinafter MBCA); American Bar Foundation, Revised Model Business Corp. Act § 8.06 (1984 draft) (1985) (hereinafter RMBCA).[10] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly

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may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

[10] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Ann. § 8.06, p. 830 (3d ed., Supp. 1986).

provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[11] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been

[11] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." 1 Model Business Corp. Act Ann. § 33, par. 4 comment (2d ed. 1971). Every State permits cumulative voting. See 2 Model Business Corp. Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, *e. g.*, *Cooley* v. *Board of Wardens*, 12 How. * 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, *e. g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc.*, *supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126

(1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. *E. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, *supra*, at * 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws

§ 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essen-

tial for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, *e. g.*, MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, *e. g.*, MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[12]

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[12] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; n. 9, *supra*. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Appellee Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[11] See generally

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the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U. L. A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U. L. A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U. L. A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States—bear a striking resemblance to the Act at issue in this case.

[11] It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one

Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, *e. g.*, Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S., at 679 (BRENNAN, J., concurring in judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting the nonresident shareholders.'" Brief for Appellee Dynamics Corp. of America 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state

doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result is more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations.* But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23–1–42–4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonres-

idents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[14]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

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14 CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

04/16

See pp. 2, 14
Footnotes Renumbered Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Powell**

Circulated: APR 17 1987

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 86–71 AND 86–97

CTS CORPORATION, APPELLANT
86–71 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

INDIANA, APPELLANT
86–97 *v.*
DYNAMICS CORPORATION OF AMERICA ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[April ——, 1987]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the questions whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23–1–42–1 *et seq.* (Supp. 1986), is preempted by the Williams Act, 82 Stat. 454, as amended, 15 U. S. C. §§ 78m(d)–(e) and 78n(d)–(f) (1982 ed. and Supp. III), or violates the Commerce Clause of the Federal Constitution, Art. I, § 8, cl. 3.

I

A

On March 4, 1986, the Governor of Indiana signed a revised Indiana Business Corporation Law, Ind. Code § 23–1–17–1 *et seq.* (Supp. 1986). That law included the Control Share Acquisitions Chapter (Indiana Act or Act). Beginning on August 1, 1987, the Act will apply to any corporation incorporated in Indiana, § 23–1–17–3(a), unless the corporation amends its articles of incorporation or bylaws to opt out of the Act, § 23–1–42–5. Before that date, any Indiana corporation can opt into the Act by resolution of its board of di-

rectors. § 23–1–17–3(b). The Act applies only to "issuing public corporations." The term "corporation" includes only businesses incorporated in Indiana. See § 23–1–20–5. An "issuing public corporation" is defined as:

> "a corporation that has:
>
> "(1) one hundred (100) or more shareholders;
>
> "(2) its principal place of business, its principal office, or substantial assets within Indiana; and
>
> "(3) either:
>
> "(A) more than ten percent (10%) of its shareholders resident in Indiana;
>
> "(B) more than ten percent (10%) of its shares owned by Indiana residents; or
>
> "(C) ten thousand (10,000) shareholders resident in Indiana." § 23–1–42–4(a).[1]

The Act focuses on the acquisition of "control shares" in an issuing public corporation. Under the Act, an entity acquires "control shares" whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%. § 23–1–42–1. An entity that acquires control shares does not necessarily acquire voting rights. Rather, it gains those rights only "to the extent granted by resolution approved by the shareholders of the issuing public corporation." § 23–1–42–9(a). Section 9 requires a majority vote of all disinterested[2] shareholders holding each class of stock for

[1] These thresholds are much higher than the 5% threshold acquisition requirement that brings a tender offer under the coverage of the Williams Act. See 15 U. S. C. § 78n(d)(1).

[2] "Interested shares" are shares with respect to which the acquiror, an officer or an inside director of the corporation "may exercise or direct the exercise of the voting power of the corporation in the election of directors." § 23–1–42–3. If the record date passes before the acquiror purchases shares pursuant to the tender offer, the purchased shares will not be "interested shares" within the meaning of the Act; although the acquiror may own the shares on the date of the meeting, it will not "exercise . . . the voting power" of the shares.

passage of such a resolution. § 23-1-42-9(b). The practical effect of this requirement is to condition acquisition of control of a corporation on approval of a majority of the pre-existing disinterested shareholders.[3]

The shareholders decide whether to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially scheduled meeting. The

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As a practical matter, the record date usually will pass before shares change hands. Under SEC regulations, the shares cannot be purchased until 20 business days after the offer commences. 17 CFR § 240.14e-1(a) (1986). If the acquiror seeks an early resolution of the issue—as most acquirors will—the meeting required by the Act must be held no more than 50 calendar days after the offer commences, about three weeks after the earliest date on which the shares could be purchased. See § 23-1-42-7. The Act requires management to give notice of the meeting "as promptly as reasonably practicable . . . to all shareholders of record as of the record date set for the meeting." § 23-1-42-8(a). It seems likely that management of the target corporation would violate this obligation if it delayed setting the record date and sending notice until after 20 business days had passed. Thus, we assume that the record date usually will be set before the date on which federal law first permits purchase of the shares.

