



10-1981

Edgar v. Mite Corp.

Lewis F. Powell Jr.

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~~7-18~~
did you
want to ask SG?
there already
is a response.

~~Not granted~~
Issue is important
Can't say it is
unsubstantiated

Presents of we have
avoided before: whether
Williams Act preempts
State laws regulating "take-over"
bids...

Issue is important & this
is an appeal.

(I wrote Va act - I
think it was the first
state law - but I'll
not desquably

PRELIMINARY MEMORANDUM

May 1
March 6, 1981 Conference
List 1, Sheet 1

No. 80-1188

JAMES EDGAR (Secretary of State)

(see)

Appeal from CA7 (Sprecher,
Cudahy, and Dumbauld)

v

MITE CORPORATION (ET AL)

OK

Federal/Civil

Timely

SUMMARY: The appellant, Secretary of State of Illinois, contests the conclusion of the courts below that the Illinois Business Take-Over Act conflicts with the Williams Act amendments to the 1934 Securities Exchange Act. He also contests their conclusion that it violates the Commerce Clause.

~~not~~ If a cert, I would deny because of the new regulations. But it's an appeal, and it presents a substantial and interesting Q.

Paul C.

FACTS: Appellant is charged with administration and enforcement of the Illinois Business Take-Over Act. The appellees, MITE and MITE Holdings, are Delaware corporations with their principal executive offices in New Haven, Connecticut. The appellees attempted to make a cash tender offer for the shares of Chicago Rivet and Machine Company, a publicly-held Illinois corporation with its principal executive offices in Illinois, without having to comply with the Illinois Act. Pursuant to § 14(d)(1) of the Williams Act, 15 U.S.C. § 78(d)(1), they filed a Schedule 14D-1 with the SEC concerning the proposed offer. MITE's tender offer of \$28 per share for all the shares of Chicago Rivet represented a \$4 premium over the market price preceding the offer.

The same day it filed its Schedule 14D-1 with the SEC, MITE filed this suit in the district court, seeking to have the Illinois Act declared null and void on its face because it violated the Supremacy Clause and the Commerce Clause. Three days later, Chicago Rivet filed a complaint in equity in the Court of Common Pleas of Blair County, Pennsylvania, seeking to enjoin MITE from proceeding with its tender offer because MITE was purportedly in violation of the Pennsylvania Takeover Disclosure Law. Chicago Rivet alleged that MITE's tender offer was subject to the Pennsylvania Act because Chicago Rivet had its principal place of business and substantial assets in the state. The Pennsylvania court issued an ex parte order granting Chicago Rivet a temporary injunction.

On the same day that it filed its Pennsylvania action, back in the Northern District of Illinois, Chicago Rivet moved to dismiss MITE's challenge to the Illinois Act on the grounds that there was no case or controversy. The Illinois court, by consent of the parties, ordered

that neither Chicago Rivet nor the Secretary would be allowed to file any action against MITE under the Illinois Act without two days notice. It otherwise continued MITE's requests for injunctive relief regarding the Act.

The following day, MITE removed the Pennsylvania action to the United States District Court for the Northern District of Pennsylvania. It then filed its own action in that court seeking to have that state's Act declared unconstitutional. Meanwhile, the Pennsylvania Securities Commission announced that it would not proceed against MITE. This, and other setbacks in the Pennsylvania litigation, prompted Chicago Rivet and the Illinois Secretary of State to reinstitute the action under the Illinois Act.

The Secretary concluded that MITE was about to violate the Illinois Act. He notified MITE that he was about to issue a cease and desist order. Chicago Rivet notified MITE that it would file suit in Circuit Court for Cook County to restrain MITE from making the tender offer. MITE renewed its request for relief in the Illinois federal district court, and the district court judge preliminarily enjoined the state from issuing the cease and desist order. MITE then published its tender offer, which represented a \$23,000,000 transaction, in the Wall Street Journal's national edition.

DC The district court later issued its final order declaring the Act null and void because it was preempted by the Williams Act and because it created an undue burden on interstate commerce in violation of the Commerce Clause.

Three days later, pursuant to a written agreement with the Chicago Rivet Company, MITE withdrew its tender offer. That agreement provided that MITE would have until March 5, 1979, to investigate Chicago Rivet

and that it would have until March 12, 1979, to renew its offer. If it did not renew the offer by March 12, it would not at any time in the future acquire Chicago Rivet. On March 2, MITE announced it would not be renewing its offer.

HOLDING BELOW: CA7 affirmed, agreeing with both conclusions of the district court. It did not believe the case was moot because it felt that, if it reversed the district court, MITE, having made an offer, would be liable for penalty under the Illinois Act.

CA7 found that the Illinois Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v Davidowitz, 312 U.S. 52, 67. In CA7's view, the Williams Act protects investors by a "market approach" and is designed to preserve a neutral balance between incumbent management and the offeror. The Illinois Act upsets that balance. Hence, the Illinois Act is preempted by the Williams Act and violates the Supremacy Clause.

CA7 also found that Illinois' interests in protecting resident shareholders and regulating control transfers are tenuous and cannot justify the Illinois Act's effect on interstate commerce. The Illinois statute undeniably slows the process of tender offers, depressing the volume of such activity. Had the Secretary of State enjoined this transaction, over \$23 million dollars of interstate commerce would have been affected.

CONTENTIONS: The appellant argues that this case raises important issues because the great majority of states have statutes similar to the one that was invalidated here. CA7 erred in holding that the Act was preempted by the Williams Act. The Court has held that the sole purpose of that Act was to protect investors confronted with a tender offer. Congress did not bar state regulation, and the Court has noted

that § 28(a) of the Securities Exchange Act of 1934 "was plainly intended to protect, rather than to limit, state authority." Leroy v Great Western United, 443 U.S. 173, 182. The Williams Act does not contain language expressly preempting concurrent state regulation, and CA7 did not hold that the federal scheme of regulating tender offers was sufficiently pervasive to indicate a congressional intent to occupy the field. Absent explicit or implicit preemption, the validity of the Illinois Act depends upon whether it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v Davidowitz, supra. The Illinois Act does not stand as an obstacle to evenhandedness between management and the offeror; it merely provides added protection to the investor who is confronted with the offer.

On the Commerce Clause issue, the appellant argues that the Illinois Act serves legitimate local interests and does so without discriminating against interstate commerce. Chicago Rivet has very many connections with Illinois. 43% of its common stock is held by Illinois residents. Protecting investors residing in a state has long been recognized as a legitimate state objective. Hall v Geiger-Jones, 242 U.S. 539, 551. Moreover, by analogy to its authority to regulate the internal affairs of a corporation, a state may regulate tender offers consistently with the Commerce Clause.

The appellees respond that the decision below is plainly correct and that, in any case, the circumstances of this case make it briefing and argument inappropriate.

First, the decision below clearly and thoroughly discusses the merits of the constitutional questions and is consistent with the only other CA decision to address the constitutionality of a state take-over

statute. Great Western United v Kidwell, 577 F2d 1256 (CA5), reversed on venue grounds sub nom Leroy v Great Western United.

Second, there is no longer a case or controversy. MITE has withdrawn its tender offer and, by written agreement, cannot make an offer again. And, MITE would not be liable for penalties because it acted under cover of the district court's ruling.

Finally, the appellees assert that it is significant that the federal law applicable to tender offers has significantly changed subsequent to the district court opinion below. SEC Rules appearing at 17 C.F.R. § 240.14d-1 et seq (1980) effectively preempt inconsistent state statutes. A decision in this case would not reach those rules.

DISCUSSION: The question of the constitutionality of state takeover statutes is an important one. The question was before the Court in Leroy v Great Western United Corp, 443 U.S. 173; however, the Leroy Court decided that case on venue grounds and did not reach the questions of the preemption and the Commerce Clause. In Leroy, CA5 found Idaho's takeover statute unconstitutional. Here, CA7 found Illinois statute unconstitutional. A district court has upheld the Ohio takeover statute against a preemption and Commerce Clause attack similar to those presented here. AMCA International Corp v Krouse, 482 F.Supp. 929 (S.D. Ohio 1979).

There is a potential problem with regard to mootness. In my view, however, since the Secretary has indicated that he intends to continue the enforcement action against MITE if he prevails, the issues are not moot. Moreover, it is probably characteristic of this type of case that the tender offer is withdrawn during litigation. Thus, it may be that the "capable of repetition while avoiding review" exception would apply.

In light of the new SEC regulations, it would be better to note in a case that brought them before the Court. Nonetheless, this case does present important issues on the merits.

For the moment, I recommend calling for the views of the SG. With a caveat on the issue of mootness, the Court probably will find that it should note.

There is a response.

2/25/61

Sexton

Opinion in Petition

N80-1188

MITE CORPORATION

[illegible]

EDGAR

vs.

MITE CORPORATION

Brief filed by Solicitor General at the invitation of the Court.

WFB Heinder
case is moot... Tender
has been withdrawn
(SG says not moot)
PS says not moot &
then seems to be right)

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓									
Brennan, J.				✓									
Stewart, J.							✓						
White, J.				✓	or aff.								
Marshall, J.							✓						
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.							✓						

Act
jsw 11/25/81

Attack on validity of tender offer
John Hunker - & I. am inclined to agree -
that case is moot. Resp., Mite Corp.,
~~made~~ commenced (announced) a tender
offer to shareholders of Chicago River Co.

On same day Mite sued the State of
Ill (Secretary of State I Hunker) in DC, seeking
a declaration that ~~the~~ Ill Act ~~is~~ is invalid
& an injunction vs its enforcement.

The DC agreed with Mite & enjoined.

Thereafter Mite Corp. abandoned its
offer when Chicago River began a counter

BENCH MEMORANDUM

To: Mr. Justice Powell

November 25, 1981

From: John Wiley

No. 80-1188: Edgar v. Mite Corp., et al.

offer to its own shareholders. And
Mite - in a settlement - agreed
never to make another
offer for Chicago River's shares.

Only argument is mootness is that

Questions Presented
Mite might be liable for violating Ill

1. Whether a controversy is moot when the only re-
maining issue is a party's liability for past violations a state
law and that violation occurred under the protection of a lower
federal court's injunction against state prosecution.

2. Whether Illinois' tender offer statute is preempt-
ed by the Williams Act.

3. Whether Illinois' tender offer statute contravenes
the Commerce Clause.

I. Background

Resps Mite sued petr Illinois the same day--January

19, 1979--that Mite commenced a tender offer for Chicago Rivet's shares. Mite's suit sought to retrain Illinois from enforcing its tender offer statute. This ^{Ill} statute requires, inter alia, filing of a notice of tender offer with the state officials and completion of a 20-day waiting period, and contemplates the possibility that Illinois would hold hearings to adjudicate whether the offer "is inequitable or would work or tend to work a fraud . . . ." App., 54a. Ill. statute

Chicago Rivet instigated skirmishing in Pennsylvania courts. When this proved unavailing, the focus of the fight returned to Illinois. On February 1, 1979, Illinois warned Mite that it intended to serve it with a cease and desist order on February 5. The DC entered a preliminary injunction enjoining enforcement of the Illinois law on February 2. Mite published its tender offer on February 5. That same day, Chicago Rivet also commenced an offer for its own stock. The DC entered a declaratory judgment and permanent injunction against Illinois on February 9, declaring that Illinois' law both was preempted by the Williams Act and violated the Commerce Clause. DC invalidates

On February 12, Chicago Rivet and Mite agreed to withdraw their mutual tender offers. Mite was given 30 days to decide whether it would either make an unopposed offer at a stipulated higher price or refrain permanently from further efforts to acquire Chicago Rivet. Mite decided to take the latter course on March 2, 1979. On October 17, 1980, the CA7 affirmed on both preemption and Commerce Clause grounds. CA7 affirmed after

the tender offer that precipitated the suit had been withdrawn

What is interest?
commitment

II. Discussion

A. Mootness

Mite contends both in its Motion to Dismiss or Affirm and in its brief that this action is moot. Mite reasons that it did not purchase any Chicago Rivet shares before February 12. The Mite-Chicago Rivet agreement of February 12, 1979, bars Mite from future tender offers against Chicago Rivet. Therefore the only basis for continuing Mite liability is for its past violation of the Illinois Act. Since Mite was protected by the the DC's injunction against Illinois' enforcement during this period, Mite asserts that it can no longer be prosecuted due to its reliance on the DC's protection. Therefore this controversy is moot.

Analysis on this point is hampered by the fact that Illinois never answers the argument. The SG discussed the problem in note 14 of its initial amicus brief urging affirmation (but not in his full brief on the merits). His position was that "the realistic possibility of enforcement proceedings based on appellees' past conduct may be sufficient to avoid mootness in this case" (emphasis added).

Mite's contrary argument has two prongs: state and federal. The state argument asserts that no criminal liability can be imposed for action taken in reliance ^{on} ~~of~~ a federal CA opinion, as a matter of Ill law. See Mite brief at 12 n.9. This is unavailing because it does not foreclose the possibility of civil liability. Moreover, Mite relied only on the DC

opinion; the CA decision was not rendered until well after the disputed activity had ceased by agreement.

Mite's federal argument is that it would violate Due Process to subject it to state penalties for action taken in reliance on the DC's injunction against state prosecution. This argument turns on the effect to be given to the DC's injunction against state prosecution.

On one hand, Illinois could argue that Mite's reliance should have been informed by the awareness that the DC order is not unconditional. Because a federal appellate court is the final judge of the DC order, Mite's reasonable reliance thus cannot be absolutely free of risk. Mite must be charged with knowledge of the vulnerability of the DC authority upon which it relied. It therefore cannot complain of unfair surprise if this foreseeable risk--reversal of the DC on appeal--in fact comes to pass. State prosecution thus is not unfairly surprising, goes the argument, and should not violate Due Process.

On the other hand, it can be argued this argument accords insufficient authority to DC orders. Mite could say that, if it were willing to act with risk of prosecution, it could have proceeded to violate state law and raised its federal claims as defenses to that state prosecution. The entire function of declaratory judgment and injunction proceedings--when permitted¹--is to eliminate that risk of prosecution.

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¹Federal injunctions against state prosecutions raise Younger v. Harris concerns. Illinois has made no abstention claims, al-

Footnote continued on next page.

Mite acted as swiftly as it could have to obtain the injunction

though it appears it would have had at least an arguable case for Younger abstention. The Illinois law is backed by both criminal and civil penalties. See App., 60a-62a. The Younger abstention doctrine applies to both sorts of prosecutions. See, e.g., Juidice v. Vail, 430 U. S. 327 (1977). It appears that Mite would have an opportunity to raise its federal defenses in state proceedings; the Illinois statute authorizes remedies to be imposed by state courts and there has been no showing that Illinois procedural law would bar assertion of federal defenses. See Moore v. Sims, 442 U. S. 415, 432 (1979). Although the timing of this situation would demand an expedited decision, that would be true in federal court as well. Finally, it is doubtful that Mite would be able to claim, by virtue of bad faith state prosecution or a flagrantly unconstitutional statute, see id. at 424, that this case should be treated as an exception to Younger's usual policy.

There are three reasons, however, why Younger probably should have no relevance to this case. First, it is not clear that Illinois' interest in enforcing its tender offer law is so strong as to resemble "vital concerns [such] as enforcement of contempt proceedings . . . or the vindication of 'important state policies such as safeguarding the fiscal integrity of [public assistance] programs' . . . ." Moore v. Sims, 442 U. S. at 423; see also id. at n.8.

Second, it is likewise not clear whether the state administrative proceedings were sufficiently advanced or of such a character as to call Younger's policies into play. Here the federal complaint had been filed prior to any Illinois administrative proceedings. The DC adjourned its proceedings on the order that neither Chicago Rivet nor Illinois initiate action against Mite without two days notice to Mite and the DC. On February 1, the Illinois Secretary of State issued a cease and desist order against Mite's tender offer and notified that it would serve this order on Mite on February 5. The DC enjoined the Illinois enforcement on February 2. Compare Hicks v. Miranda, 422 U. S. 332, 349 (1975) ("where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger v. Harris should apply with full force") (emphasis added), with Doran v. Salem Inn, Inc., 422 U. S. 922, 930 (1975) (plaintiff may challenge the constitutionality of a state statute in federal court in the absence of "an on-going state criminal proceeding," even though state criminal prosecution is imminent).

Third, and most importantly, Illinois has raised no Younger claim. Younger is a federal rule of comity. Although I have found no authority for this proposition, it seems most rea-

Footnote continued on next page.

against state prosecution. Once it won this relief, it could not, as the winning party, appeal for further certainty. That task was then Illinois'. Had Illinois wished to preserve its right to prosecute in the face of imminent Mite behavior authorized by the DC, Illinois should have sought both to have the DC's order stayed pending review as well as expedited appeal. Since it did neither, this argument would conclude, Illinois has forfeit its right to prosecute.

The latter reasoning makes the most sense to me. Any other position will remove the authority an unappealed and unstayed DC injunction should carry as a means of enforcing federal decisions. Despite the fact that Mite has been able to find only one old CA opinion to support its position directly, see United States v. Mancuso, 139 F.2d 90, 92 (CA3 1943), I think this is the better view.

On this logic, the threat of mootness is real. It is circumvented only if this case falls within the "capable of repetition yet evading review" category. But this category requires that "there [is] a reasonable expectation that the same complaining party would be subject to the same action

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sonable that such a federalism concern can be deemed waived when the State--the party that the doctrine seeks to protect--does not invoke it. Because Illinois continues its failure to mention the point, I think the Court should just ignore this issue--unless some end not now apparent to me would be served by its utilization. Complete omission of reference to Younger will have very little, if any, precedential weight.

Munsingwear
again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam) (emphasis added). In this case, the Chicago Rivet/Mite agreement bars Mite from attempting another tender offer against Chicago Rivet. And no party even alleges that there is a "reasonable expectation" that Mite will make tender offers for other Illinois companies.

I conclude the case is moot. "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." United States v. Munsingwear, 340 U. S. 36, 39 (1950).

*John
Munsingwear
case is
moot.*

B. Preemption

Assuming that the case is not moot, the first issue on the merits is whether the federal Williams Act preempts the Illinois statute. The parties agree that the relevant test is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act.² Hines v. Davidowitz, 312 U. S. 52, 67 (1941). See Petr brief at 15; Resp brief at

²This preemption test also is codified in the federal Act: "Nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. §78bb(a).

30; SG brief at 5. Mite and the SG contend that three features of the Illinois law are objectionable: (1) its provision for state hearings of potentially unlimited duration; (2) its pre-commencement notification requirement; and (3) its authorization of a decision regarding the substantive "equity" of the proposed offer. I think they have a strong argument on each point.

SG's objection

1. State hearings

The Illinois law does require that hearings be held upon the request of the Secretary of State; a majority of the target's outside directors; or Illinois residents holding 10% of the target shares. See §137.57(A), App., 53a. The hearings are to commence with 10 days of the request unless the date is extended "for the protection of the offerees in this State." App., at 53a-54a. "[T]he take-over shall not become registered until so declared by order of the Secretary," id. at 53a, and the Secretary shall make a determination "within 15 business days after the conclusion of the hearing, unless such time is extended by order of the Secretary . . . ." Id. at 54a. The Illinois Act consequently provides for an administrative mechanism that probably can be invoked at the behest of incumbent management and that, on its face, offers no assurance of swift completion.

9th provision for hearing

In enacting the Williams Act, the Court has noted that in "Congress expressly disclaimed an intention to provide a

weapon for management to discourage takeover bids . . . . Indeed, the Act's draftmen commented on the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. [citing Senate and House reports]" Rondeau v. Mosinee Paper Co., 422 U. S. 49, 58-59 (1975). In short, the Williams Act seeks to maintain a neutrality in affecting the outcome of takeover bids.

