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NOTE

STATE REGULATION OF HOSTILE TAKEOVERS: THE CONSTITUTIONALITY OF THIRD GENERATION BUSINESS COMBINATION STATUTES AND THE ROLE OF THE COURTS

Due to the regulatory burdens associated with a proxy contest, the 1960s witnessed the emergence of the "hostile takeover." A proxy contest has been defined as "a dispute between groups attempting to retain or gain control of the board of directors of a company by using the proxy device to gather sufficient voting support." A "hostile takeover" occurs when one entity, the predator, acquires control of another, the target, through the acquisition of stock, despite resistance by the target's management. See generally E. Aranow & H. Einhorn, Proxy Contests for Corporate Control 81-139 (1957) (discussing SEC regulation of proxy solicitations).


A proxy contest has been defined as "a dispute between groups attempting to retain or gain control of the board of directors of a company by using the proxy device to gather sufficient voting support." A "hostile takeover" occurs when one entity, the predator, acquires control of another, the target, through the acquisition of stock, despite resistance by the target's management. See id. at 197; see also Prentice, The Role of States in Tender Offers: An Analysis of CTS, 1988 COLUM. BUS. L. REV. 1, 4 (1988) (defining hostile tender offer). See generally J. Brooks, The Takeover Game passim (1987) (effect of takeovers on Wall Street); M. Johnston, Takeover passim (1986) (work on major players in takeover game); A. Michel & I. Shaked, Takeover Madness passim (1986) (compilation of specific takeover bids); Corporate Takeovers: Causes and Consequences passim (A. Auerbach ed. 1988) [hereinafter Corporate Takeovers] (collection of articles on takeovers).

A "hostile takeover" is usually implemented through a "tender offer," see Brown, supra note 1, at 197, which is "conventionally understood [as] a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, supra note 1, at 1251; see Edgar v. MITE Corp., 457 U.S. 624, 626 n.1 (1982) (definition cited by Court). See generally 1 M. Lipton & E. Steinberger, Takeovers & Freezeouts § 1.1-1.2 (1978) (discussion of tender offers); Chester, Definition of "Tender Offer", in Tender Offers 310-15 (M. Steinberg ed. 1985) (describing term "tender offer" as
as the predominant method of corporate acquisition. Initially takeovers were a virtually unregulated area, and the opportunity for potential abuse led to both state and federal legislative intervention. Thereafter, a conflict developed as "first generation" state antitakeover statutes were constitutionally attacked on both
delusive); Note, Target Directors' Fiduciary Duties: An Initial Reasonableness Burden, 61 NOTRE DAME L. REV. 722, 722 n.1 (1988) (how courts define "tender offer").


5 See Warren, supra note 3, at 673 ("In the absence of regulation, abuses emerged"). Concern developed over what was known as the "Saturday Night Special." See Brennan, SEC Rule 14d-8 and Two-Tier Offers, in TENDER OFFERS 110 (M. Steinberg ed. 1985). A "Saturday Night Special" is a "tender offer[] that [was] begun and completed in a very short period of time—perhaps over a weekend—which precluded any rational investor decision over whether or not to tender." Fay, State Takeover Law: Shareholder Protection, The Constitution, and The Delaware Approach, 24 GONZ. L. REV. 249, 250 (1989).


7 See Comment, State Regulation of Corporate Takeovers: Legislation After CTS Corp. v. Dynamics Corp. of America, 18 Sw. U. L. REV. 155, 160-61 n.59 (1988) ("Takeover statutes enacted following the adoption of the Williams Act, have been called 'first generation' takeover statutes"); see also infra notes 50-55 and accompanying text (discussion of "first generation" takeover statutes).
commerce clause and supremacy clause grounds.  

The United States Supreme Court first addressed these constitutional issues in Edgar v. MITE Corp., in which it declared a first generation Illinois antitakeover statute unconstitutional. This led to the enactment of a “second generation” of state regulations designed to circumvent the constitutional restrictions outlined in MITE. In CTS Corp. v. Dynamics Corp., the Court validated a second generation Indiana statute despite constitutional challenges similar to those raised in Mite. Following CTS, many states followed the lead of a few pre-CTS jurisdictions and developed more stringent antitakeover laws now classified as “third generation” statutes.

These third generation enactments have become the subject of considerable debate due to their severely restrictive effect on “hostile takeover” activity. Recently, in Amanda Acquisition Corp. v. Universal Foods Corp., the court commented that Wisconsin “third generation” statute “effectively eliminates hostile leveraged buyouts”, aff’d, 877 F.2d 496 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989); RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476, 482 (D. Del. 1988) (third generation Delaware statute “exercises substantial deterrent effects on tender offers”); Johnson & Millon, Misreading the Williams Act, 87 Minn. L. Rev. 1862, 1873-78 (1989) (criticism of third generation statutes’ goal of protecting nonshareholder interests).
Corp. v. Universal Foods Corp., the Seventh Circuit upheld a third generation Wisconsin statute and amplified the controversy regarding takeover regulation by addressing the issue of the courts' role in this area.

This Note will examine the Seventh Circuit's decision in Amanda, and assert that the court correctly analyzed the constitutional issues and properly limited the role of the judiciary in dealing with state antitakeover legislation. Part One will present the policy arguments both for and against hostile takeovers in an effort to illustrate the reasons for the present controversy. Part Two will discuss the corporate regulatory power traditionally reserved to the states and the related federal limitations in order to establish a framework for the analysis which follows. Part Three will briefly outline the history of state antitakeover statutes. Finally, Part Four will review the Amanda court's constitutional analysis, submit that the Seventh Circuit was correct in realizing that judicial limitations exist in this area, and suggest that federal legislative options should be explored.

I. THE CONTROVERSY SURROUNDING HOSTILE TAKEOVERS

Commentators have long been divided as to the societal value of hostile takeovers. Supporters argue that, from an economic perspective, takeovers provide a useful check on the efficiency of management, optimize the allocation of society's resources, in-
crease shareholder wealth by providing shareholders with the opportunity to sell their stock at a premium price, and offer society an alternative to the costs associated with bankruptcy and liquidation.

