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Post-Mite: The Constitutionality Of State Takeover Acts

POST-*MITE*: THE CONSTITUTIONALITY OF STATE TAKEOVER ACTS

In response to an increasing use of cash tender offers[1] to acquire corporate control and the absence of adequate investor protection during takeovers, Congress and a majority of state legislatures have enacted legislation regulating takeover bids.[2] Although the Securities Act of 1933 ('33 Act)[3] and the Securities Exchange Act of 1934 ('34 Act)[4] protected investors by requiring issuers to make full disclosures to investors concerning a public offering or public trading of securities,[5] investors received only minimal protections during tender offers.[6] In 1968 Congress amended

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[1] *See* 15 U.S.C. § 78n(d) (1976) (Williams Act applies to tender offers for securities registered on national securities exchange). Although Congress enacted the Williams Act to regulate tender offers, Congress did not define the term "tender offer". *See* Note, *The Elusive Definition of a Tender Offer*, 7 J. CORP. L. 503, 503 (1982). Traditionally, "tender offer" has meant a public invitation to a corporation's shareholders to sell the corporation's securities to a tender offeror at a price above the securities' market price. *See* Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). In 1979, the Securities and Exchange Commission (SEC) proposed a comprehensive definition of "tender offer." *See* SEC Securities Exchange Act Release No. 16385 (Nov. 29, 1979), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,374, at 82,600. Under the SEC's proposed definition, a transaction qualifies as a tender offer if either of two test are met. *See id.* at 82,603-05. A program to acquire a corporation's securities is a tender offer if one or more offers to purchase more than 5% of a single class of the corporation's securities is made to more than ten shareholders during any 45 day period. *See id.* at 82,603. Alternatively, an attempt to purchase securities of a single class is a tender offer if the offer exceeds the securities' market price by the greater of two dollars or five percent of the market price and is widely disseminated with no opportunity to negotiate the offered price or terms. *See id.* at 82,604-05; *see also* ALI FED. SEC. CODE § 299.68 (1978) (tender offer is offer to buy securities directed to more than thirty-five persons). *See generally* Korval, *Defining Tender Offers: Resolving a Decade of Dilemma*, 13 SEC. L. REV. 549 (1981); Note, *What is a Tender Offer?*, 37 WASH. & LEE L. REV. 908 (1980).

[2] *See* S. REP. No. 550, 90th Cong., 1st Sess. 2, *reprinted in* 1968 CODE CONG. & AD. NEWS 2811, 2812 [hereinafter cited as SENATE REPORT] (increases in use of tender offers leave investors unprotected because existing law does not require adequate disclosure of offeror's intent); E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 65 n.3 (1973) (number of tender offers increased from 8 in 1960 to 107 in 1966); *see also* 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981) (federal legislation responding to increased use of tender offers); *infra* note 21 (state legislative response to increased use of tender offers).

[3] 15 U.S.C. § 77a-bbb (1976).

[4] *Id.* § 78a-jj.

[5] *See id.* §§ 77f, 77j (disclosure requirements for issuance of securities); *id.* § 781 (information required for registration of securities traded on national securities exchanges); *see also* Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 COLUM. L. REV. 697, 698-702 (1959) (theory of Securities Act of 1933 and Securities Exchange Act of 1934).

[6] *See generally* Fleischer & Mundheim, *Corporate Acquisition By Tender Offer*, 115 U. PA. L. REV. 317, 328-53 (1967) (protection of investors during tender offers prior to Williams Act). The Securities Exchange Act of 1934 ('34 Act) treated a cash tender offer to acquire

the '34 Act by enacting the Williams Act[7] to regulate tender offers for publicly held securities.[8] The Williams Act is consistent with the '33 and '34 Acts' philosophy of protecting investors through full disclosure.[9] The Williams Act's disclosure requirements protect investors[10] by requiring

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control of a corporation in the same manner as an offer to purchase a single share of the corporation's stock. *See* 15 U.S.C. §§ 78(b) (1976) ('34 Act applies to transactions in securities conducted over the counter and on securities exchanges). The federal securities regulations enacted prior to the Williams Act, however, regulate two other types of transactions used to acquire corporate control. *See id.* § 77e(c) (federal regulation of exchange offers); *id.* § 78n(a)-(c) (federal regulation of proxy solicitation). First, the Securities Act of 1933 ('33 Act) requires a corporation that intends to acquire control of another corporation with a stock-for-stock exchange to provide the sought after corporation's shareholders with a prospectus explaining the terms of the offer, stating the identity of the purchaser, and explaining the purchaser's plans for the corporation. *Id.* § 77j. Second, the '34 Act requires shareholders attempting to acquire control of a corporation through a proxy contest to inform other shareholders of the identity of the participants, the participants shareholdings, and the date the participant acquired the shares. *Id.* § 78n(a)-(c).

[7] Williams Act, Pub. L. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981). In 1965, Senator Williams of New Jersey submitted to the Senate a bill that discouraged takeover bids by increasing incumbent management's ability to defeat tender offers. *See* S. 2731, 89th Cong., 1st Sess. (1965). Senator Williams sought to discourage takeovers because of the business community's perception of tender offerors as "corporate raiders" more interested in acquiring quick profits by reselling an acquired corporation's assets than in the efficient operation of acquired companies. *See* 113 CONG. REC. 28,257-58 (1965) (remarks of Sen. Williams) (corporate raiders have reduced "proud old companies to corporate shells"). The business community, however, gradually accepted the use of tender offers as a method of changing corporate control. *See* Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1137-39 (1974) [hereinafter cited as *Commerce Clause Limitations*] (factors other than acquiring quick profits account for increased use of tender offers). To reflect the business community's acceptance of the legitimacy of tender offers, Senator Williams submitted a second bill that Congress eventually enacted as the Williams Act. *See* S. 510, 90th Cong., 1st Sess. (1967), 113 CONG. REC. 854 (1967) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981)). Congress recognized that federal regulation of tender offers should not discourage takeover bids because some tender offers promote society's best interest by providing a method for removal of entrenched inefficient management. *See* SENATE REPORT, *supra* note 2, at 3 (takeovers serve useful purpose).

[8] 15 U.S.C. § 78n(d) (1976). The increasing use of tender offers prior to the enactment of the Williams Act removed a substantial number of contests for corporate control from the reach of existing federal disclosure requirements. Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977); *see* ARANOW & EINHORN, *supra* note 2, at 65 n.3 (use of tender offers to acquire corporate control have increased). Congress enacted the Williams Act to "close the gap" between the investor protections Congress provided shareholders during tender offers and the investor protections Congress provided investors during proxy contests and stock for stock transactions to acquire corporate control. SENATE REPORT, *supra* note 2, at 2-4; *see supra* note 6 (federal regulation of transactions to acquire corporate control before Williams Act).

[9] *See* Sowards & Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499, 507 (1967) (basic philosophy of federal securities regulation is to protect investors by requiring full and fair disclosures); *supra* note 5 and accompanying text (disclosure provisions of '33 and '34 Acts).

[10] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2636 (1982) (plurality opinion) (Congress enacted Williams Act to protect investors); Piper v. Chris-Craft Indus., 430 U.S. 1, 35 (1977)

a tender offeror to disclose to a target corporation's shareholders information pertinent to a shareholder's informed evaluation of a takeover bid.[11] Additionally, the Williams Act and the Securities and Exchange Commission (SEC) regulations, enacted pursuant to the Williams Act,[12] regulate the procedures of a tender offer and provide investors substantive protections.[13]

(sole purpose of Williams Act is investor protection); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (Congress intended to provide adequate protection to shareholders confronted with tender offers); SENATE REPORT, *supra* note 2, at 3-4 (Williams Act enacted for benefit of investors).

[11] *See* 15 U.S.C. § 78n(d)(1) (1976) (tender offeror must disclose pertinent information concurrently with commencement of offer). The disclosure provisions of the Williams Act ensure that an investor confronted with a tender offer will have adequate information about the offeror's qualifications and intentions to make an intelligent investment decision. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (purpose of Williams Act is to enable investors to make informed investment decisions); SENATE REPORT, *supra* note 2, at 2-4 (Williams Act enables shareholders to intelligently evaluate takeover bids). *See generally* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 56-103 (1977) (disclosure requirements of Williams Act).

The William Act's disclosure requirements apply to a person or corporation that will acquire by tender offer five percent or more of any class of a registered company's equity securities. 15 U.S.C. § 78n(d)(1) (1976). The Williams Act requires a tender offeror to file a schedule 14D-1 disclosure statement concurrently with the commencement of the takeover bid. *Id.*; *see* 17 C.F.R. § 240.14d-100 (1982) (schedule 14D-1 disclosure statement); *see also infra* note 127 and accompanying text (commencement of tender offers). The tender offeror files the schedule 14D-1 statement with the SEC and transmits the disclosure statement's contents to the target corporation and to the target corporation's shareholders. *See* 15 U.S.C. § 78n(d)(1) (1976); 17 C.F.R. § 240.14d-3 (1982). The Williams Act requires that the schedule 14D-1 statement disclose the bidder's identity, the source and amount of funds the bidder will use to purchase the target corporation's securities, and the extent of the bidder's prior holdings in the target company. *See* 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (1976). If the tender offeror intends to acquire control of the target company, the disclosure statement must indicate whether the offeror intends to liquidate the target company, merge the target corporation with another company, or make major changes in the acquired company's internal structure. *See id.* § 78m(d)(1)(C). The SEC also requires an offeror to disclose the purpose of the tender offer, the offeror's financial condition, and the applicability of any antitrust laws. *See* 17 C.F.R. § 240.14d-100 (1976).

[12] *See* 15 U.S.C. §§ 78m(d)(1), 78n(d)(1) (1976) (SEC authorization to enact rules and regulations to supplement Williams Act); 17 C.F.R. §§ 240.13d, .14d (1982) (SEC regulations enacted pursuant to Williams Act).

[13] *See* 15 U.S.C. § 78n(d), (e) (1976) (Williams Act regulations of tender offer procedure); 17 C.F.R. § 240.14d (1982) (SEC regulations of tender offer procedures). The substantive provisions of the Williams Act and the SEC regulations protect shareholders by regulating withdrawals of tendered shares, pro rata purchases, increases in the purchase price, and the making of false and misleading statements. *See* 15 U.S.C. § 78n(d)-(e) (1976); 17 C.F.R. § 240.14d (1982). The Williams Act as supplemented by the SEC regulations permits a shareholder to withdraw tendered shares anytime within 15 days of the commencement of the tender offer, or if the offeror has not purchased the tendered shares, anytime after 60 days of the offer's commencement. *See* 15 U.S.C. § 78n(d)(5) (1976); 17 C.F.R. § 240.14d-7 (1982) (extends withdrawal period from 7 to 15 days). If the number of securities shareholders tender during the first ten days of a tender offer exceed the number of shares the purchaser intends to acquire, the Williams Act requires the offeror to purchase the tendered

To protect investors adequately during corporate takeovers, Congress enacted a specific regulatory scheme.[14] Congress adopted a "market approach"[15] to tender offers, whereby a target corporation's shareholders determine the success or failure of a takeover bid after examining all the pertinent information concerning the offer.[16] Under the market approach, a target company's shareholders determine a takeover bid's success or failure by tendering or refusing to tender securities of the target corporation to the offeror.[17] To ensure that investors have an adequate op-

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shares on a pro rata basis according to the number of shares tendered by each shareholder. *See* 15 U.S.C. § 78n(d)(6) (1976) (Williams Act pro rata purchasing provision); *see also* 17 C.F.R. § 240.14d-8 (1982) (requirements for extending ten day period). If before the expiration of a tender offer the purchaser increases the price the purchaser is offering for the target corporation's securities, the Williams Act requires the purchaser to pay the higher price for the shares already tendered. *See* 15 U.S.C. § 78n(d)(7) (1976). The Williams Act also prohibits the making of fraudulent, deceptive, or manipulative statements concerning a tender offer. *See* 15 U.S.C. § 78n(e) (1976) (Williams Act general antifraud provision).