There seems to be little doubt that forcing delay is a known weapon in tender offer battles. This understanding is confirmed by the portion of the Hart-Scott-Rodino Antitrust Improvements Act's legislative history that the SG quotes at 10-11 of his brief:

[I]t is clear that this short [ten-day] waiting period was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act--to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success.

This legislative history establishes a fact that can be verified in professional commentary: delay is a tender offer tool typically used only by incumbent management in tender offer defense. See, e.g., Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1278 n. 49 (CA5 1978) (citing authorities). Although there is much debate about whether delaying tender offers does or does not benefit consumers, see, e.g.,

*Of course
- but
"tender
offers"
are
not
inevitably
good.*

*many are
not pro-
competitive*

*? R usually
benefits
stockholders
- not
consumers*

App., 20a-21a, it does seem clear that delay tends to benefit incumbents and hurt offerors. On this basis, the Illinois statute stands as an obstacle to the achievement of federal policy: neutrality in tender offer fights. Illinois has no convincing reply to this point. See petr brief at 20-21. I conclude the Williams' Act is preemptive on this point.

*But in the 10 day period
"neutral"*

2. Pre-commencement notification

Illinois' tender offer law specifies that it is unlawful "for any person to make a take-over offer unless the take-over offer is registered under this Act . . . ." §137.54(A), App., 49a. "A take-over offer shall become registered 20 business days after the filing of the registration statement . . . ." §137.54(E), App., 52a. The statute thus requires that offerors make their detailed disclosures well before they are actually permitted to make their tender offers.³

The SG argues that Congress has considered such a pre-commencement notification provision on six different occasions, but has refused to enact such a measure due to the imbalance it would create in tender offer fights. His most persuasive legislative history is found at 15. There he quotes a vice presi-

³The SEC subsequently promulgated federal regulations that would prohibit state pre-commencement notification provisions. See SG brief at 5-6 n.5. The SEC's authority so to act is disputed. See amicus brief of Virginia at 3-5. In any event, these regulations by their timing do not apply to this suit.

dent of the New York Stock Exchange stating that disclosure of the offer price in advance of the offer will tend to drive the stock price toward that level. This will hamper the offeror's purchase efforts; either the offeror will have to raise its price or will suffer the loss of the offer premium that was calculated to induce sales. The SG's argument thus is similar to the hearing delay provisions: that the Illinois provision puts a finger on the tender offer scale (in favor of incumbents), while the federal policy is to maintain neutrality.

I find this contention persuasive in view of Illinois' weak rebuttal. Illinois simply cites to DeCanas v. Bica, 424 U. S. 351, 360 (1976), for the proposition that congressional rejection of a provision does not mean states are precluded from adopting similar provisions. Illinois brief at 19. "Indeed, Congress' failure to enact such general sanctions reinforces the inference that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter." 424 U. S., at 360 n.9. No doubt this is a logical inference to draw for some types of provisions in the absence of explicit legislative history. But the explicit legislative history language and repeated congressional rejections convince me that the SG has the better side of this debate. Therefore I think the Illinois pre-commencement notification provision also is preempted.

3. Review of substantive fairness

The final aspect of the Illinois statute is its provision that the Secretary may deny the tender offer's registration. He is authorized to do this, inter alia, if he finds "that the take-over offer is inequitable, or would tend to work a fraud or deceit upon the offerees . . . ." §137.57(E), App., 54a (emphasis added). The Williams Act's purpose, however, is "to make the relevant facts known so that the shareholders have a fair opportunity to make their decision." SG brief at 12-13 (quoting House and Senate reports) (emphasis added). This contrast between a "regulatory" and a "market" approach to protecting investors is, I believe, the plainest federal/state conflict in this case and the most likely candidate for preemption. (Illinois' argument that its law does not authorize the Secretary to make substantive judgment about the fairness of an offer is contrary to the words of the statute and is otherwise unsupported. See Illinois brief at 21-22 & n.8.)

My conclusion therefore is that the Williams Act pre-empts all three objectionable portions of the Illinois statute. The Court need not rule on the possible preemption of the remainder of the Act; these three sections are the only ones Mite and the SG attack. By the same token, this holding would be sufficient to affirm the CA7. The Commerce Clause issue--which I turn to next--would be at most an alternative route to the same result.

C. Commerce Clause

The Commerce Clause is always difficult, in large measure due to the ad hoc nature of the law in this area. As you wrote in Raymond Motor Transport, Inc. v. Rice, in these regions "experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case." 434 U. S. 429, 441 (1978). The most widely accepted generalization seems to be Justice Stewart's from Pike v. Bruce Church, Inc., 397 U. S. 137, 142 (1970). There he wrote:

Where the statute regulates [1] evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld [2] unless the burden imposed is clearly excessive in relationship to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. [Emphasis added.]

This statement is most usefully broken down into a two-part test for this case: (1) Is the Illinois Act parochial or evenhanded regulation? As your opinion in Kassle v. Consolidated Freightways Corp., 101 S.Ct. 1309 (1981) shows, this Court is willing to scrutinize local justifications very closely if it suspects that regulation is not being imposed on an evenhanded basis. (2) If evenhanded, does the regulation nevertheless have an excessive impact on interstate commerce in comparison to the weight of the local interests thereby served? I organize my discussion around these two inquiries

1. Parochial or evenhanded regulation?

This choice of characterization turns on whether the Illinois act primarily is viewed as a effort to guard its resident consumers (of securities) against potential failings in the securities market (such as fraud or imperfect information), or as an attempt to shield the incumbent management of its resident corporations from the threat of acquisition in the national market for subsidiaries. The former is the type of welfare regulation generally sustained under Commerce Clause attack. See, e.g., Breard v. Alexandria, 341 U. S. 622 (1951) (upholding municipal privacy ordinance that banned unconsented door-to-door solicitations by in- and out-of-state salesmen); California v. Thompson, 313 U. S. 109 (1941) (upholding state licensing of ticket agents selling inter- and intrastate tours, as a means of limiting fraud). The latter seems the type of economic favoritism aimed at insulating local from national markets that has proved vulnerable to Commerce Clause challenge. See, e.g., Baldwin v. Seelig, 294 U. S. 511 (1935) (invalidating state effort to protect local dairy farmers from lower priced out-of-state competition).

On one hand, the Illinois Act does protect local economic interests from competition in the national marketplace to some extent. As the previous section explained, the Act's three objectionable provisions can make it harder for a national buyer searching for a subsidiary to purchase those corporations subject to the act--which are only corporations with a

close nexus with Illinois.⁴ In this sense, the Illinois Act to a degree protects Illinois management from national competitors who believe that they could manage more efficiently. The Illinois Act consequently does have a parochial element.

This element, however, has at most a marginal effect. Although delay may tend to favor incumbents, the Act's provision's do not purport--and in all likelihood do not act--to ban completely all acquisitions of Illinois-related corporations. The impediments to purchase are more subtle. This marginal effect may be sufficiently upsetting in the preemption context--where the test is whether federal statutory objectives are obstructed. But the marginality of this effect militates against characterizing the Illinois Act as wholly parochial legislation.

Similarly, the impediments are imposed across the board; there is no more favorable treatment of Illinois-related purchasers. In addition, the Illinois Act has a "comity" provision specifying that the Act does not apply if the Illinois Secretary of State determines that other jurisdictions have regulations that "afford protection to securityholders located

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⁴"Target companies" that can invoke the Illinois Act's protection must

1. have 10% of security holders located in Illinois, or
2. satisfy two of the following three conditions:
  - a. principle executive office in Illinois;
  - b. organized under Illinois law; or
  - c. at 10% of capital "represented in" Illinois.

in this State substantially equal to that afforded . . . by this Act." §137.53, App., 49a (emphasis added). Although this evidence of consumer protection is ambiguous (as it could be said that "protection to securityholders" is simply a euphemism referring to comparable provisions that obstruct tender offers), its language does point to a concern with consumer, rather than incumbent management, protection.

Finally and most importantly, Illinois does advance consumer protection arguments for its regulation. See Illinois brief at 25. Unlike Iowa's safety arguments in Kassel (and Wisconsin's safety assertions in Raymond Motor), Illinois' consumer protection arguments must be credited with some weight. After all, the federal government has seen fit to impose generally similar regulations via the Williams Act. Given this tenable characterization of welfare/consumer protection regulation, I think the Illinois act probably should survive the first prong of this two part Commerce Clause test.

2. Excessive impact on interstate commerce
compared to strength of the local justification?

Illinois' law clearly applies to a large volume of interstate commerce. The facts of this case illustrate that some \$23 million in interstate security purchases were at issue. Although the Illinois Act does not by its terms prevent such commerce, it does regulate it. This regulation has an impact on interstate commerce. Two features of this impact are

important.

The first is the magnitude of the impact. As previously explained, the primary effect is delay--with the potential that the Illinois Secretary of State will declare the tender offer invalid as "inequitable." See pages 10-11 supra. (Neither the CA7, Mite, nor the SG have complained about the additional disclosure requirements imposed by the Illinois act. I therefore disregard these.) The magnitude of the impact is hard to pinpoint. The statute provides for potentially unlimited delay but has corresponding exceptions that permit the Secretary, in his discretion, to limit or accelerate the process. But the minimum typical case would appear to involve a 15 business day period from the time of the offeror's notice of offer, see §137.57 (A), App., 53a, a 10 business day period from the time of request to the time of hearing, see §137.57(C), App., 53a, and (assuming a one-day hearing--a completely speculative assumption), a 15 business day from the conclusion of the hearing until the Secretary's determination. See §137.57(D), App. 54a. This totals up to at least 40 business days--as compared with the Williams Act's 10 day period. Given the pace of modern tender offers, a delay of 40 business days must, I think, be counted as significant.

40 days
vs
10 days

The second aspect of the Act's impact on commerce is its geographic scope. As the SG and Mite take pains to point out, the Illinois Act purports to have a global effect. The Secretary, by his decision to hold hearing or prevent registra-

tion, blocks the offeror's tender offer to security holders wherever they are located. In this instance, Mite--a Delaware corporation with offices in Connecticut--offered to buy Chicago Rivet shares from its shareholders, 73% of whom reside located outside of Illinois. (Fifty six percent of Chicago Rivet's total number of shares are held outside of Illinois.) App., 33a. There is nothing in the Illinois Act that requires that any of the shareholders reside in Illinois, because the applicability of the act is premised solely on the target company's connection with Illinois. See note 2 supra.⁵ I therefore conclude that both the magnitude and the geographic scope of the Illinois Act's impact on interstate commerce are quite significant.

Against these factors must be balanced the justifications that Illinois asserts for its statute. These are two. The first is the protection of Illinois investors. Petr brief at 25. Illinois argues that its protection supplements the Williams Act in an important way and that this interest should be entitled to deference.

Noramlly such an argument would be entitled to consid-

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⁵One way to analyze this case would be on an "as applied" basis, taking into account the number of shareholders actually located in Illinois in each case. This case--where about 30% of the shareholders reside in Illinois--then would be distinguished from cases in which no--or all--shareholders resided in the state. This factor presumably will become increasingly important as the balancing between commercial impact and local regulatory justification becomes closer.

erable weight, I think. But in this context I believe the conclusion developed in the earlier preemption analysis is relevant--viz., that Congress has considered more extensive tender offer regulation but has rejected this alternative in favor of neutrality between offerors and target incumbents. See pages 8-9 supra. This is equivalent to saying that the benefits of added regulations--like Illinois'--are outweighed by the resulting burdens on interstate commerce. These burdens are mainly those resulting from the insulation of inefficient Illinois managers from the efficiency-maximizing force of exposure to the national tender offer market. If you were persuaded by the legislative history analysis in the preemption discussion, this should have implications here for the weight to be attached to Illinois' asserted regulatory justification.

This suggested deference to a congressional judgment does, of course, have the potential of mixing the preemption and the Commerce Clause analyses to a degree. Perhaps this is an argument for deciding the case only on the preemption ground. But I have trouble seeing why such a national legislative weighing is not relevant in this Commerce Clause context. After all, Commerce Clause judgments from this Court are always subject to congressional revision. It is not clear why national legislative judgments should be able to excuse, but not strengthen, this Court's finding that a state action intrudes to an impermissible degree on the national marketplace.

If you decide this congressional judgment is not rele-

vant (or not clear), however, the balancing in this case is more difficult. Although I am less sure of this conclusion, I tend to think the Illinois law still should be invalid. The national market of efficient management seeking subsidiary acquisitions is an important one. The Illinois law blocks this market to a considerable--and potentially unlimited--degree. The majority of the shareholders that Illinois claims to protect do not live in Illinois. None need any, according to its law. While state efforts with more tightly circumscribed timelines and with closer mandatory connections with the State's investor population probably would pass muster, I think that Illinois' effort reaches too far in this case.

Illinois' second justification for its statute is its traditional power to regulate the "internal affairs" of Illinois corporations. I have a difficult time separating this justification from the first--protection of Illinois investors. Illinois analogizes its law to a "de facto proxy solicitation." Petr brief at 26. I do not understand how this is different than regulation undertaken for the protection of Illinois investors. Whether traditional or not, it seems to me the proper way to calculate the weight of this regulatory interest is according to the analysis in the preceeding paragraphs. I therefore conclude that the Illinois law's substantial impact on interstate commerce outweighs the local regulatory justification that Illinois asserts.

III. Conclusion

This case probably is moot. The DC's injunction preventing Illinois' prosecution of its law--so long as Illinois failed to obtain a stay or an appellate reversal of the order--should be held to immunize Mite from contemporaneous or subsequent state prosecution. Because the DC order should protect Mite in this regard, the parties no longer have a live dispute. The decisions below should be vacated with instruction to dismiss the complaint as moot. } *Moot*

If the case is not moot, then Mite should win an affirmation on preemption grounds. The Williams Act embodies policies both of neutrality between the contestants in tender offer battles and of sovereignty of investor (as opposed to agency) investment decision. Yet the Illinois act's provisions advantage incumbent management and lessen investor sovereignty to a degree. They do this by providing for significant delay, for required pre-commencement notification, and for the possibility of state agency review of the substantive fairness of the proposed tender offer. These provisions should be preempted because they obstruct achievement of the federal policies of the Williams Act. ?

Although the Court need not reach this alternative ground for affirming the CA7, I believe that Mite also has a winning argument on the Commerce Clause--although this reasoning is less certain because of the analytical vagaries in this field. But by my estimation, the Illinois statute has an un-

justifiably great impact on interstate commerce. The Act applies to a substantial volume of interstate commerce. It affects this time-sensitive commerce by delaying it on a global basis. This significant impediment on interstate commerce outweighs Illinois' proffered justifications, which reduce to the single value of investor protection. Normally this value would be entitled to substantial weight. But, in this instance, we have a congressional judgment that such additional regulation is not very important. If deference is given to this judgment--which seems appropriate--Illinois' justification should be found to be outweighed by its statute's interstate commercial impact. If this judgment is not given weight, the question is closer. I still come down, however, on the side of Commerce Clause invalidity.

Ill Take Over Act

Grimmer (Ant AB - 2LL)

Purpose of Wms Act - protect investors.
§ 8 S/State finds offer "inequitable".
- but this is not construed to allow
S/St. to make substantive judgment
that offer is unsuccessfull. This
is prerogative of the shareholder

Not "Moot"

7.
Sec Act provides for penalties
that might be imposed

(There is a flat injunction by DC.
~~Disallowed~~ forbidding State
from ~~enforcing~~ interfering with
a tender offer)

The injunction itself applies
only to Wmte Corp, but the ~~offer~~
holding of invalidity affects
enforcement of statute in other
cases.

CA 7 held not "moot"

Berman (Cent AG of N.Y.)

Amicus counsel.

State has imp. interest - protection of shareholders in N.Y.

44 filings under amended N.Y. statute.

See Brief for experience of N.Y.

Hulbert (Aspeller)

State law may control matters relating to internal affairs of a corp - e.g. merger laws

W Act applies to corp organized in other states & with principal office also in other states

In this
protective
of share-
holders?

Under Wm Act, offer can be made in one week. (Too short a period!)

Several states & SEC may be regulating the same transaction

Shapiro (S.G.)

Ill statute affects commerce
throughout the country - so long as
there are enough contacts in Ill..

JPS asked if Ill amended statute
to apply only to Ill shareholders. Shapiro
said there would be OK under Commerce Clause
but not under Supremacy Clause.

Ill Act burdens both buyers & sellers.

To be successful, tender offer
depend on "speed & surprise"

Rule 14b - allows announcement &
commencement of offer simultaneously

Under Ill Law, the offeror may
make a counter offer free of any
regulation.

Gruver (Reply)

Ill Act applies to solicitation
material by Target Corp

Supreme Court of the United States

Memorandum

9ll law:

1. Offer must be registered with Sec. of State.

Full disclosure

Not effective for 20 days.

2. 5/State, majority of officer directors, or 10% of 9ll shareholders may require Hearing - must commence in 10 days

3. 5/State may deny registration if found unequitable.

Supreme Court of the United States

Memorandum

1. Tender offers are
not invariably beneficial
- except perhaps in
short term.

2. Many also are
not pro-competitive

3. How does "delay"
hurt offerors?

E.g. Conoco

Marathon

Except by bringing in
other offerors - good
for shareholders

The Chief Justice "Take-over/tender-offer
Could hold case moot.

When Act preempts - need not
reach Commerce Clause issue - if we
reach merits

Justice Brennan Moot in first vote. Affirm is secured.

Nothing to argument that Mite Corp may
be subject to ~~ex~~ criminal penalty. We should
say so.

If we reach merits, agree with C & that
there is preemption. Also agree with CAT on

The Courts below were Commerce clause.
not clear as to whether
entire state act is preempted in
its entirety.

Justice White Not moot. Affirm

We should not decide that no criminal
penalty may be imposed. The injunction
may ~~to~~ well preclude a penalty, but if we
decide case here, case will be moot.

I'll may try to prosecute. We
can't predict what I'll will do.

Justice Marshall

Moot - or affirm

Justice Blackmun

Moot

We should hold - as W & B would

Justice Powell

May be moot, but I'm inclined to go along with B & W.

If we reach merits, I'd aff. on presumption

I agree the DC's injunction should bar criminal penalty, but ~~we~~ should we - rather than I - make this judgment.

Justice Rehnquist

Clearly moot!

BRW & LFP are acting like a
"Board of Director".

No Art III jurisdiction.

Justice Stevens

Appeal

Whether the injunction bars further
action is for Ill - not us to decide.

An injunction is not an immunity bath.

Not moot because if we were to
reverse, the Co could face penalties
under state law. Mootness issue
must be determined ~~at~~ at outset on
theory a case may be reviewed.

Justice O'Connor

Tentatively Moot.

New SEC Rules are important, & our
decision may not be ~~so~~ helpful.

On merits, app. on Commerce Clause.

