THE CONSTITUTIONALITY OF ALASKA'S TAKEOVER BID DISCLOSURE ACT

I. INTRODUCTION

Regulation of takeover bids in tender offers is a relatively new development, originating in March 1968 when the Virginia legislature established the first of such regulations.[1] Four months later, Congress enacted the Williams Act amendments to the Securities Exchange Act of 1934,[2] which were the first federal regulations in this area. Despite warnings by commentators that Congress had preempted this regulatory field,[3] three dozen states, including Alaska, followed Virginia's lead by enacting their own takeover disclosure statutes.[4] In 1982, however, the validity of these state statutes was

1. VA. CODE ANN. §§ 13.1-528 to -540 (1978 & Cum. Supp. 1981).

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

3. *See* ABA Subcomm. on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Comm., *State Takeover Statutes and the Williams Act, reprinted in* 32 BUS. LAW. 187, 190-91 (1976); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 CORNELL L. REV. 213, 246-54 (1977); Moylan, *State Regulation of Tender Offers,* 58 MARQ. L. REV. 687, 699-700 (1975); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 FORDHAM L. REV. 1, 25-31 (1976). *But see* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 CASE W. RES. 722, 759-60 (1970).

4. ALASKA STAT. §§ 45.57.010-.120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Cum. Supp. 1983); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West Cum. Supp. 1983); DEL. CODE ANN. tit. 8, § 203 (1983); FLA. STAT. ANN. §§ 517.35-.363 (West Cum. Supp. 1978) (repealed 1979); GA. CODE ANN. §§ 14-6-1 to -15 (1982 & Cum. Supp. 1984); HAWAII REV. STAT. §§ 417E-1 to -15 (1976 & Supp. 1983); IDAHO CODE §§ 30-1501 to -1513 (1980 & Cum. Supp. 1984); Illinois Business Take-Over Act §§ 1-20, ILL. ANN. STAT. ch. 121½ ¶¶ 137.51-.70 (Smith-Hurd Supp. 1980) (repealed 1983); IND. CODE ANN. §§ 23-2-3.1-0.5 to -11 (Burns 1984); IOWA CODE ANN. §§ 502.102, .211-.215 (West Supp. 1983); KAN. STAT. ANN. §§ 17-1276 to -1285 (1981); KY. REV. STAT. §§ 292.560-.991 (1981); LA. REV. STAT. ANN. §§ 51:1500-:1512 (West Supp. 1984); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (1981 & Cum. Supp. 1983); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Cum. Supp. 1983); MASS. ANN. LAWS ch. 110C, §§ 1-13 (Michie/Law. Co-op. Cum. Supp. 1984); MICH. COMP. LAWS ANN. §§ 451.901-.917 (West Cum. Supp. 1984); MINN. STAT. ANN. §§ 80B.01-.13 (West Cum. Supp. 1984); MISS. CODE ANN. §§ 75-72-101 to -121 (Cum. Supp. 1983); MO. ANN. STAT. §§ 409.500-.565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977) (repealed 1983); NEV. REV. STAT. §§ 78.376-.3778 (1979); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (1983) (amended and portions repealed 1983); N.J. STAT. ANN. §§ 49:5-1 to -19 (West Cum. Supp. 1984); N.Y. BUS. CORP. LAW §§ 1600-1614

seriously called into question when the United States Supreme Court, in *Edgar v. MITE Corp.*,[5] found the Illinois Business Take-Over Act unconstitutional under the Commerce Clause. Since this decision, several states have witnessed the invalidation of their take-over statutes by the courts.[6]

This note provides a brief examination of the elements of the Alaska Takeover Bid Disclosure Act (the "Alaska Act") and compares them to the provisions of the Williams Act amendments. It then analyzes the Alaska Act and its likely constitutional infirmities in light of recent court decisions in this area, especially focusing on the Supreme Court decision in *Edgar v. MITE Corp.* Finally, it will offer possible alternatives to the Alaska Act which would allow the state to maintain a voice in the regulation of corporate takeover bids.