[3] The United States and appellee Dynamics Corporation suggest that § 23-42-9(b)(1) requires a second vote by *all* shareholders of record. Brief for Securities and Exchange Commission and United States as *Amici Curiae* 5, and n. 6; Brief for Appellee Dynamics Corp. of America 2-3, and n. 5. Indiana disputes this interpretation of its Act. Brief for Intervenor-Appellant Indiana 29, n. Section 23-1-42-9(b)(1) provides:

"[T]he resolution must be approved by:

"(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in [Indiana Code § 23-1-38-4(a) (describing fundamental changes in corporate organization)]."

The United States contends that this section always requires a separate vote by all shareholders and that the last clause merely specifies that the vote shall be taken by separate groups if the acquisition would result in one of the listed transactions. Indiana argues that this section requires a separate vote only if the acquisition would result in one of the listed transac-

acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement,"[4] requests the meeting, and agrees to pay the expenses of the meeting. See § 23-1-42-7. If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. § 23-1-42-10(b). Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition. § 23-1-42-10(a).

B

On March 10, 1986, appellee Dynamics Corporation of America (Dynamics) owned 9.6% of the common stock of appellant CTS Corporation, an Indiana corporation. On that day, six days after the Act went into effect, Dynamics announced a tender offer for another million shares in CTS; purchase of those shares would have brought Dynamics' ownership interest in CTS to 27.5%. Also on March 10, Dynamics filed suit in the United States District Court for the Northern District of Illinois, alleging that CTS had violated the federal securities laws in a number of respects no longer relevant to these proceedings. On March 27, the Board of Directors of CTS, an Indiana corporation, elected to be governed by the provisions of the Act, see § 23-1-17-3.

Four days later, on March 31, Dynamics moved for leave to amend its complaint to allege that the Act is pre-empted by the Williams Act, 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f) (1982 ed. and Supp. III), and violates the Commerce Clause,

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tions. Because it is unnecessary to our decision, we express no opinion as to the appropriate interpretation of this section.

[4] An "acquiring person statement" is an information statement describing, *inter alia*, the identity of the acquiring person and the terms and extent of the proposed acquisition. See § 23-1-42-6.

Art. I, § 8, cl. 3. Dynamics sought a temporary restraining order, a preliminary injunction, and declaratory relief against CTS's use of the Act. On April 9, the District Court ruled that the Williams Act pre-empts the Indiana Act and granted Dynamics' motion for declaratory relief. 637 F. Supp. 389 (ND Ill. 1986). Relying on JUSTICE WHITE's plurality opinion in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982), the court concluded that the Act "wholly frustrates the purpose and objective of Congress in striking a balance between the investor, management, and the takeover bidder in takeover contests." 637 F. Supp., at 399. A week later, on April 17, the District Court issued an opinion accepting Dynamics' claim that the Act violates the Commerce Clause. This holding rested on the court's conclusion that "the substantial interference with interstate commerce created by the [Act] outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce." *Id.*, at 406. The District Court certified its decisions on the Williams Act and Commerce Clause claims as final under Fed. Rule Civ. Proc. 54(b). *Ibid.*

CTS appealed the District Court's holdings on these claims to the Court of Appeals for the Seventh Circuit. Because of the imminence of CTS's annual meeting, the Court of Appeals consolidated and expedited the two appeals. On April 23—23 days after Dynamics first contested application of the Act in the District Court—the Court of Appeals issued an order affirming the judgment of the District Court. The opinion followed on May 28. 794 F. 2d 250 (1986).

After disposing of a variety of questions not relevant to this appeal, the Court of Appeals examined Dynamics' claim that the Williams Act pre-empts the Indiana Act. The court looked first to the plurality opinion in *Edgar* v. *MITE Corp.*, *supra*, in which three Justices found that the Williams Act pre-empts state statutes that upset the balance between target management and a tender offeror. The court noted that some commentators had disputed this view of the Williams

Act, concluding instead that the Williams Act was "an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad." *Id.*, at 262. It also noted:

> "[I]t is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations. . . . But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent." *Ibid.*

Once the court had decided to apply the analysis of the *MITE* plurality, it found the case straightforward:

> "Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses." *Id.*, at 263.