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 2, 1982

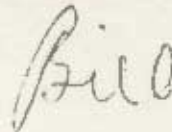


RE: No. 80-1188 Edgar v. Mite Corporation

Dear Thurgood:

I agree.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



February 3, 1982

Re: No. 80-1188 Edgar v. Mite Corporation

Dear Thurgood:

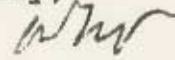
While I agree generally with your circulating draft opinion in this case, I have some difficulty reconciling the last four sentences before the Roman numeral on page 11 with Weinstein v. Bradford, 423 U.S. 147, which you cite on page 10, and with Lewis' treatment of that case in his presently circulating draft opinion in Murphy v. Hunt, No. 80-2165. Up until the sentence beginning on the fifth line on page 11 of your draft, "Nor is there any risk that the question whether the Illinois Act is constitutional will always escape review by this Court, even in cases involving other corporations", I get the impression that you are following Weinstein v. Bradford that there must be a probability that this particular plaintiff will continue to have a controversy with this particular defendant in order to come within the "capable of repetition, yet evading review" exception to the mootness principle. But beginning with the sentence just referred to, I think that sentence and the several that come after it could be read as expanding the exception to cover situations where there is no probability that these particular parties will again litigate, but where the question at issue might nonetheless continue to "escape review".

I, for one, have great reservations about such an expansion of the "capable of repetition, yet evading review" exception to the mootness principle. I think it is demonstrably contrary to Weinstein v. Bradford, *supra*, and if interpreted as I suggest would require a different result in Lewis' circulation in Murphy v. Hunt. If you mean no more than to make a practical observation, without broadening the exception, the idea may be unexceptionable,

I do not interpret the language to which WTR refers as anything more than a "practical observation." Therefore it does not concern me as threatening an expansion of Weinstein v. Bradford. Nonetheless, unless TM does seek such an expansion, we should be willing to accommodate WTR's suggested clarification. This clarification could only benefit the opinion. Therefore, I would not join until TM accommodates WTR's jo

but if this is the case I do think some of the language should be changed to make it clear that this is what is being done.

Sincerely,

A handwritten signature in dark ink, appearing to be 'J. Marshall', written in a cursive style.

Justice Marshall

Copies to the Conference

Talk to John about inf.
on Take-over Bids

Studies

Articles

Leg. pending.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

February 4, 1982

Re: 80-1188 - Edgar v. Mite

Dear Thurgood:

Your novel holding that a federal court has the power to grant immunity from enforcement of a state law even if the state law is valid is one that I cannot accept. In due course, I shall be writing in dissent.

Respectfully,

John Paul Stevens

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 8, 1982



Re: 80-1188 - Edgar v. Mite Corporation
and Mite Holdings, Inc.

Dear Thurgood,

I shall await John's dissent.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

[RE FEB 12, 1982]

TM's clerk says they
have no problem at all with
the "would/might" change on page 12.
I would join in a letter making this
suggestion. jw

pp. 8-12

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

From: Justice Marshall

Circulated: _____

Recirculated: _____ FEB 12 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1188

JAMES EDGAR, APPELLANT v. MITE CORPORATION
AND MITE HOLDINGS, INC.

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

[February —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case arises out of an attempt by appellees, Mite Corporation and Mite Holdings, Inc. (referred to collectively as Mite), to make a cash tender offer for another corporation, Chicago Rivet & Machine Co. Before making the offer, appellees sought to enjoin the Secretary of State of Illinois from enforcing the Illinois Business Take-Over Act (Illinois Act), Ill. Rev. Stat., ch. 121 1/2, § 137.51 *et seq.* (Cum. Supp. 1980). The Illinois Act regulates purchases of stock in corporations having substantial connections with Illinois. The United States District Court for the Northern District of Illinois granted injunctive relief, holding that the Illinois Act is preempted by the Williams Act amendments to the Securities Exchange Act of 1934, 15 U. S. C. §§ 78m(d)-(e), 78n(d)-(f), and imposes an impermissible burden on interstate commerce in violation of the Commerce Clause. App. to Juris. Statement (J.S. App.) 32a-41a. The United States Court of Appeals for the Seventh Circuit affirmed. *Mite Corp. v. Dixon*, 633 F. 2d 486 (1980). We noted probable jurisdiction. — U. S. — (1981). Because we conclude that the case is moot, we now vacate the judgment of the Court of Appeals. The Court of Appeals should remand the case to the District Court with instructions to dismiss.

I think TM's new language will satisfy WHR. I would want to ensure that WHR is satisfied and then join.
ju

I

Appellees are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Mite Holdings, Inc., is a wholly-owned subsidiary of Mite Corporation. Chicago Rivet & Machine Co. (Chicago Rivet), the target of Mite's takeover bid, was a defendant in the District Court, but did not participate in the proceedings in the Court of Appeals, and is not a party here. Chicago Rivet is organized under the laws of Illinois. Although its principal executive offices are located in that state, its principal place of business is in Pennsylvania.

Appellant James Edgar is the Secretary of State of Illinois, and is charged with the administration and enforcement of the Illinois Act.¹ Under the Act, any takeover offer for a target corporation that has substantial connection with Illinois must be registered with the Secretary of State.² An offer becomes registered 20 business days after the person planning to make the offer files a registration statement with

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¹ When this litigation began, Alan C. Dixon was the Secretary of State of Illinois.

² Under the Illinois Act, a take-over offer is defined as:

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

Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 (Cum. Supp. 1980).

A target company is defined as:

"a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a take-over offer is held of record by securityholders located in this State . . . , or (2) which meets any two of the following conditions:

- (a) has its principal executive office in this State;
- (b) is organized under the laws of this State;
- (c) has at least 10% of its stated capital and paid-in surplus represented in this State."

Ill. Rev. Stat., ch. 121 1/2, § 137.52-10 (Cum. Supp. 1980).

the Secretary. Ill. Rev. Stat., ch. 121 1/2, § 137.54(E) (Cum. Supp. 1980). During this 20 day period, the Secretary may call a hearing when he believes that it is necessary to protect the stockholders of the target company.³ If the Secretary does conduct a hearing and concludes that the take-over offer fails to provide full and fair disclosure to the target company stockholders, or that it is otherwise inequitable, he may deny the registration of the offer, or condition its registration upon certain modifications. Ill. Rev. Stat., ch. 121 1/2, § 137.57 (Cum. Supp. 1980). The Secretary may issue cease and desist orders and seek injunctions restraining violations of the Act. In addition, he may file an action for civil remedies and penalties. Private parties may request injunctive relief and civil remedies. Willful violations of the Act are subject to criminal prosecution. Ill. Rev. Stat. ch. 121 1/2, §§ 137.60, 137.62-137.65 (Cum. Supp. 1980).

The takeover battle began on January 19, 1979, when Mite filed a Schedule 14D-1 with the Securities and Exchange Commission, as required by § 14(d)(1) of the Williams Act, 15 U. S. C. § 78(n)(d)(1). In its filing, Mite stated that it wished to make a cash tender offer for any and all shares of Chicago Rivet common stock. It proposed to pay \$28.00 per share, which at that time represented a premium of approximately 15% over the market price. On the same day, Mite commenced this litigation in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. Mite also asked for a temporary restraining order, and preliminary and permanent injunctive relief prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded by initiating litigation in Pennsylvania, where it conducted most of its business. It sought to enjoin Mite from proceeding with its proposed cash tender

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³ The directors or stockholders of the target company may also request such a hearing. Ill. Rev. Stat., ch. 121 1/2, § 137.57 (Cum. Supp. 1980).

offer on the ground that Mite's offer violated the Pennsylvania Takeover Disclosure Law. 70 Pa. Stat. Ann., Title 70, § 711.19 (Purdon Supp. 1978).⁴ At the same time, Chicago Rivet informed the District Court for the Northern District of Illinois that it was seeking relief in Pennsylvania, and that it had no present intention of invoking the Illinois Act. The Illinois Secretary of State told the District Court that it had not yet decided whether Mite's offer should be exempt from the Illinois Act.⁵ Relying on these representations, the District Court adjourned proceedings on Mite's motion for a temporary restraining order and preliminary injunctive relief.

Chicago Rivet's efforts to obtain relief in Pennsylvania proved unsuccessful.⁶ As a result, both Chicago Rivet and the Illinois Secretary of State took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified Mite of his intention to serve an order requiring Mite to

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⁴Chicago Rivet filed an action in the Court of Common Pleas of Blair County, Pa. It alleged that the Pennsylvania Takeover Disclosure Law (Pennsylvania Act) applied to the tender offer because its principal place of business was in Pennsylvania. Chicago Rivet also filed a complaint with the Pennsylvania Securities Commission, requesting the Commission to enforce the Pennsylvania Act against Mite. On January 23, 1979, Mite removed the Pennsylvania state court action to the United States District Court for the Western District of Pennsylvania. It also filed a complaint seeking a declaratory judgment that the Pennsylvania Act was unconstitutional, and an injunction prohibiting Chicago Rivet and the Pennsylvania Securities Commission from enforcing the Act against Mite.

⁵The Illinois Act provides that the filing requirement does not apply where the Secretary has determined that another jurisdiction has statutes or rules which "are being applied and which afford protection to securityholders located in [Illinois] substantially equal to that afforded such securityholders by this Act." Ill. Rev. Stat., ch. 121 1/2, § 137.53 (Cum. Supp. 1980).

⁶On January 31, 1979, the Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order. See n. 4, *supra*.

"cease and desist all further action to make a tender offer." J.S. App. 36a. Chicago Rivet informed Mite that it would file suit in Illinois state court to enjoin the proposed offer. Mite immediately renewed its request for injunctive relief in the District Court for the Northern District of Illinois. On February 2, the District Court issued a preliminary injunction restraining Dixon from enforcing the Illinois Act against Mite's tender offer for Chicago Rivet. Record 16.⁷ It determined that the Illinois Act was probably unconstitutional, and that Mite would suffer irreparable injury if forced to comply with the Act, because compliance would lead to substantial delay.

On February 5, 1979, Mite published its tender offer in the Wall Street Journal. The offer was made to all Chicago Rivet's shareholders. On the same day, Chicago Rivet made an offer for approximately 40% of its own shares at \$30.00 per share. On February 9, the District Court entered final judgment on Mite's application, declaring that the Illinois Act was preempted by the Williams Act, and that it imposed an undue burden on interstate commerce. J.S. App. 32a-41a. It also permanently enjoined the Secretary of State from enforcing the Illinois Act against Mite. J.S. App. 40a.⁸

Several days after final judgment was entered, Mite and Chicago Rivet reached an agreement under which both tender offers were withdrawn and Mite was given 30 days to examine the books and affairs of Chicago Rivet. Under the agreement, Mite would either make a tender offer of \$31 per share on or before March 12, 1979, which Chicago Rivet agreed not to oppose, or decide not to "acquire any stock or

⁷ The order was cast as a preliminary injunction rather than as a temporary restraining order to ensure that it would be immediately appealable. App. I-9. However, neither the Secretary of State nor Chicago Rivet sought interim relief in the Court of Appeals.

⁸ Although Mite requested that both the Secretary of State and Chicago Rivet be enjoined from taking steps to enforce the Illinois Act, the permanent injunction applied only to the Secretary of State.

assets of Rivet or make any offer to merge, consolidate or otherwise acquire Rivet." App. to Brief for Appellees A. On March 2, 1979, Mite announced its decision not to make a tender offer.

The Secretary of State subsequently appealed the District Court's decision. The United States Court of Appeals for the Seventh Circuit affirmed. In reaching this decision, it expressly held that the controversy was not moot. 633 F. 2d 486, 490 (1980). As we explain below, that conclusion is incorrect.

II

The jurisdiction of this Court depends on the existence of a live controversy. *Roe v. Wade*, 410 U. S. 113, 125 (1975); *SEC v. Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972). No such controversy exists here. Chicago Rivet is not a party to these proceedings and has no interest in the outcome of this case; Mite has agreed not to attempt another takeover. Nor will the Secretary of State's position be affected by resolution of the merits of this case. Even if this Court were to hold that the Illinois Act is constitutional and lift the permanent injunction that now restrains enforcement of the Act against Mite, there would be no basis for continued litigation by the Secretary. The Secretary states that if the decision below were reversed, he would initiate enforcement proceedings against Mite in state court, seeking civil and criminal penalties for its failure to comply with the Illinois Act. However, a preliminary injunction was in effect at the time the alleged violations occurred. This injunction bars the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during that period.

The Secretary argues that the preliminary injunction merely barred him from commencing an enforcement action during the period the injunction was in effect. He suggests that if this Court were to decide that the statute is constitutional and lift the permanent injunction, the State would be

able to commence an action seeking penalties for any violations that occurred during the period the preliminary injunction was in effect. In other words, argues the Secretary, the preliminary injunction only provided temporary security. It enabled Mite to go forward with the tender offer—subject to the risk that at some later stage, the constitutionality of the statute would be upheld, and the state would commence enforcement proceedings.

Federal courts undoubtedly have the power to issue a preliminary injunction that restrains enforcement of a state statute, subject to the condition that if the statute is later found to be valid, the state is free to seek penalties for violations that occurred during the period the injunction was in effect. Just as certainly, however, federal courts also have the power to issue a preliminary injunction that offers permanent protection from penalties for violations of the statute that occurred during the period the injunction was in effect. Determining whether a particular injunction provides temporary or permanent protection becomes a question of interpretation.

In the ordinary case, unless the order contains specific language to the contrary, it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period it was in effect; the burden should be on the State to show that the injunction provided only temporary security. A presumption in favor of permanent protection is likely to reflect the intentions of the court that granted the motion. In acting upon a request for an injunction, it will recognize that short-term protection is often only marginally better than no protection at all. Parties seek to restrain the enforcement of a state statute, not just because they want short-term protection, but because they desire permanent immunity for actions they take in reliance on the injunction. If they are contemplating action that might violate a state statute, they will take little so-

lace from temporary immunity—when they know that if they decide to act, enforcement proceedings might be initiated at some later stage.⁹

Here, the preliminary injunction does not expressly state that it provides permanent immunity for violations of the Illinois Act that may occur during its effective period. The injunction provides only that the Secretary of State is enjoined from “issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act” against Mite. Record 16. However, the Secretary has failed to offer any reasons why the presumption in favor of permanent protection should not be applied here. In this context, as the District Court must have recognized, permanent protection was needed. Mite sought an injunction, not just because it desired protection from enforcement actions during the period it was actually making the tender offer, but also because it desired protection from such actions in the future. The Act provides for substantial civil and criminal penalties. Mite would have been reluctant to go forward with its offer, which entailed considerable expense, if there were some risk that it would be penalized later. Indeed, in the Schedule 14D-1 filed with the SEC, Mite expressly stated that it would not commence the tender offer unless it obtained injunctive relief. It also

from Penalties

⁹ In *Steffel v. Thompson*, 415 U. S. 452 (1974), the Court indicated that, at least in cases involving constitutionally protected activity, the function of a preliminary injunction against a state criminal statute is to allow the party obtaining the injunction to act without fear of eventual prosecution. The Court suggested that injunctive relief would ordinarily be appropriate where the applicant for relief is situated “between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.” *Id.*, at 462. See also *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500 (1925); *Terrace v. Thompson*, 263 U. S. 197, 216 (1923); *Salem Inn, Inc. v. Frank*, 501 F. 2d 18, 21 (CA2 1974), *aff’d* in relevant part *sub nom. Doran v. Salem Inn, Inc.*, 422 U. S. 922 (1975).

reserved the right to withdraw its offer if injunctive relief were initially granted, but later withdrawn. See Record, Plaintiff's Exhibit 14.¹⁰

Interpreting the injunction to provide permanent protection also ensures that Mite will not be penalized for acting in reliance on the injunction.¹¹ Mite went forward with the tender offer, reasonably believing that the District Court's order provided complete immunity. Under the circumstances, it would be improper to permit the State to penalize action taken while the injunction was in effect. In the past, this Court has recognized that reasonable reliance on judicial pronouncements may constitute a valid defense to criminal prosecution. See, e. g., *Marks v. United States*, 430 U. S. 188 (1977).¹²

In addition to arguing that the preliminary injunction should be interpreted to provide only temporary protection from a state enforcement action, the Secretary argues that

¹⁰ We also find it significant that the District Court's final order granting a permanent injunction declares that the Illinois Act is "null and void and of no force and effect." J.S. App. 41a. A reasonable construction of the order granting a preliminary injunction is that it was also intended to render the act "null and void" while the injunction was in effect.

¹¹ It is relevant to note that, although Mite sought injunctive relief prior to engaging in any action that could subject it to civil or criminal penalties, the state never sought a stay of the District Court's injunction either in that court or in the Court of Appeals, and never expressed an intent to do so.

[IV]

¹² *Marks*, a conviction for transporting obscene materials was overturned, where the materials were not obscene at time of transportation, but were rendered obscene at time of trial by intervening decision of this Court. See also *Cox v. Louisiana*, 379 U. S. 559, 569-571 (1965) (conviction for illegal picketing reversed where defendant had relied on permission from police officer); *Raley v. Ohio*, 360 U. S. 423, 437-439 (1969) (conviction for refusal to testify before state commission reversed because witness had relied on opinion of commission chairman that he was privileged to remain silent); *United States v. Mancuso*, 139 F. 2d 90 (CA3 1943) (defendant could not be held liable for ignoring induction notices issued while *ex parte* order staying induction was in effect).

resolution of the mootness issue in this case should be controlled by *Leroy v. Great Western United Corp.*, 443 U. S. 173 (1979). In that case, Great Western announced its intention to make a tender offer to purchase stock in another corporation. Idaho officials responsible for administering an Idaho statute governing corporate takeovers, see Idaho Code, §§ 30-1500 *et seq.*, objected to the offer and delayed its effective date. Great Western brought an action in Federal District Court, seeking a declaration that the Idaho takeover law was unconstitutional, and an injunction restraining Idaho officials from enforcing the statute. The District Court granted injunctive relief that enabled Great Western to complete the acquisition. This Court, in reviewing the case, held that the controversy was not moot. "[T]he question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed." *Id.*, at 478.¹³

Leroy v. Great Western United Corp. is easily distinguishable from this case. Unlike Mite, Great Western took actions that might have violated the state takeover statute before it obtained injunctive relief. If this Court had decided that the Idaho statute was valid, Idaho officials might have been able to seek penalties for those pre-injunction violations.¹⁴ *Leroy v. Great Western United Corp.* can also be distinguished on the ground that the takeover offer in that case was successful. If the Idaho statute had been found to be valid, then Idaho officials would have been able to seek a rescission of the takeover.¹⁵ Here, since the acquisition was

¹³The Court did not reach the question whether the Idaho statute was unconstitutional. It concluded that the action should have been dismissed on grounds of improper venue.

¹⁴See Idaho Code, ch. 5B, §§ 30-1502-1504, 1510.

¹⁵See Idaho Code, ch. 5B, §§ 30-1514 (allowing state to institute action for rescission). The Illinois Act also empowers the state to seek a court order rescinding sales that are unlawful under the Act. Ill. Rev. Stat., ch. 121 1/2, § 137.60 (Cum. Supp. 1980).

never completed, Illinois officials could not seek rescission.¹⁶

Finally, this case does not fall within the exception to the mootness doctrine for cases that "are capable of repetition, yet evading review." Unless a class action is involved, that exception applies only when the challenged action is too short to be fully litigated before its cessation, and when there is a reasonable expectation or a demonstrated probability that the same complaining party will be subject to the same action in the future. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U. S. 173, 187 (1979); *Weinstein v. Bradford*, 428 U. S. 147, 149 (1975). The second requirement has not been satisfied here. Mite has agreed not to renew its efforts to acquire Chicago Rivet. Thus, unless Mite breaches its agreement,¹⁷ these particular corporations will never again become involved in a dispute over the constitutionality of the Illinois Act. Nor will the state ever again have occasion to prevent Mite from making a takeover offer for Chicago Rivet.¹⁸

There is no danger that the question whether the Illinois Act is constitutional will always escape review by this Court,

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¹⁶ It is true that a rescission action would have been predicated on acts that were taken under cover of the preliminary injunction. However, injunctions should ordinarily be interpreted only as providing permanent protection from penalties. The state should be barred from penalizing the offeror for acts that took place during the period the injunction was in effect. However, if a court determines that the state statute is valid, the state should be free to provide a remedy for the continuing effects of acts that violated the statute. In particular, a state should be permitted to dismantle a successful acquisition that violated a valid statute.