II. ELEMENTS OF THE ALASKA ACT

A. Regulated Transactions

The Alaska Act purports to regulate takeover bids directed at companies incorporated under Alaska law or that have their principal office and substantial assets located in Alaska.[7] Unlike some state takeover statutes, the Alaska Act contains no requirement that a certain percentage of shareholders of the target company be state residents.[8] A takeover bid is defined as an offer "to purchase the number of shares or other units of any class of equity security of the offeree company that, together with the offeror's presently owned

(Consol. Cum. Supp. 1983); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. § 1707.04.1 (Page 1978 & Supp. 1983); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1984); S.C. CODE ANN. §§ 35-2-10 to -110 (Law. Co-op. Cum. Supp. 1980) (repealed 1981); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to -48 (1983); TENN. CODE ANN. §§ 48-2101 to -2114 (1979); UTAH CODE ANN. §§ 61-4-1 to -13 (1978) (repealed 1983); WIS. STAT. ANN. §§ 552.01-.25 (West 1980); TEX. ADMIN. GUIDELINES FOR MINIMUM STANDARDS IN TENDER OFFERS § 065.15.00.100 (Tex. Sec. Bd. 1977), *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671-55,682 (1979).

5. 457 U.S. 624 (1982).

6. *See, e.g.*, Telvest, Inc. v. Bradshaw, 697 F.2d 576 (4th Cir. 1983) (Virginia statute unconstitutional); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) (Michigan statute unconstitutional); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (Missouri statute unconstitutional); Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982) (Maryland statute unconstitutional).

7. ALASKA STAT. § 45.57.110(4) (1980).

8. *See, e.g.*, S.C. CODE ANN. § 35-2-20(5)(d) (Law. Co-op. Cum. Supp. 1983) (five percent of shareholders must be state residents before takeover regulations are triggered); WIS. STAT. ANN. § 552.01 (West 1980) (requires target company to have at least 100 resident shareholders or residents composing five percent of a class of shareholders before the company is subject to state takeover regulations); TEX. ADMIN. CODE § 129.2 (1979) (majority of shareholders must be Texas residents for regulations to apply).

shares, will in the aggregate exceed five per cent of the outstanding shares of that class."[9] Among the offers exempted from the Alaska Act are "friendly offers," those which the target company's board of directors recommends to the shareholders, provided that the shareholders are notified of the terms of the offer.[10]

B. Pre-Offer Notice and Filing Requirements

No takeover bid may commence unless the offeror has filed an information statement with both the Alaska Department of Commerce and Economic Development (the "Department") and the target company at least twenty days prior to the bid.[11] The Alaska Act requires that these statements contain a substantial amount of detailed information.[12] The offeror must not only describe the terms and conditions of the bid but also must reveal the sources and amount of the funds to be used in making the bid. Further, the Alaska Act mandates that the offeror disclose any material changes it is planning to make in the business or structure of the company, including plans to sell, liquidate, or merge it. The offeror also must provide a detailed analysis of its financial standing and biographical summaries of its directors and officers. These are only minimum requirements; the Department also may require any other information which is "necessary in the public interest or for the protection of the offerees."[13]

C. Administrative Hearing

Within ten days after the offeror has filed the required statement, the Department may order, or the offeree company may request, a hearing to determine whether the offeror has made "full, fair and effective disclosure . . . of all information material to a decision to accept or reject the offer."[14] If the offeree company requests a hearing, the Department must order one.[15] The bid may proceed only if the Department approves of the offeror's disclosure. Although the matter is to be adjudicated within thirty days following the offeror's filing, the Department may extend the adjudication for the "convenience of the parties or protection of the offerees."[16]

9. ALASKA STAT. § 45.57.110(8)-(9) (1980).
10. *Id.* § 45.57.110(2)(E).
11. *Id.* § 45.57.020(a).
12. *Id.* § 45.57.020(c).
13. *Id.*
14. *Id.* § 45.57.020(a)(1)-(2).
15. *Id.* § 45.57.020(d).
16. *Id.* § 45.57.020(b).