However, opponents maintain that both economic and public policy factors must be considered when evaluating hostile takeovers. From an economic perspective, opponents claim that takeovers improperly shift management focus to the short-term, deny shareholders information, and reduce incentives for management to perform efficiently. 

See Amanda, 877 F.2d at 500; see also Easterbrook & Fischel, Takeover Bids, Defensive Tactics, and Shareholders' Welfare, 36 Bus. Law. 1733, 1737 (1981) (takeovers result in firms' assets being put to better use); Fischel, Efficient Capital Market Theory, The Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 Tex. L. Rev. 1, 5 (1978) (market for corporate control leads to efficient allocation of society's resources); Gibson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 Stan. L. Rev. 51, 52 (1982) (takeovers allocate assets to most efficient users); Harrington, If It Ain't Broke, Don't Fix It: The Legal Propriety of Defenses Against Hostile Takeover Bids, 34 Syracuse L. Rev. 977, 981-82 (1983) (society benefits from allocation of resources to most efficient users); Manne, In Defense of the Corporate Coup, 11 N. Ky. L. Rev. 513, 518 (1984) (takeovers "reallocat[e] physical resources from less-efficient to more-efficient users").

shareholders the opportunity to benefit from long-term growth of the company, and increase the overall level of national corporate debt. From a public policy standpoint, opponents contend that takeovers often result in the “bust-up” of stable companies, decrease local levels of employment, and have a negative rippling effect in the communities surrounding target companies.

II. TRADITIONAL STATE POWER IN CORPORATE REGULATION AND THE APPLICABLE FEDERAL LIMITATIONS

To understand more fully the position of the judiciary in light of the competing policies associated with hostile takeovers, one must comprehend the present balance between state and federal power. Under the Constitution, powers not delegated to the federal government are “reserved to the States . . . or to the people.”

Traditionally, the states have enjoyed broad power in regul-
ing the creation and internal governance of corporations. However, federal limitations do exist to the extent that a state may not enact a law which violates the United States Constitution or a valid federal statute. Accordingly, state antitakeover statutes have been attacked on both commerce and the supremacy clause grounds.

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36 See W. Clark, Private Corporations § 75 (3d ed. 1916) (discussion of traditional state police power); W. Cook, The Principles of Corporate Law 388-90 (1928) (traditional police power of states in corporate regulation); C. Elliot, The Law of Private Corporations § 89 (5th rev. ed. 1923) (discussion of traditional state control over corporations); see also Restatement (Second) of Conflict of Laws § 304 (1971) (state law traditionally regulates shareholder participation in corporations).

In fact, “[n]o principle of corporation law . . . is more firmly established than a State’s authority to regulate domestic corporations.” CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987). The United States Supreme Court and the lower federal courts have firmly adhered to this principle. See, e.g., Santa Fe Indus. v. Green, 430 U.S. 462, 479 (1977) (reluctance of Court to “federalize . . . where established state policies of corporate regulation would be overridden”); Cort v. Ash, 422 U.S. 462, 479 (1977) (“Corporations are creatures of state law, . . . state law will govern the internal affairs of the corporation”); Amanda, 877 F.2d at 502 (“States have regulated corporate affairs, . . . since before the beginning of the nation”); Air Line Pilots Ass’n Int’l v. UAL Corp., 874 F.2d 439, 447 (7th Cir. 1989) (“regulation of corporations is . . . a matter of primary state responsibility”).

37 U.S. Const. art. VI, cl. 2 (supremacy clause); see also Reynolds v. Sims, 377 U.S. 533, 584 (1964) (federal Constitution overrides state constitution when in conflict); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (Court invalidated state law as violation of article I of Constitution).

38 U.S. Const. art. VI, cl. 2; see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 203-04 (1983) (Congress may expressly preempt state authority; “[a]bsent explicit pre-emptive language, Congress’ intent to supersede state law altogether may be found from a ‘scheme of federal regulation . . . so pervasive as to make . . . no room for the States to supplement it’”) (quoting Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta, 458 U.S. 141, 153 (1982); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (“act of Congress . . . is supreme; and the law of the State . . . must yield”). See generally L. Tribe, American Constitutional Law § 6-25 passim (2d ed. 1988) (discussion of federal preemption of state action).

39 See, e.g., CTS, 481 U.S. at 72 (Indiana statute unconstitutional on commerce and supremacy clause grounds); MITE, 457 U.S. at 624 (Illinois statute constitutional); Amanda, 877 F.2d at 496 (Wisconsin statute constitutional despite commerce and supremacy clause attacks); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1122 (8th Cir. 1982) (Missouri statute unconstitutional on commerce and supremacy clause grounds); RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476, 476 (D. Del. 1988) (Delaware statute constitutional despite attack on commerce and supremacy clause grounds); Batus, Inc. v. McKay, 684 F. Supp. 637, 637 (D. Nev. 1988) (Nevada statute unconstitutional on both supremacy and commerce clause grounds).

It has also been argued that the “contracts clause” may provide still another ground for constitutional challenge. See Butler & Ribstein, State Antitakeover Statutes and the Contract Clause, 57 U. Cin. L. Rev. 611, 613 (1988). Professors Butler and Ribstein contend that “the constitutional issues surrounding state anti-takeover statutes have not been resolved because the Court has not considered the crucial point that the state statutes potentially run afoul of the ‘Contracts Clause’ in article I, section 10 of the Constitution: ‘No
Under the commerce clause, claimants maintain that state acts which restrict takeover activity unconstitutionally interfere with interstate commerce. Similarly, under the supremacy clause, opponents attack state antitakeover legislation on the grounds that a valid exercise of congressional power preempts any conflicting state action. In this context, state antitakeover laws have been challenged with claims of federal preemption under the Williams Act. The Williams Act requires a bidder to make certain disclosures and “establishes procedural rules to govern tender offers.”