[14] *See* Edgard v. Mite Corp., 102 S. Ct. 2629, 2635-37 (1982) (plurality opinion) (Williams Act established regulatory scheme to protect investors); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978) (Congress adopted distinct regulatory scheme to protect investors), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979); 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976 & Supp. V 1981) (Williams Act).

[15] *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978) (Congress adopted "market approach" to investor protection), *rev'd on other grounds sub nom.*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979). The "market approach" is a regulatory scheme that ensures that the shareholders of a target corporation determine the merits of a takeover bid. *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2639 (1982) (plurality opinion) (Congress intended investors to make own investment decisions); Kidwell, 577 F.2d at 1276 (Congress intended investors to evaluate tender offers); SENATE REPORT, *supra* note 2, at 3 (Williams Act insures that investors make investment decisions). Several state legislatures have adopted a "benevolent bureaucracy" approach to investor protection that permits a state official to prevent a tender offeror from presenting an offer to a target corporation's shareholders if the state official determines that the terms of the offer are inequitable. *See infra* note 23 and accompanying text (state hearing requirements).

[16] *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978) (Williams Act enables investors to make informed investment decisions), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). Congress intended to protect the interests of investors by providing investors with the information necessary to an informed decision on whether to hold, sell, or tender the corporation's securities. *See* SENATE REPORT, *supra* note 2, at 2 (shareholder cannot make informed decision without information about offeror and offeror's plans); *see also supra* note 10 (Congress intended to protect interests of investors). The Williams Act provides shareholders an opportunity to make an intelligent evaluation of a tender offer by allowing both the offeror and the target company's management to present arguments concerning the merits of the offer. *Kidwell*, 577 F.2d at 1276; *see* SENATE REPORT, *supra* note 2, at 3 (Williams Act gives offeror and management equal opportunity to present arguments). The target corporation's shareholders then decide whether to tender the corporation's securities to the tender offeror. *See* Mite Corp. v. Dixon, 633 F.2d 486, 494 (7th Cir. 1980) (Congress intended investors to have unfettered choice), *aff'd* Edgar v. Mite Corp., 102 S. Ct. 2629 (1982). *But see* Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 383 (1969) (offering price is shareholder's primary consideration when determining whether to tender).

[17] *See* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978) (Congress intended shareholders to decide outcome of tender offers), *rev'd on other grounds sub nom.*

portunity to evaluate takeover bids, Congress enacted a scheme of regulatory neutrality that provided neither a target corporation's management nor the bidder with any undue advantage.[18] Congress avoided tipping the regulatory balance in favor of a target corporation's management because any undue advantage could increase management's ability to defeat a tender offer thereby depriving investors of the opportunity to evaluate the takeover bid.[19]

Responding to a concern that the Williams Act does not adequately protect the interests of local shareholders,[20] thirty-eight state legislatures

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Leroy v. Great W. United Corp., 443 U.S. 173 (1979). *But see infra* note 19 (defensive tactics management may use to defeat tender offer without relying on favorable investment decision of shareholders).

[18] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2636 (1983) (plurality opinion) (regulatory neutrality enhances shareholders' ability to make informed investment decisions); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (Congress avoided enhancing management's ability to defeat takeover bids); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1277 (5th Cir. 1978) (neutrality is "cornerstone" to Williams Act's objective of investor protection), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979); SENATE REPORT, *supra* note 2, at 3 (Williams Act avoids tipping balance of regulation in favor of either management or offeror).

[19] Edgar v. Mite Corp., 102 S. Ct. 2629, 2636 (1982) (plurality opinion) (Congress adopted policy of neutrality because tender offers serve useful purpose that could be upset by favoring management or offeror); *see also supra* note 7 (tender offers serve useful purpose by removing inefficient management). A successful takeover bidder may implement substantial changes in a target company's management, policy, or operations that are not in the target corporation's best interest. *See* ARANOW & EINHORN, *supra* note 2, at 217-22 (management's obligation to defend against a takeover that is not in best interest of company); Comment, *Antitakeover Maneuvers: Developments in Defense Tactics and Target Actions for Injunctive Relief*, 35 SW. L.J. 617, 618 (1981) [hereinafter cited as *Antitakeover Manuevers*] (successful takeover may substantially change target corporation). Management may decide to initiate defensive tactics to fight a takeover bid that is not in the corporation's best interest. *See* ARANOW & EINHORN, *supra* note 2, at 217-76 (defensive tactics).

Some of the defensive tactics a target corporation might adopt to attempt to defeat a takeover bid are repurchasing the corporation's securities, defensive mergers, declaration of cash dividends, initiations of a counter offer to acquire control of the tender offeror, and litigation. *Id.*; *Antitakeover Maneuvers, supra*, at 234-76. Additionally, a commonly used defensive tactic to discourage tender offers is reincorporation in a state that has a strong antitakeover statute. *Antitakeover Manuevers, supra* at 625. *But see infra* notes 151-71 and accompanying text (state takeover statutes are unconstitutional). Defensive tactics that delay the commencement or consummation of tender offers increase incumbent management's chances of defeating a takeover bid without relying on a favorable investment decision by the shareholders. *See* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977) (time is management's most potent weapon); *Commerce Clause Limitations, supra* note 7, at 1134-36 (delay provides management more time to contest tender offers); *see also* Austin, *Tender Offer Update: 1978-1979*, 15 MERGERS & ACQUISITIONS, Summer 1980, at 16-19 (statistical study showing that uncontested tender offers are more successful than contested tender offers); *infra* note 24 and accompanying text (state takeover statutes potentially may delay commencement or consumation of tender offers).

[20] *See* Note, *The Illinois Business Take-Over Act: An Examination of Constitutional and Policy Considerations*, 1981 U. ILL. L. REV. 521, 521-23 (1981) (state takeover statutes enacted to increase shareholder protections); Note, *Securities Law and the Constitution: State Tender*

have enacted legislation regulating takeover bids.[21] A majority of state takeover statutes follow the congressional philosophy of investor protection by requiring full and fair disclosure.[22] The state statutes, however,

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Offer Statutes Reconsidered, 88 YALE L.J. 510, 515 (1979) [hereinafter cited as *Tender Offer Statutes Reconsidered*] (purpose of state statutes is to provide shareholder protection); *see also* ILL. ANN. STAT. ch. 121½, §§ 135.51 to .70 (Smith-Hurd Supp. 1982-1983) (purpose of Illinois Act is to protect local shareholders). Although the stated objective of state takeover statutes is to supplement the Williams Act investor protection provisions, most commentators who have examined the legislative intentions behind the state statutes have concluded that the state legislatures intended to protect local business from out-of-state tender offerors. *See* Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U. L. REV. 767, 768 (1971) [hereinafter cited as *State Securities Regulation*] (some state legislatures have enacted legislation that protects interest of issuer rather than interests of investors); Langevoort, *supra* note 19, at 240 (state takeover statutes serve interests of entrenched incumbent management); Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 690 (1975) (state legislatures enacted takeover statutes for fear of effects of takeovers on local economy); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 18 (1976) (state legislatures sought to protect local managements from hostile takeover bids). The better view, however, is that a variety of considerations, including investor protection and protection of local business, prompted the state legislatures to enact takeover statutes. *See* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733, 741-46 (1979) (state takeover statutes prompted by concern for investors, local businesses, and quality of life within state boundaries); *see also* Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. REV. 872, 904-05 (1978) [hereinafter cited as *Response to* Great Western] (speculations as to legislative intent of state takeover statutes is futile).

[21] *See* ALASKA STAT. §§ 45.54.010-.120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West 1981 & Supp. 1982); DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); FLA. STAT. ANN. §§ 517.35 to .363 (West Supp. 1978) (repealed by 1979 Fla. Laws ch. 79-381, § 13); GA. CODE ANN. §§ 14-6-1 to -15 (1982); HAWAII REV. STAT. §§ 417E-1 to -15 (1976 & Supp. 1982); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1981); ILL. ANN. STAT. ch. 121½, §§ 137.51 to .70 (Smith-Hurd Supp. 1981-1982); IND. CODE ANN. §§ 23-2-3.1-1 to -11 (Burns Supp. 1982); IOWA CODE ANN. §§ 502.211 to .215 (West Supp. 1981-1982); KAN. STAT. ANN. §§ 17-1276 to -1284 (1981); KY. REV. STAT. ANN. §§ 292.560 to .991 (Bobbs-Merill 1981); LA. REV. STAT. ANN. §§ 51:1500 to :1512 (West Supp. 1983); ME. REV. STAT. ANN. tit. 13, §§ 801-17 (Supp. 1982-1983) (amended 1982); MD. CORP. & ASS'NS. CODE ANN. §§ 11-901 to -908 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1982-1983); MICH. COMP. LAWS ANN. §§ 451.901 to .917 (Supp. 1982-1983); MINN. STAT. ANN. §§ 80B.01-.13 (West Supp. 1983); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1982); MO. ANN. STAT. §§ 409.500 to .565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78.376 to .3778 (1981); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (1979); N.J. STAT. ANN. §§ 49:5-1 to :19 (West Supp. 1982-1983); N.Y. BUS. CORP. LAW §§ 1600-14 (McKinney Supp. 1982-1983); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. § 1707.041 (Baldwin 1982); OKLA. STAT. ANN. tit. 71, §§ 431-51 (West Supp. 1982-1983); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1982); S.C. CODE ANN. §§ 35-2-10 to -110 (Law. Co-op Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to -47 (Supp. 1982); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1982); UTAH CODE ANN. §§ 61-4-1 to -13 (1978 & Supp. 1981); VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982); WIS. STAT. ANN. §§ 552.01-.25 (West Special Pamphlet 1982); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100 to .800, *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶ 55,671-82 (1977). *See generally* ARANOW, EINBORN, & BERLSTEIN, *supra* note 11, at 207-17 (survey of different forms of state takeover statutes).

[22] *See, e.g.*, ARK. STAT. ANN. § 67-1264.1 (1980) (Arkansas takeover act's disclosure re-

generally regulate tender offers with provisions that differ significantly from the provisions of the Williams Act.[23] A problem common to many state takeover statutes is that the state statutes disrupt the Williams Act's regulatory neutrality by delaying the commencement or consummation of tender offers, thereby giving target management additional time

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quirements); ILL. ANN. STAT. ch. 121½, § 137.54 (Smith-Hurd Supp. 1981-1982) (Illinois takeover act's disclosure requirements); MICH. COMP. LAWS ANN. § 451.908 (Supp. 1982-1983); *see State Securities Regulation, supra* note 20, at 768 (state takeover statutes generally follow philosophy of federal securities regulations); *see also* Sowards & Mofsky, *supra* note 9, at 507 (basic philosophy of federal securities regulation is to protect investors by requiring full and fair disclosures).