Thus, the Department may effectively block the takeover attempt by ordering a hearing and then indefinitely delaying its final approval.

III. THE WILLIAMS ACT AND FEDERAL PREEMPTION

During the 1960's, the frequency of cash tender offers greatly accelerated.[17] This acceleration occurred in a virtually unregulated environment since neither the Securities Exchange Act of 1934 nor state securities laws addressed the issue of cash tender offers. In 1968, responding to criticism by commentators that target company shareholders need information about the offeror[18] and, to a lesser extent, to concerns by business groups who feared corporate "raiders,"[19] Congress enacted the Williams Act amendments to the Securities Exchange Act of 1934. The underlying policy of the Williams Act is the protection of shareholders in target companies through the disclosure of all information necessary for those shareholders to make a reasoned response to the tender offer.[20] The Williams Act approach to this policy is one of strict neutrality toward the bidder and the incumbent management.[21] This approach is the primary source of conflict between the Williams Act and the Alaska Act. Unlike the evenhanded approach evident in the Williams Act, the Alaska Act explicitly discriminates against the offeror and in favor of the incumbent management. As noted earlier, the Alaska Act

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17. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock,* 22 BUS. LAW. 149, 149 (1966).

18. *See, e.g.,* Cohen, *supra* note 17; Sowards & Mofsky, *Corporate Take-Over Bids: Gap in Federal Securities Legislation,* 41 ST. JOHN'S L. REV. 499 (1967).

19. A "raider" is a party which acquires a corporation solely for the purpose of stripping the corporation of its assets or liquidating it. Commentators have argued that state takeover disclosure legislation resulted in large part because the management of target companies viewed the Williams Act provisions as too weak and too "neutral" to discourage corporate raiders. *See* Moylan, *supra* note 3, at 689-90; Profusek & Gompf, *State Takeover Legislation after MITE: Standing Pat, Blue Sky or Corporation Law Concepts?,* 7 CORP. L. REV. 3, 5-6 (1984).

20. SENATE COMM. ON BANKING AND CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as "Senate Report"]. *See also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) ("The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.").

21. Senate Report, *supra* note 20, at 3, states:

> The committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The Bill is designed to require a 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.

exempts offers approved by the target's board of directors.[22] Additionally, written solicitation by the offeror must be filed with both the Department and the target company at least three days before that written solicitation may be distributed to the target's shareholders.[23] Solicitation by the target company is not subject to such delay.[24]

The difference in the approaches of these acts is clearly exemplified by their conflicting provisions. The Williams Act confers broad rulemaking powers upon the Securities and Exchange Commission (SEC).[25] Pursuant to these powers, the SEC promulgated Rule 14d-2(b), which requires the offeror to commence or withdraw the tender offer within five business days of the offeror's public announcement of its intention to make the offer.[26] The Alaska Act, by contrast, imposes a minimum twenty day waiting period from the time the offer is announced to the time the offeror may actively solicit shareholders of the target company.[27] Additionally, the Department, by ordering a hearing, may extend this period even further.[28] The time periods for withdrawal and pro rata rights also are different in the Williams Act and the Alaska Act. According to the SEC rules, a shareholder may withdraw previously tendered shares during the first fifteen business days of the tender offer.[29] By contrast, the Alaska Act provides for a twenty-one day period.[30] Also, the Williams Act imposes a ten day limit on pro rata rights,[31] while the Alaska Act contains no time limit and requires pro rata acceptance of all shares deposited during the offer.[32] While the SEC places a premium on promptness, the Alaska Act encourages delay, thus disrupting the federal policy of neutrality between offeror and target. To a target company, time is its most important ally. As Congressman Rodino stated on the floor of the House of Representatives:

> Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts

22. *See supra* text accompanying note 10.
23. ALASKA STAT. § 45.57.020(e) (1980).
24. *Id.* § 45.57.030.
25. 15 U.S.C. §§ 78m, 78n (1982).
26. 17 C.F.R. § 240.14d-2 (1983).
27. ALASKA STAT. § 45.57.020(a) (1980). Congress specifically rejected a twenty-day prenotification requirement in 1965. *See* 111 CONG. REC. 28,257-59 (1965).
28. ALASKA STAT. § 45.57.020(2)(b) (1980).
29. 17 C.F.R. § 240.14d-7(a)(1) (1983).
30. ALASKA STAT. § 45.57.010(2) (1980).
31. 15 U.S.C. § 78n(d)(6) (1982).
32. ALASKA STAT. § 45.57.010(3) (1980).

> for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly — and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tender offers give to them.[33]

Compliance with both Rule 14d-2(b)'s mandate that the offer must begin within five days of its announcement and the Alaska Act's twenty day waiting period is clearly impossible. Recognizing this divergence in most state takeover statutes, the SEC remarked in the report accompanying its rule that such statutes "frustrate the operation and purposes of the Williams Act and that . . . Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act."[34] Although neither Congress nor the Supreme Court has expressly stated that the Williams Act preempts state takeover statutes,[35] courts tend to agree with the SEC's suggestion that the Williams Act does preempt such statutes.[36]

Another area of conflict is the disclosure requirements of the two Acts. Pursuant to section 13d of the Williams Act, the SEC established disclosure standards which require the offeror to file a statement with the SEC and provide the management and shareholders of the target company with detailed information regarding the terms of the offer.[37] Such information must provide a summary of the offeror's background and identity, the source of the funds to be used in making the purchase, any plans to liquidate the company or make major changes in the corporate structure, and the extent of the offeror's holdings in the target company.[38] Unlike the Alaska Act,[39] the SEC rules neither require the offeror to disclose financial

33. 122 CONG. REC. 30,877 (1976). *See also* Langevoort, *supra* note 3, at 238; Wilner & Landy, *supra* note 3, at 9-10.

34. Tender Offers, 44 Fed. Reg. 70,326, 70,330 (1979).

35. Indeed, the Williams Act amendments left untouched § 28(a) of the Securities Exchange Act of 1934 which states: "Nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1982).

The Supreme Court has noted, however, that Congress may not have been aware of state takeover legislation because such legislation only existed in Virginia when the Williams Act was enacted. Edgar v. MITE Corp., 457 U.S. 624, 631 n.6 (1982).

36. *See, e.g.*, National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1128-30 (8th Cir. 1982); Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522, 532 (D. Md. 1982).

37. 17 C.F.R. § 240.24d-3 (1983) (established pursuant to 15 U.S.C. § 78n(d)(1) (1982)).

38. 17 C.F.R. § 240.13d-1 (1983) (established pursuant to 15 U.S.C. § 78m(d)(1) (1982)).

39. ALASKA STAT. § 45.57.020(c)(7) (1980).

information and historical summaries about its operations nor force it to release biographical data on its directors and officers.

Despite state arguments that requiring additional information from the offeror is consistent with the Williams Act's policy of investor protection, courts have not looked favorably on these requirements.[40] Indeed, the Supreme Court cautioned that excessive disclosure requirements may "bury the shareholders in an avalanche of trivial information — a result hardly conducive to informed decisionmaking."[41]

IV. *Edgar v. MITE Corp.* and Its Impact on the Alaska Act

A. *Edgar v. MITE Corp.*

On January 19, 1979, MITE Corporation, in compliance with the Williams Act, filed a Schedule 14D-1 with the SEC,[42] thereby announcing its intention to purchase all outstanding shares of Chicago Rivet and Machines Co., a publicly held Illinois corporation. That same day, MITE, refusing to comply with the Illinois Business Takeover Act (the "Illinois Act"),[43] sought a declaratory judgment in the Northern District of Illinois that the Illinois Act was preempted by the Williams Act and violated the Commerce Clause. MITE also requested a preliminary injunction prohibiting the Illinois Secretary of State from enforcing the Illinois Act.[44] On February 2, 1979, the district court issued the injunction.[45]