¹⁷ The possibility that Mite will breach its agreement does not bring this case within the "capable of repetition, yet evading review" exception. The likelihood that such a breach will occur is relatively small. The exception applies only when there is a reasonable expectation that the same action will occur in the future.

¹⁸ It is true that Mite may attempt to acquire some corporation other than Chicago Rivet, and that Illinois may seek to prevent such an acquisition. It is quite possible, however, that the constitutionality of the Illinois Act would be reviewable at that time. See text accompanying note 19 *infra*.

even in cases involving other corporations. The offeror corporation might fail to obtain an injunction before commencing the tender offer, so that its actions prior to the injunction could be the subject of an enforcement proceeding.¹⁹ Even if injunctive relief conferring complete immunity were obtained before the offeror commenced its takeover bid, the tender offer might not end as it did here, with an agreement between the offeror and the target that there would be no further takeover attempt. If the takeover efforts might be renewed, then a live controversy between the offeror and the target would remain. A live controversy might also remain if the takeover offer were successful. In such a case, if the statute were later found to be constitutional, then the state ~~would~~ be able to seek a rescission of the acquisition.

III

The parties to this appeal have no adversary interest in the resolution of the merits of this controversy. Because the case is moot, we vacate the judgment of the Court of Appeals. The Court of Appeals should remand the case to the District Court with instructions to dismiss.

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¹⁹ The constitutionality of the Act might also be reviewable if the court grants an injunction subject to the condition that if the state is later found to be valid, the state may seek penalties for any violations that took place during the period the injunction was in effect.

6/16/82

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

From: Justice Powell

Circulated: JUN 16 1982

Recirculated: _____

80-1188: Edgar v. Mite

Justice Powell, concurring in part.

I agree with Justice Marshall that this case is moot. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I, II, and VB of the Court's opinion. In my view, the remainder of the Court's opinion is unnecessary for the resolution of this case.

February 18, 1982

80-1188 Edgar v. Mite Corporation

Dear Thurgood:

Please join me in your opinion (3rd draft) for the Court.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

P.S. I understand that you will change the word "would" to "might" in the last line in Part II on page 12.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1982

Re: 80-1188 - Edgar v. Mite Corp.

Dear Byron:

As presently advised, I expect to join Part V of your opinion. I agree with you that when Congress enacted the Williams Act, it took extreme care to avoid tipping the scales either in favor of management or in favor of possible takeovers. However, it seems to me that there is a significant difference between adopting such a policy of neutrality with respect to federal legislation that Congress was enacting, and requiring states to follow the same policy. As of now, I am not persuaded that Congress intended to prevent the states from loading the scales one way or the other. You are, of course, dead right in your analysis of the Illinois statute as being loaded in favor of management.

I also am still not sure we do not need to address the mootness question more thoroughly because if the injunction were a complete defense to civil or criminal penalties, I should think this case would be moot and we would be without jurisdiction to reach the merits. I may therefore file a condensed version of my former writing on this issue.

Respectfully,

JH

Justice White

Copies to the Conference

This is why I think BRW still is wrong. jo

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 1, 1982

RE: No. 80-1188 Edgar v. Mite Corporation

Dear Byron:

I'll await the dissent.

Sincerely,

Bill

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1982

No. 80-1188 Edgar v. Mite Corporation

Dear Byron,

I will see what John's dissent says before
deciding what to join in this case.

Sincerely,

Sandra

Justice White

Copies to the Conference

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 7, 1982

RE: No. 80-1188 Edgar v. Mite Corporation

Dear Thurgood:

Please join me in your dissent.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: _____

7 JUN 1982

- pp. 15-18, 20 & stylistic -

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1188

JAMES EDGAR, APPELLANT *v.* MITE CORPORATION
AND MITE HOLDINGS, INC.

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

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121 1/2, § 137.51, *et seq.* (Supp. 1980), is unconstitutional under the Supremacy and Commerce Clauses of the Federal Constitution.

I

Appellee MITE Corporation and its wholly-owned subsidiary, MITE Holdings, Inc., are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Under the Illinois Act any takeover offer¹ for the shares of a corporation must be registered with the Secretary of State if 10% of the class of equity

¹The Illinois Act defines "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company pursuant to a tender offer. . . ." Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 (Supp. 1980). "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973). The terms "tender offer" and "takeover offer" are often used interchangeably.

See
pp 15-18
in
Commerce
Clause
2 & 5 join
only I

securities subject to the offer are owned by shareholders residing in Illinois or if any two of the following conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the state. Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 and 10 (Supp. 1980). An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. *Id.*, at § 137.54(E). The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. *Id.*, at § 137.57(A). If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees. . . ." *Id.*, at § 137.57.E.

On January 19, 1979, MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet and Machine Co., a publicly held Illinois corporation, by filing a Schedule 14D-1 with the Securities and Exchange Commission in order to comply with the Williams Act.² The Schedule 14D-1 indi-

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²The Williams Act, 82 Stat. 454, *et seq.*, codified at 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), added new sections 13(d), 13(e) and 14(d)-(f) to the Securities Exchange Act of 1934. Section 14(d)(1) of the Securities Exchange Act requires an offeror seeking to acquire more than five percent of any class of equity security by means of a tender offer to first file a Schedule 14D-1 with the Securities and Exchange Commission. The Schedule requires disclosure of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. In addition, the offeror must

cated that MITE was willing to pay \$28.00 per share for any and all outstanding shares of Chicago Rivet, a premium of approximately \$4.00 over the then-prevailing market price. MITE did not comply with the Illinois Act, however, and commenced this litigation on the same day by filing an action in the United States District Court for the Northern District of Illinois. The complaint asked for a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded three days later by bringing suit in Pennsylvania, where it conducted most of its business, seeking to enjoin MITE from proceeding with its proposed tender offer on the ground that the offer violated the Pennsylvania Takeover Disclosure Law, 70 Pa. Stat. Ann., Title 70, § 711.19 (Supp. 1978). After MITE's efforts to obtain relief in Pennsylvania proved unsuccessful,³ both Chicago

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disclose any antitrust or other legal problems which might result from the success of the offer. 17 CFR § 240.14d-100 (1981). Section 14(d)(1) requires the offeror to publish or send a statement of the relevant facts contained in the Schedule 14D-1 to the shareholders of the target company.

In addition, § 13(d), also added by the Williams Act, requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U. S. C. § 78l, to file a schedule 13D with the Commission within ten days after its purchases have exceeded five percent of the outstanding shares of the security. Schedule 13D requires essentially the same disclosures as required by Schedule 14D-1. Compare 17 CFR § 240.13d-101 (1981) with 17 CFR § 240.14d-100 (1981).

³In addition to filing suit in state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission requesting the Commission to enforce the Pennsylvania Act against MITE. On January 31, 1979 the Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States District Court for the Western District of Pennsylvania, to which MITE had removed the state court action, denied Chicago Rivet's motion for a

Rivet and the Illinois Secretary of State took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist further efforts to make a tender offer for Chicago Rivet. On February 2, 1979 Chicago Rivet notified MITE by letter that it would file suit in Illinois state court to enjoin the proposed tender offer. MITE renewed its request for injunctive relief in the District Court and on February 2 the District Court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet.

MITE then published its tender offer in the February 5 edition of the Wall Street Journal. The offer was made to all shareholders of Chicago Rivet residing throughout the United States. The outstanding stock was worth over \$23 million at the offering price. On the same day Chicago Rivet made an offer for approximately 40% of its own shares at \$30.00 per share.⁴ The District Court entered final judgment on February 9, declaring that the Illinois Act was preempted by the Williams Act and that it violated the Commerce Clause. Accordingly, the District Court permanently enjoined enforcement of the Illinois statute against MITE. Shortly after final judgment was entered, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and MITE was given 30 days to examine the books and records of Chicago Rivet. Under the agreement MITE was either to make a tender offer of \$31.00 per share before March 12, 1979, which Chicago Rivet agreed not to oppose, or decide not to acquire Chicago Rivet's share or assets. App. to Brief for Appellees 1a-4a. On March 2, 1979, MITE announced its decision not to make a tender offer.

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temporary restraining order.

⁴ Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121 1/2, § 137.52-9(4) (Supp. 1980).

The United States Court of Appeals for the Seventh Circuit affirmed *sub nom. MITE Corp. v. Dixon*, 633 F. 2d 486 (1980). It agreed with the District Court that several provisions of the Illinois Act are preempted by the Williams Act and that the Illinois Act unduly burdens interstate commerce in violation of the Commerce Clause. We noted probable jurisdiction, 451 U. S. 968 (1981), and now affirm.

II

The Court of Appeals specifically found that this case was not moot, 633 F. 2d, at 490, reasoning that because the Secretary has indicated he intends to enforce the Act against MITE, a reversal of the judgment of the District Court would expose MITE to civil and criminal liability⁵ for making the February 5, 1979 offer in violation of the Illinois Act. We agree. It is urged that the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties. While that is not a frivolous question by any means, it is an issue to be decided when and if the Secretary of State initiates an action. That action would be foreclosed if we agree with the Court of Appeals that the Illinois Act is unconstitutional. Accordingly, the case is not moot.

III

We first address the holding that the Illinois Takeover Act is unconstitutional under the Supremacy Clause. We note at the outset that in passing the Williams Act, which is an amendment to the Securities and Exchange Act of 1934, Congress did not also amend § 28(a) of the 1934 Act.⁶ In pertinent part, § 28(a) provides as follows:

⁵The Secretary of State may bring an action for civil penalties for violations of the Illinois Act., Ill. Rev. Stat. ch. 121 1/2, § 137.65 (Supp. 1980), and a person who willfully violates the Act is subject to criminal prosecution. *Id.*, at § 137.63.

⁶There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the

"Nothing in this chapter shall affect the jurisdiction of the Securities Commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Thus Congress did not explicitly prohibit states from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and,

"[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co.*, *supra*, at 526, 540-541. Accord, *De Canas v. Bica*, 424 U. S. 351, 363 (2976)." *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Our inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both the provisions of the Williams Act and the more burdensome requirements of the Illinois law. The issue thus is, as it was in the Court of Appeals, whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way.

The Williams Act, passed in 1968, was the congressional

Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code § 131-528, became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968. Takeover statutes are now in effect in 37 states. Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 Ohio St. L. J. 689, 690 n. 7 (1981).

response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of the existing disclosure requirements of the federal securities laws." *Piper v. Chris-Craft Industries*, 430 U. S. 1, 22 (1977). The Williams Act filled this regulatory gap. The Act imposes several requirements. First, it requires that upon the commencement of the tender offer, the offeror file with the SEC, publish or send to the shareholders of the target company, and furnish to the target company detailed information about the offer. 15 U. S. C. § 78(n)(d)(1), 17 CFR § 240.24d-3 (1981). The offeror must disclose information about its background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. 15 U. S. C. § 78m(d)(1), 17 CFR § 240.13d-1 (1981). See also note 2, *supra*. Second, stockholders who tender their shares may withdraw them during the first seven days of a tender offer and if the offeror has not yet purchased their shares, at any time after sixty days from the commencement of the offer. 15 U. S. C. § 78n(d)(5).⁷ Third, all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U. S. C. § 78n(d)(7).⁸

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⁷The seven-day withdrawal period contained in the Williams Act has been extended to 15 business days by the Commission. 17 CFR § 240.14d-7(a)(1).

⁸The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata basis. 15 U. S. C. § 78n(d)(6). The Act also contains a general antifraud provision, 15 U. S. C. § 78n(e), which has been interpreted to require disclosure of material information known to the offeror even if disclosure was not otherwise required. See, e. g. *Sonesta Int'l Hotels Corp. v. Welling-*

There is no question that in imposing these requirements, Congress intended to protect investors. *Piper v. Chris-Craft Industries*, *supra*, at 35; *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) ("Senate Report"). But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring of either management or the takeover bidder. As we noted in *Piper*, the disclosure provisions originally embodied in S.2731 "were avowedly pro-management in the target company's efforts to defeat takeover bids." 430 U. S., at 30. But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." Senate Report at 3.⁹ It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids . . ." *Rondeau v. Mosinee Paper Corp.*, *supra*, at 58, and expressly embraced a policy of neutrality. As Senator Williams explained, "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the persons making the takeover bids." 113 Cong. Rec. 24664 (1967). This policy of "evenhandedness", *Piper v. Chris-Craft Industries*, *supra*, at 31, represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not

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ton Associates, 488 F. 2d 247, 250 (CA 2 1973).

⁹ Congress also did not want to deny shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company", namely the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24665 (1967) (remarks of Sen. Javits).

only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. 633 F. 2d, at 496.

To implement this policy of investor protection while maintaining the balance between management and the bidder, Congress required the latter to file with the Commission and furnish the company and the investor with all information adequate to the occasion. With that filing, the offer could go forward, stock could be tendered and purchased, but a stockholder was free within a specified time to withdraw his tendered shares. He was also protected if the offer was increased. Looking at this history as a whole, it appears to us, as it did to the Court of Appeals, that Congress intended to strike a balance between the investor, management and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "intention to do . . . more than give incumbent management an opportunity to express and explain its position." *Rondeau v. Mosinee Paper Corp.*, *supra*, at 58. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time-frame provided by Congress.

IV

The Court of Appeals identified three provisions of the Illinois Act that upset the careful balance struck by Congress and which therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. We agree with the Court of Appeals in all essential respects.

A

The Illinois Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the material terms of the offer twenty busi-

ness days before the offer becomes effective. Ill. Rev. Stat., ch. 121 1/2, §§ 137.54E, 137.54B (Supp. 1980.) During that time, the offeror may not communicate its offer to the shareholders, *id.*, at § 137.54A. Meanwhile, the target company is free to disseminate information to its shareholders concerning the impending offer. The contrast with the Williams Act is apparent. Under that Act, there is no pre-commencement notification requirement; the critical date is the date a tender offer is "first published or sent or given to security holders." 15 U. S. C. § 78n(d)(1). See also 17 CFR § 240.14d-2 (1981).

We agree with with the Court of Appeals that by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.¹⁰ These consequences are precisely what Congress determined should be avoided, and for this reason, the precommencement notification provision frustrates the objectives of the Williams Act.

It is important to note in this respect that in the course of events leading to the adoption of the Williams Act, Congress several times refused to impose a precommencement disclosure requirement. In October 1965, Senator Williams introduced S.2731, a bill which would have required a bidder to notify the target company and file a public statement with the Securities and Exchange Commission at least 20 days before commencement of a cash tender offer for more than five per cent of a class of the target company's securities. 111 Cong. Rec. 28259 (1965). The Commission commented on the bill and stated that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders . . ." 112 Cong. Rec.

¹⁰ See note 11 and accompanying text, *infra*.

190005 (1966). Senator Williams introduced a new bill in 1967, S.510, which provided for a confidential filing by the tender offeror with the Commission five days prior to the commencement of the offer. S.510 was enacted as the Williams Act after elimination of the advance disclosure requirement. As the Senate Report explained,

"At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public." Senate Report at 4.

Congress rejected another pre-commencement notification proposal during deliberations on the 1970 amendments to the Williams Act.¹¹

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¹¹ H. R. 4286, 91st Cong., 2d Sess. (1970). The bill was not reported out of the subcommittee. Instead, the Senate amendments to the Williams Act, which did not contain pre-commencement notification provisions, were adopted. Pub. L. No. 91-567, 84 Stat. 1497.

The Securities and Exchange Commission has promulgated detailed rules governing the conduct of tender offers. Rule 14d-2(b), 17 CFR § 240.14d-2(b) (1981), requires that a tender offeror make its offer effective within five days of publicly announcing the material terms of the offer by disseminating specified information to shareholders and filing the requisite documents with the Commission. Otherwise the offeror must announce that it is withdrawing its offer. The events in this litigation took place prior to the effective date of Rule 14d-2(b), and because Rule 14d-2(b) operates prospectively only, see 44 Fed. Reg. 70326 (1979), it is not at issue in this case.

B

For similar reasons, we agree with the Court of Appeals that the hearing provisions of the Illinois Act frustrate the congressional purpose by introducing extended delay into the tender offer process. The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed. Ill. Rev. Stat., ch. 121 1/2, §§ 137.57A and B. (Supp. 1980) The Secretary may call a hearing at any time prior to the commencement of the offer, and there is no deadline for the completion of the hearing. *Id.*, at §§ 137.57C and D. Although the Secretary is to render a decision within 15 days after the conclusion of the hearing, that period may be extended without limitation. Not only does the Secretary of State have the power to delay a tender offer indefinitely, but incumbent management may also use the hearing provisions of the Illinois Act to delay a tender offer. The Secretary is required to call a hearing if requested to do so by, among other persons, those who are located in Illinois "as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the takeover offer." *Id.*, at § 137.57.A. Since incumbent management in many cases will control, either directly or indirectly, 10% of the target company's shares, this provision allows management to delay the commencement of an offer by insisting on a hearing. As the Court of Appeals observed, these provisions potentially afford management a "powerful weapon to stymie indefinitely a takeover." 633 F. 2d, at 494.¹² In enacting the Williams Act, Congress itself "recog-

¹² Delay has been characterized as "the most potent weapon in a tender offer fight." Langevoort, State Tender-Offer Legislation: Interests, Effects, and Political Competency, 62 Cornell L. Q. 213, 238 (1977). See also Wachtell, Special Tender Offer Litigation Tactics, 32 Bus. L. 1433,

nized that delay can seriously impede a tender offer" and sought to avoid it. *Great Western United Corp. v. Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978); Senate Report at 4.¹³

Congress reemphasized the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U. S. C. 12, *et seq.*

"[I]t is clear that this short waiting period [the ten-day period for proration provided for by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).¹⁴

1437-1442 (1977); Wilner and Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality*, 45 *Fordham L. Rev.* 1, 9-10 (1976).

¹³ According to the Securities and Exchange Commission, delay enables a target company to:

- "(1) repurchase its own securities;
- "(2) announce dividend increases or stock splits;
- "(3) issue additional shares of stock;
- "(4) acquire other companies to produce an antitrust violation should the tender offer succeed;
- "(5) arrange a defensive merger;
- "(6) enter into restrictive loan agreements,
- "(7) institute litigation challenging the tender offer." Brief for the Securities and Exchange Commission as *amicus curiae* 10, n. 8.

¹⁴ Representative Rodino set out the consequences of delay in greater detail when he described the relationship between the Hart-Scott-Rodino Act and the Williams Act:

"In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968

As we have said, Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders. We therefore agree with the Court of Appeals that these hearing provisions conflict with the Williams Act.

C

The Court of Appeals also concluded that the Illinois Act is pre-empted by the Williams Act insofar as it allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer. Under § 137.57E of the Illinois law, the Secretary is required to deny registration of a takeover offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . or that the take-over offer is inequitable . . . ." (Emphasis added).¹³ The Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to

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Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defense merger, quickly incorporating in a State with an antitakeover statute or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so." 122 Cong. Rec. 30877 (1976).

