

MISSOURI TAKEOVER REGULATION: SOLVING THE SHAREHOLDER COORDINATION PROBLEM

The Supreme Court's 1982 decision in *Edgar v. MITE Corp.*,¹ striking down the Illinois takeover statute, threatened the coexistence of state and federal tender offer regulation.² *MITE* invalidated most state takeover statutes in existence at the time of the decision.³ The broad sweep of *MITE* did not, however, deter advocates of state regulation. Committed to the protection of domestic corporations and local investors from the perceived abuses of corporate raiders,⁴ state legislators fashioned a new generation of takeover statutes. The drafters of these "second generation"⁵ statutes carefully tailored their provisions to avoid the constitutional pitfalls raised by *MITE*. In 1984, Missouri joined a growing number of states to enact second generation takeover statutes.⁶ The coexistence of state and federal regulation of tender offers turns largely on the constitutionality of second generation state takeover statutes.

This Note examines the constitutionality of the Missouri takeover statute. Part I describes the existing scheme of federal and state tender offer regulation. Part II describes the provisions and operation of Missouri's second generation takeover statute. Part III tests the constitutionality of

1. 457 U.S. 624 (1981).

2. The Court held the Illinois statute unconstitutional on commerce clause grounds. *Id.* at 644 (emphasizing the statute's application to foreign corporations); see *infra* notes 20-25 and accompanying text (discussing commerce clause balancing test).

A minority of the Court asserted that the Illinois Act violated the supremacy clause by frustrating the federal regulatory scheme established by the Williams Act. *Id.* at 634-40; see *infra* notes 26-29 and accompanying text (discussing preemption doctrine).

3. See *infra* note 30 and accompanying text.

4. An inherent problem with state takeover regulation is that states naturally favor local target corporations over bidders. State legislators are more concerned with the preservation and stability of local business concerns than with management entrenchment. See LOSS, FUNDAMENTALS OF SECURITIES REGULATIONS 601 (1983) (most state takeover statutes exempt "friendly" tender offers); see also *MITE*, 457 U.S. at 646 (Powell, J., concurring) (states "suffer significantly" from transfer of corporate headquarters out of state).

5. The term "second generation" refers to those state takeover statutes enacted in response to the Supreme Court's decision in *MITE*.

6. The Missouri General Assembly enacted the legislation as an emergency measure necessary to "insure protection for shareholders . . . who may confront proposed control share acquisitions in the immediate future, to provide shareholders . . . with an evenhanded mechanism to review and vote upon such proposed acquisitions, and to prevent fraudulent and manipulative practices in connection with proposed control transactions." MO. ANN. STAT. § 351.407.10 (Vernon 1984).

the Missouri Act, concluding that the Missouri Act survives constitutional challenges on both commerce clause and preemption grounds.

I. BACKGROUND

A. Federal Regulation of Tender Offers

Congress enacted the Williams Act⁷ in 1968 in response to the growing use of tender offers as a means for acquiring control of target corporations.⁸ The Williams Act regulates tender offers by requiring full and fair disclosure to shareholders.⁹ The Williams Act requires disclosure in two distinct types of transactions: substantial stock acquisitions and tender offers. First, a person acquiring five percent or more of a class of any equity security registered under section 12 of the 1934 Act must disclose certain information to the issuer and the Securities and Exchange Commission (SEC) pursuant to section 13(d) of the Williams Act.¹⁰ Second, a person making a tender offer¹¹ for a class of any registered equity secur-

7. Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976)).

8. Several factors contributed to the growing popularity of tender offers during this period: excess corporate liability and available credit; low price/earnings ratios, book values, and current asset ratios; lack of state and federal regulation in the area; faster and more successful results than proxy fights; and greater recognition and respectability for cash tender offers. See E. ARANOW & H. EINBORN, *TENDER OFFERS FOR CORPORATE CONTROL* 65-66 (1973); AUSTIN & FISHMAN, *CORPORATIONS IN CONFLICT—THE TENDER OFFER* 10 (1970); Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 135, 136 (1967).

9. See H.R. REP. NO. 1171, 90th Cong., 2d Sess. (1968); S. REP. NO. 550, 90th Cong., 1st Sess. (1967).

10. The bidder must also distribute this disclosure statement with each exchange on which the issuer's securities are traded. 15 U.S.C. § 78m(d) (1976). See 17 C.F.R. § 240.13d-1(a) (1984). Schedule 13D requires the disclosure statement to contain the identity and background of the person filing the statement, the person's current holdings in the issuer, the source and amount of funds used for the acquisition and, most importantly, the person's purpose underlying the substantial stock acquisition. 17 C.F.R. § 240.13d-1(a) (1984).

11. The Williams Act does not define "tender offer." The SEC has set forth eight factors to help determine whether an acquisition is a tender offer: (1) active and widespread solicitation of public shareholders; (2) solicitation for a substantial percentage of the stock; (3) offer to purchase at a premium; (4) terms of offer are firm; (5) offer is contingent on the tender of a fixed percentage of shares; (6) offer is limited in duration; (7) shareholders are subject to pressure to sell; and (8) public announcements of a purchasing program precede or accompany rapid accumulation of stock. See *Branscan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 791 (S.D.N.Y. 1979).

Courts now treat as tender offers many unconventional methods of stock acquisition that place pressure on shareholders to make hurried, uninformed decisions to sell. *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1197, 1207 (2d Cir. 1978). For examples of cases involving unconventional acquisition techniques, see *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980) (large-scale open market purchases); *Stromfeld v. Great Atl. & Pac. Tea Co.*, 484 F. Supp. 1264 (S.D.N.Y.

ity must file a disclosure statement with the SEC prior to purchasing the shares, pursuant to section 14(d) of the Williams Act.¹²

B. State Regulation of Tender Offers

During the fifteen-year period following the enactment of the Williams Act, thirty-seven states passed legislation regulating tender offers.¹³ These statutes directly regulated the initial tender offer by requiring precommencement filings,¹⁴ disclosure statements,¹⁵ and administrative hearings.¹⁶ A few statutes provided substantive proration and withdrawal provisions.¹⁷

In the late 1970s, bidders challenged the constitutionality of many of

1980) (private purchases from a small group of large holders held not to constitute a tender offer); *Branscan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979) (large-scale open market purchases held not to be a tender offer); *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979) (a series of privately negotiated transactions held to be a tender offer); *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978) (private acquisitions and open market purchases held to be a tender offer).

