Illinois' New Second Generation, Second Step Takeover Amendment: Continuing the Trend of States' Takeover Regulations, 21 J. Marshall L. Rev. 87 (1987)

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COMMENTS

ILLINOIS' NEW SECOND GENERATION, SECOND STEP TAKEOVER AMENDMENT: CONTINUING THE TREND OF STATES' TAKEOVER REGULATIONS

The Illinois legislature recently added Sections 7.85 ("Amendment")[1] and 8.85 ("Directors' Duties Provision")[2] to the Illinois Business Corporation Act.[3] These sections were added in the wake of the United States Supreme Court's holding in *Edgar v. MITE*,[4] that the prior Illinois Takeover Act[5] was unconstitutional.[6] This new Amendment also seeks to regulate takeovers. Rather than unconstitutionally regulating the first step of the takeover, however, it regulates the second or freeze-out merger step. This type of second step regulation is fairly new in state regulations.[7]

The Amendment is part of a new trend in state statutes, which

1. ILL. REV. STAT. ch. 32, ¶ 7.85 (1985). The Amendment contains supermajority voting requirements and fair price requirements that must be met before a merger or consolidation with a majority shareholder or corporation can be achieved. *See infra* notes 71-78 and accompanying text (outlining the provisions of the Amendment).

2. ILL. REV. STAT. ch. 32, ¶ 8.85 (1985). The Directors' Duties Provision outlines the Board of Directors' duties to be followed in carrying out their responsibilities. *See infra* notes 106-07 and accompanying text (outlining section of the statute).

3. Illinois Business Corporation Act of 1983, ILL. REV. STAT. ch. 32, ¶ 1.01-17.05 (1985).

4. Edgar v. MITE Corp., 457 U.S. 624 (1982).

5. ILL. REV. STAT. ch. 121½, ¶ 137.521 (Supp. 1980) (Repealed 1983).

6. *MITE*, 457 U.S. at 646.

7. *See* Scriggins & Clarke, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266, 280 n.76 (1984) (noting how until very recently all takeover regulations involved the regulation of tender offers). Fourteen states have adopted fair-price statutes: CONN. GEN. STAT. ANN. §§ 33-374A to 33-374c (West 1987); Act of July 2, 1987, ch. 87-257, 1987 Fla. Sess. Law Serv. 517-40 (West) (to be codified at § 607); GA. CODE ANN. §§ 14-2-232 to 14-2-234 (1986); ILL. ANN. STAT. ch. 32, ¶ 7.85 (Smith Hurd 1987); KY. REV. STAT. ANN § 271A.396-398 (Baldwin 1986); LA. REV. STAT. ANN. §§ 12:132-12:134 (West 1986); MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to 3-603 (1986); MICH. COMP. LAWS ANN. §§ 450.1775-450.1784 (West 1987); MISS. CODE ANN. §§ 79-25-1 to 79-25-7 (1986); Act of April 23, 1987, ch. 88 § 1, 1987 N.C. Adv. Legis. Serv. 70-73 (to be codified at N.C. GEN. STAT. §§ 55-75 to § 55-79); PA. STAT. ANN. TIT. 15, § 1409.1 (Purdon 1986); VA. CODE ANN. §§ 13.1-725 to 13.1-728 (1985); WASH. REV. CODE ANN. § 23A.08.425 (1986); and WIS. STAT. ANN. § 180.725 (West 1986).

protects minority shareholders and discourages hostile takeovers through regulating the second step of a takeover.[8] Illinois' adoption of this Amendment demonstrates Illinois' policy that hostile takeovers are not necessarily beneficial to the target corporation or to the economy and, therefore, should be regulated to protect the target corporation's shareholders.[9]

This comment, after setting out a brief historical background[10] and outlining the major provisions of the Amendment,[11] seeks to establish the constitutionality of the Amendment.[12] It also discusses the possible conflicts the Amendment might pose to established corporate policy.[13] Additionally, it discusses some potential difficulties that the Directors' Duties Provision could pose.[14]

I. CORPORATE TAKEOVERS: HISTORICAL FACTS AND LAWS

Corporate takeovers[15] have become a highly publicized[16] and regulated area of corporate law.[17] A large number of takeovers are

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8. Pennsylvania's adoption of a second step takeover statute showed the growing demand that the advisability of hostile tender offers be judged by their impact upon society as a whole and upon state and communities in particular. Newlin & Gilmer, *The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids*, 40 BUS. LAW. 111, 122-23 (Nov. 1984).

9. The regulation of the second step of a takeover is intended to protect minority shareholders by ensuring that a fair price is paid for their shares. Warren, *Developments in State Takeover Regulation: MITE and Its Aftermath*, 40 BUS. LAW. 671, 697 (Feb. 1985) (discussing the reasons for the Maryland Fair Price Legislation). *See* Newlin & Gilmer, *supra* note 8, at 122 (noting that the Pennsylvania Act, while serving as a deterrent to a substantial number of potentially undesirable takeovers, produces a fairer result to all shareholders).

10. *See infra* notes 15-67 and accompanying text.

11. *See infra* notes 68-107 and accompanying text.

12. *See infra* notes 108-50 and accompanying text.

13. *See infra* notes 151-53 and accompanying text.

14. *See infra* notes 154-60 and accompanying text.

15. A corporate takeover occurs when one corporation attempts to acquire another corporation through gaining a control of the majority of outstanding voting stock. R. JENNINGS & R. BUXBAUM, CORPORATIONS 1145 (5th ed. 1979).

16. Takeover attempts have resulted in some highly publicized cases. *See, e.g.*, Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

17. Securities transactions in the first stage of a takeover are governed by both federal and state legislation. *See* Warren, *Reflections on Dual Regulation of Securities: A Case Against Preemption*, 25 B.C.L. REV. 495 (1984). The federal government regulates tender offers through the Williams Act. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982). Most states have also regulated the tender offer stage of takeovers. Virginia enacted the first state takeover statute in 1968. VA. CODE ANN § 13.1-528—541 (1978). Thirty-six other states subsequently enacted similar statutes. *See* ALASKA STAT. §§ 45.57.010-.120 (1980); ARK. STAT. ANN. §§ 67-1264—1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101—108 (Supp. 1983); CONN. GEN. STAT. ANN. §§ 36-457—468 (West Supp. 1984); DEL. CODE ANN. tit. 8, § 203 (Supp. 1982); FLA. STAT. ANN. §§ 517.35-.363 (West Supp. 1978)(repealed 1979); GA. CODE ANN. §§ 22-1901—1915 (1977 & Supp. 1982); IDAHO CODE §§ 30-1501—1513 (1980 & Supp. 1983); ILL. REV. STAT. ch. 121 ½, ¶ 137.521 (Supp. 1983-84) (repealed by Act No. 83-365, 1983 Ill. Legis. Serv. 2628

two-tiered takeovers which use high pressure and coercive techniques.[18] In the first step of a two-tier takeover, an aggressor corporation[19] makes a tender offer[20] for a limited amount of time to buy a certain percentage of the target corporation's[21] voting stock at a specified price (usually above market).[22] The result is that many shareholders rush to sell their shares fearing that after the tender offer, the price they will receive for their shares will be less.[23] The