[23] *See* ARANOW, EINHORN & BERLSTEIN, *supra* note 11, at 234-45 (tabulation of federal and state tender offer regulations). Although the terms of state takeover statutes vary considerably from state to state, several general characteristics are prevalent. *See* Wilner & Landy, *supra* note 20, at 3-9 (general characteristics of state takeover statutes). The majority of state takeover statutes require tender offerors to disclose the material terms of a tender offer in advance of the takeover bid's commencement. *See, e.g.,* COLO. REV. STAT. § 11:51:5-104(1) (Supp. 1982) (offeror must file 10 days before commencement of bid); HAWAII REV. STAT. § 417E-3(*f*) (1976) (offeror must file 60 days before bid's commencement); VA. CODE § 13.1-531 (Supp. 1982) (offeror must file 20 days before bid's commencement). *But see* 17 C.F.R. § 240.14d-2(b) (1982) (SEC regulation designating commencement of tender offers); *infra* notes 125-35 and accompanying text (SEC regulation 14d-2(b) preempts state precommencement notice requirements). Some state takeover acts require a tender offeror to provide the state's securities agency with the same information the offeror must disclose in a schedule 14D-1 disclosure statement. *See, e.g.,* COLO. REV. STAT. § 11-51.5-104 (Supp. 1982); MD. CORP. & ASS'NS CODE ANN. § 11-902 (Supp. 1982); *see also supra* note 11 (informational requirements of schedule 14D-1 disclosure statement). Most state takeover statutes, however, require tender offerors to disclose more information than the Williams Act and SEC regulations require. *See, e.g.,* N.Y. BUS. CORP. LAW § 1603 (McKinney Supp. 1982-83); OHIO REV. CODE ANN. § 1707.041 (Baldwin 1982); PA. STAT. ANN. tit. 70 § 75 (Purdon Supp. 1982-1983).

In addition to the different disclosure requirements, a state's takeover statute usually empowers the state's securities agency to order a hearing concerning a takeover bid. *See, e.g.,* CONN. GEN. STAT. ANN. § 36-460 (Supp. 1982); IND. CODE ANN. § 23-2-3.1-7 (Burns Supp. 1982); MICH. COMP. LAWS ANN. § 451.907 (Supp. 1982-1983). Moreover, some state takeover statutes require the state's securities agency to hold a hearing at the request of a target company. *See, e.g.,* CONN. GEN. STAT. ANN. § 36-460 (West Supp. 1982); IDAHO CODE § 30-1503 (1980). Most state statutes also enable the state's securities commission to stop a tender offer from proceeding until completion of the hearing process and to stop an offer completely if the state official decides against the offeror. *See, e.g.,* KY. REV. STAT. ANN. § 292.580 (Bobbs-Merill 1981); N.J. STAT. ANN. § 49:5-4 (West Supp. 1982-1983); VA. CODE § 13.1-531 (Supp. 1982). Although a majority of states limit the scope of the hearings to whether the offeror has satisfied the state statute's disclosure requirements, a minority of state takeover statutes permit the state's securities agency to evaluate the substantive merits of the tender offer. *See, e.g.,* MO. ANN. STAT. § 409.515 (Vernon 1979) (commissioner may evaluate whether offeror complied with disclosure requirements); N.Y. BUS. CORP. LAW § 1604 (McKinney Supp. 1982-1983) (requires hearing to determine whether offeror provided full and fair disclosures); TENN. CODE ANN. § 48-2104(5) (1979) (securities commissioner may permanently stop inequitable tender offer).

The state takeover statutes also contain various substantive provisions that differ from the substantive protections that the Williams Act provides shareholders. *See* ARANOW, EINHORN, & BERLSTEIN, *supra* note 11, at 234-45 (comparison of Williams Act provisions to state takeover statute provisions); *see also supra* note 13 (Williams Act's substantive provi-

to defeat a takeover bid.[24] Furthermore, many state takeover laws modify the Williams Act's market approach to investor protection by enabling a state official to review the merits of a takeover bid and decide whether the offer may proceed.[25] Although the purpose of the state statutes is to protect local investors,[26] most state takeover statutes effect tender offers nation-wide by requiring an offeror to comply with the statute's procedural and disclosure requirements in the offeror's transactions with shareholders residing both inside and outside the regulating state.[27]

The extraterritorial reach of the state statutes and the statutes' variance with the Williams Act's regulatory neutrality and market ap-

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sions). Examples of the types of substantive provisions the state legislatures have enacted are minimum and maximum offering periods, shareholder withdrawal rights, and the time period during which a bidder must accept on a pro rata basis the securities shareholders have tendered. *See* ARANOW, EINHORN, & BERLSTEIN, *supra* note 11, at 234-35 (tabulation of state substantive provisions).

[24] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2638-39 (1982) (plurality opinion) (state statutes that delay commencement of tender offers upset balance Congress established); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1131 (8th Cir. 1982) (delays in commencement and consummation of tender offers threaten viability of tender offers). State takeover statutes with hearing provisions may delay the commencement or consummation of a tender offer if the state's securities agency decides to hold a hearing. *See, e.g.*, KY. REV. STAT. ANN. § 292.570 (Bobbs-Merill 1981) (Kentucky director of securities could delay commencement of tender offer up to 40 days); MINN. STAT. ANN. § 80B.03 (West Supp. 1983) (Minnesota commissioner of securities could delay commencement of tender offer up to 30 days); UTAH CODE ANN. § 61-4-4 (Supp. 1981) (Utah securities commission may delay commencement of tender offer up to 70 days); *see also supra* note 22 (most state takeover statutes enable state's securities commission to halt tender offer until completion of hearing). The majority of courts that have examined the constitutionality of state takeover statutes have held that state created delays disrupt the Williams Act's neutral approach to tender offer regulation by giving incumbent management additional time in which to take defensive actions. *See infra* note 28 (cases holding that Williams Act preempts state takeover statutes that disrupt regulatory scheme Congress enacted).

[25] *See supra* note 23 (some state takeover statutes enable state securities commissioner to evaluate equity of tender offer).

[26] *See supra* note 20 (objectives of state takeover statutes).

[27] *See Tender Offer Statutes Reconsidered, supra* note 20, at 515 (state takeover statutes apply to offerors' transactions with shareholders residing in other states). Although state takeover statutes regulate the actions of tender offerors, the state statutes base jurisdiction over tender offers on the target corporation's connection to the regulating state. *See, e.g.*, IND. CODE ANN. § 23-2-3.1-1 (Burns Supp. 1982); MD. CORP. & ASS'NS. CODE ANN. § 11-901(i) (Supp. 1982); MICH. COMP. LAWS ANN. § 451.904 (Supp. 1982-1983). State legislatures have adopted a number of criteria for determining whether a target corporation has sufficient nexus to a state to warrant the state's regulation of a takeover bid. *See generally* ARANOW, EINHORN, & BERLSTEIN, *supra* note 11, at 234-45 (survey of state takeover statutes). Incorporation of the target corporation in the regulating state satisfies the jurisdictional requirements of all state takeover statutes. *See id.* A tender offer also will be subject to regulation in most states if the target company has substantial assets or a principal place of business in the regulating state. *See id.* The state statutes base jurisdiction on the target company's nexus to the regulating state to prevent tender offerors from avoiding the requirements of a particular state by not extending the offer to shareholders residing in that state. ARANOW & EINHORN, *supra* note 2, at 157.

proach have rendered the state statutes susceptible to constitutional challenges under the commerce clause and the supremacy clause.[28] In *Edgar v. Mite Corp.*,[29] the United States Supreme Court held that the Illinois Business Takeover Act (Illinois Act)[30] impermissibly burdened interstate commerce.[31] Mite had initiated a cash tender offer for all outstanding shares

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[28] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2641-43 (1982) (Illinois takeover statute violates commerce clause); Telvest, Inc. v. Bradshaw, 697 F.2d 576, 579-82 (4th Cir. 1983) (Virginia takeover statute violates commerce clause); Martin-Marietta Corp. v. Bendix Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,217-20 (6th Cir. 1982) (Michigan takeover statute violates commerce clause); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1128-33 (8th Cir. 1982) (Missouri takeover statute violates commerce and supremacy clauses); Kennecott Corp. v. Smith, 637 F.2d 181, 188-91 (3rd Cir. 1980) (New Jersey takeover statute violates supremacy clause); Mite Corp. v. Dixon, 633 F.2d 486, 493-503 (7th Cir. 1980) (Illinois takeover statute violates commerce and supremacy clauses), *aff'd sub nom.* Edgar v. Mite Corp., 102 S. Ct. 2629 (1982); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1279-86 (5th Cir. 1978) (Idaho takeover statute violates commerce and supremacy clauses), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979); Occidental Petroleum Corp. v. Cities Serv. Co., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063, at 95,042-43 (W.D. Okla. 1982) (Oklahoma takeover statute violates commerce clause); Bendix Corp. v. Martin-Marietta Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,821, at 92,211-12 (D. Md. 1982) (Maryland takeover statute violates commerce and supremacy clauses); Natomas Co. v. Bryan, 512 F. Supp. 191, 193 (D. Nev. 1981) (Nevada takeover statute violates commerce and supremacy clauses); Crane Co. v. Lam, 509 F. Supp. 782, 785-91 (E.D. Pa. 1981) (Pennsylvania takeover statute violates commerce and supremacy clauses); Hi-Shear Indus. v. Campbell, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 at 90,030-34 (D.S.C. 1980) (South Carolina takeover statute violates commerce and supremacy clauses); Brascam Ltd. v. Lassiter, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,247, at 91,625 (E.D. La. 1979) (Louisiana takeover statute violates supremacy clause); Dart Indus. v. Conrad, 462 F. Supp. 1, 12-14 (S.D. Ind. 1978) (Delaware takeover statute violates commerce and supremacy clauses); Esmark, Inc. v. Strode, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,246-48 (Ky. 1982) (Kentucky takeover statute violates commerce and supremacy clauses); Kelly v. Beta-X Corp., 103 Mich. App. 51, 59, 302 N.W.2d 596, 600 (Mich. Ct. App. 1981) (Michigan takeover statute violates supremacy clause); Eure v. Grand Metropolitan Ltd., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,694, at 98,648 (N.C. Super. Ct. 1980) (North Carolina takeover statute violates supremacy clause); *see also supra* note 21 (state takeover statutes). *But see* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 933-40 (S.D. Ohio 1979) (Ohio takeover statute violates neither commerce nor supremacy clause); Sharon Steel Corp. v. Whaland, 121 N.H. 607, 701-04, 433 A.2d 1250, 1254-57 (N.H. 1981) (New Hampshire takeover statute violates neither commerce clause nor supremacy clause), *vacated,* 102 S. Ct. 3474 (1982) (vacated and remanded for consideration in light of *Edgar v. Mite Corp.*); Wylain, Inc. v. TRE Corp., 412 A.2d 338, 343-49 (Del. Ch. 1980) (Delaware takeover statute violates neither commerce clause nor supremacy clause).

[29] 102 S. Ct. 2629 (1982).

[30] ILL. ANN. STAT. ch. 121½, §§ 137.51 to .70 (Smith-Hurd Supp. 1982-1983). The jurisdictional provisions of the Illinois Act provided that a tender offeror would have to comply with the Illinois statute if at least ten percent of a target corporation's shareholders resided in Illinois or the target corporation had two of three designated connections with Illinois. *See id.* § 137.52-10. The designated connections were that Illinois must be the location of the target company's principal office, the target corporation's state of incorporation, or the home of shareholders holding at least ten percent of the target's stated capital and paid-in-surplus. *Id.*

[31] 102 S. Ct. at 2641-43.

of Chicago Rivet and Machine Company.[32] On the same day that Mite commenced the tender offer, Mite filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that the Illinois Act violated the commerce clause and the supremacy clause.[33] The district court ruled that the Williams Act preempted the Illinois Act and that the Illinois Act impermissibly burdened interstate commerce.[34] The Seventh Circuit affirmed the district court's decision on both grounds.[35]

On appeal, the Supreme Court evaluated the constitutionality of the Illinois statute using the test the Court had enunciated in *Pike v. Bruce Church, Inc.*,[36] for determining whether a state statute is unconstitutional under the commerce clause.[37] Under the *Pike v. Bruce Church* test, a state statute that indirectly regulates interstate commerce violates the commerce clause if the burden the state statute imposes on interstate commerce substantially exceeds the state statute's legitimate local benefits.[38] The *Mite* majority held that the Illinois Act imposed substantial burdens on interstate commerce by giving the Illinois Secretary of State the power to stop a nation-wide tender offer.[39] The Court stated that permitting a

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[32] *Id.* at 2633-34. Chicago Rivet and Machine Co. is an Illinois corporation with the corporation's principal executive offices in Illinois and over 25% of the corporation's shareholders residing in Illinois. Mite Corp. v. Dixon, 633 F.2d 486, 488 (7th Cir. 1980), *aff'd sub nom.* Edgar v. Mite Corp., 102 S. Ct. 2629 (1982); *see supra* note 30 (Illinois Act's jurisdictional requirements).