¹³ Appellant argues that the Illinois Act does not permit him to adjudicate the substantive fairness of a tender offer. Brief for Appellant 21-22. On this state-law issue, however, we follow the view of the Court of Appeals that § 137.57.E allows the Secretary of State "to pass upon the substantive fairness of a tender offer. . . ." 633 F. 2d, at 493.

make their own decisions. We agree. Both the House and Senate Reports observed that the Act was designed to "make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968); Senate Report at 3. Thus, as the Court of Appeals said, "the state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 633 F. 2d, at 494.

V

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U. S. Const., Art. 1, § 8, cl. 3. "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause. . . even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U. S. 366, 370-371 (1976), quoting *Freeman v. Hewitt*, 329 U. S. 249, 252 (1946). See also *Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 141 (1970), citing *Huron Cement Co. v. Detroit*, 362 U. S. 440, 443 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the states; direct regulation is prohibited. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 199 (1925). See also, *Pike v. Bruce Church, Inc.*, *supra*, at 142. The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, unless its terms are satisfied, interstate tender offers which in

turn would generate interstate transactions. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

A

States have traditionally regulated intrastate securities transactions,¹⁶ and this Court has upheld the authority of states to enact "blue-sky" laws against Commerce Clause challenges on several occasions. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568 (1917). The Court's rationale for upholding the state laws was that the laws only regulated transactions occurring within the regulated states. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in securities only incidentally." *Hall v. Geiger-Jones Co.*, *supra*, at 557-558 (cites omitted). Congress has also recognized the validity of such laws governing intrastate securities transactions in § 28a of the Securities Exchange Act, 15 U. S. C. § 78bb(a), a provision "designed to save state blue-sky laws from preemption." *Leroy v. Great Western Corp.*, 443 U. S. 173, 182, n. 13 (1979).

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly-held organization is ordinarily communicated by the use of the mails or other means of interstate commerce to shareholders across

¹⁶ For example, the Illinois Blue Sky law, Ill. Rev. Stat. ch. 121 1/2, § 137.1, *et seq.* (Supp. 1980), provides that securities subject to the law must be registered "prior to sale in this State . . ." *Id.*, at § 137.5.

the country and abroad. Securities are tendered and transactions closed by similar means. Thus, in this case, Mite Corporation, the tender offeror, is a Delaware corporation with principal offices in Connecticut. Chicago Rivet is a publicly-held Illinois corporation with shareholders scattered around the country, 27% of whom live in Illinois. Mite's offer to Chicago Rivet's shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines. These transactions would themselves be interstate commerce. Yet the Illinois law, unless complied with, sought to prevent Mite from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other states and having no connection with Illinois. Indeed, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat., ch. 121 1/2, § 137.52-10.(2) (Supp. 1980). Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other states; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In *Shafer v. Farmers Grain Co.*, *supra*, at 199, the Court held that "a state statute which by its necessary operation directly interferes with or burdens . . . [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." See also *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794,

806 (1976). The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control . . . [conduct] beyond the boundaries of the state. . . ." The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shafer v. Heitner*, 433 U. S. 186, 197 (1977).

Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the state, it must be held invalid as were the laws at issue in *Shafer* and *Southern Pacific*.

B

The Illinois Act is also unconstitutional under the test of *Pike v. Bruce Church, Inc.*, 397 U. S., at 142, for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously-described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest-valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer

mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1173-1174 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Tex. L. Rev. 1, 5, 27-28, 45 (1978); H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).

Appellant claims the Illinois Act furthers two legitimate local interests. He argues that Illinois seeks to protect resident security holders and that the Act merely regulates the internal affairs of companies incorporated under Illinois law. We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. We note, furthermore, that the Act completely exempts from coverage a corporation's acquisition of its own shares. Ill. Rev. Stat., ch. 121 1/2, § 137.52.09(4). Thus Chicago Rivet was able to make a competing tender offer for its own stock without complying with the Illinois Act, leaving Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts. This distinction is at variance with Illinois' asserted legislative purpose, and tends to undermine appellant's justification for the burdens the statute imposes on interstate commerce.

We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that

shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration and equal consideration rights. However, the Williams Act provides these same substantive protections, compare Ill. Rev. Ann. Stat., ch. 121 1/2, §§ 137.59.C, D, and E (Supp. 1980) (withdrawal, proration, and equal consideration rights) with 15 U. S. C. § 78n(d)(5), (6) and (7) and 17 CFR § 240.14d-7 (same). As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it may not substantially enhance the shareholders' ability to make informed decisions. 633 F. 2d, at 500. It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Appellant also contends that Illinois has an interest in regulating the internal affairs of a corporation incorporated under its laws. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. See *Restatement (Second) of Conflict of Laws*, § 302, Comment b at 307-308 (1971). That doctrine is of little use to the state in this context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp. v. Kidwell*, 577 F. 2d 1256, 1280 n. 3 (1978); *Restatement, supra*, § 302, comment e at 310. Furthermore, the proposed

justification is somewhat incredible since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents, Ill. Rev. Stat., ch. 121 1/2, § 137.52-10 (Supp. 1980). The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other states. Illinois has no interest in regulating the internal affairs of foreign corporations.

We conclude with the Court of Appeals that the Illinois Act imposes a substantial on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause.

The judgment of the Court of Appeals is

Affirmed.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1982

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Re: No. 80-1188 - Edgar v. Mite Corporation

Dear Byron:

Please do not hold me to this, but, as presently advised, I am inclined to join Parts I, II, III, and IV of your opinion. John, of course, may persuade me otherwise.

Sincerely,

Harry

Justice White

cc: The Conference

✓

June 11, 1982

Re: No. 80-1188 - Edgar v. Mite, Corp.

Dear Byron:

With all of our respective "backslidings" I
come to the conclusion that you are more right here
than in Nixon!! Hence I join.

Regards,

WRB

Justice White

Copies to the Conference

June 14, 1982

80-1188 Edgar v. Mite

Dear Byron:

In reviewing the "bidding" in various cases over the weekend, I note that several of us still remain out in this case.

My position remains the same. I agree with Thurgood on the mootness issue, but if the Court reaches the merits I also agree that the Illinois statute is invalid under the Commerce Clause. I think it unnecessary to address the preemption issue. I also am inclined to agree with John that there may still be room for state legislation limited to activities within the state.

If you obtain a Court to reach the merits, I will simply say the foregoing in a sentence or two. I will write no opinion beyond this.

Sincerely,

Justice White

lfp/ss

cc: The Conference

[RE JUNE 16, 1982]

John -

How can I join II

& can I agree
with TM?

Shouldn't it be III?

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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Circulated: _____
Recirculated: 16 JUN 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1188

JAMES EDGAR, APPELLANT *v.* MITE CORPORATION
AND MITE HOLDINGS, INC.

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

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121 1/2, § 137.51, *et seq.* (Supp. 1980), is unconstitutional under the Supremacy and Commerce Clauses of the Federal Constitution.

I

Appellee MITE Corporation and its wholly-owned subsidiary, MITE Holdings, Inc., are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Under the Illinois Act any takeover offer¹ for the shares of a target company must be registered with the Secretary of State. Ill. Rev. Stat., ch.

¹The Illinois Act defines "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer. . . ." Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 (Supp. 1980). "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 88 Harv. L. Rev. 1250, 1251 (1973). The terms "tender offer" and "takeover offer" are often used interchangeably.

You have joined part. No significant changes. ju

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& EB

121 1/2, § 137.54.A (Supp. 1980). A target company is defined as a corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the state. *Id.*, at § 137.52-10. An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. *Id.*, at § 137.54.E. The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. *Id.*, at § 137.57.A. If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees. . . ." *Id.*, at § 137.57.E.

On January 19, 1979, MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet and Machine Co., a publicly held Illinois corporation, by filing a Schedule 14D-1 with the Securities and Exchange Commission in order to comply with the Williams Act.² The Schedule 14D-1 indi-

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²The Williams Act, 82 Stat. 454, *et seq.*, codified at 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), added new sections 13(d), 13(e) and 14(d)-(f) to the Securities Exchange Act of 1934. Section 14(d)(1) of the Securities Exchange Act requires an offeror seeking to acquire more than five percent of any class of equity security by means of a tender offer to first file a Schedule 14D-1 with the Securities and Exchange Commission. The Schedule requires disclosure of the source of funds used to purchase the

cated that MITE was willing to pay \$28.00 per share for any and all outstanding shares of Chicago Rivet, a premium of approximately \$4.00 over the then-prevailing market price. MITE did not comply with the Illinois Act, however, and commenced this litigation on the same day by filing an action in the United States District Court for the Northern District of Illinois. The complaint asked for a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded three days later by bringing suit in Pennsylvania, where it conducted most of its business, seeking to enjoin MITE from proceeding with its proposed tender offer on the ground that the offer violated the Pennsylvania Takeover Disclosure Law, 70 Pa. Cons. Stat. § 71 *et seq.* (Supp. 1978). After MITE's efforts to obtain relief in Pennsylvania proved unsuccessful,⁵ both Chicago Rivet and

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target shares, past transactions with the target company, and other material financial information about the offeror. In addition, the offeror must disclose any antitrust or other legal problems which might result from the success of the offer. 17 CFR § 240.14d-100 (1981). Section 14(d)(1) requires the offeror to publish or send a statement of the relevant facts contained in the Schedule 14D-1 to the shareholders of the target company.

In addition, § 13(d), also added by the Williams Act, requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U. S. C. § 78l, to file a schedule 13D with the Commission within ten days after its purchases have exceeded five percent of the outstanding shares of the security. Schedule 13D requires essentially the same disclosures as required by Schedule 14D-1. Compare 17 CFR § 240.13d-101 (1981) with 17 CFR § 240.14d-100 (1981).

⁵In addition to filing suit in state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission requesting the Commission to enforce the Pennsylvania Act against MITE. On January 31, 1979 the Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States

the Illinois Secretary of State took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist further efforts to make a tender offer for Chicago Rivet. On February 2, 1979 Chicago Rivet notified MITE by letter that it would file suit in Illinois state court to enjoin the proposed tender offer. MITE renewed its request for injunctive relief in the District Court and on February 2 the District Court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet.

MITE then published its tender offer in the February 5 edition of the Wall Street Journal. The offer was made to all shareholders of Chicago Rivet residing throughout the United States. The outstanding stock was worth over \$23 million at the offering price. On the same day Chicago Rivet made an offer for approximately 40% of its own shares at \$30.00 per share.⁴ The District Court entered final judgment on February 9, declaring that the Illinois Act was preempted by the Williams Act and that it violated the Commerce Clause. Accordingly, the District Court permanently enjoined enforcement of the Illinois statute against MITE. Shortly after final judgment was entered, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and MITE was given 30 days to examine the books and records of Chicago Rivet. Under the agreement MITE was either to make a tender offer of \$31.00 per share before March 12, 1979, which Chicago Rivet agreed not to op-

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District Court for the Western District of Pennsylvania, to which MITE had removed the state court action, denied Chicago Rivet's motion for a temporary restraining order.

⁴Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121 1/2, § 137.52-9.(4) (Supp. 1980).

pose, or decide not to acquire Chicago Rivet's shares or assets. App. to Brief for Appellees 1a-4a. On March 2, 1979, MITE announced its decision not to make a tender offer.

The United States Court of Appeals for the Seventh Circuit affirmed *sub nom. MITE Corp. v. Dixon*, 633 F. 2d 486 (1980). It agreed with the District Court that several provisions of the Illinois Act are preempted by the Williams Act and that the Illinois Act unduly burdens interstate commerce in violation of the Commerce Clause. We noted probable jurisdiction, 451 U. S. 968 (1981), and now affirm.

II

The Court of Appeals specifically found that this case was not moot, 633 F. 2d, at 490, reasoning that because the Secretary has indicated he intends to enforce the Act against MITE, a reversal of the judgment of the District Court would expose MITE to civil and criminal liability⁵ for making the February 5, 1979 offer in violation of the Illinois Act. We agree. It is urged that the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties. While, as JUSTICE STEVENS' concurrence indicates, that is not a frivolous question by any means, it is an issue to be decided when and if the Secretary of State initiates an action. That action would be foreclosed if we agree with the Court of Appeals that the Illinois Act is unconstitutional. Accordingly, the case is not moot.

III

We first address the holding that the Illinois Takeover Act is unconstitutional under the Supremacy Clause. We note at

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⁵The Secretary of State may bring an action for civil penalties for violations of the Illinois Act., Ill. Rev. Stat. ch. 121 1/2, § 137.65 (Supp. 1980), and a person who willfully violates the Act is subject to criminal prosecution. *Id.*, at § 137.63.

the outset that in passing the Williams Act, which is an amendment to the Securities and Exchange Act of 1934, Congress did not also amend § 28(a) of the 1934 Act, 15 U. S. C. § 78bb(a).⁴ In pertinent part, § 28(a) provides as follows:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Thus Congress did not explicitly prohibit states from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and,

"[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co.*, *supra*, at 526, 540-541. Accord, *De Canas v. Bica*, 424 U. S. 351, 363 (1976)." *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Our inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both

⁴There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code § 131-528, became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968. Takeover statutes are now in effect in 37 states. Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 Ohio St. L. J. 689, 690 n. 7 (1981).

the provisions of the Williams Act and the more burdensome requirements of the Illinois law. The issue thus is, as it was in the Court of Appeals, whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way.

The Williams Act, passed in 1968, was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." *Piper v. Chris-Craft Industries*, 430 U. S. 1, 22 (1977). The Williams Act filled this regulatory gap. The Act imposes several requirements. First, it requires that upon the commencement of the tender offer, the offeror file with the SEC, publish or send to the shareholders of the target company, and furnish to the target company detailed information about the offer. 15 U. S. C. § 78(n)(d)(1), 17 CFR § 240.24d-3 (1981). The offeror must disclose information about its background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. 15 U. S. C. § 78m(d)(1), 17 CFR § 240.13d-1 (1981). See also note 2, *supra*. Second, stockholders who tender their shares may withdraw them during the first seven days of a tender offer and if the offeror has not yet purchased their shares, at any time after sixty days from the commencement of the offer. 15 U. S. C. § 78n(d)(5).⁷ Third, all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U. S. C. § 78n(d)(7).⁸

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⁷The seven-day withdrawal period contained in the Williams Act has been extended to 15 business days by the Commission. 17 CFR § 240.14d-7(a)(1) (1981).

⁸The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares ten-

There is no question that in imposing these requirements, Congress intended to protect investors. *Piper v. Chris-Craft Industries, supra*, at 35; *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967) ("Senate Report"). But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder. As we noted in *Piper*, the disclosure provisions originally embodied in S.2731 "were avowedly pro-management in the target company's efforts to defeat takeover bids." 480 U. S., at 30. But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." Senate Report at 3.⁹ It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids . . ." *Rondeau v. Mosinee Paper Corp., supra*, at 58, and expressly embraced a policy of neutrality. As Senator Williams explained, "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the persons making the takeover bids." 113 Cong. Rec. 24664 (1967). This policy of "evenhandedness," *Piper v. Chris-Craft Industries, supra*, at 31, represented a conviction that neither side in the contest should be extended addi-

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dered during the first 10 days of the offer must be purchased on a pro rata basis. 15 U. S. C. § 78n(d)(6). The Act also contains a general antifraud provision, 15 U. S. C. § 78n(e), which has been interpreted to require disclosure of material information known to the offeror even if disclosure were not otherwise required. See, e. g. *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F. 2d 247, 250 (CA 2 1973).

⁹ Congress also did not want to deny shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company," namely the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24666 (1967) (remarks of Sen. Javits).

tional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. 633 F. 2d, at 496.

To implement this policy of investor protection while maintaining the balance between management and the bidder, Congress required the latter to file with the Commission and furnish the company and the investor with all information adequate to the occasion. With that filing, the offer could go forward, stock could be tendered and purchased, but a stockholder was free within a specified time to withdraw his tendered shares. He was also protected if the offer was increased. Looking at this history as a whole, it appears to us, as it did to the Court of Appeals, that Congress intended to strike a balance between the investor, management and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "intention to do . . . more than give incumbent management an opportunity to express and explain its position." *Rondeau v. Mosinee Paper Corp.*, *supra*, at 58. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time-frame provided by Congress.

IV

The Court of Appeals identified three provisions of the Illinois Act that upset the careful balance struck by Congress and which therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. We agree with the Court of Appeals in all essential respects.

A

The Illinois Act requires a tender offeror to notify the Secretary of State and the target company of its intent to make a tender offer and the material terms of the offer twenty business days before the offer becomes effective. Ill. Rev. Stat., ch. 121 1/2, §§ 137.54.E, 137.54.B (Supp. 1980.) During that time, the offeror may not communicate its offer to the shareholders. *Id.*, at § 137.54.A. Meanwhile, the target company is free to disseminate information to its shareholders concerning the impending offer. The contrast with the Williams Act is apparent. Under that Act, there is no pre-commencement notification requirement; the critical date is the date a tender offer is "first published or sent or given to security holders." 15 U. S. C. § 78n(d)(1). See also 17 CFR § 240.14d-2 (1981).

We agree with with the Court of Appeals that by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.¹⁰ These consequences are precisely what Congress determined should be avoided, and for this reason, the precommencement notification provision frustrates the objectives of the Williams Act.

It is important to note in this respect that in the course of events leading to the adoption of the Williams Act, Congress several times refused to impose a precommencement disclosure requirement. In October 1965, Senator Williams introduced S.2731, a bill which would have required a bidder to notify the target company and file a public statement with the Securities and Exchange Commission at least 20 days before commencement of a cash tender offer for more than five per cent of a class of the target company's securities. 111 Cong. Rec. 28259 (1965). The Commission commented on

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¹⁰ See note 11 and accompanying text, *infra*.

the bill and stated that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders . . ." 112 Cong. Rec. 19005 (1966). Senator Williams introduced a new bill in 1967, S.510, which provided for a confidential filing by the tender offeror with the Commission five days prior to the commencement of the offer. S.510 was enacted as the Williams Act after elimination of the advance disclosure requirement. As the Senate Report explained,

"At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public." Senate Report at 4.

Congress rejected another pre-commencement notification proposal during deliberations on the 1970 amendments to the Williams Act.¹¹

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¹¹ H. R. 4285, 91st Cong., 2d Sess. (1970). The bill was not reported out of the subcommittee. Instead, the Senate amendments to the Williams Act, which did not contain pre-commencement notification provisions, were adopted. Pub. L. No. 91-567, 84 Stat. 1497.

The Securities and Exchange Commission has promulgated detailed rules governing the conduct of tender offers. Rule 14d-2(b), 17 CFR § 240.14d-2(b) (1981), requires that a tender offeror make its offer effective within five days of publicly announcing the material terms of the offer by disseminating specified information to shareholders and filing the requisite documents with the Commission. Otherwise the offeror must announce that it is withdrawing its offer. The events in this litigation took place prior to the effective date of Rule 14d-2(b), and because Rule 14d-2(b) operates prospectively only, see 44 Fed. Reg. 70326 (1979), it is not at issue

B

For similar reasons, we agree with the Court of Appeals that the hearing provisions of the Illinois Act frustrate the congressional purpose by introducing extended delay into the tender offer process. The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed. Ill. Rev. Stat., ch. 121 1/2, §§ 137.57.A and B (Supp. 1980). The Secretary may call a hearing at any time prior to the commencement of the offer, and there is no deadline for the completion of the hearing. *Id.*, at §§ 137.57.C and D. Although the Secretary is to render a decision within 15 days after the conclusion of the hearing, that period may be extended without limitation. Not only does the Secretary of State have the power to delay a tender offer indefinitely, but incumbent management may also use the hearing provisions of the Illinois Act to delay a tender offer. The Secretary is required to call a hearing if requested to do so by, among other persons, those who are located in Illinois "as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the takeover offer." *Id.*, at § 137.57.A. Since incumbent management in many cases will control, either directly or indirectly, 10% of the target company's shares, this provision allows management to delay the commencement of an offer by insisting on a hearing. As the Court of Appeals observed, these provisions potentially afford management a "powerful weapon to stymie indefinitely a takeover." 633 F. 2d, at 494.¹² In enacting the Williams Act, Congress itself "recog-

in this case.