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(West)); IND. CODE ANN. §§ 23-2-3.1-1—3.1-11 (West Supp. 1983-84); IOWA CODE ANN. §§ 502.211-.215 (West Supp. 1983-84); KAN. STAT. ANN. §§ 17-1276—1284 (1981); KY. REV. STAT. ANN. §§ 292.560-.991 (Michie/Bobbs-Merrill 1981 & Supp. 1982); LA REV. STAT. ANN. §§ 51:1500—1512 (West Supp. 1984); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (Supp. 1983-84); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901—908 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1983-84); MICH. COMP. LAWS ANN. §§ 451.901—.917 (West Supp. 1983-84); MINN. STAT. ANN. §§ 80B.01—.13 (West Supp. 1984); MISS. CODE ANN. §§ 75-72-101—121 (Supp. 1983); MO. ANN. STAT. §§ 409.500—.565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401—2417 (1977); NEV. REV. STAT. §§ 78.376—.3778 (1979) (amended 1981); N.H. REV. STAT. ANN. §§ 421-A:1—:15 (Supp. 1983) (amended 1983); N.J. STAT. ANN. §§ 49:5-1—:19 (West Supp. 1983-84); N.Y. BUS. CORP. LAW §§ 1600—1614 (McKinney Supp. 1983-84); N.C. GEN. STAT. §§ 78B-1—11 (1981); OHIO REV. CODE ANN. § 1707.041 (Baldwin 1979) (amended 1982); OKLA. STAT. ANN. tit. 71, §§ 431-450 (West Supp. 1983-84); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1983-84); S.C. CODE ANN. §§ 35-2-10—110 (Law Co-op Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 47-32-1—47 (Supp. 1983); TENN. CODE ANN. §§ 48-2101—2114 (1979 & Supp. 1983); TEX. ADMIN. CODE tit. 7, § 129 (1984); UTAH CODE ANN. §§ 61-4-1—13 (1978) (repealed 1983); and WIS. STAT. ANN. §§ 552.01—.25 (West Special Pamphlet 1983). *See also* Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporate Law Concepts?*, 7 CORP. L. REV. 3, 5 n.16 (1984) (giving a tabular breakdown of statutes and provisions).

18. Warren, *supra* note 9, at 696 (criticizing the two-tiered offer as being both coercive and manipulative). *See also* Harrington, *If It Ain't Broke, Don't Fix It: The Legal Propriety Of Defenses Against Hostile Takeover Bids*, 34 SYRACUSE L. REV. 977, 1003 (1983).

19. An aggressor corporation is the corporation which is attempting to acquire the target corporation through buying a controlling interest in the target corporation's stock. HAMILTON, CORPORATIONS 601-03 (2d ed. 1981).

20. The tender offer is a publicly made offer to the target corporation's shareholders for them to tender or sell their shares to the aggressor corporation 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).

21. The target corporation is the corporation that the aggressor is attempting to acquire, usually without the present management's approval.

22. For example in 1969, Chris-Craft publicly announced a cash tender offer for up to 300,000 shares of Piper at $65 per share which was $12 above the then current market price. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 5 (1977).

23. Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1361-62 (1978) (discussing how disclosure in tender offers has a whipsaw effect whereby shareholders rush to sell their shares even though they may not be satisfied with the terms); Greene, *Corporate Freezeout Mergers: A Proposed Analysis*, 28 STAN. L. REV. 487, 509 (1976) (discussing how minority shareholders are compelled to participate in tender offers for fear of being pushed out in a subsequent merger at less desirable terms); Comment, *Front-End Loaded Tender Offers: The Application Of Federal And State Law To An Innovative Corporate Acquisition Technique*, 131 U. PA. L. REV. 389, 403-13 (1982) [hereinafter *Front-End Loaded Tender Offers*] (discussing the coercive effect of two-tiered offers); Note, *Fairness In Freezeout Transactions: Observations on Coping with Going Private Problems*, 69 KY. L.J. 77, 85 (1980-81) (discussing the coerciveness of tender offers).

goal of the aggressor corporation is to acquire voting control of the target corporation.

In the second step of a two-tiered takeover, the aggressor corporation votes its nominees onto the target corporation's board of directors. The newly elected directors then approve a merger or consolidation of the two corporations. The remaining minority shareholders of the target corporation are then given an opportunity to either sell their shares or to exchange them for the aggressor corporation's stock,[24] often resulting in less value per share than the tender offer price.[25] The result, therefore, is that the remaining minority shareholders receive less for their shares than the shares are worth.[26]

In order to protect the shareholders in these tender offers, Congress has enacted the Williams Act.[27] The Williams Act requires tender offerors to make "full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."[28] Essentially, the Williams Act requires a tender offeror to file a disclosure statement[29] with the Securities and Exchange Commission ("S.E.C.") at the time it commences its tender offer.[30] Copies of the statement are given to the target corporation,[31] any competing bidders,[32] and the target corporation's shareholders.[33] The statement discloses the offeror's identity,[34] source of funds to be used,[35] amount of funds available,[36] offeror's current holdings of the target corporation's shares,[37] and any plans the offeror has to liquidate, merge, or change the nature of the target corporation.[38]

24. The principal difference between a cash offer and a public exchange offer is that the shareholder receives an interest in the aggressor corporation rather than cash. HAMILTON, CORPORATIONS 605 (2d. ed. 1981).

25. *See* Radol v. Thomas, 534 F. Supp. 1302, 1312 (S.D. Ohio 1982) (stating that tender offers are coercive because shareholders are forced to sell their shares in the tender offer stage or risk getting less in the subsequent merger).

26. Target shareholders who fail to tender in the first step should expect to receive less than the tender offer. *Front-End Loaded Tender Offers, supra* note 23, at 406.

27. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

28. H.R. REP. No. 1711, 90th Cong. 2d Sess. 3, *reprinted in* 1968 U.S. CODE CONG. & AD. ADMIN. NEWS 2811, 2813.

29. Offerors seeking to acquire five percent or more of a publicly held corporation's shares must file a schedule 14D-1 with the Securities Exchange Commission. 17 C.F.R. § 240.14d-100 (1986).

30. 15 U.S.C. § 78 m(d)(1) (1986).

31. *Id.*

32. 17 C.F.R. § 240.14d-3 (1984).

33. 15 U.S.C. § 78n(d)(1) (1982).

34. *Id.* § 78m(d)(1).

35. *Id.* § 78m(d)(1)(B).

36. *Id.*

37. *Id.* § 78m(d)(1)(D).

38. *Id.* § 78m(d)(1)(C).