12. 15 U.S.C. § 78n(d) (1976); *see also* 17 C.F.R. § 240.14d-3 (1984). The disclosure statement must disclose the bidder's past transactions with the target company, as well as any additional material information about the bidder. 17 C.F.R. § 240.14d-1 (1984). The bidder must also send portions of the disclosure statement to the target company's management and shareholders. *Id.*

Rule 14d-2(b) requires the bidder to commence its tender offer within five days of the first public announcement of the tender offer. 17 C.F.R. § 240.14d-2(b) (1984). The Williams Act also allows shareholders a fifteen-day withdrawal period after accepting a tender offer. 17 C.F.R. § 240.14d-7(a)(1) (1982). Additionally, the Williams Act permits shareholders to withdraw tendered shares if the offeror does not complete the tender offer within sixty days after its inception. 15 U.S.C. § 78n(d)(5) (1976). If the total number of tendered shares exceeds the number desired by the offeror, the Williams Act requires the offeror to purchase pro rata the shares tendered during the first ten days of the offer. 15 U.S.C. § 78(d)(6) (1976). *See* 17 C.F.R. § 240.14d-8 (1982). The Williams Act also requires the offeror to apply any change in the terms of the offer during the tender offer period to all tendering shareholders, including those who have already tendered. 15 U.S.C. § 78n(d)(7) (1976).

13. For a comprehensive discussion of the first generation state takeover statutes and their common characteristics, *see Wilner & Landy, The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 *FORDHAM L. REV.* 1, 5-9 (1976); *see also* Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 *OHIO ST. L.J.* 689, 702-29 (1981) (discussing the Indiana, Maryland, New York, and Pennsylvania statutes); Shapiro, *State Takeover Laws*, in *Practicing Law Institute, TWELFTH ANNUAL INSTITUTE ON SECURITIES REGULATION* 401-42 (1980).

14. *See, e.g.*, IDAHO CODE § 30-1502 (1980 & Supp. 1982); KAN. STAT. ANN. § 17-1277 (1981); S.D. COMP. LAWS ANN. § 47-32-21 (Supp. 1982).

15. *See, e.g.*, IND. CODE ANN. § 23-2-3-2(c) (Burns Supp. 1982); OHIO REV. CODE ANN. § 1707.041(B)(3) (Baldwin 1979).

16. *See, e.g.*, IND. CODE ANN. § 23-2-3-2(e) (Burns Supp. 1982); OHIO REV. CODE ANN. § 1707.041(B)(1)(b) (Baldwin 1979); S.D. COMP. LAWS ANN. § 47-32-23 (Supp. 1982).

17. *See, e.g.*, DEL. CODE ANN. tit. 8, § 203(a)(2) (Supp. 1982).

the state takeover statutes. Lower federal and state courts invalidated several statutes, holding them unconstitutional on commerce clause and preemption grounds.¹⁸

In *Edgar v. MITE Corp.*,¹⁹ the Supreme Court addressed the constitutionality of a first generation state takeover statute. The *MITE* Court held that the Illinois Business Takeover Act (the "Illinois Act") violated the commerce clause.²⁰ The commerce clause creates an implicit limitation on state statutes that burden interstate commerce.²¹ Courts typically evaluate the permissibility of a burden on interstate commerce by weighing the burden against the advancement of legitimate local benefits.²² A majority of the Court in *MITE* concluded that the Illinois Act's

18. See, e.g., *Kennecott Corp. v. Smith*, 637 F.2d 181, 191 (3d Cir. 1980) (New Jersey statute unconstitutional on preemption grounds); *MITE Corp. v. Dixon*, 633 F.2d 486, 500-02 (7th Cir. 1980) (Illinois statute unconstitutional on commerce clause and preemption grounds), *aff'd sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1279 (5th Cir. 1978) (Idaho statute unconstitutional on commerce clause and preemption grounds), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 433 U.S. 173 (1979); *Crane Co. v. Lam*, 509 F. Supp. 782, 786 (E.D. Pa. 1981) (Pennsylvania statute unconstitutional on preemption grounds); *Natomas Co. v. Bryan*, 512 F. Supp. 191, 193 (D. Nev. 1981) (Nevada statute unconstitutional on preemption grounds); *Dart Indus., Inc. v. Conrad*, 452 F. Supp. 1, 13 (S.D. Ind. 1980) (Delaware statute unconstitutional on preemption grounds). *But see City Investing Co. v. Sincos*, 476 F. Supp. 112 (S.D. Ind. 1979) (upholding the Indiana statute on commerce clause and preemption grounds).

19. 457 U.S. 624 (1982). For a discussion of this landmark decision and its effect on state takeover legislation, see Note, *Corporate Battles for Control—Edgar v. MITE and the Constitutionality of State Takeover Legislation—The Continuing Saga*, 26 *How. L.J.* 1425 (1983); Note, *A Failed Experiment: State Takeover Regulation after Edgar v. MITE Corp.*, 1983 *U. ILL. L. REV.* 457; Casenote, *The Unsung Death of State Takeover Statutes: Edgar v. MITE Corp.*, 24 *B.C.L. REV.* 1017 (1983); Comment, *Tender Offers—Edgar v. MITE Corp. and State Tender Offer Regulation*, 9 *J. CORP. L.* 95 (1983).