[33] 102 S. Ct. at 2634.

[34] *Id.*

[35] *See* Mite Corp. v. Dixon, 633 F.2d 486, 493-503 (7th Cir. 1979), *aff'd sub nom.* Edgar v. Mite Corp., 102 S. Ct. 2629 (1982).

[36] 397 U.S. 137, 142 (1970). The commerce clause grants Congress the power to regulate commerce among the states. U.S. CONST. art. 1, § 8, cl. 3. The Supreme Court has interpreted the commerce clause as limiting the power of the states to enact legislation that affects interstate commerce. *See* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976). Nonetheless, state legislation that affects interstate commerce may be constitutional if the state legislation serves legitimate state interests without discriminating against interstate commerce. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978). The Supreme Court in *Pike v. Bruce Church, Inc.*, set forth a two step test for determining whether state legislation impermissibly interferes with interstate commerce. 397 U.S. at 142. First, although the commerce clause does permit some incidental regulation of interstate commerce, a state may not directly regulate interstate commerce. *Id.*; *see* Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925) (direct regulation of interstate commerce is prohibited). Second, an incidental regulation of interstate commerce is constitutional only if the state statute regulates even-handedly to effectuate a legitimate local interest and if the putative local benefits exceed the burdens the state statute imposes on interstate commerce. 397 U.S. at 142.

[37] 102 S. Ct. at 2641-42.

[38] *See supra* note 36 (Pike v. Bruce Church test).

[39] 102 S. Ct. at 2642; *see* ILL. ANN. STAT. ch. 121½, § 137.57(A)-(B) (Smith-Hurd Supp. 1982-1983) (Illinois Secretary of State may order hearing concerning takeover bid and delay commencement of tender offer). State takeover statutes impose numerous burdens on interstate securities transactions. *See Commerce Clause Limitations, supra* note 7, at 1149-52 (adverse effects of state takeover statutes on interstate commerce). The most objectionable burden state takeover statutes impose on interstate commerce is the state statutes' impact on nation-wide tender offers. *See* 102 S. Ct. at 2641-42. The nation-wide reach of a state

state official to block a nation-wide tender offer deprives shareholders of the opportunity to sell the target corporation's securities at a premium, hinders the efficient allocation of economic resources, and reduces management's incentive to perform effectively and maintain high stock prices.[40] The *Mite* Court, however, found few local benefits to counterbalance the Illinois Act's substantial burden on interstate commerce.[41]

The Illinois Secretary of State claimed that the Illinois legislature's interests in protecting resident shareholders and in regulating the internal affairs of Illinois corporations outweighed any burdens the Illinois Act imposed on interstate securities transactions.[42] Although the *Mite* Court denied that the Illinois legislature has any interest in protecting nonresident shareholders, the Court acknowledged that the Illinois legislature has a legitimate interest in protecting local shareholders.[43] The Court, however, assigned little importance to the Illinois legislature's recognized interest in protecting resident shareholders because the Illinois Act essentially duplicated the Williams Act.[44] Moreover, the *Mite* majority suggested

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takeover statute enables a single state's securities agency to decide if a tender offer may proceed anywhere. *Id.*; *see supra* note 23 (most state takeover statutes enable state securities commissioner to stop tender offer until completion of hearing). The delays incumbent in the state takeover laws also impose substantial burdens on interstate commerce. *See* Martin-Marietta Corp. v. Bendix Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,218 (6th Cir. 1982) (delays upset timing of interstate tender offers). Delays that the state statutes cause burden interstate commerce by disrupting the normal securities market and discouraging tender offers. *See* Telvest, Inc. v. Bradshaw, 697 F.2d 576, 580 (4th Cir. 1982).

[40] 102 S. Ct. at 2642.

[41] *Id.* at 2642-43. The majority of courts that have examined the local benefits of state takeover statutes have held that any benefit the state law provides shareholders is marginal because the Williams Act fully protects investors. *See* Telvest, Inc. v. Bradshaw, 697 F.2d 576, 581 (4th Cir. 1983); Mite Corp. v. Dixon, 633 F.2d 486, 500 (7th Cir. 1980); Mesa Petroleum Co. v. Cities Serv. Co., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,064, at 95,049 (W.D. Okla. 1982). Commentators, however, have identified several benefits state takeover laws provide local shareholders. *See* Comment, *State Regulation of Tender Offers: How Much is Constitutional?*, 33 BAYLOR L. REV. 657, 674-75 (1981) [hereinafter cited as *How Much is Constitutional?*]; *Tender Offer Statutes Reconsidered, supra* note 20, at 524, 529-30. The delays incumbent in state takeover statutes provide investors with more time to make informed investment decisions. *See How Much is Constitutional?, supra*, at 674 (state takeover statutes eliminate pressure on investors to make hasty decision on whether or not to tender); *Tender Offer Statutes Reconsidered, supra* note 27, at 524 (state statutes reduce pressure on shareholders to tender immediately). Additionally, delay may benefit local investors with higher premiums because of competitive bidding for a target company's securities on the open market during a delay. *See Tender Offer Statutes Reconsidred, supra* note 20, at 524 (delay encourages higher bid for target corporation's stocks); *Response to* Great Western, *supra* note 20, at 901-02 (delay enables competing offeror to make tender offer at higher price). *But see infra* notes 59-61 and accompanying text (delay frustrates objectives of Williams Act).

[42] 102 S. Ct. at 2642.

[43] *Id.*

[44] *Id. Compare* ILL. ANN. STAT. ch. 121½, § 137.59(C) (Smith-Hurd Supp. 1982-1983) (shareholder may withdraw tendered shares during first 17 days of offer); *id.* § 137.59(D) (offeror must purchase securities pro rata if shareholders tender more securities than in-

that where the Illinois statute differed from the Williams Act, the Illinois statute actually might harm investors by increasing the possibility that management would be able to defeat a takeover bid before the shareholders had evaluated the tender offer.[45]

The *Mite* Court also rejected the Illinois Secretary of State's contention that the burdens the Illinois Act imposed on interstate commerce were permissible because the burdens were the result of Illinois' acknowledged right to regulate the internal affairs of a local corporation.[46] The internal affairs doctrine is a conflict of laws principle that permits a corporation's state of incorporation to regulate the internal affairs of the corporation to the exclusion of other states' regulations.[47] The *Mite*

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vestor intended to purchase); *and id.* § 137.59(E) (offeror must pay highest price he has offered to all shareholders that have tendered if offeror varies terms of offer during takeover bid); *with* 15 U.S.C. § 78n(d)(6) (1976) (offeror must purchase pro rata shares tendered during the first 10 days of offer if shareholders have tendered more shares in first 10 days than offeror intended to purchase); *id.* § 78n(d)(7) (1976) (if offeror increases purchase price then offeror must pay higher price to all shareholder that have tendered); *and* 17 C.F.R. § 240.14d-7 (1982) (shareholder may withdraw tendered shares anytime within 15 days after commencement of offer).

[45] *See* 102 S. Ct. at 2642 (increased risk that tender offer might fail outweighs possible benefits of delays); *see also supra* note 19 (delays increase management's chances of defeating takeover bid).

[46] *See* 102 S. Ct. at 2642-43 (internal affairs doctrine is inapplicable to tender offers).

[47] *See* Cort v. Ash, 422 U.S. 66, 84 (1975) (state of incorporation governs corporation's internal affairs). A minority of courts that have examined the constitutionality of state takeover statutes have held that state takeover statutes do not violate the commerce clause because the state's extraterritorial regulation of tender offers is analogous to the states' regulation of the internal affairs of locally incorporated companies. *See supra* note 28 (courts holding that state takeover statutes do not violate commerce clause). Those courts upholding state statutes often compare them to constitutionally permissible state regulation of proxy contests. *See* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 939 (S.D. Ohio 1979) (tender offers are functional equivalents of proxy contests). A corporation's state of incorporation may regulate proxy contests pursuant to the internal affairs doctrine. *See* Wilner & Landy, *supra* note 20, at 17. Some commentators have argued that courts should allow a corporation's state of incorporation to regulate tender offers because successful takeovers may materially alter the internal structure of local target corporations. Boehm, *supra* note 20, at 743, 756; Burch, Edgar v. Mite Corporation: *A Proposed Analysis*, 17 TULSA L.J. 229, 240-50 (1981); Langevoort, *supra* note 19, at 221-23; McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295, 303-04 (1981); Sargent, *On the Validity of State Takeover Regulation: State Responses to* Mite *and* Kidwell, 42 OHIO ST. L.J. 689, 724-25 (1981); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 741-45 (1970); *cf. How Much is Constitutional?*, *supra* note 41, at 672 (pseudo-foreign corporation doctrine is better theory for upholding validity of state takeover statutes). State proxy laws, however, govern the relationship between the corporation and the corporation's shareholders during an internal struggle for control of the corporation. Wilner & Landy, *supra* note 20, at 17. State takeover statutes govern the securities transactions between a corporation's shareholders and third parties not connected with the corporation. *See id.* (internal affairs doctrine cannot justify state regulation of tender offers); *Commerce Clause Limitations*, *supra* note 7, at 1154-55 (in tender offer situation relationship between corporation and shareholders that justifies regulating proxy contests has not yet formed). The majority of courts that have examined the constitutionality

majority, however, held that the internal affairs doctrine does not apply in the context of a tender offer because the internal affairs doctrine is limited to the relationship between a locally incorporated corporation and the corporation's officers, directors, and shareholders.[48] The Court noted that the Illinois Act regulated the relationship between shareholders of local corporations and tender offerors who might have no connection with Illinois other than the takeover bid.[49] The *Mite* Court concluded that the Illinois Act violated the commerce clause because the questionable benefits the Illinois statute provided local shareholders were insufficient to justify the statute's substantial burden on interstate commerce.[50]

Although the *Mite* majority did not reach the preemption issue, a plurality of the Court argued that the Illinois Act also violated the supremacy clause.[51] The plurality's reasoning is indicative of the analysis

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of state takeover statutes have concluded that the internal affairs doctrine cannot support the validity of state takeover statutes because tender offers have nothing to do with internal corporate procedures. *See* 102 S. Ct. at 2642-43 (internal affairs doctrine not applicable to state takeover statutes).

[48] 102 S. Ct. at 2642. Specific internal affairs subject to regulation by a corporation's state of incorporation include the election of directors, adoption of by-laws, voting rights, stockholders meetings, fiduciary duties, and transfer of shares. *See Response to* Great Western, *supra* note 20, at 931-32.

[49] 102 S. Ct. at 2643. The *Mite* Court stated that the Illinois Secretary of State's contention that the Illinois Act was constitutional under the internal affairs doctrine was "incredible" since the Illinois Act could apply to corporations not incorporated in Illinois. *Id.* The Court concluded that Illinois had no interest in regulating the internal affairs of foreign corporations. *Id.*

[50] *Id.* A plurality of four justices held that the Illinois Act was unconstitutional as a direct regulation of interstate commerce. *Id.* at 2640-41; *see supra* note 36 (state statutes that directly regulate interstate commerce violate commerce clause). The four justice plurality held that the extraterritorial reach of the Illinois Act directly restrained interstate commerce by preventing a tender offeror from conducting interstate securities transactions with shareholders in other states. 102 S. Ct. 2641. The plurality noted that although twenty-seven percent of Chicago Rivet's shareholders resided in Illinois, the Illinois statute could apply equally to a tender offer in which no shareholders resided in Illinois. *Id.*; *see supra* note 30 (Illinois Act's jurisdictional provision). Furthermore, the four justice plurality stated that permitting multiple states to regulate interstate securities transactions would overly complicate the regulation of nation-wide tender offers, thereby stifling takeover bids. *Id.* at 2642.