In an attempt to protect the tendering shareholders, the Williams Act also regulates the procedures of the offer.[39] It requires a fixed withdrawal date,[40] pro rata purchasing of shares if more shares are tendered than desired,[41] minimum time periods for the tender offer,[42] equalization of the price paid for all shares in the offer,[43] and the prohibition of fraudulent or deceptive practices during the offer.[44]

Congress designed the Williams Act to protect the target corporation's shareholders[45] while remaining completely neutral with regard to the offeror and target corporation's management.[46] The Williams Act purports not to favor either party nor to promote or inhibit takeovers. In reality, however, commentators have recognized that the Williams Act favors the aggressor corporation.[47] To counteract this effect, most states have enacted statutes that further regulate the first step of a takeover.[48]

The United States Supreme Court called the constitutionality

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39. The Williams Act authorizes the S.E.C. to enact rules and procedures to supplement its provisions. *Id.* §§ 78m(d)(1), 78n(d)(1). Consequently, some of the procedures are enumerated in S.E.C. regulations as well as the Williams Act. *See id.*

40. Tendering shareholders may withdraw their tendered shares at any time within seven days or after sixty days from the date of the original offer. *Id.* § 78n(d)(5); *See also* 17 C.F.R. 240.14d-7 (1986).

41. 15 U.S.C. § 78n(d)(6) (1982). If more shares are tendered than the percentage the aggressor offered to buy in its original offer, the aggressor is required to buy a pro rata share of all shares tendered during the offer period rather than buying just the first ones tendered. *Id.*; 17 C.F.R. 240.14d-8 (1986) (exception to statutory pro rata requirements). This requirement avoids some of the stampeding effect of a tender offer. *See* 15 U.S.C. § 78n(d)(6); 17 C.F.R. 240.14d-8 (1986).

42. 17 C.F.R. § 240.14e-1 (1986).

43. 15 U.S.C. § 78n(d)(7) (1982). If the offeror increases the price offered for shares at any time during the tender offer all tendering shareholders, including those who tendered before the price increase, receive the increased price for their shares.

44. *Id.* § 78n(e).

45. The principal purpose of the Williams Act is to protect investors. Edgar v. Mite Corp., 457 U.S. 624, 633 (1981); Piper v. Chris-Craft Indus. Inc., 430 U.S., 26-29 (1976); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). *See also* H.R. REP. No. 1711, 90th Cong. 2d Sess. § 3, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813-14; S. REP. No. 550, 90th Cong., 1st Sess. 2 (1967).

46. Senator Harrison Williams stated that the Williams Act was intended to protect investors without encouraging or discouraging tender offers. 113 CONG. REC. 24,664 (1967). The Act was drafted "to avoid tipping the scales either in favor of management or in favor of the . . . tender offer[or]." *Id. See also MITE*, 457 U.S. at 633 (the Court held that neutrality and investor purposes are intertwined and indistinguishable); *Piper*, 430 U.S. at 29-30 (the Court noted that neutrality was a characteristic of the Williams Act); Warren, *supra* note 9, at 675-79 (discussing the Williams Act, its provision, and its neutrality intentions).

47. *See* Sell, *A Critical Analysis of a New Approach to State Takeover Legislation After MITE*, 23 WASHBURN L.J. 473, 474-75 (1984); Kjellenberg, *The Illinois Business Corporation's Act of 1983, 1985 Amendments*, IICLE Seminar on Officers' and Directors' Liability, § 7.85, at 2 (May 29, 1986). *See also* Scriggins & Clarke, *supra* note 7, at 286-89 (noting that the offeror has all of the advantages in tender offers).

48. *See supra* note 17.

of the first generation of these statutes into question when it found the Illinois Takeover Act ("Illinois Act") unconstitutional in *Edgar v. MITE*.[49] The Court found that the Illinois Act's regulation of the first step of a takeover was unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.[50] Further, the Court held that the Williams Act preempted the Illinois Act, thereby rendering it unconstitutional under the Supremacy Clause.[51]

The Illinois Act substantially frustrated the objectives of the Williams Act because it imposed procedural and/or substantive requirements directly on the tender offeror.[52] The Illinois Act's provision allowing the Secretary of State to hold hearings substituted the judgment of an administrative official for that of investors in determining the fairness of a tender offer.[53] Additionally, the precommencement notice and hearing requirements favored management through providing a delay during which they could develop defensive tactics.[54]

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49. *MITE*, 457 U.S. at 646. *MITE* casts a shadow over all state anti-takeover laws and is the subject of several articles. *See, e.g., The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62 (1982); Note, *State Takeover Statutes Under Attack — Casualties in the Battle for Corporate Control — MITE Corp. v. Dixon*, 30 DE PAUL L. REV. 989 (1981).

50. *MITE*, 457 U.S. at 629-46. The Court's opinion held that the Act was unconstitutional under the Commerce Clause. *Id.* at 643-46. Only Justice White found that the Illinois Act was unconstitutional under the Supremacy Clause. *Id.* at 630-40 (White, J., concurring). Justice Powell and Stevens found that Congress' policy of neutrality in the Williams Act is not tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management. *Id.* at 646-47 (Powell & Stevens, J.J., concurring). Justices O'Connor, Marshall, Brennan and Rehnquist did not reach the issue. *Id.* at 647-67 (O'Connor, J., concurring) (Marshall, Brennan & Rehnquist, J.J., dissenting).

51. *Id.* at 631-40.

52. The Illinois Act required an offeror to file a precommencement notice twenty days prior to the offer becoming effective. *Id.* at 634-35. The Act allowed the Secretary of State to call a hearing with respect to a tender offer. *Id.* at 637. The offer could not proceed until that hearing was completed. *Id.* Additionally, the Act allowed the Secretary of State to pass judgment on the fairness of the tender offer. *Id.* at 639.

53. Under the Illinois Act, the Secretary of State was allowed to pass on the fairness of an offer and deny registration of the offer if he found it inequitable. *Id.* Justice White's opinion found that this allowed the Secretary of State to substitute his judgment for that of the investor. *Id.* This was unconstitutional because the Williams Act was designed to allow investors to be free to make decisions themselves once they have learned of the relevant facts and have had a fair opportunity in which to decide. *Id.* at 639-40 (citing H.R. REP. No. 1711 90th Cong., 2d Sess., 4 (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813).

54. During the 20-day precommencement notification period, the offeror could not communicate with the shareholders, but the target corporation could disseminate information to the shareholders on the impending offer. *Id.* at 635-36. Additionally, the hearing provisions allowed the Secretary of State to call a hearing at any time prior to commencement of the offer with no deadlines for the period in which to complete this hearing. *Id.* at 637. Justice White found that these provisions caused delays which the target corporation could use to its benefit. *Id.* Congress has recognized that a delay can seriously impede a tender offer. Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1277 (5th Cir. 1978), *rev'd on other grounds*, Leroy v. Great

The legislative history of the Williams Act clearly shows that it was intended to protect shareholders by allowing them to have full disclosure with which to decide upon the fairness of an offer, and to remain completely neutral with regard to the aggressor and target corporations.[55] The Illinois Act's hearing requirement interfered with the shareholder's ability to decide upon the fairness of a tender offer. The Illinois Act also favored management by allowing them delay time to develop and implement defense tactics. The Illinois Act was unconstitutional, therefore, because it frustrated the shareholder protection and neutrality objectives of the Williams Act.[56]