20. 457 U.S. at 646. A majority of the Court held that the burden imposed by the Illinois Act on interstate commerce exceeded any local benefits advanced by the Act. *Id.*; see also *id.* at 646-55 (Powell, Stevens, and O'Connor, JJ., concurring separately). Justice White, joined by Chief Justice Burger, also asserted that the Illinois Act was invalid because it imposed a "direct" burden on interstate commerce. *Id.* at 643. A majority of the Court, however, rejected the application of the direct impact test to the Illinois Act. See *infra* note 76 (discussing the direct impact test).

21. The United States Constitution confers upon Congress the power to regulate commerce. U.S. CONST. art. 1, § 8, cl. 3. The Constitution does not address the scope of this power in the absence of congressional legislation. Courts have interpreted the affirmative grant of commerce power to Congress as creating a limitation on states' authority to adopt regulations that burden commerce. This limitation is referred to as the dormant commerce clause power. State regulation that affects interstate commerce is therefore subject to commerce clause scrutiny. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 266-67 (1983).

22. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (balancing test applied to state highway safety regulations); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (balancing test applied to statute forbidding the sale of milk and milk products in plastic

nationwide reach constituted a substantial burden on interstate commerce.²³ The majority considered two local interests asserted in defense of the statute: the protection of local investors and the regulation of the internal affairs of domestic corporations.²⁴ The majority conceded that both interests constituted legitimate state interests, but concluded that the Illinois Act failed to advance either interest.²⁵

Part IV of Justice White's opinion in *MITE* concluded that the Williams Act preempted the Illinois Act.²⁶ Justice White focused exclusively on the legislative history of the Williams Act that expressed Congress' desire to regulate tender offers without favoring either man-

nonreturnable containers); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (balancing test applied to state statute prohibiting the importation of waste); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (discussing balancing test).

In *Pike*, the leading judicial formulation of the balancing test, Justice Stewart stated:

Where the state regulates evenhandedly 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact with interstate activities.

397 U.S. at 142.

23. 457 U.S. at 643.

24. *Id.* at 644.

25. The Court recognized a state's legitimate interest in protecting its local shareholders. The Illinois Act, however, extended its protection to nonresident shareholders. *Id.* The Court also stated that the Williams Act provides nearly the same substantive protections afforded by the Illinois Act. The Court concluded that the state's interest was therefore speculative. *Id.* at 644-45.

The Court also rejected as a substantial local interest the regulation of the internal affairs of a domestic corporation. First, because tender offers involve transfers of stock from shareholders to third parties, direct regulation of tender offers does not constitute regulation of the internal affairs of the corporation. *Id.* Second, the Court reasoned, the internal affairs doctrine does not support regulation of foreign corporations that are neither incorporated nor headquartered in the state. *Id.* at 645-46. *See infra* note 71 and accompanying text.

26. The supremacy clause provides that ". . . the Laws of the United States . . . shall be the supreme Law of the Land. . . ." U.S. CONST. art. VI, cl. 2.

Federal legislation preempts state regulation in three contexts. First, preemption occurs when state law directly conflicts with federal law, making compliance with both impossible. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Second, preemption occurs when Congress evidences an intent to preempt, either expressly or implicitly, by creating a pervasive federal scheme. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639-40 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). Third, preemption occurs if state law frustrates congressional intent behind federal legislation. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977).

agement or the bidder.²⁷ Furthermore, he recognized that the delays in a tender offer caused by the Illinois Act's provisions would allow the target management to adopt an array of takeover defensive tactics.²⁸ Justice White concluded that the Illinois Act gave the target management an unfair advantage and therefore frustrated the policy of neutrality underlying the Williams Act.²⁹

Courts and commentators concluded that *MITE* invalidated many first generation state statutes on either commerce clause or preemption grounds.³⁰ The Supreme Court decision in *MITE* signalled the demise of first generation state takeover statutes. After *MITE*, the SEC expressed hostility toward direct state regulation of tender offers.³¹

Responding to *MITE*, several state legislatures revised their takeover statutes in an attempt to preserve state regulation of tender offers.³² These second generation statutes indirectly regulate tender offers by regulating the internal affairs of the target corporation.³³ Ohio and Maryland, although adopting different approaches, were the first states to

27. 457 U.S. at 633. Only two Justices joined Part IV of Justice White's opinion discussing preemption. See *infra* note 83.

28. *Id.* at 638 & n.13; see *infra* note 84.

29. *Id.*

30. See *supra* note 18. During the eighteen months following *MITE*, many courts invalidated first generation state takeover statutes. See, e.g., *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (invalidating the Oklahoma statute); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (invalidating the Michigan statute); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1982) (invalidating the Virginia statute); *Occidental Petroleum Corp. v. Cities Serv. Co.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 (W.D. Okla. 1982) (invalidating the Oklahoma statute); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982) (invalidating the Maryland statute); *Esmark, Inc. v. Strode*, 639 S.W.2d 768 (Ky. 1982) (invalidating the Kentucky statute). But see *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982) (Massachusetts statute survived preemption challenge; no commerce clause challenge made).

The Missouri General Assembly had enacted a first generation state takeover statute in 1979. MO. ANN. STAT. §§ 409.500-409.565 (Vernon 1979) (amended 1984). In 1982 the Eighth Circuit invalidated that statute on the grounds that it violated the supremacy and commerce clauses of the Constitution. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982).

31. See SEC, Advisory Committee on Tender Offers, *Report of Recommendations* 17 (1983); see also Statement of John S.R. Shad, SEC Chairman, before Hearings of the House Subcommittee on Telecommunications, Consumer Protection and Finance Concerning the Recommendations of the SEC Advisory Committee on Tender Offers, [Current Binder] FED. SEC. L. REP. (CCH) ¶ 83,511 (March 28, 1984).