More specifically, the Williams Act mandates that a bidder who acquires more than five percent of certain classes of stock must disclose information concerning its background, its method of financing, its purpose, and any arrangements it may have with management. Furthermore, the Williams Act sets time limits that provide shareholders with an opportunity to consider the offer, ensures that shareholders tendering their shares within these limits will receive the same price, and prohibits unethical practices by the bidder.

State shall . . . pass any . . . Law impairing the obligations of Contracts.’” Id.

U.S. CONST. art. I, § 8, cl. 3. The commerce clause provides that the federal government, through Congress, “shall have Power . . . [t]o regulate Commerce . . . among the several States.” Id.

The Constitution does not explicitly prohibit the states from interfering with interstate commerce. See L. Tribe, supra note 38, § 6.2, at 403. Thus, this limitation on the states is based on “the Constitution’s negative implications.” Id.

See, e.g., CTS, 481 U.S. at 87-89; MITE, 457 U.S. at 640-47; Amanda, 877 F.2d at 505-09.


See, e.g., CTS, 481 U.S. at 78-86; MITE, 457 U.S. at 630-40; Amanda, 877 F.2d at 502-05; see also 15 U.S.C. § 78m(d)-(e), 78n(d)-(f) (1988) (the Williams Act).

The Williams Act was enacted in 1968 in response to the increasing number of tender offers. See Fay, supra note 5, at 250; Note, A Policy Analysis of New York State Security Takeover Disclosure Act, 53 Brooklyl L. Rev. 1117, 1119 (1988); see also Warren, supra note 3, at 671-73 (discussion of situation in which Congress enacted Williams Act).

See CTS, 481 U.S. at 79.

See id.


Id. § 78n(d)(5).

Id. § 78n(d)(7).

Id. § 78n(e).
III. State Antitakeover Statutes: A Brief History

The history of state antitakeover statutes can be divided into three stages or “generations.”

A. The First Generation

The first piece of legislation representing governmental regulation of “hostile takeovers” was enacted at the state level in 1968. Federal regulation, in the form of the Williams Act, soon followed and by 1982 thirty-seven states had some form of antitakeover legislation. Many of these statutes allowed a state to regulate transactions occurring outside of its borders and were inconsistent with the federal requirements of the Williams Act. As a result, many first generation statutes fell victim to constitutional challenges.

The United States Supreme Court initially addressed the constitutional issues associated with first generation statutes in *Edgar v. MITE Corp.* In *MITE*, a Delaware corporation, seeking to ac-
quire an Illinois corporation, challenged the constitutionality of the Illinois Business Take-Over Act.\(^7\) The Illinois Act, like many first generation statutes, included the following: timing requirements which differed from the Williams Act;\(^8\) an allowance for the intervention of government officials to determine the “fairness” of the acquisition;\(^9\) and a theoretical grant of power to Illinois to regulate a transaction involving the takeover of a “foreign corporation” which might “not affect a single Illinois shareholder.”\(^8\)0

Stressing that the Illinois Act sought to directly regulate interstate commerce and that the resulting burdens would be excessive in relation to the local interests the Act sought to protect, the MITE majority invalidated the Act on commerce clause grounds.\(^6\)

In addition, a plurality of the Court determined that the Illinois Act was unconstitutional on supremacy clause grounds since it was preempted by the Williams Act.\(^6\)

B. The Second Generation

The states responded to the constitutional analysis in MITE by enacting a wide variety of second generation statutes.\(^6\)3 In an effort to avoid commerce clause violations, this wave of legislation focused on the traditional power of the states to regulate internal

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\(^7\) Id. The Illinois Act, ILL. ANN. STAT. ch. 121 ½, para. 137.52-10, 137.54, 137.57 (Smith-Hurd 1980) (repealed 1983), was challenged under both the commerce clause and the supremacy clause. Mite, 457 U.S. at 624.

\(^8\) See ILL. ANN. STAT. ch. 121 ½, para. 137.54(E) (Smith-Hurd 1980) (repealed 1983).

\(^9\) See id. para. 137.57(A).

\(^10\) See id. para. 137.52-10(2).

\(^11\) See MITE, 457 U.S. at 641-46. The Court was concerned about the fact that Illinois could regulate outside of its borders and thus held the statute to be unconstitutional as a violation of the commerce clause. Id. at 643. Applying the “Pike balancing test,” the Court determined that the burdens imposed on interstate commerce were excessive in comparison to the local interests the statute served. Id.; see Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

\(^6\)See MITE, 457 U.S. at 630-40. The MITE plurality believed the Illinois Act to be preempted by the Williams Act for three reasons. First, it had timing requirements which differed with those of the Williams Act. Id. at 634-36. Second, the statute contained administrative review provisions which were believed to hurt the chances of a successful tender offer. Id. at 636-39. Third, it was viewed as an impediment to “investor autonomy”—the right of the shareholder to make his own individual choice. Id. at 639-40.

\(^6\) See supra notes 11-12 and accompanying text (second generation statutes); see also Black, Barton & Roth, State Takeover Statutes: The “Second Generation”, 13 Sec. Rec. L.J. 332, 333 (1986) (“a number of states have attempted to enact takeover statutes designed to withstand constitutional scrutiny”); Prentice, supra note 2, at 23 (“states adopted a number of new strategies to remedy perceived constitutional defects”).
Despite the various approaches taken, these statutes had two elements in common: (1) they applied only to corporations incorporated within the state; and (2) instead of attempting to monitor the sale of securities, they concentrated on regulating matters pertaining to a corporation’s internal affairs, such as the voting rights of shareholders.