The Illinois Act was unconstitutional under the Commerce Clause because it imposed burdens[57] on interstate commerce that were excessive in light of Illinois' local interests.[58] The Illinois Act regulated all corporations that had their principal executive offices in Illinois or had at least ten percent of their security holders residing in Illinois.[59] The Illinois Act, therefore, could be applied to regulate tender offers which did not affect a single Illinois shareholder nor an Illinois corporation.[60] The Court's opinion in *MITE* specifically noted that the "nationwide" reach of the Illinois Act unconstitutionally burdened interstate commerce under the Commerce Clause.[61] Illinois' asserted interests in protecting resident security holders and regulating the internal affairs of domestic corporations did not justify the burden on nonresident shareholders or

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W. United Corp., 443 U.S. 173 (1979). A delay is a potent weapon in a tender offer fight because it enables a target company to arrange and implement various defensive techniques to thwart the tender offer's success. Brief for Securities and Exchange Commission as Amicus Curiae at 10, n.8, Edgar v. MITE Corp., 457 U.S. 636 (1982). *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977) (characterizing delay as a potent weapon in tender offers).

55. *See supra* notes 45-46.

56. *MITE*, 457 U.S. at 631-40.

57. *Id.* at 643. The Court found that the Illinois Act burdened interstate commerce through its "nationwide reach" which gave Illinois the power to determine whether a tender offer may proceed anywhere. *Id.* This could result in the shareholders being deprived of the opportunity to sell their shares at a premium, thereby hindering the reallocation of economic resources to their highest valued use. *Id.*

58. *Id.* at 644. Illinois claimed two legitimate local interests to justify the Illinois Act. *Id.* Illinois claimed that the Act was intended to protect resident security holders and also that the Act regulated the internal affairs of Illinois corporations, a legitimate area of state regulation. *Id.*

59. ILL. REV. STAT. ch. 121½, ¶ 137.52-10(2) (1979), *repealed by* Act No. 83-365, 1983 Ill. Legis. Serv. 2628 (West).

60. *MITE*, 457 U.S. at 642. Theoretically, the Illinois Act could be applied to an aggressor corporation's tender offer for a corporation organized and located outside of Illinois and in which no Illinois shareholder tendered any shares. The Act, therefore, would be regulating transactions which were completely outside of Illinois and which did not involve an Illinois resident.

61. *Id.* at 644. The Court found that Illinois had no legitimate interests in protecting nonresident shareholders. *Id.*

corporations.[62]

Subsequent to the Supreme Court's decision in *MITE*, numerous lower courts invalidated the first generation of takeover statutes.[63] Some states enacted a second generation of statutes to regulate takeovers.[64] Although some of these statutes mirrored previous disclosure statutes, most attempted to fit within the loopholes the Court had left in the *MITE* decision.[65] Most of these types of second generation statutes, when challenged, were found unconstitutional.[66] A few of these new statutes regulated the second or merger step of the two-tier takeover.[67] Illinois' recent Amendment to the Business Corporation Act is one of these second generation fair-price statutes that regulates the second step or business combination of a takeover, after a tender offer has been successful.

62. *Id.* at 645. The Court was unconvinced that the Illinois Act substantially enhanced the shareholders' position. *Id.* Additionally, the Court did not believe Illinois' proposed justifications of protecting local interests because the Act could be applied to foreign corporations and nonresident shareholders. *Id.* These burdens on out-of-state commerce were excessive in light of the questionable interests asserted. *Id.* at 645-46.

63. *See, e.g.*, Mesa Petroleum Co. v. Cities Servs. Co., 715 F.2d 1425 (10th Cir. 1983) (Oklahoma Take-Over Bid Act found unconstitutional); Telvest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983) (Virginia Take-Over Bid Disclosure Act found unconstitutional); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (Michigan Take-Over Offers Act found unconstitutional); National City Lines, Inc., v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (Missouri Takeover Bid Disclosure Act found unconstitutional); Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982) (Maryland Corporate Takeover Laws found unconstitutional); Sharon Steel Corp. v. Whaland, 466 A.2d 919 (N.H. 1983) (New Hampshire Security Takeover Disclosure Act found unconstitutional); Esmark, Inc. v. Strode, 639 S.W.2d 768 (Ky. 1982) (Kentucky Take-Over Bids Disclosure Act found unconstitutional).

64. *See, e.g*, HAW. REV. STAT. § 417E-1(1985); MINN. STAT. §§ 80B.01 (1984); MO. REV. STAT. § 351.407 (1984); OHIO REV. CODE ANN. §§ 1701.01, 1701.831 (Anderson Supp. 1985).

65. Justice Powell noted in his concurrence that the Court's opinion in part V-B regarding the Act's constitutionality under the Commerce Clause left some room for state regulation of tender offers. *MITE*, 457 U.S. at 646. *See also* Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 SEC. REG. L.J. 332 (1986) (discussing how the MITE decision marked the end of the first generation state takeover statutes).

66. One statute has withstood constitutional scrutiny in part. *See* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) (court declared the Minnesota Takeover Act constitutional). *See infra* note 115 for a discussion of the court's analysis of the Minnesota Takeover Act. Others have not withstood constitutional challenges. *See, e.g.*, APL Ltd. Partnership v. Van Dusen Air, Inc., 622 F. Supp. 1216 (D. Minn. 1985) (declaring the Minnesota Control Share Acquisition Act unconstitutional); Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Miss. 1985) (declaring the Missouri Control Share Acquisition Statute unconstitutional).

67. *See* CONN. GEN. STAT. § 33-366 (1984); GA. CODE ANN. § 14-2-232 (Supp 1985); KY. REV. STAT. ANN § 271A.397 (Michie/Bobbs-Merrill Supp. 1984); LA. REV. STAT. ANN. § 12:132 (West Supp. 1985); MD. CORPS. & ASS'NS CODE ANN. § 3-601 (1985); MICH. COMP. LAWS §§ 21.200(776) (1985); PA. CONS. STAT. ANN. §§ 1409.1, 1910 (Purdon Supp. 1983).

II. The Amendment to the Illinois Business Corporations Act

The actual Amendment to the Illinois Business Corporation Act,[68] though short, is detailed and confusing at first reading. Accordingly, an explanation of its major provisions and definitions is necessary. First, the Amendment applies only to domestic Illinois corporations[69] whose securities are registered under the Securities Exchange Act of 1934.[70] The major requirement of the Amendment is a super-majority vote of eighty percent of all outstanding voting shares *and* a majority of the voting shares of disinterested shareholders[71] to bring about five different business combinations.[72] These business combinations are: 1) any merger, consolidation or share exchange with any interested shareholder[73] (one who owns more than ten percent of the outstanding voting shares);[74] 2) any sale, lease, transfer, *etc.*, of any assets of the corporation to an interested shareholder equalling ten percent or more of the corporate net worth;[75] 3) any issuance or transfer of any securities to any interested shareholder;[76] 4) the adoption of any interested shareholder's plan or proposal to liquidate or dissolve the corporation;[77] and 5) any reclassification of securities which increases the proportionate amount of any interested shareholder's portion of shares.[78]

The Amendment lists two exceptions to the super-majority vote requirement.[79] The first exception occurs when the business combination receives a two-thirds vote of approval of the disinterested directors.[80] A disinterested director is one who: is neither an interested

68. ILL. REV. STAT. ch. 32, ¶ 7.85 (1985).

69. A domestic Illinois corporation is one which is incorporated under the laws of Illinois.

70. ILL. REV. STAT. ch. 32, ¶ 7.85 A. The Amendment also applies to any other domestic Illinois corporation which specifically adopts the Amendment into its articles of incorporation. *Id.* Once the Amendment is adopted, a vote of 80% of the outstanding shares, *and* a majority vote of the disinterested shares is required to amend or repeal the provision. *Id.*

71. A disinterested shareholder is a "shareholder . . . who is not an interested shareholder [nor] an affiliate or an associate of an interested shareholder." *Id.* ¶ C(9).