32. See, e.g., MD. CORPS. & ASS'NS CODE ANN. §§ 3-601-3-603, 8-301(14) (Supp. 1984); MO. ANN. STAT. §§ 351.015, 351.090, 351.215, 351.245, 351.407 (Vernon Supp. 1985); OHIO REV. CODE ANN. §§ 1701.01, 1701.831 (Page Supp. 1984); PA. STAT. ANN. tit. 15 §§ 1408, 1409.1, 1910 (Purdon Supp. 1984-85).

33. For a discussion of the differences between first and second generation state takeover statutes, see Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or*

amend their takeover statutes in the wake of *MITE*.³⁴ Other states followed, typically patterning their legislation after either the Ohio or the Maryland statute.³⁵

II. THE MISSOURI SECOND GENERATION TAKEOVER ACT

In 1984, the Missouri General Assembly enacted a second generation takeover statute to regulate tender offers in a manner consistent with *MITE*.³⁶ Although the drafters patterned the Missouri Act on the Ohio

Corporation Law Concepts?, 7 CORP. L. REV. 3, 24-29 (1984); Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV., 3, 5-8.

34. The Ohio statute delineates three separate percentage ranges of control. OHIO REV. CODE ANN. § 1701.01(2)(1) (Page Supp. 1984). A proposed acquisition resulting in the acquiring person's initial exercise of voting power in one of the three ranges of control requires compliance with the statute. The statutory requirements pertain to both the acquiring person and the target corporation. When an acquiring person anticipates an acquisition of shares that would place it in a new zone of control, the statute requires delivery of a disclosure statement to the target corporation. *Id.* § 1701.831(E)(1).

The bulk of the regulation, however, is directed at the target corporation. Within ten days after receiving the disclosure statement, the directors of the target corporation must hold a special shareholders' meeting to vote on the proposed acquisition. *Id.* § 1701.831(C). The corporation must give notice to its shareholders about the special meeting. The notice must include a copy of the disclosure statement and a statement by the corporation presenting its position on the proposed acquisition. *Id.* § 1701.831(D). The proposed acquisition may not be consummated unless approved by a majority of the shareholders. *Id.* § 1701.831(E)(1).

For a detailed discussion of the Ohio second generation state takeover statute, see Kreider, *Fortress Without Foundation? Ohio Takeover Act II*, 52 U. CIN. L. REV. 108, 112-15, 116-20 (1983) (discussing practical problems and effects of the new Ohio statute).

The Maryland statute is designed primarily to regulate two-tiered takeovers. The statute ignores the first step of the two-step transaction, the tender offer and the tender of shares, and focuses solely on the second step, the business combination. Before the business combination may be consummated, the tender offeror must obtain super-majority approval from all shareholders or pay a "fair price" to nontendering shareholders in the second transaction. MD. CORPS. & ASS'NS CODE ANN. §§ 3-601 to 3-603 (Supp. 1984).

For a detailed discussion of the Maryland second generation state takeover statute, see Scriggins & Clark, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266, 272-79 (1984).

35. Minnesota and Missouri patterned their statutes after the Ohio statute. Connecticut, Kentucky, and Michigan patterned their statutes after the Maryland statute.

Wisconsin enacted a statute containing versions of both the Ohio and the Maryland statute. See Malmgren & Pelisek, *Take-Overs of Wisconsin Corporations: A New Era of Shareholder Protection Begins*, WIS. B. BULL., May 1984, at 26 (explaining the new Wisconsin takeover statute).

Pennsylvania enacted a statute unlike either Ohio's or Maryland's. See Steinberg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184 (1984) (explaining the new Pennsylvania takeover statute).

36. Missouri's second generation takeover statute took the form of various amendments to the state's general corporate laws. MO. ANN. STAT. §§ 351.015, 351.090, 351.215, 351.245, 351.407 (Vernon Supp. 1985) (collectively referred to as the "Missouri Act").

takeover statute,³⁷ the Missouri Act contains several significant innovations, including a two-thirds shareholder approval requirement and appraisal rights.³⁸

The Missouri Act only applies to Missouri corporations with fifty or more shareholders and with their principal executive offices or substantial assets within the state of Missouri.³⁹ The Missouri Act requires a bidder to obtain shareholder approval before making a "control share acquisition."⁴⁰ A control share acquisition is a bidder's acquisition of a fraction of the issuer's voting stock falling within one of the following ranges of control: a) one-fifth to one-third; b) one-third to one-half; or c) one-half or more.⁴¹ Furthermore, any proposed acquisition that would cause a bidder to move into a new range of control triggers the statutory requirements described below.

To make a control share acquisition, a bidder must deliver a disclosure statement to the target company.⁴² The disclosure statement must include a detailed description of the terms of the proposed acquisition, the source of funds to be used to finance the proposed acquisition, and the bidder's representation, with supporting factual basis, that the proposed acquisition is not contrary to law.⁴³

The heart of the Missouri Act is its shareholder approval requirement. Within fifty days after receiving a complying disclosure statement, the target company must hold a special shareholders' meeting for the pur-

37. See *supra* note 34 (discussing the Ohio takeover statute).

38. See Jeffries, *Control Share Acquisitions Under Missouri's General Business Corporation Law*, 41 J. Mo. B. 159 (1985) (describing the control share acquisition amendments to Missouri corporate law).

39. MO. ANN. STAT. § 351.015(6) (Vernon Supp. 1985).

40. *Id.* § 351.407.1. The Missouri Act exempts acquisitions pursuant to: (1) a testamentary disposition or gift; (2) a distribution of shares from the target company; (3) a benefit or other compensation plan of the target company; (4) the target company's conversion of debt securities to equity securities; (5) the satisfaction of a security interest created in good faith; (6) a merger or consolidation if the bidder company is a party to the agreement of merger or consolidation; (7) a contract in existence prior to June 13, 1984; (8) a contract, other than one created in connection with a tender offer, in which the holders of shares representing at least two-thirds of the voting power simultaneously agree to sell their shares; and (9) a contract with any party who, at any time within one year prior to acquisition, owned shares representing a majority of the voting power of the target company. *Id.* § 351.015(6).