Although MITE later decided not to make the offer,[46] the Illinois Secretary of State continued his appeal to the Seventh Circuit Court of Appeals.[47] Affirming the lower court, the court of appeals noted that the Illinois Act favored the incumbent management, thus frustrating the Williams Act's policy of neutrality.[48] Specifically, the

40. *See, e.g.,* Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 (5th Cir. 1978), *rev'd on venue grounds sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

41. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976).

42. Any offeror seeking to acquire more than five percent of any class of equity security by means of a tender offer must file a Schedule 14D-1 with the SEC. The offeror is required to disclose in a Schedule 14D-1 its source of funds for the offer, previous transactions with the target, pertinent financial information, and any possible legal problem with a successful offer. 17 C.F.R. § 240.14d-100 (1983).

43. Illinois Business Take-Over Act §§ 1-20, Ill. Ann. Stat. ch. 121½, ¶¶ 137.51-.70 (Smith-Hurd Supp. 1980) (repealed 1983).

44. Edgar v. MITE Corp., 457 U.S. 624, 628 (1982).

45. *Id.* at 629.

46. *Id.* at 629-30.

47. *Id.* at 630.

48. MITE Corp. v. Dixon, 633 F.2d 486, 494-95 (7th Cir. 1980).

court found the twenty day pre-commencement notification period,[49] the hearing process, [50] and the requirement that the Illinois Secretary of State decide whether the offer was inequitable[51] contrary to the principles supporting the Williams Act.[52]

The Supreme Court affirmed the holding of the Seventh Circuit but did so in a fractured decision which produced six separate opinions.[53] The only portion of the Court's opinion, written by Justice White, to command a majority was the holding that the Illinois Act violated the Commerce Clause as an indirect burden on interstate commerce.[54] A plurality held that the Illinois Act constituted a direct burden on interstate commerce,[55] and three Justices believed the Illinois Act violated the Supremacy Clause.[56] Four Justices found the case moot on the ground that MITE never completed the tender offer.[57]

The majority based its Commerce Clause rationale on the traditional analysis presented in *Pike v. Bruce Church, Inc.,* which held that if the state "statute regulates evenhandedly to effectuate a legitmate 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."[58] The Illinois Secretary of State advanced two local interests: (1) protection of resident security holders and (2) regulation of the internal affairs of companies incorporated under Illinois law.[59]

Rejecting the first interest, the Court found that the protections the Illinois Act offered Illinois residents were "speculative"[60] because the Act did not apply to tender offers approved by the target's board of directors, such as a corporation's acquisition of its own shares.[61] Further, the Court felt that any possible benefit from the Illinois Act's inherent delays was outweighed by the risk that the

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49. *Id.* at 497.
50. *Id.* at 494-95.
51. *Id.* at 493.
52. *See supra* text accompanying notes 20-21.
53. Edgar v. MITE Corp., 457 U.S. 624 (1982).
54. *Id.* at 643-46. Justice White was joined on this point by Chief Justice Burger and Justices Powell, Stevens, and O'Connor.
55. Chief Justice Burger and Justices White, Stevens, and O'Connor.
56. Chief Justice Burger and Justices White and Blackmun.
57. Justices Brennan, Marshall, Powell, and Rehnquist. The majority disagreed that the case was moot because a reversal of the court of appeals decision would have subjected MITE to civil and criminal liability for violating the Illinois Act. 457 U.S. at 630.
58. 397 U.S. 137, 142 (1970).
59. 457 U.S. at 644.
60. *Id.* at 645.
61. *Id.* at 644.