[51] *Id.* at 2637-40. Six of the Justices held that the Illinois Act was an unconstitutional violation of the commerce clause. *Id.* at 2640-43. (C.J. Burger, J. White, J. Blackmun, J. Powell, J. Stevens, J. O'Connor); *see supra* text accompanying notes 36-50 (Illinois Act violates commerce clause). Five justices ruled that the Illinois Act impermissibly burdened interstate commerce. 102 S. Ct. at 2641-43 (J. Burger, J. White, J. Powell, J. Stevens, J. O'Connor); *see supra* text accompanying notes 36-50 (Illinois Act impermissibly burdens interstate commerce). Four justices held that the Illinois Act was unconstitutional as a direct restraint on interstate commerce. 102 S. Ct. at 2640-41 (C.J. Burger, J. White, J. Blackmun, J. Powell, J. Stevens); *see supra* note 50 (Illinois Act directly regulates interstate commerce). Three justices ruled that the Williams Act preempted the Illinois Act. 102 S. Ct. at 2637-40 (C.J. Burger, J. White, J. Blackmun); *see infra* text accompanying notes 51-65 (Illinois Act violates supremacy clause). Three justices ruled the case moot and did not address the constitutional issues. 102 S. Ct. at 2648-54 (J. Marshall, J. Brennan, and J. Rehnquist dissenting).

other courts have adopted when examining whether the Williams Act preempts a state takeover statute.[52] Justice White, writing for the plurality, noted that the legislative history of the Williams Act indicates that Congress intended to permit states to regulate tender offers.[53] The *Mite* plurality, however, stated that the Williams Act preempts a state statute if the statute directly conflicts with a provision of the Williams Act or if the state statute frustrates the Williams Act's objective of protecting shareholders.[54]

The *Mite* plurality reasoned that the Illinois statute's pre-commencement disclosure requirements[55] and hearing requirements[56] disrupted the regulatory balance Congress found essential to achieving

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[52] *See supra* note 28 (cases holding state takeover statutes unconstitutional under supremacy clause).

[53] 102 S. Ct. at 2635; *see* 15 U.S.C. § 78bb(a) (1976) (state legislatures may enact securities regulations that do not conflict with federal securities laws).

[54] 102 S. Ct. at 2637-40. The supremacy clause of the United States Constitution states that federal law is the supreme law of the land. U.S. CONST. art. VI, § 2. An Act of Congress or an administrative regulation promulgated pursuant to an Act of Congress preempts state laws that frustrate the purposes and objectives of Congress. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (state statute that is obstacle to accomplishment and execution of congressional purposes and objectives is unconstitutional). The Supreme Court in *Jones v. Rath Packing Co.*, set forth a sequence of analysis for determining whether federal legislation preempts a state law. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977). First, a federal statute preempts a state law if Congress expressly intended to exclude the states from regulating in a particular area. *Id.* at 525; *see* Rice v. Santa Fe Elevator, 331 U.S. 218, 236 (1947). Second, even in the absence of an explicit congressional intent to preempt, a federal statute preempts state law if Congress implicitly intended to preempt state law. 430 U.S. at 525; *see* Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (pervasive regulation infers congressional intent to preempt). Third, even if Congress neither explicitly nor implicitly intended to preempt state law, a federal statute preempts state law if the operation of the state law directly conflicts with the operation of the federal law. 430 U.S. at 526; *see* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Finally, a federal statute preempts a state law if, under the facts of the particular case, the state law frustrates the purposes and objectives of Congress. 430 U.S. at 526; *see* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[55] *See* ILL. ANN. STAT. ch. 121½, § 137.54(B), (E) (Smith-Hurd Supp. 1982-1983) (Illinois Act's pre-commencement notice requirements). The Illinois Act required a tender offeror to notify the Illinois Secretary of State and the target company 20 days before the commencement of a tender offer that the offeror intends to make an offer and the proposed offer's material terms. *Id.*

[56] *See id.* § 137.57(A), (B), (E) (Illinois Act's hearing requirements). The Illinois Act permitted the Illinois Secretary of State to order a hearing before a tender offer commences to determine whether the takeover bid is equitable. *Id.* § 137.57(A), (E). The Illinois Act required the Secretary of State to order a hearing upon written request by the directors of the target company or upon written request of the shareholders that own at least ten percent of any class of the target's securities and reside in Illinois. *Id.* § 137.57(A). Once the Secretary of State ordered a hearing, the Illinois Act prevented the offer from commencing until the Secretary of State ordered a decision on the merits of the takeover bid. *Id.* § 137.57(B). If the Illinois Secretary of State found that the tender offer did not provide adequate disclosures or that the takeover bid was inequitable, the Illinois statute required the Secretary to stop the offer by denying registration of the tender offer. *Id.* § 137.57(E).

adequate shareholder protection.[57] Justice White stated that Illinois' pre-commencement disclosure requirements upset the balance the Williams Act established between tender offerors and target corporations by providing target corporations with additional time to take defensive actions.[58] The *Mite* plurality also argued that the Illinois statute's hearing requirement similarly disrupted the regulatory balance of the Williams Act by potentially delaying the commencement of a tender offer.[59] The plurality stated that any delay would upset the William Act's regulatory balance by providing target management with additional time to frustrate a tender offer at the shareholders' expense.[60] Justice White stated that the Williams Act preempts state takeover statutes that provide a target corporation's management with any undue advantage that would disrupt the Williams Act's regulatory neutrality.[61]

Moreover, the *Mite* plurality reasoned that the Illinois Act conflicted with the Williams Act's market approach.[62] Justice White noted that the Illinois Act deprived shareholders of the opportunity to evaluate tender offers by granting the Illinois Secretary of State the power to stop an inequitable takeover bid.[63] The *Mite* plurality argued that a state statute that substituted investor protection for investor autonomy conflicted with the market approach of the Williams Act.[64] The *Mite* plurality concluded that the Williams Act preempts the Illinois Act because the Illinois statute frustrates the Williams Act's objective of investor protection by disrupting the regulatory scheme Congress found essential to protecting the interests of shareholders.[65]

Several recent decisions have refined and expanded the *Mite* Court's ruling on the constitutionality of state takeover statutes.[66] In *Telvest, Inc.*

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[57] *See* 102 S. Ct. at 2637-40 (Illinois Act disrupts market approach and regulatory neutrality Congress found essential to investor protection); *see also* notes 7-19 and accompanying text (congressional purposes and objectives of Williams Act).

[58] 102 S. Ct. at 2637; *see* Langevoort, *supra* note 19, at 238 (time is management's most potent weapon); *supra* notes 18-19 and accompanying text (Congress enacted scheme of regulatory neutrality).

[59] 102 S. Ct. at 2638-39; *see supra* note 56 (Illinois Secretary of State may order hearing and delay commencement of tender offer).

[60] 102 S. Ct. at 2639.

[61] *See id.* at 2636, 2639 (Congress intended to protect investors by establishing a regulatory balance between offerors and management); *see also supra* note 28 (cases holding that delays disrupt Williams Act's neutral approach to tender offer regulation).

[62] 102 S. Ct., at 2640; *see supra* notes 15-17 and accompanying text (Congress adopted market approach to investor protection).

[63] 102 S. Ct. at 239-40; *see supra* note 56 (Illinois Secretary of State may halt inequitable takeover bid).

[64] 102 S. Ct. at 2640; *see supra* note 28 (cases holding that state statutes that conflict with Williams Act's market approach violate supremacy clause).

[65] *See* 102 S. Ct., at 2637-40 (Illinois Act conflicts with market approach and regulatory neutrality that Congress found essential to achieve objective of investor protection); *see also supra* notes 14-19 and accompanying text (regulatory scheme of Williams Act).

[66] *See* Telvest, Inc. v. Bradshaw, 697 F.2d 576, 582 (4th Cir. 1983) (Virginia takeover

v. Bradshaw,[67] the Fourth Circuit held that Virginia's Take Over Bid Disclosure Act (Virginia Act)[68] impermissibly burdened interstate commerce.[69] The provisions of the Virginia Act at issue regulated creeping tender offers instead of cash tender offers.[70] A creeping tender offer is an acquisition strategy that enables a purchaser to achieve a substantial position in a company through open market purchases over an extended period of time.[71] The Virginia Act's creeping tender offer provisions required a shareholder that intended to acquire control of a Virginia corporation to comply with the state statute before purchasing additional shares of the corporation.[72] The Virginia law established a presumption that a shareholder intended to acquire control of a Virginia corporation when the shareholder owned more than ten percent of the corporation and had purchased more than one percent of the corporation's stock in the past year.[73] If a shareholder did not intend to acquire control of a Virginia corporation but intended to continue purchasing the corporation's securities, the shareholder had to persuade the Virginia Corporation Commission that the purchases were not for the purpose of changing control of the corporation.[74] After acquiring more than ten percent of American Furniture Company through open market purchases, Telvest sought a

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statute impermissibly burdens interstate commerce); National City Lines, Inc. v. LLC Corp. 687 F.2d 1122, 1133 (8th Cir. 1982) (Missouri takeover statute impermissibly burdens interstate commerce and disrupts Williams Act's regulatory neutrality); Agency Rent-A-Car, Inc. v. Connolly, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,947 (1st Cir. 1982) (sanctions provision for violating Massachusetts takeover statute is not unconstitutional under supremacy clause); Martin-Marietta Corp. v. Bendix Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,219-20 (6th Cir. 1982) (Michigan takeover statute impermissibly burdens interstate commerce); Occidental Petroleum Corp. v. City Serv. Co., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063, at 95,043 (W.D. Okla. 1982) (Oklahoma takeover statute impermissibly burdens interstate commerce); Bendix Corp. v. Martin-Marietta Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,821, at 94,211-12 (D. Md. 1982) (Maryland takeover statute violates commerce and supremacy clauses); Esmark, Inc. v. Strode, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,246-48 (Ky. 1982) (Kentucky takeover statute violates commerce and supremacy clauses).

[67] 697 F.2d 576 (4th Cir. 1983).

[68] VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982).

[69] 697 F.2d at 582.

[70] *See* VA. CODE § 13.1-529(b)(iii) (Supp. 1982) (Virginia Act applies to creeping tender offers). Several state legislatures have enacted statutes regulating creeping tender offers. *See e.g.*, KY. REV. STAT. ANN. § 292.570(2) (Bobbs-Merill 1981); MASS. GEN. LAWS ANN. ch. 110C, § 3 (West Supp. 1982-1983); NEB. REV. STAT. § 21-2403 (1977).

[71] *See* 697 F.2d at 577 n.1 (definition of creeping tender offer); *cf. supra* note 1 (definition of tender offer). *See generally* Note, *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Agreements, and Standstill Agreements*, 39 WASH. & LEE L. REV. 1095, 1095-107 (1982).

[72] *See* VA. CODE § 13.1-529(b)(iii) (Supp. 1982) (offeror must register intent to acquire control of corporation with Virginia Corporation Commission).