The court next addressed Dynamic's Commerce Clause challenge to the Act. Applying the balancing test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), the court found the Act unconstitutional:

> "Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents.
>
> ". . . Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is

> not authorized to opt out of, as in effect it has done in this statute." 794 F. 2d, at 264.

Finally, the court addressed the "internal affairs" doctrine, a "principle of conflict of laws . . . designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association." *Ibid.* It stated:

> "We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation. . . . But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial. . . . [T]hat the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause." *Ibid.*

Accordingly, the court affirmed the judgment of the District Court.

Both Indiana and CTS filed jurisdictional statements. We noted probable jurisdiction under 28 U. S. C. § 1254(2), 479 U. S. —— (1986), and now reverse.[5]

II

The first question in this case is whether the Williams Act pre-empts the Indiana Act. As we have stated frequently,

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[5] CTS and Dynamics have settled several of the disputes associated with Dynamics' tender offer for shares of CTS. The case is not moot, however, because the judgment of this Court still affects voting rights in the shares Dynamics purchased pursuant to the offer. If we were to affirm, Dynamics would continue to exercise the voting rights it had under the judgment of the Court of Appeals that the Act was pre-empted and unconstitutional. Because we decide today to reverse the judgment of the Court of Appeals, CTS will have no voting rights in its shares unless shareholders in Dynamics grant those rights in a meeting held pursuant to the Act. See Settlement Agreement, p. 7, par. 12, reprinted in Letter from James A. Strain, Counsel for CTS, to Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court (Mar. 13, 1987).

absent an explicit indication by Congress of an intent to pre-empt state law, a state statute is pre-empted only

> "'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941) . . . ." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be pre-empted only if it frustrates the purposes of the federal law.

A

Our discussion begins with a brief summary of the structure and purposes of the Williams Act. Congress passed the Williams Act in 1968 in response to the increasing number of hostile tender offers. Before its passage, these transactions were not covered by the disclosure requirements of the federal securities laws. See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 22 (1977). The Williams Act, backed by regulations of the Securities and Exchange Commission (SEC), imposes requirements in two basic areas. First, it requires the offeror to file a statement disclosing information about the offer, including: the offeror's background and identity; the source and amount of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. See 15 U. S. C. § 78n(d)(1) (incorporating § 78m(d)(1) by reference); 17 CFR §§ 240.13d–1, 240.14d–3 (1986).

Second, the Williams Act, and the regulations that accompany it, establish procedural rules to govern tender offers.

For example, stockholders who tender their shares may withdraw them during the first 15 business days of the tender offer and, if the offeror has not purchased their shares, any time after 60 days from commencement of the offer. 15 U. S. C. § 78n(d)(5); 17 CFR § 240.14d–7(a)(1) (1986). The offer must remain open for at least 20 business days. 17 CFR § 240.14e–1(a) (1986). If more shares are tendered than the offeror sought to purchase, purchases must be made on a pro rata basis from each tendering shareholder. 15 U. S. C. § 78n(d)(6); 17 CFR § 240.14(8) (1986). Finally, the offeror must pay the same price for all purchases; if the offering price is increased before the end of the offer, those who already have tendered must receive the benefit of the increased price. § 78n(d)(7).

B

The Indiana Act differs in major respects from the Illinois statute that the Court considered in *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). After reviewing the legislative history of the Williams Act, JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE BLACKMUN (the plurality), concluded that the Williams Act struck a careful balance between the interests of offerors and target companies, and that any state statute that "upset" this balance was pre-empted. *Id.*, at 632–634.