41. *Id.*

42. *Id.* § 351.407.2.

43. *Id.* § 351.407.2(7). The statute also requires the disclosure statement to set forth the bidder's identity and the number of target company shares or other securities over which the bidder exercises voting power. *Id.*

pose of voting on the proposed acquisition.⁴⁴ A copy of the disclosure statement and a statement setting forth the management's position with respect to the proposed acquisition must accompany the target company's notice of the special meeting.⁴⁵ The proposed acquisition may proceed only if two conditions are satisfied. At least two-thirds of the shareholders, not including the bidder, must vote in favor of the proposed acquisition.⁴⁶ Finally, the bidder must complete the acquisition in accordance with the terms of its offer within sixty days following shareholder approval.⁴⁷

The Missouri Act, unlike the Ohio Act, contains provisions governing the rights of dissenting shareholders. A dissenting shareholder may tender his shares to the company and receive their fair value if the shareholder objects in writing to the proposed acquisition, abstains from voting in favor of the proposed acquisition, and demands in writing the fair value of his shares.⁴⁸ If the dissenting shareholder and the target company do not agree within thirty days on fair value, the shareholder may sue to obtain a judicial determination of fair value.⁴⁹

III. CONSTITUTIONAL ANALYSIS OF THE MISSOURI ACT

A. Commerce Clause Analysis

The Supreme Court in *MITE* found that the Illinois Act's nationwide scope burdened interstate commerce by imposing several conditions on

44. *Id.* § 351.407.3. The target company must call the special meeting within ten days of its receipt of the disclosure statement. *Id.*

45. *Id.* The bidder may request that the special meeting of shareholders be held at another date. The special meeting may not be held, however, sooner than thirty days after the target company's receipt of the disclosure statement from the bidder. *Id.*

46. *Id.* § 351.407.5(1). The Missouri Act does not prevent shareholders from tendering their shares at any time; rather, the Missouri Act only prevents the bidder from actually purchasing the shares without prior shareholder approval.

47. *Id.* § 351.407.5(2).

48. *Id.* Fair value is determined as of the day prior to the date on which the vote was taken approving the control share acquisition. *Id.* § 351.407.6. The written demand must state the number and class of shares owned by the dissenting shareholder. *Id.* A shareholder failing to make demand within a twenty-day period is conclusively presumed to have consented to the control share acquisition. *Id.*

49. *Id.* § 351.407.8. The fair value is determined as of the day prior to the date of the shareholder vote, plus interest from that date through the date of judgment. *Id.* A dissenting shareholder's right to receive fair value exists only if the shareholders approve the acquisition or the bidder fails to consummate the acquisition despite such approval. *Id.* § 351.407.9.

For a discussion of fair value and the appraisal process in the context of state merger law, see Thompson, *Squeeze-Out Mergers and the "New" Appraisal Remedy*, 62 WASH. U.L.Q. 415 (1984).

the commencement of a tender offer.⁵⁰ The Court asserted that any state takeover statute that inhibits nationwide tender offers imposes a burden on interstate commerce.⁵¹

1. *The Burdens Imposed by the Missouri Act*

The Missouri Act inhibits tender offers by increasing the risks that a bidder must face.⁵² By requiring approval of two-thirds of the shareholders before a bidder can make a control share acquisition,⁵³ the Missouri Act decreases a bidder's probability of success and increases the risks associated with the takeover bid.⁵⁴ Additionally, by allowing the target company to delay for fifty days before holding the special shareholders' meeting, the Missouri Act gives management extra time to employ an array of defensive tactics.⁵⁵ Finally, the Missouri Act's provision for dissenting shareholder rights requires the bidder to consider the possibility of a large but uncertain cash outflow from its new acquisition.⁵⁶ In conclusion, the risks created by the Missouri Act inhibit tender offers, and therefore impose a burden on interstate commerce.

50. 457 U.S. at 643.

51. *Id.*

52. Even without state regulation of tender offers, the risks associated with a tender offer are high. The bidder must incur substantial costs preparing for the tender offer despite the opportunity of the target company to thwart the takeover by means of a wide variety of defensive tactics. *See infra* note 96. A takeover attempt usually requires the combined efforts of several attorneys, an investment banker, a professional proxy solicitor, a network of soliciting banks, trust companies, and security dealers, a certified public accountant, and a public relations expert. *See E. ARANOW & H. EINHORN, supra* note 8, at 10; *see also* A. FLEISCHER, JR., TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING 2-6 (1981) (team effort required to initiate a tender offer).

53. *See supra* notes 44-47 and accompanying text.

54. The risk created by shareholder approval procedures is particularly acute in the context of a partial or two-tier tender offer. For example, if the bidder wanted to acquire 51% of the outstanding shares of a company and conditioned its offer upon the aggregate tender of at least that number of shares, the tender offer would succeed if 51% of the company's shareholders tendered shares. Under the Missouri Act, however, the tender offer would not succeed unless two-thirds of the shareholders voted for the acquisition at the special meeting. *See supra* notes 44-47 and accompanying text. The probability of two-thirds of the shareholders approving the acquisition is of course less than the probability of 51% of the shareholders approving. The risk to the bidder company is therefore significantly increased. Notably, the Missouri Act differs significantly from the Ohio takeover statute by requiring two-thirds shareholder approval rather than "majority" approval. *See supra* note 34.

55. *See infra* notes 84 & 96 and accompanying text.

56. The greater the risk an investor is willing to accept, the higher the return he expects. As a result of the Missouri Act, the risks associated with a tender offer increase, but the expected return remains constant, thereby making the tender offer a less attractive investment. The Missouri Act thus discourages tender offers and therefore burdens interstate commerce.