¹² Delay has been characterized as "the most potent weapon in a tender offer fight." Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 238 (1977). See

nized that delay can seriously impede a tender offer" and sought to avoid it. *Great Western United Corp. v. Kidwell*, 577 F. 2d 1256, 1277 (CA5 1978); Senate Report at 4.¹³

Congress reemphasized the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U. S. C. 12, *et seq.*

"[I]t is clear that this short waiting period [the ten-day period for proration provided for by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).¹⁴

also Wachtell, *Special Tender Offer Litigation Tactics*, 32 Bus. L. 1433, 1437-1442 (1977); Wilner and Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality*, 45 Ford. L. Rev. 1, 9-10 (1976).

¹³ According to the Securities and Exchange Commission, delay enables a target company to:

- "(1) repurchase its own securities;
- "(2) announce dividend increases or stock splits;
- "(3) issue additional shares of stock;
- "(4) acquire other companies to produce an antitrust violation should the tender offer succeed;
- "(5) arrange a defensive merger;
- "(6) enter into restrictive loan agreements,
- "(7) institute litigation challenging the tender offer." Brief for the Securities and Exchange Commission as *amicus curiae* 10, n. 8.

¹⁴ Representative Rodino set out the consequences of delay in greater detail when he described the relationship between the Hart-Scott-Rodino Act and the Williams Act:

"In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way in-

As we have said, Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders. We therefore agree with the Court of Appeals that these hearing provisions conflict with the Williams Act.

C

The Court of Appeals also concluded that the Illinois Act is pre-empted by the Williams Act insofar as it allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer. Under § 137.57.E of the Illinois law, the Secretary is required to deny registration of a takeover offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . or that the take-over offer is inequitable . . . ." (Emphasis added).¹⁴ The Court of Appeals understood the Williams Act and its legislative history to

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tends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defense merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House Conferees contemplate that the courts will continue to do so." 122 Cong. Rec. 30877 (1976).

"Appellant argues that the Illinois Act does not permit him to adjudicate the substantive fairness of a tender offer. Brief for Appellant 21-22. On this state-law issue, however, we follow the view of the Court of Appeals that § 137.57.E allows the Secretary of State "to pass upon the substantive fairness of a tender offer. . . ." 638 F. 2d, at 493.

indicate that Congress intended for investors to be free to make their own decisions. We agree. Both the House and Senate Reports observed that the Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968); Senate Report at 3. Thus, as the Court of Appeals said, "[t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 633 F. 2d, at 494.

V

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U. S. Const., Art. 1, §8, cl. 3. "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause. . . even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U. S. 366, 370-371 (1976), quoting *Freeman v. Hewitt*, 329 U. S. 249, 252 (1946). See also *Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), citing *Huron Cement Co. v. Detroit*, 362 U. S. 440, 443 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the states; direct regulation is prohibited. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 199 (1925). See also *Pike v. Bruce Church, Inc.*, *supra*, at 142. The Illinois Act violates these principles for two reasons. First, it directly regulates and prevents, un-

less its terms are satisfied, interstate tender offers which in turn would generate interstate transactions. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

A

States have traditionally regulated intrastate securities transactions,¹⁶ and this Court has upheld the authority of states to enact "blue-sky" laws against Commerce Clause challenges on several occasions. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568 (1917). The Court's rationale for upholding blue-sky laws was that they only regulated transactions occurring within the regulating states. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in securities only incidentally." *Hall v. Geiger-Jones Co.*, *supra*, at 557-558 (cites omitted). Congress has also recognized the validity of such laws governing intrastate securities transactions in § 28a of the Securities Exchange Act, 15 U. S. C. § 78bb(a), a provision "designed to save state blue-sky laws from preemption." *Leroy v. Great Western United Corp.*, 443 U. S. 173, 182, n. 13 (1979).

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. A tender offer for securities of a publicly-held corporation is ordinarily communicated by the use of the mails or

¹⁶For example, the Illinois Blue Sky law, Ill. Rev. Stat. ch. 121 1/2, § 137.1, *et seq.* (Supp. 1980), provides that securities subject to the law must be registered "prior to sale in this State. . . ." *Id.*, at § 137.5.

other means of interstate commerce to shareholders across the country and abroad. Securities are tendered and transactions closed by similar means. Thus, in this case, MITE Corporation, the tender offeror, is a Delaware corporation with principal offices in Connecticut. Chicago Rivet is a publicly-held Illinois corporation with shareholders scattered around the country, 27% of whom live in Illinois. Mite's offer to Chicago Rivet's shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines. These transactions would themselves be interstate commerce. Yet the Illinois law, unless complied with, sought to prevent Mite from making its offer and concluding interstate transactions not only with Chicago Rivet's stockholders living in Illinois, but also with those living in other states and having no connection with Illinois. Indeed, the Illinois law on its face would apply even if not a single one of Chicago Rivet's shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat., ch. 121 1/2, § 137.52-10.(2) (Supp. 1980). Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other states; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. In *Shafer v. Farmers Grain Co.*, 268 U. S., at 199, the Court held that "a state statute which by its necessary operation directly interferes with or burdens . . . [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was en-

acted." See also *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. In *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control . . . [conduct] beyond the boundaries of the state. . . ." The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shafer v. Heitner*, 433 U. S. 186, 197 (1977).

Because the Illinois Act purports to regulate directly and to interdict interstate commerce, including commerce wholly outside the state, it must be held invalid as were the laws at issue in *Shafer* and *Southern Pacific*.

B

The Illinois Act is also unconstitutional under the test of *Pike v. Bruce Church, Inc.*, 397 U. S., at 142, for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously-described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.

The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest-valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer

mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1173-1174 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Tex. L. Rev. 1, 5, 27-28, 45 (1978); H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).

Appellant claims the Illinois Act furthers two legitimate local interests. He argues that Illinois seeks to protect resident security holders and that the Act merely regulates the internal affairs of companies incorporated under Illinois law. We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. We note, furthermore, that the Act completely exempts from coverage a corporation's acquisition of its own shares. Ill. Rev. Stat., ch. 121 1/2, § 137.52.09.4. Thus Chicago Rivet was able to make a competing tender offer for its own stock without complying with the Illinois Act, leaving Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts. This distinction is at variance with Illinois' asserted legislative purpose, and tends to undermine appellant's justification for the burdens the statute imposes on interstate commerce.

We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that

shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration and equal consideration rights. However, the Williams Act provides these same substantive protections, compare Ill. Rev. Stat., ch. 121 1/2, §§ 137.59.C, D, and E (Supp. 1980) (withdrawal, proration, and equal consideration rights) with 15 U. S. C. § 78n(d)(5), (6) and (7) and 17 CFR § 240.14d-7 (1981) (same). As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it may not substantially enhance the shareholders' ability to make informed decisions. 633 F. 2d, at 500. It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Appellant also contends that Illinois has an interest in regulating the internal affairs of a corporation incorporated under its laws. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. See *Restatement (Second) of Conflict of Laws*, § 302, Comment b at 307-308 (1971). That doctrine is of little use to the state in this context. Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company. *Great Western United Corp. v. Kidwell*, 577 F. 2d, at 1280, n. 53; *Restatement, supra*, § 302, comment e at 310. Furthermore, the proposed justifi-

cation is somewhat incredible since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents, Ill. Rev. Stat., ch. 121 1/2, § 137.52-10 (Supp. 1980). The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other states. Illinois has no interest in regulating the internal affairs of foreign corporations.

We conclude with the Court of Appeals that the Illinois Act imposes a substantial on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause.

The judgment of the Court of Appeals is

Affirmed.

06/16/82

5

80-1188: Edgar v. Mite

Justice Powell, concurring in part.

I agree with Justice Marshall that this case is
moot. ^{however,} In view of the decision of a majority of the Court
^{reach the merits,} to ~~the contrary, however,~~ I join Parts I, II, and VB of
the Court's opinion. ^{In my view,} The remainder of the Court's opinion
^{unnecessary} is ~~not needed~~ for the resolution of this case.

10

jsw 06/16/82

Memorandum to Justice Powell

Re: Edgar v. Mite

The voting on this case breaks down as follows:

BRW: Preemption -- CJ; HAB (tentative)

Commerce Clause --CJ; JPS; SOC

TM: WJB

WHR: No one else.

As a result, no one theory currently commands a Court. BRW does, however, have 5 votes for a judgment.

In this situation, I have three recommendations.

1. The recommendation that I urge the most strongly is that you stick by TM and his mootness vote. I have made this case before and will not bore you at length now. But I think that once you agree that the Court is without jurisdiction, this should end analysis for you. Further comment seems to me to be dicta. It seems especially anomalous that such "dicta" should cast the deciding vote for a particular theory that then becomes binding precedent until overruled.

2. If you disagree, my next recommendation is that you select the narrowest of the many available alternative theories to resolve the merits of this case. Unquestionably the narrowest of BRW's theories is his preemption analysis (Parts III and IV). This

analysis applies only to tender offer laws, and could have no possible application to state blue sky statutes. In addition, I agree with the numerous commentators on this point that Congress sought to preserve a neutrality with which state takeover laws -- although completely well intentioned and perhaps of superior wisdom -- do undoubtedly interfere. This interference is plain from the frequency with which target companies attempt resort to state statute protection.

This holding by the Court would not extend outside the tender offer area and would leave the problem for Congress if it believes that the Court has erred. Your vote would leave this case with only pluralities for each of theories on the merits. But you may view this a something of an advantage if you are reluctant to make binding law in a case that you believe is moot.

3. If you disagree again, I recommend that you join BRW's Part VB. This portion of his Commerce Clause analysis is narrower than Part VA. Both A and B possibly could be read as threatening state blue sky laws, which do have some extraterritorial effect in halting stock sales that are not completely intrastate. Part B, however, is narrower than Part A in that it is tied more directly to the characteristics and justifications for the particular Illinois statute here under attack.

The Commerce Clause holding again would leave the matter susceptible to ultimate congressional review. But the holding would be broader than the preemption analysis because of the relevance of the holding to state laws outside of the tender offer context -- notably state blue sky statutes.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 16, 1982

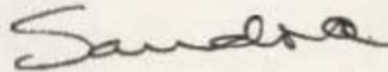
No. 80-1188 Edgar v. Mite Corporation

Dear Byron,

After revising my own views about this case more than once, I have decided to join Parts I, II and V of your opinion.

I will circulate a paragraph so stating.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra", followed by a small circular flourish.

Justice White

Copies to the Conference

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

June 17, 1982

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

✓

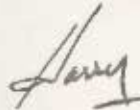
Re: No. 80-1188 - Edgar v. Mite Corporation

Dear Byron:

Just for the record, I formally join Parts I, II, III, and IV of your opinion.

According to my notes, you have a Court for Parts I, II, and V-B, four votes for Part V-A and three votes for Parts III and IV.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1982

Memorandum to the Conference

Re: No. 80-1188

Edgar v. Mite

Great!

I may suggest to Henry Lind that he include the following as part of the syllabus in Edgar v. Mite--for the benefit of confused readers. What do you think?

The votes for Justice White's opinion are as follows:

	Parts							
	I	II	III	IVA	IVB	IVC	VA	VB
Chief Justice	x	x	x	x	x	x	x	x
Justice Brennan								
Justice White	x	x	x	x	x	x	x	x
Justice Marshall								
Justice Blackmun	x	x	x	x	x	x		
Justice Rehnquist								
Justice Powell	x	x						x
Justice Stevens	x						x	x
Justice O'Connor	x	x					x	x

There are five votes for parts I (statement of the case), II (mootness), and VB (invalid under commerce clause).

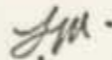
There are six separate opinions.

- 1) Justice White
- 2) Justice Marshall, joined by Justice Brennan, dissenting on mootness grounds.
- 3) Justice Rehnquist, dissenting on mootness grounds.
- 4) Justice Powell, concurring in part.
- 5) Justice Stevens, concurring in part and concurring in the judgment.
- 6) Justice O'Connor, concurring in part.

The votes have shifted as follows:

- 1) Justice Marshall circulates opinion for the Court.
- 2) Justice Brennan joins.
- 3) Justice Rehnquist joins.
- 4) Justice Powell joins.
- 5) Justice White circulates a dissent.
- 6) Justice Stevens circulates a dissent.
- 7) Justice Blackmun joins Justice White.
- 8) Justice O'Connor joins Justice Stevens.
- 9) The Chief Justice joins Justice Marshall.
- 10) Justice Rehnquist changes vote.
- 11) The Chief Justice changes vote.
- 12) Justice White circulates opinion for the Court.
- 13) Justice Marshall circulates dissent.
- 14) Justice Brennan joins Justice Marshall.
- 15) Justice Stevens circulates concurring opinion.
- 16) Justice Rehnquist circulates dissent.
- 17) The Chief Justice joins Justice White.
- 18) Justice O'Connor concurs.
- 19) Justice Powell concurs.
- 20) Justice Blackmun concurs.

Sincerely,



TM

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

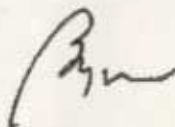
June 18, 1982

Re: 80-1188 - Edgar v. Mite Corp.

Dear Thurgood,

You are just envious. Counting all of the x's set out, I bet you have never had as many votes for any of your opinions. I am proud of each of these votes, especially since some of them add up to an opinion for the Court.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

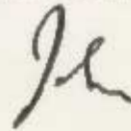
June 18, 1982

Re: 80-1188 - Edgar v. Mite Corp.

Dear Thurgood:

If you can devise a three-dimensional device that will reflect the information on page one and the information on page two simultaneously--and if ATEX can print it without blowing a fuse and thereby making Bill miss the ferry--I will join your proposed syllabus.

Respectfully,

A handwritten signature in dark ink, appearing to be 'JM' or similar initials, written in a cursive style.

Justice Marshall

Copies to the Conference

June 19, 1982

80-1188 Edgar v. Mite

Dear Byron:

Thurgood's wonderful "charting" of the gyrations of the "Brothers and Sister" in this case should make the history books.

I note that among those who have "gyrated", I may be tied for the leadership with John. Not wishing to be outdone, my final vote is to join Parts I and V-B only - as expressed in the enclosed revision of my little concurrence.

I look forward to hearing you announce this case and to what the reporters say about it.

Sincerely,

Justice White

lfp/ss

cc: The Conference

6/19/82

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: 6/19/82

Recirculated: _____

80-1188 Edgar v. Mite

JUSTICE POWELL, concurring in part.

I agree with Justice Marhsall that this case is moot. In view, however, of the decision of majority of the Court to reach the merits, I join Parts I and V-B of the Court's opinion.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1982

80-1188 Edgar v. Mite

Dear Byron:

Thurgood's wonderful "charting" of the gyrations of the "Brothers and Sister" in this case should make the history books.

I note that among those who have "gyrated", I may be tied for the leadership with John. Not wishing to be outdone, my final vote is to join Parts I and V-B only - as expressed in the enclosed revision of my little concurrence.

I look forward to hearing you announce this case and to what the reporters say about it.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

jsw 06/19/82 10:05 AM

Memorandum to Justice Powell

Re: Edgar v. Mite

✓
I've handled
you to V.B.
6/19

The introduction to Part V (pp. 15-16) states that the Illinois Act violates the Commerce Clause for two reasons: "First, it directly regulates and prevents, unless its terms are satisfied, interstate tender offers which [sic!] in turn would generate interstate transaction. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further." The two subsequent subparts elaborate these distinct and alternative rationales.

Part VA focuses on the "direc[t]" geographic effect of the state law. P. 16. It stresses that the Illinois Act "directly regulates transactions which [sic!] take place across state lines, even if wholly outside the State of Illinois." P. 16. It is this "sweeping extraterritorial effect" that is found to condemn the law, p. 17, irrespective of the State's purpose in enacting the law. This section argues simply that any such expansive regulation is beyond State power.

Part VB concentrates on weighing the "indirec[t]" burdens of the State's regulation against "the local interests served by the statute." P. 18. BRW concludes this weighing by finding that the indirect effects are "substantial," p. 18, while Illinois' "asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce." P. 19.

Parts VA and VB are alternative because the two arguments do not build on each other and each concludes that the state law is invalid. Part VB is narrower than part VA because VB takes into account the State's asserted interests in its law. A law with the same extraterritorial effect but with stronger justifications might have survived part VB. It logically could not survive part VA, however, because that section looks only to the extent of extraterritorial effect. It engages in no balancing.

Part III is just an exposition of preemption principles in the context of the Williams Act. It is completely irrelevant to resolution of the case on grounds of parts VA and VB. Your join of this section in effect would constitute a broad gauge expression of dicta.

In sum, if you do not wish to join part II, I recommend that you join only parts I and VB. This completely resolves the case, but does so on the narrowest Commerce Clause grounds -- thus creating the smallest degree of risk to state blue sky laws.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 21, 1982

80-1188 Edgar v. Mite

Dear Byron:

Here is the paragraph that I mentioned this morning as being something I would like to add to my little concurring statement. It explains - what is not self evident - why I join only Part V-B of the operative portion of your opinion.

I should have done this much earlier, and therefore have said that if this addition would hold you up I will scrub it. I am delivering copies to the printer and to Henry Lind.

This also will enable Thurgood to make an additional entry in his chart.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference
Mr. Henry Lind

lfp/ss 06/21/82

Rider A, Mite

MITEA SALLY-POW

I join only Part V-B because its Commerce Clause reasoning leaves some room for state regulation of tender offers. In a period in our history marked by conglomerate corporate formations essentially unrestricted by the antitrust laws, it is far from clear to me that the Williams Act's policy of "neutrality" operates fairly or in the public interest. Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as in capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. The Williams Act provisions seem to assume corporate entities of substantially equal resources. Moreover, in terms of general public interest, when corporate headquarters are moved away from a city and State inevitably there are certain adverse consequences.* I therefore agree with Justice Stevens that the Williams Act should not necessarily be read as prohibiting state legislation designed to assure - at least in some circumstances - greater protection to interests that

include but often are broader than those of incumbent management.

---

*The corporate headquarters of the great national and multi-national corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel - many of whom have provided community leadership - may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life - both in terms of leadership and financial support - also tend to diminish when there is a move of corporate headquarters.

June 21, 1982

80-1188 Edgar v. Mite

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lfp/ss

cc: The Conference
Mr. Henry Lind

lfp/ss 06/21/82

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Write

Bryan

TM

BRW

W.J.B.