[73] *Id.*

[74] *See id.* § 13.1-529(b)(vi) (Virginia Corporation Commission may exempt purchaser from complying with Virginia Act if purchaser proves no intent to change control of corporation).

declaratory judgment that the creeping tender offer provisions of the Virginia Act were unconstitutional.[75]

The *Telvest* court noted that although the Virginia Act applied only to the acquisition of securities of Virginia companies,[76] the Virginia Act affected interstate commerce by potentially applying to securities transactions between shareholders residing in other states.[77] The court then applied the balancing test of *Pike v. Bruce Church, Inc.*,[78] to determine whether the extraterritorial effects of the Virginia Act impermissibly burdened interstate commerce.[79] The *Telvest* court identified numerous burdens the Virginia statute imposed on interstate commerce.[80] The court stated that the statute disrupted the market for securities of Virginia corporations by requiring an offeror to postpone purchases of Virginia corporations' stocks, deprived shareholders of an opportunity to sell securities at a premium, discouraged investment in Virginia companies, impaired the ability of the free market to price securities efficiently, and reduced the incentive for incumbent management to perform effectively.[81] Relying on the Supreme Court's decision in *Mite*, the *Telvest* court ruled that the Virginia legislature had no legitimate interest in protecting shareholders residing in other states.[82] Moreover, the *Telvest* court stated that the benefits the Virginia law provided local shareholders were uncertain because the Williams Act already provided protection to investors during creeping tender offers.[83] The *Telvest* court noted that the Williams Act requires a purchaser that has acquired more than five percent of a corporation's securities to file a disclosure statement revealing any plans for acquiring control of the target corporation.[84] The *Telvest* court concluded that although the Virginia Act's creeping tender offer provisions imposed a lesser burden on interstate commerce than the hearing provisions the *Mite* court examined,[85] the Virginia law's benefits to local investors were too speculative to sustain the law's validity.[86]

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[75] *See* 697 F.2d at 578 (Telvest had acquired 11.64% of the outstanding stock of American Furniture Co.).

[76] *See* VA. CODE § 13.1-529(b)(iii) (Supp. 1982) (offeror that intends to acquire control of corporation incorporated in Virginia must comply with Virginia Act); *cf. supra* note 30 (Illinois Act's jurisdictional requirements).

[77] 697 F.2d at 579.

[78] 397 U.S. 137 (1970) *see supra* notes 36-38 and accompanying text (*Pike v. Bruce Church, Inc.* test).

[79] 697 F.2d at 579-81.

[80] *Id.* at 580.

[81] *Id.*; *cf. supra* note 39 and accompanying text (most objectional burden state takeover statutes impose on interstate commerce is state statutes' impact on nationwide tender offers).

[82] 697 F.2d at 581; *see supra* text accompanying note 43 (Illinois legislature has no legitimate interest in protecting shareholders residing in other states).

[83] 697 F.2d at 580-81.

[84] *See id.* 15 U.S.C. § 78n(d) (1976).

[85] *See supra* notes 39-40 and accompanying text (burdens Illinois Act imposed on interstate commerce).

[86] 697 F.2d at 582; *see* Edgar v. Mite Corp., 102 S. Ct. 2629, 2642 (1982) (protections

Although the state statute that the *Mite* court found to impermissibly burden interstate commerce applied to securities transactions between tender offerors and shareholders residing in other states, a number of post-*Mite* cases have expanded the *Mite* decision and ruled unconstitutional state takeover statutes that apply only to that part of a tender offer that involves local shareholders.[87] For example, in *Martin-Marietta*

Illinois Act provided local shareholders are speculative); Esmark, Inc. v. Strode, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,248 (Ky. 1982) (Kentucky takeover statute impermissibly burdens interstate commerce). In *Esmark, Inc. v. Strode*, the Supreme Court of Kentucky held that the Kentucky Take-Over Bids Disclosure Act (Kentucky Act) violated the commerce clause. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,248; *see* KY. REV. STAT. ANN. §§ 292.560 to .991 (Bobbs-Merill 1981) (Kentucky Act). Esmark had purchased on the open market over 11% of the outstanding shares of Reliance Universal, Inc., a Kentucky corporation in an attempt to eventually acquire control of Reliance. *See* [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,244. Esmark, however, did not comply with the Kentucky Act, which prevented an offeror that had acquired 5% or more of a Kentucky corporation's securities in the past year from commencing a tender offer if the offeror did not disclose to the investors selling the securities any intention of acquiring control of the corporation. *Id.*; *see* KY. REV. STAT. ANN. §.292.570(2) (Bobbs-Merill 1981) (Kentucky Act regulates creeping tender offers). The Kentucky director of securities filed suit against Esmark for violating the Kentucky Act. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,244. The *Esmark* court noted that the disclosure and hearing provisions of the Kentucky Act were similar to the Illinois provisions the *Mite* Court found unconstitutional. *Id.* at 94,246-47; *see* KY. REV. STAT. ANN. § 292.570(1) (Bobbs-Merill 1981) (Kentucky Act's disclosure and hearing provisions); *supra* notes 56-57 (Illinois Act's disclosure and hearing requirements). The *Esmark* court concluded that the similarities between the Kentucky Act and the Illinois Act rendered the *Mite* decision controlling and that therefore the Kentucky Act was invalid under the Commerce Clause. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,247-48.

[87] *See* Martin-Marietta Corp. v. Bendix, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶, 98,822, at 94,219-20 (6th Cir. 1982) (Michigan takeover statute violates commerce clause); Occidental Petroleum Corp. v. Cities Serv. Co., [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 at 95,043 (W.D. Okla. 1982) (Oklahoma takeover statute violates commerce clause). In *Occidental Petroleum Corp. v. City Serv. Co.*, the United States District Court for the Western District of Oklahoma held that the Oklahoma Take Over Bid Act (Oklahoma Act) impermissibly burdened interstate commerce. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 at 94,042-43; *see* OKLA. STAT. ANN. tit. 71, §§ 431-51 (West Supp. 1982-1983) (Oklahoma Act). Occidental Petroleum had announced a nation-wide tender offer to acquire approximately 49% of the outstanding stock of City Service. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063, at 95,038. On the day that Occidental Petroleum announced an intention to make a tender offer, Occidental Petroleum filed suit seeking a declaratory judgment that the Oklahoma Act was unconstitutional. *Id.*

Like the Illinois Act, the Oklahoma Act permitted a state official to order a hearing and stop an offer from proceeding. *See* OKLA. STAT. ANN. tit. 71, § 437 (West Supp. 1982-1983); ILL. STAT. ANN. ch. 121½, § 137.57(E) (Smith-Hurd Supp. 1982-1983). The Administrator of the Oklahoma Department of Securities, however, contended that the burdens the Oklahoma Act imposed on interstate commerce were not great enough to render the Oklahoma Act unconstitutional because the Oklahoma Act permitted the Administrator to halt only the tender offer transactions between the offeror and local shareholders leaving the offer free to proceed in other states. [Current Binder] FED. SEC. L. REP. (CCH) ¶ 99,063, at 95,042; The *Occidental Petroleum* court rejected the Oklahoma Administrator's argument and held that the Oklahoma Act applied to securities transactions between offerors and shareholders

Corp. v. Bendix Corp.,[88] the Sixth Circuit held that the Michigan Takeover Offers Act (Michigan Act)[89] impermissibly burdened interstate commerce.[90] Bendix had announced a nation-wide tender offer for up to forty-eight percent of the outstanding shares of Martin-Marietta.[91] Martin-Marietta retaliated to the Bendix takeover bid by initiating a counter tender offer in a bid for control of Bendix.[92] On the day that Martin-Marietta announced the counter offer, Martin-Marietta filed suit in the United States District Court for the Eastern District of Michigan seeking declaratory and injunctive relief against the enforcement of the Michigan Act.[93] From a denial of injunctive relief, Martin-Marietta appealed to the Sixth Circuit.[94]

Like the Illinois Act, the Michigan Act permitted a state official to stop an offer from proceeding.[95] A Michigan circuit court, however, had interpreted the Michigan Act as permitting the Director of the Michigan corporations' stocks, deprived shareholders of an opportunity to sell tions between the offeror and local shareholders and that the offer was free to proceed in other states.[96] The *Martin-Marietta* court rejected the Michigan Director's contention that the Michigan circuit court's ruling limited the extraterritorial reach of the Michigan Act and therefore rendered the Michigan Act constitutional.[97] The *Martin-Marietta* court held that the Michigan law impermissibly burdened interstate securities transactions by preventing Michigan shareholders from participating in nationwide tender offers when an offeror refused to file a disclosure statement with the Michigan Corporation and Securities Bureau.[98] The *Martin-Marietta* court reasoned that the Michigan Act's effect of defeating na-

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residing in other states and that therefore the Oklahoma Act impermissibly burdened interstate commerce. *Id.* at 95,042-43. The court, however, noted that if the Oklahoma Act applied only to transactions with resident shareholders, the Act would still impermissibly burden interstate commerce because preventing Oklahoma shareholders from participating in nation-wide tender offers potentially could defeat a tender offer that required Oklahoma shares for success. *Id.* at 95,043.

[88] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, 94,212 (6th Cir. 1982).

[89] MICH. COMP. LAWS. ANN. §§ 451.901 to .917 (Supp. 1982-1983).

[90] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,217-20.

[91] *Id.* at 94,213.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 94,215.

[95] *Compare* MICH. COMP. LAWS ANN. § 451.914 (Supp. 1982-1983) (Michigan department of commerce may bring suit in state court to enjoin offeror from proceeding if appears that offeror has or will violate the Michigan Act) *with* ILL. STAT. ANN. ch. 121½, § 137.57(E) (Smith-Hurd Supp. 1982-1983) (Illinois Secretary of State may stop tender offer if offeror does not provide adequate disclosures or if takeover bid is inequitable).

[96] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,215. The Circuit Court for the County of Oakland had issued an order that limited the term "offerees" to Michigan residents. *Id.*; *see* MICH. COMP. LAWS ANN. § 451.903(1) (Supp. 1982-1983) ("offeree" means shareholder whose securities tender offeror is attempting to acquire).

[97] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822 at 94,219.

[98] *Id.* at 94,220.

tional takeover bids when an offeror needed the shares of Michigan investors to complete the takeover bid rendered the statute an unconstitutional violation of the commerce clause.[99] The court therefore enjoined the Michigan Director from enforcing the Michigan Act against Martin-Marietta.[100]

Several post-*Mite* cases have not limited analysis of a state takeover statute to whether the statute impermissibly burdens interstate commerce but have followed the *Mite* plurality's lead and examined the constitutionality of the state statute under the supremacy clause.[101] For example, in *National City Lines, Inc. v. LLC Corp.*,[102] the Eighth Circuit held that the Missouri Takeover Bid Disclosure Act (Missouri Act)[103] violated both the commerce clause and the supremacy clause.[104] National City Lines, after announcing a cash tender offer for all outstanding shares of LLC Corporation, filed suit in the United States District Court for the Western District of Missouri seeking to invalidate several provisions of the Missouri Act.[105] The district court ruled that the Williams Act preempted the Missouri statute.[106] On appeal, the Eighth Circuit noted the recent *Mite* decision and with little analysis held that the Missouri Act violated the commerce clause because the burdens that the Missouri Act imposed on interstate commerce were essentially the same as the burdens the Illinois Act imposed on interstate commerce.[107] The *National City Lines* court then examined at length whether the Williams Act preempted the Missouri Act.[108]

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[99] *Id.*; *see supra* note 87 (although Oklahoma takeover statute may apply only to tender offer transactions with local shareholder, Oklahoma Act impermissibly burdens interstate commerce).

[100] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,822, at 94,221.

[101] *See* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1128-33 (8th Cir. 1982) (Missouri takeover statute violates supremacy clause); Agency Rent-A-Car, Inc. v. Connolly, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,944-47 (1st Cir. 1982) (Massachusetts takeover statute's sanction for violating Massachusetts takeover statute is valid state regulation under supremacy clause); Bendix Corp. v. Martin-Marietta Corp., [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,821, at 94,212 (D. Md. 1982) (Maryland takeover statute violates supremacy clause).