The nature of the tender offer process, however, mitigates the burden imposed on interstate commerce by the Missouri Act. A tender offer requires shareholders to tender their shares. The act of tendering provides each shareholder with the opportunity effectively to "vote" on the acquisition. Although the Missouri Act requires two-thirds shareholder approval of a tender offer, shareholders who wish to tender their shares would logically vote for the proposed acquisition at the shareholder meeting. The Missouri Act therefore creates little additional risk to a bidder who proposes to acquire at least two-thirds of the outstanding shares.⁵⁷ The Missouri Act increases the bidder's risk if the bidder seeks to acquire less than two-thirds of the outstanding shares.⁵⁸ However, the risk to the bidder decreases as the number of shares sought approaches two-thirds of the outstanding shares.

2. *The Benefits Advanced by the Missouri Act*

Although the increased risk associated with the Missouri Act may inhibit some partial or two-tier⁵⁹ tender offers, the shareholder approval provisions address a significant concern for shareholder protection. Recently, courts and commentators have pointed out that two-tier tender offers coerce shareholders into making hasty investment decisions.⁶⁰ Shareholders faced with a two-tier tender offer are put in a prisoner's dilemma: either the shareholder tenders at the first step of the tender offer or he refuses to tender, thereby risking being relegated to the less desirable second step if the offer is otherwise accepted.⁶¹ In short, the inability of shareholders to unite in a common front against an inade-

57. Of course, a bidder might be able to acquire two-thirds of the shares from less than two-thirds of shareholders.

58. See *supra* note 54 and accompanying text.

59. A two-tier tender offer is an acquisition technique that is accomplished in two steps. In the first step, the bidder uses a tender offer to acquire a controlling interest, usually 51%, in the target. The bidder usually offers to purchase shares in the first step at a substantial premium. In the second step, the bidder will exercise his control to bring about a merger of the target with the bidder, squeezing out the minority shareholders. The shareholders in the second step usually receive debt securities of the target in exchange for their shares. Naturally, shareholders prefer to tender, if necessary, at the first step of the two-tier tender offer.

60. In *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985), the Delaware Supreme Court stated: "It is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction."

61. For a discussion of the coercive nature of a two-tier tender offer, see Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964 (1985).

quate tender offer allows bidders to exploit their disunity by employing coercive tender offers and forcing shareholders to accept an inadequate offer.

The Missouri Act resolves this shareholder coordination problem by allowing shareholders to vote collectively on a takeover bid.⁶² Under the Missouri Act, shareholders can make informed investment decisions without the fear of being undermined by the coercive elements of a two-tier tender offer.

Although acknowledging a state's legitimate interest in protecting local investors, the Court in *MITE* concluded that the Illinois Act did not further these objectives.⁶³ The Illinois Act sought to protect target company shareholders by providing them with the information and time necessary to evaluate the merits of the tender offer.⁶⁴ The Court insisted, however, that the Williams Act provided substantially the same substantive protection to investors as the Illinois Act.⁶⁵

Unlike the Illinois Act, the Missouri Act provides local investors with protections not found in the Williams Act. In particular, the Missouri Act grants target company shareholders the right to approve a tender offer or, alternatively, to dissent and obtain fair value.⁶⁶ The right to approve control share acquisitions allows shareholders to determine collectively the persons who exercise control over their company and to protect themselves from inadequate offers.⁶⁷ The Missouri Act provides protection to local investors beyond the scope of the Williams Act. Unlike the Illinois Act, the Missouri Act advances the state's asserted interest in protecting local investors in domestic corporations.

In *MITE*, the Court also held that the Illinois Act failed to advance

62. See *supra* notes 44-47 and accompanying text (discussing the Missouri Act's shareholder approval provisions).

63. The Court stated: "While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders." *MITE*, 457 U.S. at 644. See *supra* note 26 and accompanying text.

Admittedly, the Missouri Act extends protection to nonresident investors in whom it has no legitimate interest. As the Court in *MITE* stated: "Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S. at 644. However, the Missouri Act only protects shareholders of corporations that have substantial contact with Missouri. See *supra* note 39 and accompanying text. By protecting these shareholders, the Missouri Act protects only local corporations from inadequate offers. See *supra* notes 59-62 and accompanying text.

64. See *id.* at 626-27, 644; see also *supra* note 25 and accompanying text.

65. *Id.* at 644-45.

66. See *supra* notes 44-49 and accompanying text (discussing the Missouri Act).

67. See *supra* notes 59-62 and accompanying text.

the state's legitimate interest in regulating the internal affairs of its domestic corporations.⁶⁸ The Court reasoned that the "internal affairs doctrine" does not typically apply in the context of a tender offer because the contemplated transaction is between the shareholders and a third party, rather than between a third party and the corporation.⁶⁹ Furthermore, the Court stressed that the Illinois Act applied to foreign corporations with insubstantial contacts to the state.⁷⁰

The Supreme Court's interpretation of the internal affairs doctrine as applied to tender offers emphasizes the form of a tender offer over its substance.⁷¹ States have traditionally regulated transfers of control brought about by mergers.⁷² Although tender offers ostensibly involve only the bidder and the shareholders, one court has recognized that tender offers, to the extent they entail a transfer of control, are comparable to mergers.⁷³ By extending shareholder approval requirements and appraisal rights to the tender offer context, the Missouri Act regulates the internal affairs of a corporation consistently with state merger law.⁷⁴

68. 457 U.S. at 645-46.

69. *Id.* at 645.

70. *Id.* at 645-46.