Of the states which enacted second generation antitakeover laws, many adopted “control share acquisition” statutes. Under this approach, a bidder who acquired “more than a specified percentage of the issuer’s stock [was required to] obtain shareholder approval of the acquisition in order to be accorded full voting rights or to complete the acquisition.” Theoretically, such statutes were designed to avoid the inequities of a “two-tier” tender offer and to protect the interests of the target shareholders on a “group” rather than “individual” basis by shielding them from the “coercive aspects” of such offers.
In *CTS Corp. v. Dynamics Corp.*, the Court, confronted with Indiana's "second generation control share acquisition" statute, was again faced with the issue of the constitutionality of state takeover regulation. Under the Indiana Act, an entity acquiring a "control share" of an "issuing public corporation" did not obtain the applicable voting rights unless a majority of the remaining "pre-existing disinterested" shareholders of each class of stock outstanding and entitled to vote approved. This provision effectively placed the prospect of a successful hostile takeover in the collective hands of the shareholders. The district court invalidated the law on both Williams Act preemption grounds and commerce clause grounds, and the court of appeals affirmed. The Supreme Court, however, found the statute to be constitutional and reversed.

On the issue of preemption, the Court found neither the purpose nor any provision of the Indiana Act to be in conflict with the Williams Act. Regarding the commerce clause claim, the Court

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73 See *Ind. Code Ann.* § 23-1-42-1 to -11 (West 1989). This act was more properly known as the Control Share Acquisitions Chapter of the Indiana Business Corporation Law. See *CTS*, 481 U.S. at 72.
74 *Ind. Code Ann.* § 23-1-42-1 (West 1989); see *CTS*, 481 U.S. at 73. "Under the Act, an entity acquires 'control shares' whenever it acquires shares that, but for the operation of the Act, would bring its voting power in the corporation to or above any of three thresholds: 20%, 33 1/3%, or 50%." *Id.*
75 See *Ind. Code Ann.* § 23-1-42-4(a) (West 1989). This act applied only to certain qualified Indiana corporations. See *id.* § 23-1-20-5; *CTS*, 481 U.S. at 72-73.
76 See *CTS*, 481 U.S. at 73-74 n.2; *Ind. Code Ann.* § 23-1-42-9(b) (West 1989).
77 See *CTS*, 481 U.S. at 74.
79 See *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250, 262-64 (7th Cir. 1986), *rev'd*, 481 U.S. 69, 94 (1987).
80 *CTS*, 481 U.S. at 94.
81 See *id.* at 86-87. The Court stressed that the Illinois Act protected shareholders on a collective basis, requiring a collective vote to avoid coercion of individual investors. *Id.* at 82-83. The Court felt this requirement furthered the protection of shareholders, one purpose of the Williams Act. *Id.* at 83.
82 See *id.* at 86-87. The Seventh Circuit had held the Indiana Act to be preempted due to a provision which could lead to delays in excess of the Williams Act. *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250, 263 (7th Cir. 1986), *rev'd*, 481 U.S. 69, 94 (1987). The Supreme Court found that the Act did not impose an absolute delay, "nor [did] it preclude an offeror from purchasing shares as soon as federal law permits." *CTS*, 481 U.S. at 84. Regarding the preemption issue, the Court also stated that "[t]he longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." *Id.* at 86.
held that the Indiana Act was within constitutional limits, \(^8\) since it did not treat nonresidents in a discriminatory manner \(^9\) and would not result in inconsistent regulation. \(^5\) In arriving at this conclusion, the Court emphasized the traditional role of the states in regulating corporate governance \(^6\) and noted that the Indiana law in no way prohibited the actual transfer of stock. \(^7\)

**C. The Third Generation**

After the Supreme Court's *CTS* decision, a number of jurisdictions followed the pre-*CTS* lead of states such as New York and New Jersey and adopted what were known as "business combination statutes."\(^8\) Although technically in existence prior to *CTS*,\(^9\) the recent popularity of this regulatory form\(^8\) has led both courts\(^9\) and commentators\(^9\) to refer to such statutes as part of the third generation of state antitakeover law.

A controversial distinguishing feature of many "business combination" statutes\(^3\) is that "they expressly inject target company..."
management into the decision-making process, giving it an effective veto power over hostile bids to be followed by "business combinations"—a veto that the bidder and target company shareholders are virtually powerless to override. This veto power is achieved by the inclusion of provisions which delay any "business combination" for three to five years unless there has been prior approval by the target's board of directors. Although some statutes contain exceptions, these provisions have been criticized as ineffective because they fail to give shareholders any real power to implement a change not desired by management. While a few "business combination" statutes have been constitutionally challenged, the judicial approaches to the issue have been far from uniform.

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97 See Johnson & Millon, supra note 94, at 1875-76 (criticism of Delaware exception as unrealistic).
99 Compare BNS, 683 F. Supp. at 469 (applying "meaningful opportunity for success" test) with Amanda, 877 F.2d at 508 (rejecting "meaningful opportunity" test).

Courts are especially divided over the application of the "meaningful opportunity for success" test. See BNS, 683 F. Supp. at 469. Under this test, "even statutes with substantial deterrent effects on tender offers do not circumvent Williams Act goals, so long as hostile offers which are beneficial to target shareholders have a meaningful opportunity for success." Id.
IV. THE SEVENTH CIRCUIT'S CONSTITUTIONAL ANALYSIS IN Amanda

A. Amanda Acquisition Corp. v. Universal Foods Corp.

Recently, in *Amanda Acquisition Corp. v. Universal Foods Corp.*, the United States Court of Appeals for the Seventh Circuit was confronted with a challenge to the constitutionality of Wisconsin's third generation business combination statute. The controversy arose when Amanda Acquisition Corp., a subsidiary of a Massachusetts corporation, tendered an offer in a takeover bid to acquire Universal Foods Corp., a Wisconsin corporation. Amanda's bid was contingent, *inter alia*, upon its being tendered seventy-five percent of the outstanding stock and a final determination that Wisconsin's antitakeover statute was unconstitutional or inapplicable. However, despite the fact that Amanda's bids were well in excess of the market price, Universal Foods' board of directors recommended that its shareholders reject Amanda's proposals.