[102] 687 F.2d 1122 (8th Cir. 1982).

[103] MO. ANN. STAT. § 409.500 to .565 (Vernon 1979).

[104] 687 F.2d at 1128-33.

[105] *Id.* at 1124. National City Lines sought to invalidate the Missouri Act's pre-commencement notice requirement, hearing provision, disclosure requirements, and substantive requirements. *See id.*; MO. ANN. STAT. §§ 409.510, 409.515.1 to .2 (Vernon 1979). LLC Corp. and the Missouri commissioner of securities conceded that the Missouri Act's pre-commencement notice requirement conflicted with SEC rule 14d-2(b) and that therefore the pre-commencement notice requirement violated the commerce clause, 687 F.2d at 1131; *see* 17 C.F.R. § 240.14d-2(b) (1982) (tender offer must commence within five days of offer's announcement); *see also infra* notes 125-35 and accompanying text (SEC rule 14d-2(b) preempts state pre-commencement notice requirements).

[106] 687 F.2d at 1125.

[107] *Id.* at 1128; *see supra* notes 39-40 and accompanying text (burdens Illinois Act imposed on interstate commerce).

[108] 687 F.2d at 1129-33.

Unlike the Illinois Act's hearing provision, under which the Secretary of State could stop inequitous tender offers, the hearing provision of the Missouri Act did not authorize a state official to determine the merits of takeover bids.[109] Instead the Missouri Act authorized the Missouri Commissioner to order a hearing only to determine whether an offeror had complied with the Missouri Act's disclosure requirements.[110] Although the *National City Lines* court acknowledged a qualitative difference between the hearing provision of the Missouri Act and the hearing provision of the Illinois Act, the court held that the differences between the two statutes were insufficient to render the Missouri statute constitutional.[111] The court noted that the Missouri Act disrupted the Williams Act's regulatory neutrality by permitting the Missouri Commissioner to delay a tender offer until the Commissioner concluded a hearing on whether the offeror would comply adequately with the Missouri Act's disclosure requirements.[112] The court concluded that the Williams Act preempts any state statute that delays the commencement or consummation of a tender offer.[113]

The *National City Lines* court also extended the *Mite* plurality's preemption holding to state disclosure requirements and timing restrictions that differ significantly from the Williams Act.[114] First, the court held that the Missouri Act's disclosure requirements violated the supremacy clause.[115] The Missouri statute required a tender offeror to disclose substantially more information than the Williams Act required an offeror to disclose.[116] The court reasoned that excessive disclosure may confuse shareholders by obscuring in a statement full of irrelevant facts the information necessary for an informed investment decision.[117] Alternatively, the court noted that Congress had delegated to the SEC the task of determining the disclosure requirements necessary to carry out

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[109] *Compare* MO. ANN. STAT. § 409.515.1(2) (Vernon 1979) (offer may not proceed if Missouri commissioner of securities orders hearing to determine whether offeror intends to make fair, full and objective disclosures) *with* ILL. ANN. STAT. ch. 121½, § 137.57(A), (E) (Smith-Hurd Supp. 1982-1983) (Illinois Secretary of State may order hearing to determine whether offer is equitable).

[110] *See* MO. ANN. STAT. § 409.515.1(2) (Vernon 1979).

[111] 687 F.2d at 1131.

[112] *Id.*; *see supra* text accompanying notes 59-60 (delay upsets Williams Act's regulatory neutrality).

[113] 687 F.2d at 1131. The *National City Lines* court stated that delays discourage tender offerors from completing takeover bids. *Id.*

[114] *See* 687 F.2d at 1131-33 (Missouri Act's disclosure requirements and substantive provisions violate supremacy clause); MO. ANN. STAT. §§ 409.510, 409.515 (Vernon 1979) (disclosure and substantive requirements).

[115] 687 F.2d at 1132; *see* MO. ANN. STAT. § 409.515 (Vernon 1979) (disclosure requirements).

[116] *See* MO. ANN. STAT. § 409.515 (Vernon 1979) (disclosure requirements); *cf. supra* note 11 (Williams Act's disclosure requirements).

[117] 687 F.2d at 1131; *see* Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1280 (5th Cir. 1978) (too much information may confuse investors), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

the Williams Act's objective of enabling shareholders to evaluate tender offers intelligently.[118] The *National City Lines* court concluded that the Missouri statute's disclosure requirements violated the supremacy clause by directly conflicting with the congressional determination of appropriate disclosure requirements and by frustrating the Williams Act's objective of enabling investors to make informed investment decisions.[119]

Second, the Missouri statute established time periods for withdrawal and pro rata purchasing rights that differed significantly from the time periods the Williams Act established.[120] The *National City Lines* court noted that an offeror's compliance with both the Williams Act and the Missouri statute was impossible.[121] Furthermore, the court stated that compliance with the Missouri Act's substantive requirements provided incumbent management with advantages that would disrupt the regulatory neutrality that Congress established to ensure the proper operation of the market approach to investor protection.[122] The *National City Lines* court concluded that the Williams Act preempted the Missouri statute's withdrawal and pro rata purchasing provisions.[123]

The *National City Lines* decision and the *Mite* plurality's preemption opinion indicate that the regulatory scheme Congress enacted to accomplish the Williams Act's objective of investor protection limits the scope of state takeover legislation that differs from the Williams Act.[124] The SEC has further limited the scope of state tender offer regulations by enacting SEC rule 14d-2(b)[125] which restricts the effectiveness of state

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[118] 687 F.2d at 1132; *see* 15 U.S.C. § 78n(d)(1) (1976) (tender offeror must disclose information required by SEC); *see also supra* note 11 (disclosures required by SEC).

[119] 687 F.2d at 1131-32; *see supra* note 16 (Congress intended to protect investors by providing investors with information necessary to informed investment decision).

[120] *Compare* MO. ANN. STAT. § 409.510(3) (Vernon 1979) (shareholder may withdraw tendered shares any time within 21 days of offer's commencement); *id.* § 409.510(4) (offeror must purchase pro rata shares tendered during entire period of offer if number of tendered shares exceeds number of shares sought); *and id.* § 409.510(2) (if offeror amends offer for any reason, deposit period must be extended at least 21 days from amendment date) *with* 15 U.S.C. § 78n(d)(6) (1976) (if number of shares tendered in first 10 days of offer exceed number of shares offeror intends to acquire, offer must purchase tendered shares pro rata); 17 C.F.R. § 240.14d-7(a)(1) (1982) (shareholder may withdraw tendered shares anytime within fifteen days of offer's commencement); and *id.* § 240.14e-1(b) (if offeror amends offer to increase offering price, offer extended ten days). *See supra* note 13 (pro rata purchasing rights and withdrawal rights).

[121] 687 F.2d at 1132.

[122] *Id.* at 1133; *see supra* notes 15-19 and accompanying text (Congress adopted market approach to investor protection by establishing scheme of regulatory neutrality).

[123] 687 F.2d at 1132; *see* Dart Indus., v. Conrad, 462 F. Supp. 1, 13 (S. D. Ind. 1978) (Williams Act preempts substantive provisions of Delaware takeover statute that regulate tender offers differently than Williams Act).

[124] *See supra* notes 55-65 and accompanying text (Williams Act preempts state takeover statutes that disrupt Williams Act's regulatory scheme); *supra* notes 114-23 and accompanying text (Williams Act preempts state takeover statutes that regulate tender offers differently than Williams Act).

[125] 17 C.F.R. § 240.14d-2(b) (1982).

pre-commencement notice requirements.[126] SEC rule 14d-2(b) requires that a tender offer commence within five days of an offer's announcement.[127] State pre-commencement notice requirements, however, generally require announcement of a tender offer twenty days before the offer commences.[128] In *Canadian Pacific Enterprises, Inc. v. Krause*,[129] the United States District Court for the Southern District of Ohio held that SEC rule 14d-2(b) preempted the Ohio takeover statute's twenty day pre-commencement notice requirement.[130] Canadian Pacific had announced a tender offer for all outstanding shares of Hobart Corporation.[131] Confronted with the impossibility of complying with both the SEC rule and the Ohio statute, Canadian Pacific filed suit to enjoin the Ohio Commissioner of Securities from enforcing the Ohio statute.[132] The *Canadian Pacific* court noted that SEC rule 14d-2(b) was a valid regulatory provision promulgated pursuant to the Williams Act.[133] The court stated that the Ohio statute directly conflicted with SEC rule 14d-2(b) because the time frames contradicted each other.[134] The *Canadian Pacific* court concluded that the Ohio statute's con-

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[126] *See id.* (tender offeror must commence or withdraw offer within 5 days of offers announcement); *see also* Kennecott Corp. v. Smith, 637 F.2d 181, 191 (3rd Cir. 1980) (reasonable likelyhood that SEC rule 14d-2(b) preempts New Jersey takeover statute's 20 day pre-commencement provision); SEC Securities Exchange Act Release No. 34-16384 (Nov. 29, 1979), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584 [hereinafter cited as SEC Release No. 34-16384] (SEC rule 14d-2(b) preempts state takeover statutes that postpone commencement of offer until end of pre-commencement waiting period or that postpone commencement until completion of hearing); *supra* note 23 (pre-commencement notice and hearing provisions).

[127] 17 C.F.R. § 240.14d-2(b) (1982). SEC rule 14d-2(a) (5) provides that a tender offer commences when the offeror first publishes or otherwise disseminates the offer's terms to the target corporation's shareholders. *Id.* § 240.14d-2(a) (5). SEC rule 14d-2(b) provides that an offeror's press release, newspaper advertisement or public statement which discloses the identity of the offeror, the identity of the target company, the amount and class of securities sought, and the offered price commences a tender offer under SEC rule 14d-2(b). *Id.* § 240.14d-2(b); *see id.* § 240.14d-2(c) (informational the SEC requires an offeror to disclose to commence tender offer). Under SEC rule 14d-2(b) (1), however, an offeror has 5 days to withdraw an offer. *Id.* § 240.14d-2(b) (1). Furthermore, if an offeror files a schedule 14D-1 disclosure statement within five days of the offer's publication, the offer commences on the date of the schedule 14D-1 statement's filing. *Id.* § 240.14d-2(b) (2); *see supra* note 13 (disclosure requirements of schedule 14D-1 statement). *See generally* Note, *The Validity of State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-*Kidwell *Federal Decisions*, 38 WASH. & LEE L. REV. 1025 (1981) [hereinafter cited as *Validity of State Tender Offer Statutes*].

[128] *See supra* note 23 (state pre-commencement notice requirements); *but see infra* note 135 (state takeover statutes that have been amended to comply with SEC rule 14d-2(b)).

[129] 506 F. Supp. 1192 (S.D. Ohio 1981).

[130] *Id.* at 1197, *See* OHIO REV. CODE ANN. § 1707.041 (Baldwin 1982) (twenty day pre-commencement notice requirement).

[131] 506 F. Supp. at 1193.

[132] *Id.* at 1194.

[133] *Id.* at 1203. The *Canadian Pacific* court held that SEC rule 14d-2(b) was a valid exercise of the SEC's rulemaking authority because the rule does not exceed the SEC's statutory authority and because the rule was not arbitrary and capricious. *Id.* at 1198-203.