71. The Court's discussion of the internal affairs doctrine focused on the conflict of laws principle that recognizes that only one state should have the authority to regulate a corporation's internal affairs—"matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders. . . ." *Id.* at 645. The Court added that tender offers do not implicate the internal affairs of the target corporation because the underlying transaction is between a bidder and a shareholder, rather than between a bidder and a corporation. *Id.* However, the SEC specifically rejected such formalistic distinctions when it abandoned the so-called "no-sale" rule that exempted merger transactions from the regulation of sales of securities under the Securities Act of 1933. Under the previous "no-sale" rule, ordinary mergers involving the exchange of securities were deemed not to involve the "sale" of a security because the stockholders, who voted to approve the transaction, were simply participating in an act of the corporation rather than making an individual investment decision. See LOSS, *supra* note 4, at 316-19 (criticizing the rule as "unforgiveably formalistic"). The SEC promulgated rule 145 to reject the artificial distinction between individual sales of stock and corporate sales of stock through a merger requiring shareholder approval. See 17 C.F.R. § 230.145; see also Heyman, *Implications of Rule 145 Under the Securities Act of 1933*, 53 B.U.L. REV. 785 (1973).

72. See Lyckman, *Missouri's New Control Share Acquisition Procedures*, 41 J. MO. B. 228, 232 (1985).

73. In *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 939 (S.D. Ohio 1979), the court explained:

Tender offers profoundly affect corporate internal affairs and fiduciary relationships traditionally within the purview of state regulation. The Court is persuaded that tender offers are to be considered functionally as internal affairs transactions, comparable to proxy contests and mergers. . . .

See also Lyckman, *supra* note 72, at 232.

74. *Id.*

Finally, the Missouri Act, unlike the Illinois Act, only applies to corporations incorporated under the laws of Missouri.⁷⁵ The Missouri Act therefore advances the state's interest in regulating the internal affairs of its domestic corporations.⁷⁶

3. *Balancing the Burdens and Benefits*

In *MITE*, the Supreme Court was unable to find any legitimate state interest clearly advanced by the Illinois Act to be weighed in the balance to sustain the law. The Missouri Act, however, demonstrably advances the state's interest in protecting local investors⁷⁷ and regulates the internal affairs of its domestic corporations. The significant benefits advanced by the Missouri Act outweigh any incidental burden on interstate commerce.⁷⁸ The Missouri Act should survive constitutional scrutiny on commerce clause grounds.

B. *Preemption Analysis*

The supremacy clause creates a potential limitation on state takeover statutes that frustrate the underlying policies of the federal regulatory

75. See *supra* note 39 and accompanying text. The Missouri Act requires Missouri target corporations to call a special meeting of shareholders when faced with a proposed control share acquisition. By imposing substantive obligations on the target corporation, the state is regulating the internal affairs of the corporation and not merely the affairs of the shareholders and a third party. See *supra* notes 44-47 and accompanying text. Additionally, the Missouri Act was enacted pursuant to Missouri's general corporate laws as opposed to the state's blue sky laws. See *supra* note 36 and accompanying text.

76. In Part V-A of his opinion in *MITE*, Justice White resurrected the direct/indirect burden distinction as a means for evaluating the constitutionality of burdens on interstate commerce. 457 U.S. at 640-41. Under this analysis, courts upheld only those statutes that indirectly burdened interstate commerce. See, e.g., *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925); *Air-Way Corp. v. Day*, 266 U.S. 71, 81 (1924). A majority of the Court in *MITE* refused to join this part of Justice White's opinion. Nevertheless, to the extent that the Missouri Act regulates the internal affairs of domestic corporations, it indirectly regulates tender offers.

77. See *supra* notes 59-62 and accompanying text.

78. Balancing is, of course, partially subjective and subject therefore to attack by those who disagree with the conclusion reached. This Note supports the conclusion of constitutionality with the following argument by analogy. Courts have validated state blue sky laws challenged on commerce clause grounds, holding that the statutes further a state's interest in protecting resident shareholders from securities fraud and other potential abuses, while affecting interstate commerce only indirectly. *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). The Missouri Act furthers the same state interest in protecting resident shareholders. The Missouri Act also affects interstate commerce only indirectly, not directly. Because the Missouri Act's benefits and the nature of its burden on interstate commerce correspond closely with those of state blue sky laws, and because state blue sky laws have passed constitutional muster, it follows that the Missouri Act should also survive commerce clause scrutiny.

scheme established by the Williams Act.⁷⁹ In *Piper v. Chris-Craft Industries*,⁸⁰ the Supreme Court found the sole purpose of the Williams Act was “the protection of investors who are confronted with a tender offer.”⁸¹ One characteristic of the protection of investors is the policy of neutrality between management and the takeover bidder.⁸² In *MITE*, Justice White focused on the policy of neutrality to provide an alternative ground for striking down the Illinois Act.⁸³ Justice White argued that the Williams Act preempted state takeover regulations that cause delays in the tender offer process.⁸⁴ By favoring incumbent management and by diminishing the chance of a bidder’s success, the Illinois Act, according to Justice White, frustrated the delicate balance established by the Williams Act.⁸⁵

Concern for relative parity among participants in struggles for corporate control should not overshadow the primary purpose of the Williams Act. As the *Piper* Court emphasized, the policy of neutrality does not go to the purpose of the legislation.⁸⁶ “Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection

79. See *supra* note 26 and accompanying text.

80. 430 U.S. 1 (1977).

81. *Id.* at 35.

82. *Id.* at 29. The legislative history of the Williams Act reflects this policy of neutrality: It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require 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.

H.R. REP. NO. 1711, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2813, 2813.

83. 457 U.S. at 634-40. Only two Justices joined Part IV of Justice White’s opinion discussing the preemption doctrine. One observer posited two possible explanations for the Supreme Court’s failure to invalidate the Illinois Act on preemption grounds. First, a majority of the justices were unwilling to join Justice White’s subjective interpretation of the legislative history of the Williams Act for fear that it might effectively preempt all state business takeover regulation. Second, the holding evidenced a general trend of Burger Court decisions favoring state’s rights. Casenote, *supra* note 19, at 1044-45.