72. *Id.* ¶ A(1)(a)-(e).

73. *Id.* ¶ A(1)(a).

74. *Id.* ¶ C(2)(a). The definition also includes any affiliate or associate of the Illinois corporation that was the owner of ten percent or more of the outstanding voting shares within two years prior to the date of the proposed business combination. *Id.* ¶ C(2)(b).

75. *Id.* ¶ A(1)(b).

76. *Id.* ¶ A(1)(c).

77. *Id.* The definition also includes any plan in which the interested shareholder will receive anything other than cash. *Id.*

78. *Id.* ¶ A(1)(e).

79. *Id.* ¶ B(1)-(2). When one of these exceptions is met, the higher vote requirement is not required for the approval of any of the business combinations. *Id.* Only the affirmative vote as required by law, or outlined in the corporation's articles of incorporation, is required. *Id.*

80. *Id.* ¶ B(1).

shareholder nor an affiliate or associate of an interested shareholder;[81] was a member of the board before the interested shareholder became an interested shareholder, or was made a member through the majority vote of disinterested directors;[82] *and* was not nominated as a director by an interested shareholder.[83]

The second exception occurs when certain fair price requirements and procedures are followed.[84] The requirements concern the price offered for shareholder's shares not tendered during the first step of the takeover. The statute lists two different methods for determining the fair price of a share, depending on whether the share is common stock[85] or all other series of stocks.[86] For common stock, the price received in the second step or business combination must be equal to or higher than the highest[87] of either the highest price the interested shareholder paid for any share in the first step,[88] or the fair market value of the share.[89] For all other series of stocks,[90] the price received in the second step must be equal to or higher than the highest of four prices.[91] These four prices are determined as follows: 1) the highest price the interested shareholder paid for that type of stock in the first step;[92] 2) the highest preferential amount

81. *Id.* ¶ C(7)(a).

82. *Id.* ¶ C(7)(b). Either of these two requirements may be met to fulfill this part of the definition. *Id.*

83. *Id.* ¶ C(7)(c). All three of the requirements listed must be met to be a disinterested director. *Id.* ¶ B(2).

84. *Id.* ¶ B(2)(a)-(f). *All* of the conditions listed must be met to fulfill the exception. *Id.*

85. *Id.* ¶ B(2)(a)(1)-(2).

86. *Id.* ¶ B(2)(b)(1)-(4).

87. The interested shareholder must pay the highest of either the price found through the price paid provision or that found through the fair market value provision. *Id.* ¶ B(2)(a)(1)-(2).

88. The highest price the interested shareholder paid is the highest price paid for any share bought within two years prior to the first public announcement of the proposed business combination, *or* the highest price paid for any share in the transaction in which the interested shareholder became an interested shareholder (acquired ten percent or more of the outstanding voting stock), whichever is higher. *Id.* ¶ B(2)(a)(1).

89. The fair market value of the share is the fair market on the first trading day after the day the business combination was announced, *or* the fair market value on the first trading date after the interested shareholder became an interested shareholder, whichever is higher. *Id.* ¶ B(2)(a)(2).

90. This provision would apply to all other series of stocks than common, such as preferred stock. Usually these other series of stocks are non-voting and receive preferential treatment in dividends and liquidation. This provision also applies even if the interested shareholder did not previously acquire any shares of that classification of stock. *Id.* ¶ B(2)(a)(2)(b).

91. The interested shareholder must pay the highest price of the four determined prices for any share of that series of stock. *Id.*

92. This is the highest price paid for a share (if applicable) that was bought within a two-year period prior to the announcement of the business combination, *or* the highest price paid (if applicable) in the transaction in which the interested shareholder became an interested shareholder. *Id.* ¶ B(2)(b)(1).

received per share if the corporation is liquidated;[93] 3) the fair market value;[94] or 4) the result of multiplying the number found in the fair market provision by a ratio.[95]

To fulfill the fair price exception, it is also required that certain conditions be met in addition to the price requirements.[96] The shares must be purchased with the same form of consideration the interested shareholder used to acquire his other shares.[97] Additionally, the exception forbids:[98] certain dividends from being withheld,[99] the reduction of dividends,[100] the reclassification of stock if it reduces the number of outstanding shares without an increase of dividends,[101] and the interested shareholder's acquisition of any additional shares.[102]

The fair price exception also forbids the interested shareholder from receiving any loans, advances, or other financial assistance from the corporation in anticipation of the business combination.[103] Additionally, a proxy or information statement that complies with the S.E.C. regulations[104] must be sent out thirty days prior to the

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93. This is the highest preferential amount (if applicable) the shareholder would receive in the event of any voluntary or involuntary liquidation or dissolution. *Id.* ¶ B(2)(b)(2).

94. The fair market value is determined in the same manner as for common stock. *Id.* ¶ B(2)(b)(3). *See supra* note 89.

95. The ratio is determined as follows: x = the highest price the interested shareholder paid for that type of share within a two-year period prior to the announcement of the business combination; y = the market value on the first day in that two-year period on which the interested shareholder acquired any shares of that type. *Id.* ¶ B(2)(b)(4).

96. *Id.* ¶ B(c)-(f).

97. The consideration involved must be cash if the interested shareholder paid in cash. *Id.* ¶ B(c). If the interested shareholder paid in various ways, the consideration must be in cash, *or* in the form used to acquire the largest amount of such stock. *Id.*

98. The prohibitions must be adhered to in the period between when the interested shareholder became an interested shareholder and the business combination date. *Id.* ¶ B(d).

99. There can be no failure to pay dividends on stock other than common stock unless it is first approved by a two-thirds vote of disinterested directors. *Id.*

100. There can be no reduction in the annual rate of dividends on common stock unless it is approved by a two-thirds vote of disinterested directors or is covered under the reclassification provision. *Id.*

101. If the stock is reclassified or reorganized in such a way that it reduces the number of outstanding common shares, then there must be an increase in the annual rate of dividends to prevent any reduction to common shareholders. *Id.*

102. The interested shareholder must not have acquired any more voting shares after becoming an interested shareholder. *Id.*

103. The interested shareholder cannot have received (except proportionately as a shareholder) directly or indirectly any loans, advances, guarantees, pledges, or other financial assistance, *or* any tax credits or tax advantages from the corporation in anticipation of the business combination. *Id.* ¶ B(2)(e).