Subsequently, Amanda filed suit in the United States District Court for the Eastern District of Wisconsin seeking injunctive relief on the theory that Wisconsin's antitakeover statute was unconstitutional. The Wisconsin statute provided: "[u]nless the target's board agrees to the transaction in advance, [a] bidder must wait three years after buying the shares to merge with the target or acquire more than 5% of its assets." Notwithstanding a finding that the Wisconsin statute "effectively eliminates hostile leveraged

\footnote{100} 877 F.2d 496 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989).
\footnote{101} Id. at 499; see Wis. Stat. Ann. § 180.726 (West Supp. 1989).
\footnote{102} Id. at 498. The sole purpose for Amanda Acquisition's existence was to acquire Universal Foods. Id.

\footnote{103} See Amanda Acquisition Corp. v. Universal Foods Corp., 708 F. Supp. 984, 989 (E.D. Wis.) (listing conditions of purchase), *aff'd* 877 F.2d 496 (7th Cir. 1989). The only other condition the court considered relevant was the redemption of the shareholders' rights plan, also called a "poison pill." Id. at 989.
\footnote{104} See id. at 989. Amanda's offer eventually reached thirty-eight dollars a share. *Amanda*, 877 F.2d at 498. One month previously, Universal Foods' stock had a market value of twenty-five dollars a share. *Id.*
\footnote{105} *Amanda*, 708 F. Supp. at 989.
\footnote{106} *Id.* Amanda claimed that the Wisconsin act violated both the commerce clause and the supremacy clause. *Id.* at 996-97.
\footnote{107} *Amanda*, 877 F.2d at 497-98; see also Wis. Stat. Ann. § 180.726(2) (West Supp. 1989).
buyouts," the district court found no constitutional violation. Thus, the requested relief was denied and an appeal followed.

Despite Circuit Judge Easterbrook’s lengthy critique of restrictive antitakeover statutes, the Seventh Circuit affirmed. In addressing the statute’s constitutionality, the Seventh Circuit considered both the Williams Act and the commerce clause.

Addressing the issue of preemption under the Williams Act, the Seventh Circuit noted the historical reluctance of federal courts to infer preemption in areas traditionally regulated by the states. Drawing from this general doctrine, the court proceeded to examine the language of the Securities Exchange Act of 1934 and the views expressed in CTS. Based on these considerations, the court concluded that the Williams Act was designed to regulate the “process” of a takeover bid and that state corporation law was left to regulate substantive matters such as shareholder voting rights. The court supported this position with a long litany of permissible state regulations of corporate governance which, despite lowering the probability of successful takeover bids, would not be preempted by the Williams Act. Thus, the Amanda court

108 Amanda, 708 F. Supp. at 1000.
109 Id. at 1016.
110 Id.
111 See Amanda, 877 F.2d at 500-02. Judge Easterbrook commented: “If our views of the wisdom of state law mattered, Wisconsin's takeover statute would not survive.” Id. at 500; see Fox, The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window, 61 N.Y.U. L. Rev. 554, 557 (1986) (discussion of Easterbrook as “exemplary of the Chicago School approach to law and economics”). Traditional Chicago School doctrine maintains that “all people and firms are motivated by price advantage alone.” Id. at 558. For a better understanding of the Chicago School view and its relation to the law, see the articles by Judge Easterbrook listed in Boyer, supra note 6, at 545 n.30.
112 Amanda, 877 F.2d at 509.
113 See id. at 502-09.
114 Id. at 502; see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (presumption that historical state powers are not preempted without clear congressional intent). See generally L. Tribe, supra note 38, at § 6-27 (discussion of presumption against preemption).
115 See Amanda, 877 F.2d at 502. The court primarily analyzed the Securities Exchange Act of 1934 because it had incorporated the Williams Act. See id.
116 See id. at 502-05; see also supra notes 81-82 and accompanying text (CTS on preemption).
117 See Amanda, 877 F.2d at 503.
118 See id. at 504. The Seventh Circuit noted a number of state laws that allow practices which deter not only tender offers, but also proxy contests. Id. Examples include: (1) the ability to organize without traded shares; (2) the ability to issue stock under buy-sell agreements where the firm has the right-of-first-refusal at a formula price; and (3) the ability to issue non-voting stock. Id.
concluded that although "[i]t is not attractive to put bids on the table for Wisconsin corporations, [since] Wisconsin leaves the process alone once a bidder appears, its law may co-exist with the Williams Act."\textsuperscript{119}

Examining the commerce clause claim, the Seventh Circuit first addressed the "\textit{Pike} balancing test" employed by some courts to determine the potential deleterious effects of state antitakeover laws on interstate commerce.\textsuperscript{120} Noting that the \textit{CTS} Court failed to apply this test, the Seventh Circuit recognized that it was limited in considering the wisdom of state policy choices and that it would be improper to render a judgment by balancing state and federal interests.\textsuperscript{121}

With such restrictions in mind, the \textit{Amanda} court compared the Wisconsin statute to the Indiana Act in \textit{CTS}.\textsuperscript{122} Because each statute was restricted to regulating the internal affairs of businesses incorporated within its jurisdiction, the court stressed that neither statute treated an out-of-state bidder differently from an in-state bidder, and neither would lead to inconsistent regulation.\textsuperscript{123} The court also expressly rejected the "meaningful opportunity for success" test sometimes used in analyzing the constitutionality of antitakeover regulations.\textsuperscript{124} Rather, the court reasoned that Supreme Court precedent has acknowledged that under proper circumstances it is within a state's inherent power to prohibit a business combination.\textsuperscript{125} Thus, "[a] state with the power to forbid mergers has the power to defer them for three years."\textsuperscript{126} While the court questioned the statute's wisdom, it nevertheless recognized that "[t]he Constitution has room for many economic policies,"

\begin{footnotes}
\item[119] \textit{Id.} at 505.
\item[120] \textit{See id.; see also supra note 61 and accompanying text (discussion of origins of Pike test).}
\item[121] \textit{See Amanda, 877 F.2d at 505 ("CTS did not even cite [Pike]").} Citing Justice Scalia's concurring opinion counseling against judicial balancing, the court opined that a "closer examination" revealed that the case law actually rested on statutory facial discrimination rather than discriminatory impact. \textit{Id.}
\item[122] \textit{See id. at 506.}
\item[123] \textit{See id. at 506-07.}
\item[124] \textit{See id. at 508.} The "meaningful opportunity" test was established in \textit{BNS, Inc. v. Koppers Co.}, 683 F. Supp. 458, 469 (D. Del. 1988).
\item[125] \textit{See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126-27 (1978).} The Seventh Circuit looked to the Supreme Court's decision in \textit{Exxon Corp.}, which upheld a Maryland statute banning vertical integration in the oil industry. \textit{See Amanda, 877 F.2d at 508; see also Exxon Corp.}, 437 U.S. at 119-21 (Maryland statute prohibiting oil producers and refiners from operating retail service stations within the state held constitutional).
\item[126] \textit{Amanda, 877 F.2d at 508-09.}
\end{footnotes}
and that "'[a] law can be both economic folly and constitutional'."\(^\text{127}\)