The plurality then identified three offending features of the Illinois statute. JUSTICE WHITE's opinion first noted that the Illinois statute provided for a 20-day precommencement period. During this time, management could disseminate its views on the upcoming offer to shareholders, but offerors could not publish their offers. The plurality found that this provision gave management "a powerful tool to combat tender offers." *Id.*, at 635. This contrasted dramatically with the Williams Act; Congress had deleted express precommencement notice provisions from the Williams Act. According to the plurality, Congress had determined that the

potentially adverse consequences of such a provision on shareholders should be avoided. Thus, the plurality concluded that the Illinois provision "frustrate[d] the objectives of the Williams Act." *Ibid.* The second criticized feature of the Illinois statute was a provision for a hearing on a tender offer that, because it set no deadline, allowed management "'to stymie indefinitely a takeover,'" *id.*, at 637 (quoting *MITE Corp.* v. *Dixon*, 633 F. 2d 486, 494 (CA7 1980)). The plurality noted that "'delay can seriously impede a tender offer,'" 457 U. S., at 637 (quoting *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978) (per Wisdom, J.)), and that "Congress anticipated that investors and the takeover offeror would be free to go forward without unreasonable delay," 457 U. S., at 639. Accordingly, the plurality concluded that this provision conflicted with the Williams Act. The third troublesome feature of the Illinois statute was its requirement that the fairness of tender offers would be reviewed by the Illinois Secretary of State. Noting that "Congress intended for investors to be free to make their own decisions," the plurality concluded that "'[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress.'" *Id.*, at 639–640 (quoting *MITE Corp.* v. *Dixon*, *supra*, at 494).

C

As the plurality opinion in *MITE* did not represent the views of a majority of the Court,[6] we are not bound by its reasoning. We need not question that reasoning, however,

[6] JUSTICE WHITE's opinion on the pre-emption issue, 457 U. S., at 630–640, was joined only by Chief Justice Burger and by JUSTICE BLACKMUN. Two Justices disagreed with JUSTICE WHITE's conclusion. See *id.*, at 646–647 (POWELL, J., concurring in part); *id.*, at 655 (STEVENS, J., concurring in part and concurring in judgment). Four Justices did not address the question. See *id.*. at 655 (O'CONNOR, J., concurring in part); *id.*, at 664 (MARSHALL, J., with whom BRENNAN, J. joined, dissenting); *id.*, at 667 (REHNQUIST, J., dissenting).

because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by JUSTICE WHITE in *MITE*. As is apparent from our summary of its reasoning, the overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders. By contrast, the statute now before the Court protects the independent shareholder against both of the contending parties. Thus, the Act furthers a basic purpose of the Williams Act, "'plac[ing] investors on an equal footing with the takeover bidder,'" *Piper* v. *Chris-Craft Industries*, 430 U. S., at 30 (quoting the Senate Report accompanying the Williams Act, S. Rep. No. 550, 90th Cong., 1st Sess., 4 (1967)).[7]

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[7] Dynamics finds evidence of an intent to favor management in several features of the Act. It argues that the provision of the Act allowing management to opt into the Act, see § 23-1-17-3(b), grants management a strategic advantage because tender offerors will be reluctant to take the expensive preliminary steps of a tender offer if they do not know whether their efforts will be subjected to the Act's requirements. But this provision is only a temporary option available for the first 17 months after enactment of the Act. The Indiana Legislature reasonably could have concluded that corporations should be allowed an interim period during which the Act would not apply automatically. Because of its short duration, the potential strategic advantage offered by the opportunity to opt into the Act during this transition period is of little significance.

The Act also imposes some added expenses on the offeror, requiring it, *inter alia*, to pay the costs of special shareholder meetings to vote on the transfer of voting rights, see § 23-1-42-7(a). In our view, the expenses of such a meeting fairly are charged to the offeror. A corporation pays the costs of annual meetings that it holds to discuss its affairs. If an offeror—who has no official position with the corporation—desires a special meeting, solely to discuss the voting rights of the offeror, it is not unreasonable to have the offeror pay for the meeting.

Of course, by regulating tender offers, the Act makes them more expensive and thus deters them somewhat, but this type of reasonable regulation does not alter the balance between management and offeror in any significant way. The principal result of the Act is to grant shareholders the

The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-Tender Offer Purchase Programs, SEC Exchange Act Rel. No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed. Sec. L. Rep. ¶83,637, p. 86,916 (footnote omitted) (hereinafter SEC Release No. 21079). See Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 83 Colum. L. Rev. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

In implementing its goal, the Indiana Act avoids the problems the plurality discussed in *MITE*. Unlike the *MITE* statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers. Nothing in the Act prohibits an offeror from consummating an offer on the

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power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.

20th business day, the earliest day permitted under applicable federal regulations, see 17 CFR § 240.14e-1(a) (1986). Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows *shareholders* to evaluate the fairness of the offer collectively.

D

The Court of Appeals based its finding of pre-emption on its view that the practical effect of the Indiana Act is to delay consummation of tender offers until 50 days after the commencement of the offer. 794 F. 2d, at 263. As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. 17 CFR § 240.14e-1 (1986). We find the alleged conflict illusory.

The Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time. The Williams Act permits tender offers to be conditioned on the offeror's subsequently obtaining regulatory approval. *E. g.*, Interpretive Release Relating to Tender Offer Rules, SEC Exchange Act Rel. No. 34-16623 (Mar. 5, 1980), 3 CCH Fed. Sec. L. Rep. ¶24,284I, p. 17,758, quoted in *MacFadden Holdings, Inc.* v. *JB Acquisition Corp.*, 802

F. 2d 62, 70 (CA2 1986).[8] There is no reason to doubt that this type of conditional tender offer would be legitimate as well.[9]

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." 457 U. S., at 639 (emphasis added). In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day maximum period Congress established for tender offers in 15 U. S. C. § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Finally, we note that the Williams Act would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that

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[8] Although the SEC does not appear to have spoken authoritatively on this point, similar transactions are not uncommon. For example, Hanson Trust recently conditioned consummation of a tender offer for shares in SCM Corporation on the removal of a "lockup option" that would have seriously diminished the value of acquiring the shares of SCM Corporation. See *Hanson Trust PLC* v. *ML SCM Acquisition, Inc.*, 781 F. 2d 264, 272, and n. 7 (CA2 1986).

[9] Dynamics argues that conditional tender offers are not an adequate alternative because they leave management in place for three extra weeks, with "free rein to take other defensive steps that will diminish the value of tendered shares." Brief for Appellee Dynamics Corp. of America 37. We reject this contention. In the unlikely event that management were to take actions designed to diminish the value of the corporation's shares, it may incur liability under state law. But this problem does not control our pre-emption analysis. Neither the Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors. Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975).

may limit or delay the free exercise of power after a successful tender offer. State corporate laws commonly permit corporations to stagger the terms of their directors. See Model Business Corp. Act § 37 (1969 draft) in 3 Model Business Corp. Act Ann. (2d ed. 1971) (hereinafter MBCA); American Bar Foundation, Revised Model Business Corp. Act § 8.06 (1984 draft) (1985) (hereinafter RMBCA).[10] By staggering the terms of directors, and thus having annual elections for only one class of directors each year, corporations may delay the time when a successful offeror gains control of the board of directors. Similarly, state corporation laws commonly provide for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28.[11] By enabling minority shareholders to assure themselves of representation in each class of directors, cumulative voting provisions can delay further the ability of offerors to gain untrammeled authority over the affairs of the target corporation. See Hochman & Folger, Deflecting Takeovers: Charter and By-Law Techniques, 34 Bus. Law. 537, 538–539 (1979).

In our view, the possibility that the Indiana Act will delay some tender offers is insufficient to require a conclusion that the Williams Act pre-empts the Act. The longstanding prevalence of state regulation in this area suggests that, if

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[10] Every State except Arkansas and California allows classification of directors to stagger their terms of office. See 2 Model Business Corp. Act Ann. § 8.06, p. 830 (3d ed., Supp. 1986).

[11] "Cumulative voting is a means devised to protect minorities by providing a method of voting which assures to a minority, if it is sufficiently purposeful and cohesive, representation on the board of directors to an extent roughly proportionate to the minority's size. This is achieved by permitting each shareholder . . . to cast the total number of his votes for a single candidate for election to the board, or to distribute such total among any number of such candidates (the total number of his votes being equal to the number of shares he is voting multiplied by the number of directors to be elected)." 1 Model Business Corp. Act Ann. § 33, par. 4 comment (2d ed. 1971). Every State permits cumulative voting. See 2 Model Business Corp. Act Ann. § 7.28, pp. 675–677 (3d ed., Supp. 1986).

Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly. The regulatory conditions that the Act places on tender offers are consistent with the text and the purposes of the Williams Act. Accordingly, we hold that the Williams Act does not pre-empt the Indiana Act.

III

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. We now address this holding. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce . . . among the several States . . . ," Art. I, § 8, cl. 3. But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action. See, *e. g., Cooley* v. *Board of Wardens*, 12 How. * 299 (1852). The Court's interpretation of "these great silences of the Constitution," *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949), has not always been easy to follow. Rather, as the volume and complexity of commerce and regulation has grown in this country, the Court has articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits. See, *e. g., Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 441, n. 15 (1978).