104. The S.E.C. rules require that a proxy solicitation be accompanied by a proxy statement containing information set forth in schedule 14A. 17 C.F.R. § 240.14a-3(a) (1986). The information required depends on the type of issue involved. *Id.*

business combination regardless of whether the S.E.C. requires one.[105] The fair price requirements and procedures are intended to protect the minority shareholders from receiving less value for their shares than those shareholders who sold their shares in the initial tender offer.

The other section added to the Illinois Business Corporations Act with the Amendment is the Directors' Duties Provision. It addresses the duties that directors must follow when carrying out their responsibilities.[106] It allows them to consider the best interests of the corporation in making decisions. It also allows them to consider the effects of any actions upon employees, suppliers, and customers of the corporation, as well as the communities in which the offices of the corporation are located.[107]

III. THE CONSTITUTIONALITY OF THE AMENDMENT

If challenged, the Amendment to the Illinois Business Corporations Act will withstand constitutional scrutiny. The Amendment does not contain any of the provisions of the original Illinois Takeover Act which were found unconstitutional.[108] The Amendment is constitutional under the Supremacy Clause because it regulates the second step of a takeover as compared to the Williams Act, which regulates the first step.[109] It also is constitutional under the Commerce Clause because it does not place an excessive burden on interstate commerce in light of the local benefits it creates.[110]

The Williams Act does not preempt the Amendment, thereby rendering it unconstitutional under the Supremacy Clause.[111] The Williams Act only regulates the tender offer[112] and not the merger or business combination after the offer is successful. The Amendment, on the other hand, only regulates the second or merger step of a takeover.[113] Additionally, the Amendment does not contain any of

105. ILL. REV. STAT. ch. 32, ¶ 7.85 B(2)(f) (1985).

106. *Id.* ¶ 8.85.

107. The provision allows the directors, in considering the best interests of the corporation, to also consider the effects of any action upon the employees, suppliers, customers and communities in which the corporation is located as well as all other pertinent factors. *Id.*

108. *See infra* notes 114-15 and accompanying text.

109. *See infra* notes 111-28 and accompanying text.

110. *See infra* notes 129-50 and accompanying text.

111. *See* Comment, *The 1983 Amendments to Pennsylvania's Business Corporation Law: Unconstitutional? MITE Be*, 89 DICK. L. REV. 401, 428-31 (1985) (concluding that the Pennsylvania Fair Price Statute is not preempted by the Williams Act because it contains none of the provisions found in *MITE* and because it regulates the second step of a takeover).

112. The Williams Act does not regulate mergers, sales of assets or dissolutions. For a discussion of the Williams Act, see *supra* notes 27-48 and accompanying text.

113. *See supra* notes 71-78 and accompanying text.

the specific provisions that were found to conflict with the Williams Act in *MITE*.[114] It does not require any precommencement notice, waiting period or hearings, and does not substitute the judgment of a state official on the fairness of an offer for that of the shareholder.[115] The Amendment regulates management's fiduciary duties, the relationships of the shareholders to the corporation, and the relationships of the shareholders among themselves.[116] This regulation of the internal affairs of a corporation is a traditional area of state law that the Williams Act does not address.[117]

An argument could be made, however, that the Amendment is contrary to the Williams Act's policy of neutrality because the target corporation can use the Amendment to fend off the second step of a take-over.[118] The Amendment can be used to deter the completion of a two-step takeover in several ways. First, the fair price requirements will relieve the pressure on shareholders to sell their shares in the tender offer because they realize that they will receive the same price for them later.[119] This could make the completion of a tender offer more difficult to accomplish and would favor the target corporation's management.[120] The possibility of this favoring effect, however, is difficult, if not impossible, to prove. It would be difficult to prove that an aggressor corporation's tender offer was unsuccessful due solely to the Amendment's fair price requirements when there are a variety of factors that can affect the success of a tender offer.[121] Additionally, two Supreme Court Justices have stated that

114. *See supra* notes 52-56 and accompanying text.

115. *See* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984). In upholding the Minnesota Act as constitutional, the *Cardiff* court found that the Act was materially different in scope and application from the Illinois statute in *MITE*. *Id.* at 909-10. Specifically, the Minnesota Statute did not contain a precommencement notice period, did not delay the tender offer, and did not allow the state commissioner to pass on the fairness of an offer. *Id.* at 910-11. Illinois' Amendment also does not contain any of these provisions. Additionally, it is even more different in scope than the Minnesota statute because it applies to the second step of a takeover only, whereas the Minnesota statute applied to the first.

116. The internal affairs of a corporation are "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *MITE*, 457 U.S. at 645.

117. *See infra* notes 142-44 and accompanying text.

118. *See* Block, Barton & Roth, *supra* note 65, at 353.

119. Fair Price Requirements will enable shareholders to resist tendering their shares in the initial offer since later price offers will be as high. *See* Newlin & Gilmer, *supra* note 8, at 121. Also, the requirements prevent the target corporation from being acquired at a bargain price by squeezing out the remaining shareholders through consolidation, merger or sale of assets. *Id. See also Front-End Loaded Tender Offers*, *supra* note 23, at 407 (noting that equal consideration in a two step takeover gives the shareholders too little incentive to tender in the first step); Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 786-92 (April 1982) (discussing the effects of fair price deterrents).

120. *See supra* note 18.

121. After a tender offer has been commenced, the target corporation's manage-

the Williams Act's neutrality policy does not imply a congressional intent to prohibit all state regulation of tender offers, even if the state regulation protects the incumbent management.[122] It is unlikely, therefore, that the Amendment would be found unconstitutional as inhibiting tender offers on this basis.

Second, the Amendment can also be used to deter a takeover because it makes the second step more difficult to accomplish due to the burden of acquiring a supermajority vote or the meeting of the fair price requirements.[123] The target corporation's management can use the Amendment to make it difficult for the aggressor corporation to complete a takeover. This possible use as a defense, however, is in the second step or business combination and not the tender offer. The Williams Act's position of neutrality lies in the regulation of tender offers and does not extend beyond that step. The Amendment does not contain any provisions which favor management in the tender offer step.[124] Any favoritism, therefore, would not be unconstitutional under the Supremacy Clause because it would occur, if at all, in a step or action that the Williams Act does not regulate.[125] The Amendment cannot be said, therefore, to frustrate the objectives of the Williams Act.[126]

Additionally, the main purpose of the Williams Act is to protect shareholders in takeover situations.[127] The purpose of the Amendment is to protect the minority shareholders and not to protect the

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ment can use several defense tactics to thwart the success of the tender offer. They can: 1) drive up the market price of the target's shares so the offer will be unattractive; 2) issue additional treasury or previously unissued shares and place them in friendly hands, thereby diluting the aggressor's position; 3) find a more congenial suitor (white knight); 4) buy off the aggressor corporation or persuade it to withdraw its offer; or even 5) litigate. HAMILTON, CORPORATIONS 642 (2d. ed. 1980). *See also* E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 193-202 (1977) [hereinafter DEVELOPMENTS IN TENDER OFFERS] (discussing defensive tactics to thwart a tender offer). Because some or all of these tactics are usually employed, it would be impossible to determine the effect on the tender offer of the shark repellent Illinois Amendment.