HAB

GPS (in part)

SOC

THE C. J.	W. J. B.	~~W. J. B.~~	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
				12/12/81				
Join TM ~~1/3/82~~ 3/3/82	Join TM 2/2/82	Join JPS 3/1/82	await descent 2/8/82	1st draft 2/1/82 2nd draft	Join BKW 3/1/82	Join TM 2/18/82	1st draft con in judgment 2/18/82	will descent 2/4/82
agree with BLW's first draft 4/8/82			typed draft 2/26/82	2/4/82 3rd draft 2/12/82 4th draft				1st draft 2/27/82 2nd draft
			1st draft 3/2/82	2/24/82 5th draft 3/11/82				3/3/82 3rd draft 3/15/82
				6th draft 3/19/82				
Join BKW 6/11/82	await descent 6/1/82 Join Join TM 6/7/82	await. descent 6/3/82 ~~1st draft~~ 1st draft con in part 6/16/82	4/21/82 1st draft 5/28/82 2nd draft 6/7/82 3rd draft 6/11/82 4th draft 6/16/82 5th draft 6/22/82	1st draft 6/4/82 2nd draft 6/9/82	maybe 6/9/82 perhaps I, II, III & IV 6/17/82	con in part 6/16/82 typed draft	descent 1st draft 6/10/82 2nd draft 6/21/82	typed draft con in part con in judgment 6/9/82 1st printed draft 6/14/82 2nd draft con in part 6/16/82 Join BKW Parts I, II & V 6/16/82
				80-1189	Edgar v. Mite Corporation			

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 1, 1982

No. 80-1188 Edgar v. Mite Corporation

Dear John,

Although I voted at Conference to decide this case on mootness, your dissent is persuasive.

Please join me in it.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra", written in dark ink.

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 1, 1982

✓

No. 80-1188 Edgar v. Mite Corporation

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Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

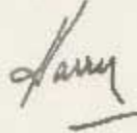
March 1, 1982

Re: No. 80-1188 - Edgar v. Mite Corporation

Dear Byron:

This case has given me much difficulty. I now agree with your dissent. Please join me.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

9 in still with T.M.

March 1, 1982

No. 80-1188 Edgar v. Mite Corporation

Dear Thurgood,

Although I initially thought this case could be resolved on the grounds of mootness, John's dissent raises sufficient concerns that I now believe we should not decide it on the basis of mootness and we should decide it on the merits.

Accordingly, I am unable to join the draft opinion.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

SOC joins IPS's dissent, while HAB joins BRW's dissent. These two dissents are not ~~compatible~~ compatible, I think. Therefore the Court will end up very divided, unless the CJ (the only vote not yet cast) joins TM. Although I think this would be bad on grounds of the authority of unstayed DC injunctions based on constitutional grounds, it would not be so tragic to reach the merits of the Williams Act's (over)

divided Court

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

CHAMBERS OF
THE CHIEF JUSTICE



March 3, 1982

Re: No. 80-1188 - Edgar v. Mite Corp.

Dear Thurgood:

I join.

Regards,

Justice Marshall

Copies to the Conference

Memorandum to Justice Powell

Re: Edgar v. Mite Corp.

Justice Rehnquist's switch of his vote in this case, combined with the Chief's announcement that he is reviewing his position, has thrown this case into the air. As I count the votes, presently there are four to reach the merits (two via BRW's theory that we should not "reach" the mootness issue, and two via JPS's theory that federal courts cannot convey durable protection in the form of a preliminary injunction); four to dismiss and vacate as moot (including your vote and the Chief's shaky vote); and WHR's vote to dismiss the appeal and leave the CA7 decision in place. The first thing that comes to mind is affirmance on the basis of an evenly divided Court. But that doctrine seems inapplicable when nine Justices vote. I suppose this means that the "dissenters" who believe the Court can reach the merits have the stronger claim on WHR's vote; he at least would leave the CA7 opinion standing instead of vacating it as moot.

Obviously there will have to be some further discussion before this case issues. I still believe that TM is correct in finding the case moot. I do confess, however, that JPS's dissent has shaken my conviction a bit. His best point is that a vacated

injunction cannot still have the force to bar Illinois' subsequent prosecution of Mite. I think that that injunction, though vacated, would still bar Illinois' action on Supremacy Clause grounds. The DC found Mite had a federal right to engage in its conduct. Mite could plead this a federal defense to any future prosecution by Illinois.

In short, I think you should stay with TM for the present and await future developments.

Yes

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

CHAMBERS OF
THE CHIEF JUSTICE

March 17, 1982

Re: No. 80-1188 - Edgar v. Mite Corp.

Dear Thurgood:

This case has been very difficult for everyone, beginning with the Conference discussion. In light of all the writing I am now going back over all the exchanges and the Conference itself. There were roughly four different positions at Conference.

My own concluding comment was that the intervening developments seemed to make this case moot. Alternatively, I said I could probably affirm but not on the rationale of the Seventh Circuit. As it should, the continuing exchanges have ventilated the subject more fully than was possible at the Conference.

As soon as I complete my re-examination I will "report."

Regards,

WECB

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 17, 1982

Re: No. 80-1188 Edgar v. Mite Corporation

Dear Thurgood:

As I let you know just a short while ago, I have become more and more uneasy with my position in this case as the debate between you, John, and Byron has escalated. With the increasing prominence, in each of the recirculations, which has been given to the issue of liability for the improvident issuance of an injunction (a question which I gather that all agree is one of first impression) I now find myself in the embarrassing position of having to withdraw my previous partial "join" and partial concurrence in the result. Although the issue of mootness is adequately briefed by the parties, the factual assertions which they necessarily make to support their positions are, in my view, not adequately documented in this skimpy record. I think it is something akin to the tail wagging the dog to decide the injunction issue in order to dispose of the mootness question: the latter simply consists of the application of well recognized principles to this particular case, while the former is an important and novel issue.

Would you, therefore, please note at the end of your opinion the following:

"JUSTICE REHNQUIST, believing that it is impossible to dispose of the issue of mootness in this case without deciding far-reaching questions of first impression tendered on a record all but barren of the factual development necessary to their decision, would dismiss the appeal. See Socialist Labor Party v. Gilligan, 406 U.S. 583

(1972); Rescue Army v. Municipal Court, 331 U.S.
549 (1947)."

Sincerely,

Wm

Justice Marshall

Copies to the Conference

March 17, 1982

80-1188 Edgar v. Mite Corporation

Dear Thurgood:

I am still with you.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

✓
April 8, 1982

Re: No. 80-1188 - Edgar v. Mite Corp.

MEMORANDUM TO THE CONFERENCE:

My memo of March 17 reflected "second thoughts" arising from the differing views that emerged in the several separate and dissenting opinions.

I now conclude that I am in general agreement with Byron's latest draft.

Regards,

WRB

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

CHAMBERS OF
THE CHIEF JUSTICE

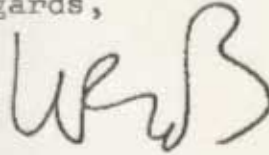
April 21, 1982

Re: 80-1188 - Edgar v. Mite Corp.

Dear Byron:

In view of the exchanges, it appears the case should
be assigned to you.

Regards,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

April 23, 1982

Re: 80-1188 Edgar v. Mite Corporation

Dear Byron,

In reviewing my notes on this case it appears that I thought the extraterritorial aspects of the Illinois statute interfere impermissibly with interstate commerce. I also thought the Williams Act did not preempt the state law because Congress had not expressed such an intent. I am still of the same view unless persuaded otherwise by the writing.

Sincerely,

Sandra

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

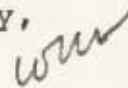
May 3, 1982

Re: No. 80-1188 Edgar v. Mite Corp.

Dear Byron:

You have inquired each of the last couple of Conferences how we all stood on this case since it has been reassigned to you. I did not volunteer any position, because I have wandered all over the lot as it is, and wanted to be fairly sure that if I did make some statement there would be a reasonable probability that I would stick to it. I have done a fair amount of thinking about the case, and while I still cannot join Thurgood's proposed disposition concluding that the case is moot, I think that by following a different route I can avoid confronting the "injunction" issue debated between Thurgood and John and nonetheless conclude it is moot. I find support for my position in Oil Workers Unions v. Missouri, 361 U.S. 363 (1960), and American Book Co. v. Kansas, 193 U.S. 49 (1904).

Sincerely,



Justice White

Copies to the Conference

To: Justice Stevens

From: David DeBruin

Date: May 3, 1982

Justice Rehnquist relies on Oil Workers Unions v. Missouri, 361 U.S. 363, to conclude that Mite is moot. In Oil Workers, a state statute authorized the Governor to take possession of any public utility affected by a work stoppage when in his opinion "the public interest, health and welfare are jeopardized." The statute prohibited any concerted refusal to work after the utility had been taken over by the State. If a union struck after that time, (1) the union became subject to statutory penalties, and (2) the strike could be enjoined by a state court.

In Oil Workers, a union struck a gas company after an existing collective bargaining agreement expired. Five days later the Governor took possession of the utility. After the seizure, the union continued to strike. Two actions in state court then followed. In one action, the State sought an injunction against the strike. In the second, the State sought monetary penalties from the union. The injunction was granted in the first case. The union then terminated its strike and negotiated a new collective bargaining agreement with the utility. The union nevertheless challenged the injunction on appeal, contending that the state statute under which it was

granted was unconstitutional. The Missouri Supreme Court recognized that the injunction had "expired by its own terms," but considered the merits of the union's challenge to the statute. The state court upheld the constitutionality of the statute and affirmed the order that enjoined the union from continuing its strike.

On appeal, this Court held that the case was moot. Since the union had terminated its strike, the propriety of the injunction issued against it was no longer a live issue. The Court also stated that the pendency of the separate damages action was irrelevant. Noting that the statutory penalties did not turn on the validity of the injunction, the Court held that "when [the damages] claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome."

Oil Workers is quite different from Mite. The potential liability of the union in Oil Workers for the statutory penalty resulted entirely from the fact that it had violated the terms of the statute. The fact that the union had later been specifically enjoined from violating the statute could not affect the union's statutory liability for damages. The only effect of the injunction was to permit the State to seek contempt penalties in addition to the monetary penalty set forth in the statute. Of course, if this Court had considered the merits and determined whether the issuance of the injunction had been proper, it also would have determined whether the union was liable for the

statutory penalty. The Court refused to hold, however, that the first action was not moot simply because its resolution would affect an open issue in the second.

In Mite, the party subject to the injunction did not cease its arguably unlawful conduct; rather, the party protected by the injunction did so. In Mite it is the State that was restrained from enforcing its statute, and the State has not abandoned its desire to do so. The State currently is prohibited from enforcing the statute by the federal court's injunction. If that injunction was issued properly, the State will remain permanently enjoined from taking the action that it wishes to take; if the injunction was improper, the State will be free to seek monetary penalties. The validity of the injunction is very much a live issue in this case.

There are two possible bases on which to conclude that this case is moot: (1) the injunction granted Mite absolute immunity from a future enforcement action, whether or not the injunction was issued properly; or (2) Mite has no interest in whether or not the State may bring an enforcement action against it, since it can always defend that action by asserting its arguments that the statute is unconstitutional. The first argument has been addressed in our dissent. The second is equally insufficient; Mite certainly has an interest in avoiding the uncertainty and costs of a future enforcement proceeding, even though it ultimately may prevail on the merits in such a proceeding.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 3, 1982

✓

Re: No. 80-1188 Edgar v. Mite Corp.

Dear Byron:

You have inquired each of the last couple of Conferences how we all stood on this case since it has been reassigned to you. I did not volunteer any position, because I have wandered all over the lot as it is, and wanted to be fairly sure that if I did make some statement there would be a reasonable probability that I would stick to it. I have done a fair amount of thinking about the case, and while I still cannot join Thurgood's proposed disposition concluding that the case is moot, I think that by following a different route I can avoid confronting the "injunction" issue debated between Thurgood and John and nonetheless conclude it is moot. I find support for my position in Oil Workers Unions v. Missouri, 361 U.S. 363 (1960), and American Book Co. v. Kansas, 193 U.S. 49 (1904).

Sincerely,

WHR

Justice White

Copies to the Conference

With this latest shift in WHR's position, there now are 4 votes for mootness. If WHR's change moves CJ, then once again there will be a Court for a mootness holding.

I recommence awaiting developments.

juw

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

✓

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

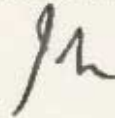
May 4, 1982

Re: 80-1188 - Edgar v. Mite Corp.

Dear Byron:

On the merits I have grave doubts about the validity of the Court of Appeals' pre-emption analysis, but I am satisfied that the Illinois statute imposes an impermissible burden on interstate commerce.

Respectfully,



Justice White

Copies to the Conference

P.S. For the reasons set forth in the attached memorandum prepared by David DeBruin, Bill Rehnquist's citation of the Oil Workers case does not change my opinion that the case is not moot.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

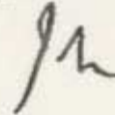
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Justice White

Copies to the Conference

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I would await WTR's reply.

ju

BRW finds no "mootness" - p 5
Then invalidates Ill Act
as preempted by Wm. Act.
Also invalid under Commerce
Clause

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 28 MAY 1982

Recirculated:

Virginia Act (that I helped write and
1st DRAFT "lobbied" through Va
SUPREME COURT OF THE UNITED STATES *Legislature*)

No. 80-1188

JAMES EDGAR, APPELLANT v. MITE CORPORATION
AND MITE HOLDINGS, INC.

*has been followed
- in substance
by 36
states - 6.*

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

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Illinois Business Take-Over Act, Ill. Rev. Stat., ch. 121 1/2, § 137.51, *et seq.* (Supp. 1980), is unconstitutional under the Supremacy and Commerce Clauses of the Federal Constitution.

*Reviewed.
5/30*

I

Appellee MITE Corporation and its wholly-owned subsidiary, MITE Holdings, Inc., are corporations organized under the laws of Delaware with their principal executive offices in Connecticut. Appellant James Edgar is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Under the Illinois Act any takeover offer¹ for the shares of a corporation must be registered with the Secretary of State if 10% of the class of equity

Though I am not persuaded on "mootness" issue, if BRW gets a court I'd join it.

¹ The Illinois Act defines "take-over offer" as "the offer to acquire or the acquisition of any equity security of a target company pursuant to a tender offer. . . ." Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 (Supp. 1980). "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934, 86 Harv. L. Rev. 1250, 1251 (1973). The terms "tender offer" and "takeover offer" are often used interchangeably.

securities subject to the offer are owned by shareholders residing in Illinois or if any two of the following conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois, or has at least 10% of its stated capital and paid-in surplus represented within the state. Ill. Rev. Stat., ch. 121 1/2, § 137.52-9 and 10 (Supp. 1980). An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. *Id.*, at § 137.54(E). The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. *Id.*, at § 137.57(A). If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that it "fails to provide full and fair disclosure to the offerees of all material information concerning the take-over, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees. . . ." *Id.*, at § 137.57.E.

On January 19, 1979, MITE initiated a cash tender offer for all outstanding shares of Chicago Rivet and Machine Co., a publicly held Illinois corporation, by filing a Schedule 14D-1 with the Securities and Exchange Commission in order to comply with the Williams Act.² The Schedule 14D-1 indi-

²The Williams Act, 82 Stat. 454, *et seq.*, codified at 15 U. S. C. §§ 78m(d)-(e) and 78n(d)-(f), added new sections 13(d), 13(e) and 14(d)-(f) to the Securities Exchange Act of 1934. Section 14(d)(1) of the Securities Exchange Act requires an offeror seeking to acquire more than five percent of any class of equity security by means of a tender offer to first file a Schedule 14D-1 with the Securities and Exchange Commission. The Schedule requires disclosure of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. In addition, the offeror must

cated that MITE was willing to pay \$28.00 per share for any and all outstanding shares of Chicago Rivet, a premium of approximately \$4.00 over the then-prevailing market price. MITE did not comply with the Illinois Act, however, and commenced this litigation on the same day by filing an action in the United States District Court for the Northern District of Illinois. The complaint asked for a declaratory judgment that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. In addition, MITE sought a temporary restraining order and preliminary and permanent injunctions prohibiting the Illinois Secretary of State from enforcing the Illinois Act.

Chicago Rivet responded three days later by bringing suit in Pennsylvania, where it conducted most of its business, seeking to enjoin MITE from proceeding with its proposed tender offer on the ground that the offer violated the Pennsylvania Takeover Disclosure Law, 70 Pa. Stat. Ann., Title 70, § 711.19 (Supp. 1978). After MITE's efforts to obtain relief in Pennsylvania proved unsuccessful,³ both Chicago

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disclose any antitrust or other legal problems which might result from the success of the offer. 17 CFR § 240.14d-100 (1981). Section 14(d)(1) requires the offeror to publish or send a statement of the relevant facts contained in the Schedule 14D-1 to the shareholders of the target company.

In addition, § 13(d), also added by the Williams Act, requires a purchaser of any equity security registered pursuant to § 12 of the Securities Exchange Act, 15 U. S. C. § 78l, to file a schedule 13D with the Commission within ten days after its purchases have exceeded five percent of the outstanding shares of the security. Schedule 13D requires essentially the same disclosures as required by Schedule 14D-1. Compare 17 CFR § 240.13d-101 (1981) with 17 CFR § 240.14d-100 (1981).

³ In addition to filing suit in state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission requesting the Commission to enforce the Pennsylvania Act against MITE. On January 31, 1979 the Pennsylvania Securities Commission decided that it would not invoke the Pennsylvania Takeover Disclosure Law. The next day, the United States District Court for the Western District of Pennsylvania, to which MITE had removed the state court action, denied Chicago Rivet's motion for a

Rivet and the Illinois Secretary of State took steps to invoke the Illinois Act. On February 1, 1979, the Secretary of State notified MITE that he intended to issue an order requiring it to cease and desist further efforts to make a tender offer for Chicago Rivet. On February 2, 1979 Chicago Rivet notified MITE by letter that it would file suit in Illinois state court to enjoin the proposed tender offer. MITE renewed its request for injunctive relief in the District Court and on February 2 the District Court issued a preliminary injunction prohibiting the Secretary of State from enforcing the Illinois Act against MITE's tender offer for Chicago Rivet.

MITE then published its tender offer in the February 5 edition of the Wall Street Journal. The offer was made to all shareholders of Chicago Rivet residing throughout the United States. The outstanding stock was worth over \$23 million at the offering price. On the same day Chicago Rivet made an offer for approximately 40% of its own shares at \$80.00 per share.⁴ The District Court entered final judgment on February 9, declaring that the Illinois Act was preempted by the Williams Act and that it violated the Commerce Clause. Accordingly, the District Court permanently enjoined enforcement of the Illinois statute against MITE. Shortly after final judgment was entered, MITE and Chicago Rivet entered into an agreement whereby both tender offers were withdrawn and MITE was given 30 days to examine the books and records of Chicago Rivet. Under the agreement MITE was either to make a tender offer of \$31.00 per share before March 12, 1979, which Chicago Rivet agreed not to oppose, or decide not to acquire Chicago Rivet's share or assets. App. to Brief for Appellees 1a-4a. On March 2, 1979, MITE announced its decision not to make a tender offer.

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temporary restraining order.

⁴Chicago Rivet's offer for its own shares was exempt from the requirements of the Illinois Act pursuant to Ill. Rev. Stat., ch. 121 1/2, § 137.52-9(4) (Supp. 1980).

The United States Court of Appeals for the Seventh Circuit affirmed *sub nom. MITE Corp. v. Dixon*, 633 F. 2d 486 (1980). It agreed with the District Court that several provisions of the Illinois Act are preempted by the Williams Act and that the Illinois Act unduly burdens interstate commerce in violation of the Commerce Clause. We noted probable jurisdiction, 451 U. S. 968 (1981), and now affirm.

II

The Court of Appeals specifically found that this case was not moot, 633 F. 2d, at 490, reasoning that because the Secretary has indicated he intends to enforce the Act against MITE, a reversal of the judgment of the District Court would expose MITE to civil and criminal liability⁵ for making the February 5, 1979 offer in violation of the Illinois Act. We agree. It is urged that the preliminary injunction issued by the District Court is a complete defense to civil or criminal penalties. While that is not a frivolous question by any means, it is an issue to be decided when and if the Secretary of State initiates an action. That action would be foreclosed if we agree with the Court of Appeals that the Illinois Act is unconstitutional. Accordingly, the case is not moot.