tender offer might collapse because of defensive tactics by the management.[62] The majority also observed that the more detailed disclosure requirements of the Illinois Act "may not substantially enhance the shareholders' ability to make informed decisions."[63] Noting that the Illinois Act applied to non-resident shareholders as well, the Court found that Illinois had "no legitimate interest" in protecting these shareholders.[64] The majority then rejected the second interest presented by the Illinois Secretary of State since the Illinois Act was applicable to foreign as well as domestic corporations,[65] and tender offers "do not themselves implicate the internal affairs of the target company."[66]

Believing these local interests advanced by the state to be inadequate, the Court found the burden on interstate commerce to be excessive. It stated:

> The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest-valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.[67]

A plurality of the Court offered two alternative bases for striking down the Illinois Act. First, the Act allowed the regulation of a tender offer regardless of whether any Illinois residents were shareholders of the target company.[68] Justice White, joined by Justices Burger, Stevens, and O'Connor, considered this a "direct restraint on interstate commerce [with] a sweeping extraterritorial effect."[69] Second, three Justices agreed with the Seventh Circuit Court of Appeals that the Illinois Act violated the Supremacy Clause by upsetting the balance between the offeror and management which Congress intended to create.[70] Referring to the inconsistencies between the Williams Act and the Illinois Act, Justice White wrote that "the investor

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62. *Id.* at 645.
63. *Id.*
64. *Id.* at 644.
65. *Id.* at 645-46.
66. *Id.* at 645.
67. *Id.* at 643.
68. The Illinois Act operated if two of the following characteristics applied to the target corporation: (1) its principal executive office was in Illinois, (2) it was incorporated under Illinois law, or (3) at least ten percent of its stated capital and paid-in surplus was represented in Illinois. Illinois Business Take-Over Act §§ 1-20, ILL. ANN. STAT. ch. 121½, ¶ 137.52-10(2) (Smith-Hurd Supp. 1980) (repealed 1983).
69. 457 U.S. at 642.
70. *Id.* at 630-34. *See also supra* notes 20-21 and accompanying text.

. . . and the takeover bidder should be free to move forward within the time-frame provided by Congress."[71] Justice Stevens, joined by Justice Powell, disagreed with the assertion that Congress' desire for neutrality prohibited states from providing protection for incumbent management.[72]

B. The Vulnerability of the Alaska Act

Analyzing the Alaska Act in light of the holding in *MITE,* it appears that the Alaska Act suffers constitutional infirmities similar to those of the Illinois Act. The Alaska Act has the same "sweeping extraterritorial effect" that the plurality denounced in *MITE.*[73] If the target company is incorporated in Alaska or has substantial assets and its principal office in Alaska, the Alaska Act applies regardless of whether the target company has any Alaska residents as shareholders.[74] Thus, the Alaska Act purports to regulate tender offers which occur wholly outside Alaska. The Supreme Court termed such a nationwide reach "the most obvious burden" the Illinois Act imposed on interstate commerce.[75] Additionally, the Alaska disclosure requirements[76] are virtually identical to those portions of the Illinois Act[77] which the Court rejected as contrary to the purposes of the Williams Act.[78]

Justice White noted three provisions in the Illinois Act which he felt disrupted the neutral stance of the Williams Act — the twenty day waiting period, the hearing provisions, and the need for a state official to pass on the substantive fairness of the tender offer.[79] The Alaska Act shares the first two provisions but not the last; it provides only that the Department should adjudicate whether a "full, fair and effective disclosure" has been made.[80] The fact that the Alaska Act does not contain such a provision will not save the Act. The fault which Justice White and the court of appeals found with the substantive fairness hurdle is that such a regulation frustrates the congressional intent that investors must be free to make their own decisions.[81] Similarly, the Alaska Act, by allowing the Department