**B. The Seventh Circuit's Constitutional Analysis**

The Seventh Circuit, in deciding *Amanda*, recognized the limited role of the courts in making determinations regarding the policy considerations associated with hostile takeovers.\(^\text{128}\) Based on the present state of the law, it is submitted that the Seventh Circuit correctly decided that "business combination" statutes, such as the Wisconsin Act, do not violate the Constitution on either preemption or commerce clause grounds.

1. Preemption Analysis

Because it is part of the Securities Exchange Act of 1934,\(^\text{129}\) the Williams Act is subject to a provision which provides, "[n]othing in this chapter shall affect the jurisdiction . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter."\(^\text{130}\) This, coupled with the historical reluctance of federal courts to infer preemption in traditional state areas,\(^\text{131}\) creates a presumption against preemption.\(^\text{132}\)

\(^{127}\) *Id.* at 509 (quoting Justice Scalia's concurrence in *CTS*, 481 U.S. at 96-97); *see* Fox, *supra* note 111, at 557 (discussion of Judge Easterbrook's economic approach); *see also* *supra* note 111 and accompanying text (discussion of Judge Easterbrook's criticism of Wisconsin statute).

\(^{128}\) *See* *Amanda*, 887 F.2d at 502. The Seventh Circuit viewed the Wisconsin act as a state policy determination which must be respected "[u]nless a federal statute or the Constitution bars the way." *Id.* The court found no such bar. *Id.; see also* Veere Inc. v. Firestone Tire & Rubber Co., 685 F. Supp. 1027, 1033 (N.D. Ohio 1988) (Ohio act neither discriminates against interstate commerce nor subjects activities to regulation inconsistent with the Williams Act).


\(^{130}\) *Id.* § 78bb(a). In his concurring opinion in *CTS*, Justice Scalia emphasized that this provision would either preclude a finding of preemption under the Williams Act or create a strong presumption against it. *CTS*, 481 U.S. at 96 (Scalia, J., concurring). Thus, it would seem that "[t]he plain meaning of the only statutory expression of intent . . . requires a finding that Congress did not intend that any policy reflected . . . become the basis for preempting state laws not inconsistent with its actual provisions." Pritchard, *supra* note 90, at 967.


\(^{132}\) *See* L. Tribe, *supra* note 38, § 6-25, at 479 & n.7 ("there does appear to be an overriding reluctance to infer preemption in ambiguous cases"); Cox, *The Constitutional "Dynamics" of the Internal Affairs Rule—A Comment on CTS Corporation*, 13 J. Corp. L. 317, 318, 332-37 (1988). Professor Cox noted that "*CTS Corp.* is important . . . [because] its resolution of the federal preemption issue, consistent with the Court's recent supremacy
However, such a presumption may be overcome with evidence of a congressional intent that a federal law should regulate a given area or a showing that the disputed state action impedes the accomplishment of a valid federal objective.\textsuperscript{135}

While there is general agreement that Congress intended that the Williams Act protect investors,\textsuperscript{134} authorities are split as to the scope of this protection.\textsuperscript{135} One view submits that "a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder."\textsuperscript{136} Thus, proponents of this position claim that Congress intended to preempt any state action which provides an unfair advantage to either side as to the eventual success or failure of a tender offer.\textsuperscript{137} However, the better approach appears to be that Congress, in enacting the Williams Act, clause precedent, suggests a strong tendency to validate expressions of state sovereignty absent an express indication of a congressional intent to displace state law." \textit{Id.} at 318.

\textsuperscript{135} \textit{See supra} note 38 (overview of Supreme Court's preemption analysis). To determine the intent or purpose of Congress when not expressly stated, an examination of a statute's legislative history is appropriate. \textit{See} Hamilton v. Rathbone, 175 U.S. 414, 419 (1899). "The general rule is perfectly well settled that, where a statute is of doubtful meaning . . . the court may look into prior and contemporaneous acts, the reasons which induced the act . . . and the purpose intended . . . to determine its proper construction." \textit{Id.} \textit{See generally} Jones, \textit{Extrinsic Aids in the Federal Courts}, 25 \textit{Iowa L. Rev.} 737 passim (1940) (value of legislative history in interpreting statutes); Kernochan, \textit{Statutory Interpretation: An Outline of Method}, 3 \textit{Dalhousie L.J.} 333 passim (1976) (same). Ascertaining congressional intent or purpose based on the legislative history of the Williams Act is an area which has produced substantial debate. \textit{See} Johnson \& Millon, \textit{supra} note 94, at 1909. Professors Johnson and Millon note three different interpretations of the Williams Act's legislative history. \textit{Id.} The first, adopted by the Securities and Exchange Commission, asserts that the Williams Act was aimed at preserving shareholder autonomy—the right of each individual shareholder to make a free choice. \textit{See id.} at 1882, 1909. The second, hinted at by the Court in \textit{CTS}, submits that the Williams Act was intended to ensure shareholder protection on a collective level. \textit{See id.} at 1882-83, 1909. The final approach, and that taken by Professors Johnson and Millon, is that Congress intended neither. \textit{Id.} at 1909.

\textsuperscript{134} \textit{See MITE}, 457 U.S. at 633 (plurality opinion) ("There is no question that in imposing these requirements, Congress intended to protect investors").