A

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. See, *e. g., Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36–37 (1980); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). See generally Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). The Indi-

ana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits its effects equally upon both interstate and local business," *Lewis* v. *BT Investment Managers, Inc., supra*, at 36.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 126 (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981) (rejecting a claim of discrimination because the challenged statute "regulate[d] evenhandedly . . . without regard to whether the [commerce came] from outside the State"); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981) (rejecting a claim of discrimination because the "tax burden [was] borne according to the amount . . . consumed and not according to any distinction between in-state and out-of-state consumers"). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

B

This Court's recent Commerce Clause cases also have invalidated statutes that adversely may affect interstate commerce by subjecting activities to inconsistent regulations. *E. g., Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. ——, —— (1986); *Edgar* v. *MITE Corp.*, 457 U. S., at 642 (plurality opinion of WHITE, J.); *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S. 662, 671 (1981) (plurality opinion of POWELL, J.). See *South-*

ern Pacific Co. v. *Arizona*, 325 U. S. 761, 774 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths); *Cooley* v. *Board of Wardens*, *supra*, at * 319 (stating that the Commerce Clause prohibits States from regulating subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation"). The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"). Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

C

The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the ob-

> ject for which it was created." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819).

See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 822–824 (1978) (REHNQUIST, J., dissenting). Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges, or even regional exchanges, will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. See, *e. g.*, MBCA § 73 (requiring approval of a merger by a majority of all shares, rather than simply a majority of votes cast); RMBCA § 11.03 (same). By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. See, *e. g.*, MBCA § 80–81; RMBCA § 13.02. By requiring the corporation to purchase

the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.[12]

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A

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[12] Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. See MBCA § 79; RMBCA § 12.02. The election of directors may be staggered over a period of years to prevent abrupt changes in management. See MBCA § 37; RMBCA § 8.06. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. See MBCA § 15; RMBCA § 6.01(c). Provisions may be made for cumulative voting. See MBCA § 33, par. 4; RMBCA § 7.28; n. 9, *supra*. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. See MBCA § 45 (noting that a corporation's articles of incorporation can restrict payment of dividends); RMBCA § 6.40 (same). Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled.

Nor is it unusual for partnership law to restrict certain transactions. For example, a purchaser of a partnership interest generally can gain a right to control the business only with the consent of other owners. See Uniform Partnership Act § 27, 6 U. L. A. 353 (1969); Uniform Limited Partnership Act § 19 (1916 draft), 6 U. L. A. 603 (1969); Revised Uniform Limited Partnership Act §§ 702, 704 (1976 draft), 6 U. L. A. 259, 261 (Supp. 1986). These provisions—in force in the great majority of the States—bear a striking resemblance to the Act at issue in this case.

change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Appellee Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively.[13] See generally Easterbrook and Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161 (1981). As indicated *supra*, at 12, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the Securities and Exchange Commission, see SEC Release No. 21079, p. 86,916, and by a number of scholarly commentators, see, *e. g.*, Bradley & Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377, 1412–1413 (1986); Macey & McChesney, A Theoretical Analysis of Corporate Greenmail, 95 Yale L. J. 13, 20–22 (1985); Lowenstein, 83 Colum. L. Rev., at 307–309. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined "to second-guess the empirical

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[13] It is appropriate to note when discussing the merits and demerits of tender offers that generalizations usually require qualification. No one doubts that some successful tender offers will provide more effective management or other benefits such as needed diversification. But there is no reason to *assume* that the type of conglomerate corporation that may result from repetitive takeovers necessarily will result is more effective management or otherwise be beneficial to shareholders. The divergent views in the literature—and even now being debated in the Congress—reflect the reality that the type and utility of tender offers vary widely. Of course, in many situations the offer to shareholders is simply a cash price substantially higher than the market price prior to the offer.

judgments of lawmakers concerning the utility of legislation," *Kassel* v. *Consolidated Freightways Corp.*, 450 U. S., at 679 (BRENNAN, J., concurring in judgment). In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "'no legitimate interest in protecting the nonresident shareholders.'" Brief for Appellee Dynamics Corp. of America 21 (quoting *Edgar* v. *MITE Corp.*, 457 U. S., at 644). Dynamics relies heavily on the statement by the *MITE* Court that "[i]nsofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U. S., at 644. But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. See Ind. Code § 23-1-42-4(a)(3) (Supp. 1986). Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

D

Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reit-

erate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S., at 127. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.[14]

IV

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends

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[14] CTS also contends that the Act does not violate the Commerce Clause—regardless of any burdens it may impose on interstate commerce—because a corporation's decision to be covered by the Act is purely "private" activity beyond the reach of the Commerce Clause. Because we reverse the judgment of the Court of Appeals on other grounds, we have no occasion to consider this argument.

the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.