71. 457 U.S. at 634.
72. *Id.* at 655.
73. *Id.* at 642.
74. ALASKA STAT. § 45.57.110(4) (1980).
75. 457 U.S. at 643.
76. ALASKA STAT. § 45.57.020(c) (1980).
77. Illinois Business Take-Over Act §§ 1-20, ILL. ANN. STAT. ch. 121½, ¶ 137.54(4)(c) (Smith-Hurd Supp. 1980) (repealed in 1983).
78. 457 U.S. at 644-45.
79. *Id.* at 634-40.
80. ALASKA STAT. § 45.57.020(a)(2) (1980).
81. 457 U.S. at 639-40.

to delay the hearing indefinitely,[82] takes the decision away from the investor. Thus, the Alaska Act provides "investor protection at the expense of investor autonomy"[83] and frustrates Congress's intent as much as the hearing for substantive fairness.

V. Suggested Alternatives to the Alaska Act

Although *MITE* does not completely prohibit state regulation of tender offers, the cases following *MITE* have interpreted its holding broadly. Most of these decisions have not attempted to distinguish the challenged statutes from the Illinois Act.[84] Despite this restrictive judicial attitude toward state takeover legislation, there appear to be alternative approaches to state tender offer regulation which will withstand constitutional scrutiny. These approaches, outlined below, focus on traditional means by which states have regulated corporations and avoid direct conflict with federal securities laws. Nevertheless, these proposals must be viewed as somewhat speculative in light of the sparse judicial precedent in this area.

Since the fatal constitutional flaw in the Alaska Act is its potential national reach, one promising remedial approach would be to restrict the Act's applicability to local companies. Although takeover regulation of a local company almost always will have some effect on interstate commerce, the Supreme Court has held that so long as such effect is only incidental rather than direct, the Commerce Clause will not prohibit the regulation.[85] The SEC, which has vigorously opposed current state takeover legislation,[86] has also expressed its approval of state regulation of local companies. In its proposed amendments to the Williams Act, the SEC recognized the concept of the local company. The SEC urged Congress to amend section 28(a) of the Securities Exchange Act of 1934 so as to preempt state takeover statutes explicitly except for any state law which

> applies to a tender offer for, or an acquisition of, equity securities of a company (1) that has its principal place of business in that state, and (2) more than fifty percent of the beneficial holders, as defined by the Commission, . . . who in the aggregate hold fifty

82. Alaska Stat. § 45.57.020(b) (1980) (no time limit placed on length of extension for the adjudication).

83. 633 F.2d at 494.

84. *See, e.g.,* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982); Bendix Corp. v. Martin Marietta Corp., 547 F. Supp. 522 (D. Md. 1982).

85. Edgar v. MITE Corp., 457 U.S. 624, 640 (1982). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

86. *See* Memorandum of the SEC to the Senate Committee on Banking, Housing and Urban Affairs Proposing Amendments to the Williams Act, *reprinted in* Sec. Reg. & L. Rep. (BNA) No. 542, at 18-19 (Spl. Supp. Feb. 27, 1980).

percent or more of [the outstanding voting] securities, are residents of that state.[87]

State regulation of such local companies, therefore, appears to be a permissible, albeit limited, remedy.

Another potentially acceptable type of regulation which is not as limited as the local company concept is one directed at industries traditionally regulated by states, such as banking and insurance. The state can construct a stronger state interest argument to justify regulating these industries than it could for others because these industries affect the welfare of all state residents and not just stockholders.[88] In *Professional Investors Life Ins. Co. v. Roussel*,[89] a federal district court upheld the Kansas Insurance Holding Company Act[90] which requires the state insurance commissioner to determine whether the interests of the insurance company's stockholders and policyholders are impaired when a purchaser buys ten percent of the company's outstanding stock.[91] The court noted that "[c]omplete harmony between federal securities regulation and state insurance regulation is clearly not required."[92] The court distinguished the case from *MITE* on the grounds that the controversy in *MITE* involved a general takeover statute. The court observed that "[s]uch statutes must have a greater impact upon commerce and be a greater impediment to federal securities regulation than a law concentrating on insurance company transactions."[93]