\textsuperscript{135} \textit{See Pritchard, supra} note 90, at 967-76 (describing views varying between no preemption of state protection merely because Williams Act may make some domestic corporations unattractive to potential bidders, to sole protection of investors confronted with tender offer).

\textsuperscript{136} \textit{MITE}, 457 U.S. at 633 (plurality opinion).

intended to ensure that should a tender offer be made, the ensuing procedure would be such that neither management nor the bidder would be favored at the expense of the shareholders. Recent commentaries indicate that the legislative history of the Williams Act must be viewed cautiously since Congress, in 1968, could not have contemplated the modern development of hostile takeovers and that if Congress had intended to enact comprehensive regulation in this area, it would have made this intention clear. This sentiment was reflected by the Supreme Court in *CTS* when it declined to follow the *MITE* plurality’s view of preemption under the Williams Act, and returned to its prior decision in *Piper v. Chris-Craft Indus., Inc.* to ascertain the purpose of the Williams Act. Significantly, the *Piper* Court had stated, “[t]he legislative history ... shows that the sole purpose of the Williams Act was [to

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138 See *Amanda*, 877 F.2d at 503; see also *Veere Inc. v. Firestone Tire & Rubber Co.*, 685 F. Supp. 1027, 1030 (N.D. Ohio 1988). The *Veere* court stated that “the Court now views the purpose of the Williams Act, not as a guarantee of a level playing field for offeror and management ... but as protection for the investor while management and the offeror are on the field.” *Id.* This view has also been adopted by some commentators. See, e.g., *Fay*, supra note 5, at 278 & n.144 (supports narrow view of preemptive effect of Williams Act); *Leebron, Games Corporations Play: A Theory of Tender Offers*, 61 N.Y.U. L. Rev. 153, 221 (1986) (“All the [Williams] Act requires is that states not interfere with disclosure mechanisms and basic tender offer procedures”); cf. *Booth, The Emerging Conflict Between Federal Securities Law and State Corporation Law*, 12 J. Corp. L. 73, 73 (1986) (“Perhaps the safest generalization ... is that federal law is based on full disclosure and state law governs the substance”).

The Supreme Court has echoed this sentiment concerning the preemptive effect of the Williams Act in cases dealing with similar issues. See *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8-13 (1985) (“'manipulative' acts under § 14(e) require misrepresentation or nondisclosure”); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (“By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position”). In *Rondeau*, the Court stated that “[t]he purpose of the Williams Act is to ensure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.” *Id.* (emphasis added).

139 See *Johnson & Millon, supra* note 94, at 1903-13. In their article, Professors Johnson and Millon assert that judges and policymakers should not search for an “intent” that does not exist. *Id.* at 1868.

140 See *Pritchard, supra* note 90, at 972; see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (federal act does not supercede state law unless that is clear and manifest intent of Congress).


142 See *CTS*, 481 U.S. at 81-82.
Based on both the wording of the statute and the modern interpretation of the pertinent legislative history, it is asserted that the Seventh Circuit was correct in its view that the Williams Act was intended to regulate the process of a tender offer while traditional state functions, such as the promulgation of laws regarding voting rights, were to remain the province of the states.

2. Commerce Clause Analysis

In CTS, the Court established a two-pronged test to determine whether a state antitakeover law violates the commerce clause. The first prong looks to whether the state treats out-of-state residents differently from in-state residents. Since the Wisconsin Act applied equally to both in-state and out-of-state bidders, it would appear that the Amanda court was correct in finding that this factor was not present. The second prong examines whether the state statute interferes with interstate commerce by subjecting the same activity to inconsistent state regulation. Since the Wisconsin law applied only to certain businesses incorporated within Wisconsin, it would seem the Amanda court was also justified in finding that the possibility of inconsistent regulation was not a problem.

It has been argued that a court must also examine the restrictive effects of a state enactment on interstate commerce to determine whether they are excessive in light of the local interests being protected. Such a determination, called the "Pike balancing

143 Piper, 430 U.S. at 35 (emphasis added); see Veere Inc. v. Firestone Tire & Rubber Co., 685 F. Supp. 1027, 1030 (D. Ohio 1988); see also Pritchard, supra note 90, at 969-72 (on Piper view).


145 CTS, 481 U.S. at 87-88.

146 Wis. Stat. Ann. § 180.726(1)(j) (West 1988); Amanda, 877 F.2d at 506 (“Wisconsin . . . is indifferent to the domicile of the bidder”).

147 See CTS, 481 U.S. at 88-89.

148 See Wis. Stat. Ann. § 180.726(2) (West 1988); see also Amanda, 877 F.2d at 506 (“Wisconsin’s law . . . regulates the internal affairs of firms incorporated there”).

149 See Brief for Appellant at 17-18, Amanda Acquisition Corp. v. Universal Foods
test,"\textsuperscript{150} was employed by the Supreme Court in MITE.\textsuperscript{161} However, while the Court in CTS discussed the local interest which Indiana sought to protect in enacting its antitakeover statute,\textsuperscript{162} there was never any mention or application of the "Pike balancing test."\textsuperscript{163} According to the views recently expressed by both courts and commentators, it would appear that such a test is no longer applicable in the takeover context.\textsuperscript{164}

The Seventh Circuit's narrow view of the commerce clause also derived support from the Supreme Court's decision in Exxon Corp. v. Governor of Maryland,\textsuperscript{165} which held that a Maryland statute\textsuperscript{166} banning takeovers of oil retailers by oil producers did not interfere with interstate commerce.\textsuperscript{167} Thus, based on the Court's failure to apply the "Pike balancing test" in CTS and its prior decision in Exxon Corp., the Seventh Circuit appears to have properly addressed the commerce clause issue in both its analysis and conclusion.