122. *See* Block, Barton & Roth, *supra* note 65, at 354.

123. Supermajority voting provisions will raise the offeror's cost of acquiring control and make a takeover more difficult to accomplish. *See* Newlin & Gilmer, *supra* note 8, at 121.

124. *See supra* notes 114-15.

125. *See* Scriggins & Clarke, *supra* note 7, at 289 (concluding that the Maryland Fair Price Act would be constitutional because it does not frustrate the time and informational objectives of the Williams Act and because it regulates an entirely different transaction).

126. In reality, the Amendment furthers the objectives of the Williams Act because it allows shareholders to make more rational judgments regarding their shares due to the removal of the coercive influences. *See* Scriggins & Clarke, *supra* note 7, at 289 (reviewing the constitutionality of the Maryland Fair Price Act); Newlin & Gilmer, *supra* note 8, at 122.

127. *See supra* notes 45-46 and accompanying text.

target corporation's management.[128] It is unlikely, therefore, that the Amendment's possible use as a defense for the target corporation will render it unconstitutional.

The Amendment would be found constitutional under the Commerce Clause because it furthers legitimate state interests without unnecessarily burdening interstate trade. When a state regulation is challenged on Commerce Clause grounds, courts apply a balancing test.[129] They determine whether the burden imposed on interstate commerce is clearly excessive in relation to the legitimate state interest the statute effectuates.[130] Courts have already determined that protecting resident investors[131] and regulating the internal affairs of domestic corporations are legitimate state interests.[132] Courts have also recognized, however, that halting or discouraging takeovers,[133] lowering the initial price offered to shareholders,[134] or depriving shareholders of a premium for their shares are burdens on interstate commerce.[135] The Amendment, however, is constitutional because it does not result in the decreasing of initial offers or the depriving shareholders of a premium for their shares. Although the Amendment might be used to discourage takeovers, it is nevertheless constitutional under the Commerce Clause because the Amendment's interests in protecting local investors and regulating the internal affairs of Illinois corporations outweigh this incidental burden.

The Amendment applies only to domestic Illinois corpora-

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128. *See supra* note 9.

129. The general rule is that "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld 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). The test is one of degree depending on the nature of the local interest involved. *Id. See also Developments in Tender Offers, supra* note 121, at 229-33.

130. *Pike*, 397 U.S. at 142.

131. *MITE*, 457 U.S. at 644; *Icahn*, 612 F. Supp. at 1417.

132. Burks v. Lasker, 441 U.S. 471 (1979) (federal courts should refer to state law to determine whether independent directors have power to terminate derivative suits brought under the federal securities laws); Santa Fe Indus. v. Green, 430 U.S. 462 (1977) (determining that the plaintiff's sole remedy for an "unfair" transaction was under state corporate law); Cort v. Ash, 422 U.S. 66 (1975) (in deference to state corporate law, a cause of action will not be implied from a federal statute in the absence of an express command from Congress). *See also* Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 724-27 (1981); Scriggins & Clarke, *supra* note 7, at 290.

133. Mesa Petroleum Corp. v. Cities Serv. Co., 715 F.2d 1425 (10th Cir. 1983); Telvest v. Bradshaw, 697 F.2d 576 (4th Cir. 1983); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982).

134. Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1283 (5th Cir. 1978), *rev'd on other grounds*, Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

135. *MITE*, 457 U.S. at 643.

tions.[136] The Amendment does not, therefore, have the "nationwide reach" that the Court found unconstitutional in *MITE*.[137] The Amendment does not regulate securities exchanges outside of Illinois.[138] It regulates the internal corporate activities of Illinois corporations in various business combinations.[139] Because it does not affect or apply to a tender offer,[140] it cannot have the effect of decreasing an aggressor corporation's initial offer to shareholders. Additionally, the Amendment is designed to insure that all shareholders, including those who did not tender their shares in the first step, will receive the highest value for their shares.[141] Consequently, it cannot be said to deprive shareholders of a premium for their shares. The Amendment, therefore, is not unconstitutional under the Commerce Clause for burdening interstate commerce in either of these ways.

Although the Amendment might be used to discourage interstate takeovers, thereby burdening interstate commerce, this burden is not excessive in relation to Illinois' legitimate state interests. Illinois has a legitimate interest in protecting resident shareholders and regulating the internal affairs of domestic corporations. Because neither Congress nor the courts have federalized corporate law, great deference is afforded states in regulating the internal affairs of corporations.[142] The jurisdictional basis of a state's regulation affects the weight given to its internal affairs interest.[143] A statute applicable only to corporations incorporated in the regulating state most clearly shows a state's internal affairs' interest.[144]

The Amendment is constitutional as a regulation of internal af-

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136. *See supra* note 69.

137. *MITE*, 457 U.S. at 643.

138. In *MITE*, the Court reasoned that a tender offer was for the transfer of stock by a stockholder to a third person and did not, therefore, involve the internal affairs of a corporation. *Id.* at 645. The Amendment does not regulate tender offers or exchanges of stock. Rather, it regulates the business combinations between the corporation and its majority shareholder and the effects of those combinations on the corporation's shareholders. *See supra* notes 73-78 and accompanying text (discussing five business combinations affected).

139. Courts have noted that there is a distinction between regulating the acquisition of shares and regulating the use of power once the shares have been acquired. *MITE*, 457 U.S. at 645. The latter can be a proper subject for state regulation. *Id.*

140. The key to understanding the constitutionality of the Amendment is that it does not regulate the initial tender offer stage of a takeover at all. It regulates the second or business combination step which directly concerns the corporation's internal affairs. *See* Scriggins & Clarke, *supra* note 7, at 286. (examining the constitutionality of the Maryland Fair Price Act).

141. *See supra* note 9.

142. State regulation of internal affairs has been protected from federalization. *See supra* notes 138-39. *See also* McDaniel, *supra* note 111, at 417.

143. *See* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH & LEE L. REV. 733, 752 (1979). *See also* McDaniel, *supra* note 111, at 417.

144. *See supra* note 143.

fairs because it regulates Illinois corporations only.[145] Illinois clearly has a legitimate state interest in regulating its own state-created corporations and, therefore, would be given deference in that regulation.[146] Additionally, the Amendment is constitutional under the internal affairs doctrine because it regulates the second, forced transaction stage of a takeover.[147] The business combinations the Amendment covers directly concern the target corporation's internal affairs.[148] The internal affairs of a corporation are matters peculiar to the relationships among the corporation and its current officers, directors, and shareholders.[149] The Illinois Amendment regulates the relationships between the shareholders and the Illinois corporation, and among the shareholders themselves.[150] It clearly regulates the internal affairs of Illinois corporations and, therefore, is not an excessive burden on commerce in relation to this important legitimate state interest.