Perhaps the most promising alternative is to adopt the approach taken by Ohio, the first state to enact takeover legislation in response to *MITE*. The Ohio statute (the "Ohio Act") requires shareholder approval of any acquisition of a controlling interest in a company's stock by tender offer or otherwise.[94] The philosophy behind this approach is that the effect of a tender offer is a fundamental change in the corporation's internal structure, and that states have historically

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87. *Id.* at 23. This definition of a local company is consistent with section 1904(c) of the American Law Institute's proposed Federal Securities Code. The failure of Congress to consider either the SEC's or the American Law Institute's proposals should not necessarily be viewed as a ruling on the merits of these proposals.

88. For a good overview of this and other potential remedies, see Fein & Fried, *State Regulation of Tenders and Takeovers*, in STATE REGULATION OF CAPITAL FORMATION AND SECURITIES TRANSACTIONS 609, 640-56 (Practicing Law Institute 1983).

89. 528 F. Supp. 391 (D. Kan. 1981).

90. KAN. STAT. ANN. §§ 40-3301 to -3313 (1981).

91. 528 F. Supp. at 402.

92. *Id.*

93. *Id.*

94. OHIO REV. CODE ANN. §§ 1701.01(Z)(1), 1701.48, 1701.831, and 1707.041 (Page Supp. 1983). For an excellent discussion and constitutional analysis of the Ohio approach, see Profusek & Gompf, *supra* note 19, at 30-41.

regulated the internal affairs of corporations organized under their laws. The *MITE* opinion apparently leaves room for regulation of a corporation's internal affairs. Justice White wrote in his Commerce Clause analysis that "tender offers . . . do not *themselves* implicate the internal affairs of the target company."[95] The Ohio Act, however, does not purport to regulate tender offers themselves; in fact, the Ohio Act does not even mention "tender offers." Rather, as part of the state's corporate code, the Ohio Act regulates acquisitions of controlling interests of corporate stock — fundamental changes in the internal structure of corporations. This approach is consistent with the universal requirement of shareholder approval in other instances of changes in corporate control, such as liquidations and mergers. Additionally, the Ohio Act resolves some of the difficulties present in the jurisdictional bases of the Illinois Act. The Ohio Act applies only to Ohio corporations which have their principal place of business, principal executive offices, or substantial assets located in Ohio;[96] it does not apply to foreign corporations. By requiring only shareholder approval, the Ohio Act avoids the three provisions of the Illinois Act — precommencement notification, administrative hearings on the offer's substantive fairness, and additional disclosure — which the Court found particularly inappropriate. Although this formula has not been tested by the courts, it does appear that the Ohio Act, by adopting an internal affairs approach to takeovers, removes many of the constitutional infirmities present in most state takeover legislation.[97]

VI. CONCLUSION

Since *MITE,* the vulnerability of state takeover legislation has become increasingly evident, and Alaska's Takeover Bid Disclosure Act should be no exception. The broad extraterritorial sweep of the Alaska Act and its direct conflict with the Williams Act clearly violate the Commerce Clause and appear to violate the Supremacy Clause of the United States Constitution. Unless Congress permits otherwise, state takeover legislation is likely to be restricted to regulation of local companies and those industries traditionally regulated by the states. State legislatures, however, should look closely at the

95. 457 U.S. at 645 (emphasis added).

96. OHIO REV. CODE ANN. § 1701.01(Y) (Page Supp. 1983).

97. *But see* Gittleman & Smith, *State Regulation of Nationwide Tender Offers After Edgar v. MITE,* in STATE REGULATION OF CAPITAL FORMATION AND SECURITIES TRANSACTIONS 659, 701-04 (Practicing Law Institute 1983); Kreider, *Fortress Without Foundation? Ohio Takeover Act II,* 52 U. CIN. L. REV. 108, 120-22 (1983).

internal affairs model presented by the Ohio Act as a permissible means of regulating the effects of corporate takeovers.

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