[134] 506 F. Supp. at 1197. *Compare* 17 C.F.R. § 240.14d-2(b) (tender offers commence within

flict with SEC rule 14d-2(b) rendered the statute's pre-commencement filing requirement unconstitutional under the supremacy clause.[135]

Although the majority of post-*Mite* cases and SEC rule 14d-2(b) limit the permissible scope of state takeover statutes, one post-*Mite* court has affirmed the constitutionality of a state takeover statute.[136] In *Agency Rent-A-Car, Inc. v. Connolly*,[137] the First Circuit held that the Williams Act did not preempt the Massachusetts takeover statute's sanctions provision.[138] The Massachusetts statute regulated creeping tender offers by prohibiting a shareholder that owns at least five percent of a Massachusetts corporation and intends to acquire control of the corporation from making a tender offer if the offeror purchased shares of the corporation in the preceeding year and failed to disclose any intentions of acquiring control of the corporation.[139] Agency Rent-A-Car initiated a tender offer to acquire control of Spencer Companies.[140] The Massachusetts Securities Division, however, ordered Agency to discontinue the tender

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5 days of offer's announcement) *with* OHIO REV. CODE ANN. § 1707.041 (Baldwin 1982) (offeror must wait 20 days after disclosure before commencing takeover bid).

[135] 506 F. Supp. at 1197. An advance announcement that an offeror intends to make a tender offer for a corporation's securities without specifying the amount of securities the offeror will purchase or the price the offeror will pay does not commence a tender offer under SEC rule 14d-2(b). 17 C.F.R. § 240.14d-2(d) (1982). SEC rule 14d-2(b), therefore, does not preempt state pre-commencement notice provisions that limit the information an offeror must disclose to shareholders to the information specified in SEC Rule 14d-2(d). *See* NEV. REV. STAT. § 78.3771 (1981) (offeror must file twenty days before commencement of offer but need not specify amount of securities sought or offered price); *see also Validity of State Tender Offer Statutes, supra* note 127, at 1037-38 (states can bring pre-commencement notice requirements into compliance with SEC rule 14d-2(b)). Several state legislatures have eliminated the state's pre-commencement notice requirements but have conditioned an offeror's purchase of tendered shares upon the completion of the state's review process. *See, e.g.*, IND. CODE ANN. § 23-2-3.1-7(a), 23-2-3.1-8 (Burns Supp. 1981) (offeror may not purchase shares within first 20 days after offer commences); N.Y. BUS. CORP. LAW § 1602, McKinney Supp. 1982-1983) (offeror must file registration statement with New York Attorney General on date of offer's commencement); N.Y. BUS. CORP. LAW § 1604 (McKinney Supp. 1982-1983) (New York Attorney General may order hearing within 15 days after offer's commencement); Pennsylvania Securities Commission, Interpretive Opinion, May 9, 1981, *reprinted in* 2 BLUE SKY L. REP. (CCH) ¶ 48,681, at 43,651 (offer is not subject to waiting period if offer conditioned on registration becoming effective and conditioned on offeror making no purchases of tendered securities prior to effective date of registration); *see also Sargent, supra* note 47, at 708-12 (state statutes that comply with SEC Rule 14d-2(b)).

[136] *See* Agency Rent-A-Car, Inc. v. Connolly, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,947 (ist Cir. 1982) (Massachusetts takeover statute's sanctions provision for violating statute does not violate supremacy clause); *see also supra* note 28 (cases holding that state takeover statute does not violate commerce clause).

[137] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,939 (1st Cir. 1982).

[138] *Id.* at 93,947; *see* MASS. GEN. LAWS ANN. ch. 110C, § 3 (West Supp. 1982-1983) (sanction provision for violating Massachusetts takeover statute).

[139] MASS. GEN. LAWS ANN. ch. 110C, § 3 (West Supp. 1982-1983); *cf. supra* note 86 (provisions of Kentucky takeover statute, similar to provisions of Massachusetts takeover statute, held to violate supremacy clause).

[140] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,940.

offer because Agency had purchased Spencer securities in the year preceeding the takeover bid without disclosing an intent to gain control of Spencer.[141] Subsequently, Agency filed suit to enjoin the Massachusetts Securities Division from enforcing the order stopping the takeover bid.[142]

The *Agency Rent-A-Car* court noted that although the Massachusetts statute's sanction for violating the statute's disclosure requirement delayed tender offers, the delay did not tip the regulatory balance in favor of incumbent management, but instead, ensured compliance with the statute's provisions.[143] The court distinguished the *Mite* plurality's holding that delay conflicted with the Williams Act by noting that an offeror could not avoid the delays the Illinois Act imposed on tender offers because the delays were "built-in" to the timing requirements of tender offers subject to the Illinois Act.[144] The *Agency Rent-A-Car* court, however, stated that an offeror could avoid the delay caused by the Massachusetts takeover statute by complying with the disclosure requirements of the statute.[145] The court concluded that any conflict between the Massachusetts statute's sanction provision and the Williams Act was insufficient to justify preemption.[146] The court's holding, therefore, is limited to state statutes that penalize offerors for violating the provisions of the state's takeover statute.[147] The *Agency Rent-A-Car* court did not address the constitutionality of the Massachusetts statute's disclosure requirements.[148] Furthermore, the *Agency Rent-A-Car* court remanded the case to the district court for a determination of the constitutionality of the Massachusetts statute in light of the Supreme Court's commerce clause ruling in *Mite*.[149] The post-*Mite* commerce clause decisions indicate that the Massachusetts statute impermissibly burdens interstate commerce because the Massachusetts statute halts interstate securities transactions.[150]

The post-*Mite* cases concerning the constitutionality of state takeover statutes demonstrate the extent that *Mite* restricts the effectiveness of state takeover laws.[151] The Supreme Court dramatically restricted the reach of state takeover statutes by ruling that the only legitimate state interest in regulating takeover bids was to protect the interests of resi-

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[141] *Id.*

[142] *Id.*

[143] *Id.* at 93,946-47.

[144] *Id.* at 93,947.

[145] *Id.* at 93,947.

[146] *Id.*

[147] *See supra* text accompanying note 138-39 (Williams Act does not preempt sanction provision).

[148] [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,776, at 93,947.

[149] *Id.* at 93,948; *see supra* notes 36-50 and accompanying text (*Mite* Court's commerce clause holding).

[150] *See supra* note 86 (Supreme Court of Kentucky held that Kentucky statute similar to Massachusetts takeover statute impermissibly burdens interstate commerce).

[151] *See infra* text accompanying notes 152-71 (*Mite* and post-*Mite* decisions have restricted permissible scope of state takeover legislation).

dent shareholders.[152] To satisfy the requirements of *Mite*, therefore, a state's takeover statute must directly and beneficially regulate the interests of resident shareholders without imposing substantial burdens on interstate commerce.[153] Furthermore, the benefits a state takeover statute provides local investors must be real and substantial.[154] The post-*Mite* cases demonstrate the difficulty states will have in demonstrating that the state's takeover statute provides real and substantial benefits to local investors.[155] As the Fourth Circuit noted in *Telvest, Inc. v. Bradshaw*, the benefits of state legislation that duplicates the investor protection provisions of the Williams Act are too uncertain to justify the burdens a state takeover statute imposes on interstate commerce.[156] Additionally, the *Mite* Court suggested that a state takeover statute that attempts to provide local shareholders with more protection than the Williams Act provides, actually might harm investors by tipping the regulatory balance of the Williams Act toward management thereby increasing the risk that management would defeat a tender offer.[157] Consequently the benefits attributable to state takeover statutes are few because of the proposed benefits' speculative nature when the state law is either similar to or different than the investor protection provisions of the Williams Act.[158]

Even state laws providing real and substantial benefits to local investors are constitutionally suspect because of the substantial burden complying with numerous local statutes imposes on nation-wide tender offers.[159] State legislatures could lessen the offeror's burden of complying with numerous states' regulations by restricting the scope of state statutes to include only target corporations with a high percentage of resident shareholders.[160] The fact that the majority of tender offers are for diversely held corporations, however, limits the usefulness of state takeover statutes that base jurisdiction on a high percentage of local shareholders.[161] The

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[152] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2642 (1982) (state has no interest in protecting nonresident shareholders).

[153] *See supra* note 36 (*Pike v. Bruce Church* test).

[154] *See supra* text accompanying notes 44-45 (benefits of Illinois statute to local shareholders too speculative to render Illinois takeover statute constitutional).

[155] *See supra* text accompanying notes 41 (state takeover statutes provide few benefits to local investors).

[156] *See supra* text accompanying note 83 (benefits of Virginia takeover statute's creeping tender offer provisions too uncertain to render Virginia statute constitutional).

[157] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2642 (1982) (increased risk that tender offer might fail outweighs probable benefits of delays); *see also supra* note 19 (delay increases management's chances of defeating takeover bids).

[158] *See supra* text accompanying notes 44-45 (benefits of Illinois statute to local shareholders too speculative to render Illinois takeover statute constitutional).

[159] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2641 (1982) (multiple state regulation of takeovers would stifle takeover bids).

[160] *See id.* at 2642 (protecting local investors is legitimate state interest).

[161] *See* Austin, *Tender Offer Update: 1978-1979*, 15 Mergers & Acquisitions, Summer

very nature of tender offers as interstate transactions, therefore, precludes states from effectively regulating takeover bids without imposing undue burdens on interstate commerce.[162] The decision of the Sixth Circuit in *Martin-Marietta Corp. v. Bendix Corp.* illustrates the extent that seemingly local takeover legislation can burden impermissibly interstate securities transactions.[163] The *Martin-Marietta* decision demonstrates that even a state takeover statute which applies only to the part of a tender offer that an offeror directs to local shareholders imposes substantial burdens on interstate commerce by affecting the success of nation-wide tender offers that require the shares of local investors for success.[164] In light of the speculative benefits of state takeover statutes and the substantial burdens that even the most locally oriented statute imposes on interstate securities transactions, the ability of any effective state takeover statute to withstand commerce clause analysis is doubtful.[165]

The post-*Mite* cases that have examined whether a state takeover statute violates the supremacy clause have imposed further restraints on the methods state legislatures may adopt to regulate tender offers.[166] The *Mite* plurality's opinion and the *National City Lines* decision indicate that the Williams Act preempts state statutes that potentially delay the commencement or consumation of a tender offer.[167] Additionally, the *National City Lines* case illustrates the propensity of courts to hold that the Williams Act preempts state laws that regulate takeovers differently than the Williams Act.[168] SEC rule 14d-2(d)'s preemption of pre-commencement notice requirements and the rulings of the post-*Mite* cases limit the scope of permissible state regulation of tender offers to regulations similar to the provisions of the Williams Act.[169] The benefits to local shareholders of state regulations similar to the provisions of the Williams Act, however, are speculative and will not render a state takeover statute constitutional

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1928, at 24-32 (listing of corporations subjected to tender offers between 1976-1979).

[162] *See* Edgar v. Mite Corp., 102 S. Ct. 2629, 2642 (1982) (Illinois statute effects nationwide tender offers).

[163] *See supra* notes 97-99 and accompanying text (state takeover statutes that regulate only transactions between offeror and local investors burden interstate commerce).

[164] *Id.*

[165] *Id.; supra* text accompanying notes 155-58 (state takeover statutes benefit to local investors is speculative).

[166] *See supra* note 101 (post-*Mite* cases examining the constitutionality of state statutes under the supremacy clause).

[167] *See supra* notes 57-61 and accompanying text (Williams Act preempts state statutes that provide management with any undue advantage; *supra* notes 55-65 and accompanying text (Williams Act preempts state statutes that disrupt Williams Act's regulatory neutrality).

[168] *See supra* notes 114-23 and accompanying text (Williams Act preempts state takeover statutes that regulate tender offers differently than Williams Act).

[169] *See id.; supra* notes 125-35 and accompanying text (SEC rule 14d-2(b) preempts conflicting state provisions).

under the commerce clause.[170] The dual threat of the supremacy clause and the commerce clause, therefore, precludes the states from effectively regulating takeover bids.[171]

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[170] *See supra* text accompanying notes 154-55 (benefits must be real and substantial).

[171] *See supra* text accompanying notes 151-70 (state takeover statutes are unconstitutional).