IV. Potential Conflicts the Amendment Poses

Although the Illinois Amendment would pass a constitutional challenge, it does pose some interesting problems in that, unlike most takeover statutes, it can be applied to many internal corporate activities other than takeovers. A close inspection of the defined business combinations reveals that the supermajority vote is required in a number of various corporate activities involving a majority shareholder other than the second step of a takeover. These potential applications may conflict with established corporate policy. This potential use could interfere because it would require the supermajority vote or fair price provisions to be followed before the business can be transacted.[151]

In keeping with the Amendment's purpose to protect the minority shareholders, these additional applications are advantageous to the minority shareholders. A requirement of a supermajority vote in transactions with a majority shareholder will give the minority shareholders more rights and protections than they would have had before the Amendment.[152] The Amendment, however, allows an ex-

145. *See supra* notes 136-40 and accompanying text.
146. *See supra* notes 142-44 and accompanying text.
147. *See supra* notes 129-40 and accompanying text.
148. *See supra* notes 73-78 and accompanying text.
149. *See supra* notes 142-44 and accompanying text.
150. *See supra* note 140 and accompanying text.
151. *See supra* notes 68-71.
152. In the usual corporate situation, if a minority shareholder is dissatisfied with management's policies or proposals, his only choice of action is to sell his shares or to wage a proxy fight. Hamilton, Corporations 492 (2d ed. 1980). Because the minority shareholder's proportion of the voting stock is so small, his voice through voting his shares is small. Under the Illinois Amendment, a majority vote of all disin-

ception to its supermajority voting requirements with a two-thirds vote of disinterested directors.[153] It is unlikely, therefore, that its application to other transactions will interfere with everyday corporate business.

The Directors' Duties Provision also poses some problems because it contains language that can be read to expand the Board of Directors' duties.[154] The Courts have fashioned a well-recognized duty of care that a director owes to the corporation.[155] Traditionally, these duties have been held to be owed only to the corporation. Few states have adopted specific statutes providing this or any standard of care and have instead left the determination of the standard up to the judiciary.[156] This section begins to codify these duties in statutory form. Ironically, this part of the section includes language that allows the directors to consider the effects of their actions on the employees and communities of the corporation.[157] The language might be construed to be an expansion of the traditional duties of directors. It is doubtful, however, that any court would read this language to expand duties that have long been judicially determined to constitute something else. If the language were interpreted this way, however, the provision may be used to sue directors personally for breaching their duties where the corporation's activities have led to physical or financial harm to the corporation's employees or the community in which it is located.

Despite the potential difficulties, however, the Amendment will encourage new corporations to incorporate in Illinois due to the statutory protection it provides in the event of a hostile takeover.[158]

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terested shares is required to approve the five business combinations with a majority shareholder. *See supra* notes 71-78 and accompanying text. By reducing the proportion of voting shares to just disinterested shares, the minority shareholders voice has increased proportionately. The minority shareholder, therefore, can have a voice in voting on matters that he would not have had without the Amendment. *See also Freezeouts under the 1983 Illinois Business Corporation Act: The Need For Protection Of Minority Shareholders From "Going Private" Mergers*, 3 U. ILL. L. REV. 679, 693-97, 701-06 (1985) (discussing different devices designed to protect minority shareholders in the going private freezeout situation).

153. *See supra* note 80.

154. *See supra* notes 106-07 and accompanying text.

155. Traditional fiduciary duties of Directors require the exercise of sound business judgment, in utmost good faith, and in the best interests of the corporation and its shareholders. Pepper v. Litton, 308 U.S. 295, 311 (1939) (Supreme Court considered the fiduciary duties of directors); Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939) (leading case on the fiduciary duties of officers and directors). *See also* PITT & HISTAND, 1 HOSTILE BATTLES FOR CORPORATE CONTROL, FIDUCIARY DUTIES OF OFFICERS AND DIRECTORS 9 (Supp. 1983).

156. Kjellenberg, *The Illinois Business Corporation's Act of 1983, 1985 Amendments*, IICLE Seminar on Officers' and Directors' Liability § 8.85, at 3 (May 29, 1986).

157. *See supra* notes 106-07 and accompanying text.

158. The Pennsylvania Act will encourage corporations to incorporate in Pennsylvania or domesticate there to receive the protection of the Act. *See* Newlin & Gil-

This is advantageous because it will increase corporate activity in Illinois, thereby increasing state revenue through incorporation fees and taxes. Additionally, present corporations will want to adopt the Amendment into their by-laws to discourage attempted corporate takeovers.[159] The Amendment, therefore, which was designed to protect minority shareholders, may wind up as a corporate tool used to fend off hostile takeovers. This potential use as a takeover defense is beneficial, however, because hostile takeovers are not necessarily in the target corporation's interest or in the public interest.[160]

CONCLUSION

The Amendment to the Illinois Business Corporation Act is part of a new trend in state regulation to protect minority shareholders by requiring a supermajority vote to bring about the second step of a takeover. The Amendment would pass a constitutional challenge because the Williams Act does not preempt it, and the Amendment does not place an unnecessary burden on interstate commerce. The Amendment might pose some problems for corporations, however, in transactions other than takeovers. In all, the Amendment should encourage corporations to incorporate in Illinois to acquire this built-in statutory protection against hostile takeovers. The aggressor corporation will be more hesitant to attempt to take over a target corporation if, once it has achieved its voting control, a supermajority or fairness requirement is necessary to complete the takeover. The Amendment is a good one, therefore, because it achieves its goal of protection for minority shareholders and also discourages hostile takeovers of Illinois corporations.

Valerie Ann Hall

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mer, *supra* note 8, at 122.

159. Shark repellents are state statutes designed to discourage unwanted takeovers. R. HAMILTON, CORPORATIONS 627 (2d ed. 1981). A shark repellent deters a takeover attempt by making the target less desirable and more difficult to acquire and, therefore, encourages the shark or aggressor corporation to seek other prey. *See* Gilson, *supra* note 119, at 776-77. For further discussions of shark repellents, see E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 223 (1973); DEVELOPMENTS IN TENDER OFFERS, *supra* note 121, at 194-96; P. DAVEY, DEFENSES AGAINST UNNEGOTIATED CASH TENDER OFFERS 2 (1977); Black & Smith, *Antitakeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699 (1979); Cohen, *Takeover Bids: How Target Companies Fight Back*, Jan.-Feb. 1970, at FIN. ANALYSTS J., 26; and Hochman & Folger, *Deflecting Takeovers: Charter and By-law Techniques*, 34 BUS. LAW. 537 (1979).

160. *See supra* note 135. *See also* Scriggins & Clarke, *supra* note 7, at 286-89 (discussing tender offers being undesirable because shareholders are not able to make rational economic judgments due to the amount of information disclosed and the coercive nature): Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 257-68 (1983) (arguing that takeovers are bad because they allow shareholders, rather than directors, to decide whether a corporation should merge and that is inconsistent with the principles of corporate theory).