C. The Need For Legislative Reform

Although the Seventh Circuit realized its limitations as a judicial body, it clearly articulated its opinion that statutes such as Wis-
consin's can be unfair to shareholders. This unfairness is illustrated in the process by which numerous states have enacted antitakeover regulations at the request of local management. Since shareholders are often dispersed nationally, local management clearly is in a better position to exert pressure on state legislatures to enact laws favorable to their interests. Based on the limitations placed on the courts in examining the fairness of state actions, it appears that takeover legislation, because of its policy implications, must be left to the legislature.

A wide variety of federal legislative approaches have been proposed. An examination of previous congressional attempts to in-

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158 See Amanda, 877 F.2d at 500 ("we believe that antitakeover legislation injures shareholders").

159 See Macey, supra note 23, at 469-70 (list of states which have enacted antitakeover laws at the request of specific corporations); Romano, supra note 6, at 461 n.11 (same).

In fact, some states have even responded with laws drafted and put into effect during the course of a specific takeover bid. See Butler, Corporation-Specific Anti-takeover Statutes and the Market for Corporate Charters, 1988 Wis. L. Rev. 365, 366 (1988) ("Takeover specific antitakeover laws are . . . designed to thwart on-going . . . hostile takeovers"); Romano, supra note 6, at 461 ("[statutes] are frequently pushed through the legislature at the behest of a . . . local corporation that is the target of a hostile bid").

160 See Macey, supra note 23, at 471. Professor Macey asserts that "most states are peculiarly ill-suited to provide socially desirable takeover legislation because . . . [shareholders] are systematically underrepresented in the political process." Id.

In terms of the clout of local management, Professor Romano has noted that "[t]he political influence that a major corporation . . . could have upon . . . [a state's] legislature is no surprise." Romano, supra note 20, at 123.

161 See supra notes 35-49 and accompanying text (discussion of federal limits on state action).

162 See Pritchard, supra note 90, at 983 ("the question [of the merits and demerits of tender offers] is obviously far better suited to legislative than judicial resolution"); cf. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3058 (1989) ("the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from . . . the legislative process"); Mistretta v. United States, 109 S. Ct 647, 677 (1989) (Scalia, J., dissenting) ("the basic policy decisions governing society are to be made by the Legislature").

163 See Romano, supra note 6, at 470 ("From 1963-1987, over 200 bills regulating corporate takeovers . . . were introduced in Congress"). The different approaches vary based on the degree of federal involvement, ranging from repeal of the Williams Act, see Kozyris, supra note 22, at 1135 (Congress should repeal Williams Act if it decides to leave regulation to the states); cf. Leebron, supra note 138, at 221 (criticism of proponents of Williams Act repeal), to substantial federal preemption, see Butler, supra note 159, at 378-79 (noting the extreme of "total federal preemption"); Hazen, State Anti-Takeover Legislation: The Second and Third Generations, 23 WAKE FOREST L. REV. 77, 110 (1988) ("it may be necessary for Congress to enact legislation specifically preempting the field"); Kozyris, supra note 22, at 1133-35 (noting an approach giving "maximum preemptive effect to federal law").

troduce such legislation reveals that most "takeover-related bills . . . aim at making acquisitions more difficult" by imposing additional restrictions on the bidder.\textsuperscript{164} In addition, a recent trend has developed to monitor the conduct of management.\textsuperscript{165} However, it should be noted that "while congressional power under the affirmative dimension of the commerce clause undoubtedly includes the authority to enact . . . federal corporation law for interstate . . . entities, the possibility for such action remains quite remote."\textsuperscript{166}

\section*{Conclusion}

One of the most well-recognized traditions of common law is the power of a state to regulate the internal affairs of its corporations. However, a state is constitutionally limited to the extent it cannot enact statutes which interfere with interstate commerce or impair a valid federal law. When a statute is challenged on either ground, it is the role of the courts to determine whether the statute should stand.

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\textsuperscript{164} See Romano, supra note 6, at 472; see, e.g., Airline Antitakeover Bill Gains, N.Y. Times, Oct. 19, 1989, at D5, col. 3. Recently, a House committee voted to give the Transportation Department authority to veto any proposed takeover of an airline if it believed the deal would not be beneficial to the health of the airline. \textit{Id.} However, the Transportation Secretary indicated that "if 'this or any similar legislation' should pass, [he] would 'join the President's other senior advisers in recommending that he veto it.'" \textit{Id.}


Commentators have also been active in making suggestions. See, e.g., Bebchuk, \textit{The Pressure to Tender: An Analysis and a Proposed Remedy}, 12 DET. J. CORP. L. 911, 931-49 (1987) (proposal of remedy and discussion of 5 alternatives); Butler, supra note 159, at 378-82 (suggests federal legislation which would provide that "shareholders . . . have an opportunity to exit before a state statute . . . becomes effective"); Davis, supra note 22, at 522 ("One resolution . . . might be federal legislation preempting state law . . . [with] limited room for the states"); Kozyris, supra note 22, at 1133-42 (creation of "interstate stock" classification). Perhaps the most novel of these is the proposed creation of a system to classify "interstate stock." See id. at 1154-66. Under this approach, stock that qualifies as "interstate stock" would be subject to federal regulation as to transferability. \textit{Id.} at 1110. The only restriction that would be placed on the states would be their inability to interfere with the transferability of such stock. \textit{Id.} at 1140. Under this approach, "interstate stock" would be subject to federal regulation designed to ensure free transferability in the market and promote free choice among individual investors. See \textit{id.} at 1154-55, 1166.

\textsuperscript{166} Kozyris, supra note 22, at 1134-35 (discussing tension between traditional governance of corporate practices by state law and federal power to regulate interstate commerce in securities).
In *Amanda Acquisition Corp. v. Universal Foods Corp.*, the Seventh Circuit was faced with the task of determining the constitutionality of a third generation Wisconsin antitakeover statute. Despite commenting on what it perceived as a poor policy decision, the Seventh Circuit realized its limitations as a judicial unit. Instead of straining to reach an equitable result by balancing all of the competing policy interests, the Seventh Circuit based its decision on Supreme Court precedent. In doing so, it was aware that many of the policy issues would still remain and, thus, properly left them to be handled through legislation.

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