III

We first address the holding that the Illinois Takeover Act is unconstitutional under the Supremacy Clause. We note at the outset that in passing the Williams Act, which is an amendment to the Securities and Exchange Act of 1934, Congress did not also amend § 28(a) of the latter Act.⁶ In pertinent part, § 28(a) provides as follows:

⁵The Secretary of State may bring an action for civil penalties for violations of the Illinois Act., Ill. Rev. Stat. ch. 121 1/2, § 137.65 (Supp. 1980), and a person who willfully violates the Act is subject to criminal prosecution. *Id.*, at § 137.63.

⁶There is no evidence in the legislative history that Congress was aware of state takeover laws when it enacted the Williams Act. When the

"Nothing in this chapter shall affect the jurisdiction of the Securities Commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Thus Congress did not explicitly prohibit states from regulating takeovers; it left the determination whether the Illinois statute conflicts with the Williams Act to the courts. Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute; and,

"[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941); *Jones v. Rath Packing Co.*, *supra*, at 526, 540-541. Accord, *De Canas v. Bica*, 424 U. S. 351, 363 (1976)." *Ray v. Atlantic Richfield Co.*, 435 U. S. 151, 158 (1978).

Our inquiry is further narrowed in this case since there is no contention that it would be impossible to comply with both the provisions of the Williams Act and the more burdensome requirements of the Illinois law. The issue thus is, as it was in the Court of Appeals, whether the Illinois Act frustrates the objectives of the Williams Act in some substantial way,

The Williams Act, passed in 1968, was the congressional

Williams Act was enacted in 1968, only Virginia had a takeover statute. The Virginia statute, Va. Code § 131-528, became effective March 5, 1968; the Williams Act was enacted several months later on July 19, 1968. Takeover statutes are now in effect in 37 states. Sargent, On the Validity of State Takeover Regulation: State Responses to *MITE* and *Kidwell*, 42 Ohio St. L. J. 689, 690 n. 7 (1981).

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response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of the existing disclosure requirements of the federal securities laws." *Piper v. Chris-Craft Industries*, 430 U. S. 1, 22 (1977). The Williams Act filled this regulatory gap. The Act imposes several requirements. First, it requires that upon the commencement of the tender offer, the offeror file with the SEC, publish or send to the shareholders of the target company, and furnish to the target company detailed information about the offer. 15 U. S. C. § 78(n)(d)(1), 17 CFR § 240.24d-3 (1981). The offeror must disclose information about its background and identity; the source of the funds to be used in making the purchase; the purpose of the purchase, including any plans to liquidate the company or make major changes in its corporate structure; and the extent of the offeror's holdings in the target company. 15 U. S. C. § 78m(d)(1), 17 CFR § 240.13d-1 (1981). See also note 2, *supra*. Second, stockholders who tender their shares may withdraw them during the first seven days of a tender offer and if the offeror has not yet purchased their shares, at any time after sixty days from the commencement of the offer. 15 U. S. C. § 78n(d)(5).⁷ Third, all shares tendered must be purchased for the same price; if an offering price is increased, those who have already tendered receive the benefit of the increase. 15 U. S. C. § 78n(d)(7).⁸

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⁷The seven-day withdrawal period contained in the Williams Act has been extended to 15 business days by the Commission. 17 CFR § 240.14d-7(a)(1).

⁸The Williams Act also provides that when the number of shares tendered exceeds the number of shares sought in the offer, those shares tendered during the first 10 days of the offer must be purchased on a pro rata basis. 15 U. S. C. § 78n(d)(6). The Act also contains a general antifraud provision, 15 U. S. C. § 78n(e), which has been interpreted to require disclosure of material information known to the offeror even if disclosure was not otherwise required. See, e. g. *Sonesta Int'l Hotels Corp. v. Welling-*

There is no question that in imposing these requirements, Congress intended to protect investors. *Piper v. Chris-Craft Industries*, *supra*, at 35; *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) ("Senate Report"). But it is also crystal clear that a major aspect of the effort to protect the investor was to avoid tipping the scales in favor of either management or the takeover bidder. As we noted in *Piper*, the disclosure provisions originally embodied in S.2731 "were avowedly pro-management in the target company's efforts to defeat takeover bids." 430 U. S., at 30. But Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." Senate Report at 3.² It also became apparent that entrenched management was often successful in defeating takeover attempts. As the legislation evolved, therefore, Congress disclaimed any "intention to provide a weapon for management to discourage takeover bids . . ." *Rondeau v. Mosinee Paper Corp.*, *supra*, at 58, and expressly embraced a policy of neutrality. As Senator Williams explained, "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the persons making the takeover bids." 113 Cong. Rec. 24664 (1967). This policy of "evenhandedness", *Piper v. Chris-Craft Industries*, *supra*, at 31, represented a conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information should be in a position to make his own informed choice. We, therefore, agree with the Court of Appeals that Congress sought to protect the investor not

ton Associates, 483 F. 2d 247, 250 (CA 2 1973).

²Congress also did not want to deny shareholders "the opportunities which result from the competitive bidding for a block of stock of a given company", namely the opportunity to sell shares for a premium over their market price. 113 Cong. Rec. 24665 (1967) (remarks of Sen. Javits).

only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice. 633 F. 2d, at 496.

To implement this policy of investor protection while maintaining the balance between management and the bidder, Congress required the latter to file with the Commission and furnish the company and the investor with all information adequate to the occasion. With that filing, the offer could go forward, stock could be tendered and purchased, but a stockholder was free within a specified time to withdraw his tendered shares. He was also protected if the offer was increased. Looking at this history as a whole, it appears to us, as it did to the Court of Appeals, that Congress intended to strike a balance between the investor, management and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no "intention to do . . . more than give incumbent management an opportunity to express and explain its position." *Rondeau v. Mosinee Paper Corp.*, *supra*, at 58. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time-frame provided by Congress.

IV

The Court of Appeals identified three provisions of the Illinois Act that upset the careful balance struck by Congress and which therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. We agree with the Court of Appeals in all essential respects.

A

The Illinois Act requires tender offerors to notify the Secretary of State and the target company of its intent to make a tender offer and the material terms of the offer twenty busi-

ness days before the offer becomes effective. Ill. Rev. Stat., ch. 121 1/2, §§ 137.54E, 137.54B (Supp. 1980.) During that time, the offeror may not communicate its offer to the shareholders, *id.*, at § 137.54A. Meanwhile, the target company is free to disseminate information to its shareholders concerning the impending offer. The contrast with the Williams Act is apparent. Under that Act, there is no pre-commencement notification requirement; the critical date is the date a tender offer is "first published or sent or given to security holders." 15 U. S. C. § 78n(d)(1). See also 17 CFR § 240.14d-2 (1981).

We agree with the Court of Appeals that by providing the target company with additional time within which to take steps to combat the offer, the precommencement notification provisions furnish incumbent management with a powerful tool to combat tender offers, perhaps to the detriment of the stockholders who will not have an offer before them during this period.¹⁰ These consequences are precisely what Congress determined should be avoided, and for this reason, the precommencement notification provision frustrates the objectives of the Williams Act.

It is important to note in this respect that in the course of events leading to the adoption of the Williams Act, Congress several times refused to impose a precommencement disclosure requirement. In October 1965, Senator Williams introduced S.2731, a bill which would have required a bidder to notify the target company and file a public statement with the Securities and Exchange Commission at least 20 days before commencement of a cash tender offer for more than five per cent of a class of the target company's securities. 111 Cong. Rec. 28259 (1965). The Commission commented on the bill and stated that "the requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders . . ." 112 Cong. Rec. 190005 (1966). Senator Williams introduced a new bill in 1967, S.510, which provided for a confidential filing by the

¹⁰ See note 11 and accompanying text, *infra*.

tender offeror with the Commission five days prior to the commencement of the offer. S.510 was enacted as the Williams Act after elimination of the advance disclosure requirement. As the Senate Report explained,

"At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public." Senate Report at 4.

Congress rejected another pre-commencement notification proposal during deliberations on the 1970 amendments to the Williams Act.¹¹

B

For similar reasons, we agree with the Court of Appeals that the hearing provisions of the Illinois Act frustrate the congressional purpose by introducing extended delay into the

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¹¹ H. R. 4285, 91st Cong., 2d Sess. (1970). The bill was not reported out of the subcommittee. Instead, the Senate amendments to the Williams Act, which did not contain pre-commencement notification provisions, were adopted. Pub. L. No. 91-567, 84 Stat. 1497.

The Securities and Exchange Commission has promulgated detailed rules governing the conduct of tender offers. Rule 14d-2(b), 17 CFR § 240.14d-2(b) (1981), requires that a tender offeror make its offer effective within five days of publicly announcing the material terms of the offer by disseminating specified information to shareholders and filing the requisite documents with the Commission. Otherwise the offeror must announce that it is withdrawing its offer. The events in this litigation took place prior to the effective date of Rule 14d-2(b), and because Rule 14d-2(b) operates prospectively only, see 44 Fed. Reg. 70326 (1979), it is not at issue in this case.

tender offer process. The Illinois Act allows the Secretary of State to call a hearing with respect to any tender offer subject to the Act, and the offer may not proceed until the hearing is completed. Ill. Rev. Stat., ch. 121 1/2, §§ 137.57A and B. (Supp. 1980) The Secretary may call a hearing at any time prior to the commencement of the offer, and there is no deadline for the completion of the hearing. *Id.*, at §§ 137.57C and D. Although the Secretary is to render a decision within 15 days after the conclusion of the hearing, that period may be extended without limitation. Not only does the Secretary of State have the power to delay a tender offer indefinitely, but incumbent management may also use the hearing provisions of the Illinois Act to delay a tender offer. The Secretary is required to call a hearing if requested to do so by, among other persons, those who are located in Illinois "as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the takeover offer." *Id.*, at § 137.57.A. Since incumbent management in many cases will control, either directly or indirectly, 10% of the target company's shares, this provision allows management to delay the commencement of an offer by insisting on a hearing. As the Court of Appeals observed, these provisions potentially afford management a "powerful weapon to stymie indefinitely a takeover." 633 F. 2d, at 494.¹² In enacting the Williams Act, Congress itself "recognized that delay can seriously impede a tender offer" and sought to avoid it. *Great Western United Corp. v. Kidwell*,

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¹² Delay has been characterized as "the most potent weapon in a tender offer fight." Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Q. 213, 238 (1977). See also Wachtell, *Special Tender Offer Litigation Tactics*, 32 Bus. L. 1433, 1437-1442 (1977); Wilner and Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality*, 45 Fordham L. Rev. 1, 9-10 (1976).

577 F. 2d 1256, 1277 (CA5 1978); Senate Report at 4.¹³

Congress reemphasized the consequences of delay when it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383, 15 U. S. C. 12, *et seq.*

"[I]t is clear that this short waiting period [the ten-day period for proration provided for by § 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This ten-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthy delays that might discourage their chances for success." H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).¹⁴

¹³ According to the Securities and Exchange Commission, delay enables a target company to:

- "(1) repurchase its own securities;
- "(2) announce dividend increases or stock splits;
- "(3) issue additional shares of stock;
- "(4) acquire other companies to produce an antitrust violation should the tender offer succeed;
- "(5) arrange a defensive merger;
- "(6) enter into restrictive loan agreements,
- "(7) institute litigation challenging the tender offer." Brief for the Securities and Exchange Commission as *amicus curiae* 10, n. 8.

¹⁴ Representative Rodino set out the consequences of delay in greater detail when he described the relationship between the Hart-Scott-Rodino Act and the Williams Act:

"In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. . . . Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defense merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market,

As we have said, Congress anticipated investors and the takeover offeror be free to go forward without unreasonable delay. The potential for delay provided by the hearing provisions upset the balance struck by Congress by favoring management at the expense of stockholders. We therefore agree with the Court of Appeals that these hearing provisions conflict with the Williams Act.

C

The Court of Appeals also concluded that the Illinois Act is pre-empted by the Williams Act insofar as it allows the Secretary of State of Illinois to pass on the substantive fairness of a tender offer. Under § 137.57E of the Illinois law, the Secretary is required to deny registration of a takeover offer if he finds that the offer "fails to provide full and fair disclosure to the offerees . . . or that the take-over offer is inequitable . . . ." (Emphasis added).¹⁵ The Court of Appeals understood the Williams Act and its legislative history to indicate that Congress intended for investors to be free to make their own decisions. We agree. Both the House and Senate Reports observed that the Act was designed to "make the relevant facts known so that shareholders have a fair opportunity to make their decision." H. R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968); Senate Rept. at 3. Thus, as the Court of Appeals said, "the state thus offers investor protection at the expense of investor autonomy—an approach

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making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so." 122 Cong. Rec. 30877 (1976).

¹⁵ Appellant argues that the Illinois Act does not permit him to adjudicate the substantive fairness of a tender offer. Brief for Appellant 21-22. On this state-law issue, however, we follow the view of the Court of Appeals that § 137.57.E allows the Secretary of State "to pass upon the substantive fairness of a tender offer. . . ." 633 F. 2d, at 493.

quite in conflict with that adopted by Congress." 633 F. 2d, at 494.

V

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states." U. S. Const., Art. 1, § 8, cl. 3. "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause. . . even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U. S. 366, 370-371 (1976), quoting *Freeman v. Hewitt*, 329 U. S. 249, 252 (1946). See also *Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980). Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 141 (1970), citing *Huron Cement Co. v. Detroit*, 362 U. S. 440, 443 (1960). The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the states; direct regulation is prohibited. *Shafer v. Farmers Grain Co.*, 268 U. S. 189, 199 (1925). The Illinois Act violates these principles for two reasons. First, it directly regulates interstate commerce through the exercise of extraterritorial jurisdiction. Second, the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further.

A

States have traditionally regulated intrastate securities transactions,¹⁶ and this Court has upheld the authority of

¹⁶For example, the Illinois Blue Sky law, Ill. Rev. Stat. ch. 121 1/2, § 137.1, *et seq.* (Supp. 1980), provides that securities subject to the law

states to enact "blue-sky" laws against Commerce Clause challenges on several occasions. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568 (1917). The Court's rationale for upholding the state laws was that the laws only regulated transactions occurring within the regulated states. "The provisions of the law . . . apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed . . . they are only affected by the requirement of a license of one who deals with them *within* the State. . . . Such regulations affect interstate commerce in securities only incidentally." *Hall v. Geiger-Jones Co.*, *supra*, at 557-558 (cites omitted). Congress has also recognized the validity of such laws governing intrastate securities transactions in §28a of the Securities Exchange Act, 15 U. S. C. §78bb(a), a provision "designed to save state blue-sky laws from preemption." *Leroy v. Great Western Corp.*, 443 U. S. 173, 182, n. 13 (1979).

The Illinois Act differs substantially from state blue-sky laws in that it directly regulates transactions which take place across state lines, even if wholly outside the state of Illinois. Although in this case some 27% of Chicago Rivet's shareholders were Illinois residents, the Illinois Act applied to transactions with any of its shareholders, wherever located. Also, it would have applied even if none of Chicago Rivet's shareholders were Illinois residents, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Rev. Stat., ch. 121 1/2, §137.52-10.(2) (Supp. 1980). Thus the Act could be applied to regulate a tender offer which would not affect a single Illinois shareholder.

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must be registered "prior to sale in this State . . ." *Id.*, at §137.5.

The Illinois statute has sweeping extraterritorial effect. A tender offer for the securities of a publicly-held corporation is ordinarily communicated by use of the mails or other means of interstate commerce to shareholders across the country and abroad; securities are tendered to the offeror by similar means. Yet the Illinois Act operates directly on these interstate transactions even when they take place entirely outside the state. The Commerce Clause has long precluded the application of a statute such as the Illinois Act to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. In *Shafer v. Farmers Grain Co.*, *supra*, at 199, the Court held that "a state statute which by its necessary operation directly interferes with or burdens . . . [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." See also *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). Similarly, in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 775 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control . . . [conduct] beyond the boundaries of the state. . . ."

The limits on a state's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shafer v. Heitner*, 433 U. S. 186, 197 (1977). Because the Illinois Act purports to regulate directly conduct occurring wholly outside the state, it must be held invalid as were the laws at issue in *Shafer* and *Southern Pacific*.

B

The Illinois Act is also unconstitutional under the test of *Pike v. Bruce Church, Inc.*, 397 U. S., at 142, for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in

relation to the local interests served by the statute. The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously-described extraterritorial reach which purports to give Illinois the power to determine whether a nationwide tender offer may proceed.

The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest-valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced. See Easterbrook and Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1173-1174 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Tex. L. Rev. 1, 5, 27-28, 45 (1978); H. R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).

Appellant claims the Illinois Act furthers two legitimate local interests. He argues that Illinois seeks to protect resident security holders and that the Act merely regulates the internal affairs of companies incorporated under Illinois law. We agree with the Court of Appeals that these asserted interests are insufficient to outweigh the burdens Illinois imposes on interstate commerce.

While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders. Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law. We note, furthermore, that the Act completely exempts from coverage a corporation's acquisition of its own shares. Ill. Rev. Stat., ch. 121 1/2, § 137.52.09(4). Thus Chicago Rivet was able to make a competing tender offer for its own stock without complying

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with the Illinois Act, leaving Chicago Rivet's shareholders to depend only on the protections afforded them by federal securities law, protections which Illinois views as inadequate to protect investors in other contexts. This distinction is at variance with Illinois' asserted legislative purpose, and tends to undermine appellant's justification for the burdens the statute imposes on interstate commerce.

We are also unconvinced that the Illinois Act substantially enhances the shareholders' position. The Illinois Act seeks to protect shareholders of a company subject to a tender offer by requiring disclosures regarding the offer, assuring that shareholders have adequate time to decide whether to tender their shares, and according shareholders withdrawal, proration and equal consideration rights. However, the Williams Act provides these same substantive protections, compare Ill. Rev. Ann. Stat., ch. 121 1/2, §§ 137.59.C, D, and E (Supp. 1980) (withdrawal, proration, and equal consideration rights) with 15 U. S. C. § 78n(d)(5), (6) and (7) and 17 CFR § 240.14d-7 (same). As the Court of Appeals noted, the disclosures required by the Illinois Act which go beyond those mandated by the Williams Act and the regulations pursuant to it may not substantially enhance the shareholders' ability to make informed decisions. 633 F. 2d, at 500. It also was of the view that the possible benefits of the potential delays required by the Act may be outweighed by the increased risk that the tender offer will fail due to defensive tactics employed by incumbent management. We are unprepared to disagree with the Court of Appeals in these respects, and conclude that the protections the Illinois Act affords resident security holders are, for the most part, speculative.

Appellant also contends that Illinois has an interest in regulating the internal affairs of a corporation incorporated under its laws. The internal affairs doctrine is a conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or be-

tween the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. See *Restatement (Second) of Conflict of Laws*, §302, Comment b at 307-308 (1971). That doctrine is of little use to the state in this context. The Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents, Ill. Rev. Stat., ch. 121 1/2, § 137.52-10 (Supp. 1980). The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other states. Illinois has no interest in regulating the internal affairs of foreign corporations.

We conclude with the Court of Appeals that the Illinois Act imposes a substantial on interstate commerce which outweighs its putative local benefits. It is accordingly invalid under the Commerce Clause.

The judgment of the Court of Appeals is

Affirmed.