84. *Id.* at 636-39. Specifically, Justice White commented that delays in the tender offer process allow a target company to: (1) repurchase its own securities; (2) announce dividend increases or stock splits; (3) issue additional shares of stock; (4) create antitrust violations by appropriate business acquisitions; (5) arrange a defensive merger; (6) enter into restrictive loan agreements; and (7) institute litigation challenging the tender offer. *Id.* at 638.

85. *Id.* at 639.

86. 430 U.S. at 35.

of investors.⁸⁷ The Williams Act protects investors by compelling the bidder to disclose sufficient information to allow the investor to make an informed investment decision.⁸⁸ Therefore, if state regulation promotes informed investment decisions, then no reason exists for considering slippery notions of neutrality.⁸⁹

The Missouri Act protects target company shareholders from the coercive effects of two-tier tender offers.⁹⁰ By conditioning the consummation of a tender offer on shareholder approval, the Missouri Act protects shareholders who might otherwise unwillingly tender their shares out of fear of being squeezed out later at an unfair price.⁹¹ Recently, in *Unocal Corp. v. Mesa Petroleum Co.*,⁹² the Delaware Supreme Court permitted Unocal's management to proceed with a discriminatory tender offer⁹³ in the face of an inadequate and coercive tender offer by Mesa Petroleum. Implicit in the court's reasoning was the recognition that shareholders are unable to act concertedly to protect themselves from coercive tender offers.⁹⁴

87. *Id.*

88. *See supra* note 9 and accompanying text.

89. Many courts focus on the policy of neutrality in their preemption analysis. *See, e.g.,* MITE Corp. v. Dixon, 633 F.2d 486, 495-96 (7th Cir. 1980), *aff'd sub nom.* Edgar v. MITE Corp., 457 U.S. 624 (1982); Great W. United Corp. v. Kidwell, 557 F.2d 1256, 1279-80 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979). *Accord* Telco Mktg. Serv., Inc. v. Hospital Fin. Corp., No. 79-C-2343 (N.D. Ill. June 11, 1979); Brascan Ltd. v. Lassiter, No. 79-1253 (E.D. La. May 3, 1979); Dart Indus. Inc. v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978); Daylin v. Varco, No. 78-C-4246 (N.D. Ill. Nov. 27, 1978).

Other courts focus their preemption analysis entirely upon the policy of investor protection. *See, e.g.,* AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1978); *cf.* Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1031 (4th Cir. 1980) (Congress intended the Williams Act to protect shareholders of the target corporation); *see also* Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 NOTRE DAME LAW. 725, 734-35 (1979) (arguing that the policy of neutrality is merely a means toward achieving investor protection and is not an independent purpose of the Williams Act); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. REV. 872, 914-15 (1978) (arguing that the policy of neutrality was merely a characteristic of legislation directed to the sole purpose of protecting investors).

Several courts that downplay the policy of neutrality as only a characteristic, but not a purpose, of the Williams Act, upheld state takeover statutes on preemption grounds. *See, e.g.,* Strode v. Esmark, Inc., [1980] FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *aff'd in part and rev'd in part*, 639 S.W.2d 768 (Ky. 1982); Telvest, Inc. v. Bradshaw, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,154 (E.D. Va. 1979), *vacated*, 618 F.2d 1029 (4th Cir. 1980).

90. *See supra* notes 59-62 and accompanying text.

91. *See supra* note 61 and accompanying text.

92. 493 A.2d 946 (Del. 1985).

93. Unocal's self-tender offered shareholders a substantial premium, but excluded Mesa from tendering any of its 13% of Unocal stock. *Id.* at 949.

94. *Id.* at 956. *See supra* note 61 and accompanying text.

The Missouri Act provides an alternative means for solving the shareholder coordination problem.⁹⁵ By enabling the shareholders to meet collectively to pass on the merits of the proposed acquisition, the Missouri Act allows shareholders to protect themselves from inadequate tender offers. Compared to *Unocal*, the Missouri Act provides a less obtrusive mechanism for solving the shareholder coordination problem.⁹⁶ Moreover, if *Unocal* is sustainable on constitutional preemption grounds, then, a fortiori, the Missouri Act is also constitutional.⁹⁷

Finally, the delay caused by the Missouri Act's shareholder approval provisions creates no irreconcilable conflict with the Williams Act. Rule 14d-2(b),⁹⁸ promulgated under section 14(d) of the Williams Act, requires a bidder to commence its tender offer within five days of the first public announcement. Furthermore, rule 14d-2(b) permits a shareholder to withdraw tendered shares if the bidder does not consummate the tender offer within sixty days of its inception.⁹⁹ The Missouri Act does not limit the time when an announced bidder may *commence* the tender offer. Therefore, the Missouri Act is consistent with the first part of rule 14d-2(b). Moreover, shareholders are free to tender their shares at any time under the Missouri Act.¹⁰⁰

Nevertheless, the Missouri Act requires a bidder to wait for as long as fifty days from the first public announcement, until the shareholders vote on the proposed acquisition, before consummating the tender offer.¹⁰¹

95. See *supra* notes 59-62 and accompanying text.

96. At least the Missouri Act allows the shareholders ultimately to decide whether to accept the takeover bid. Most defensive tactics adopted by management, including the discriminatory tender offer, effectively supplant investor choice for director choice.

For a discussion of defensive tactics and their effect upon the success of a tender offer, see e.g., E. ARANOW & H. EINHORN, *supra* note 8, at 266-68 (discussing a suit by target management against the bidder as a defensive tactic); A. FLEISCHER, JR., *supra* note 76, at 139 (discussing target management's arrangement of a competing tender offer from a "white knight" as a defensive tactic); M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS § 6.2.7 (1979) (discussing target management's placement of shares with a friendly party as a defensive tactic); Nathan, *Lock-Ups and Leg-Ups: The Search for Security in the Acquisitions Marketplace*, 13 ANN. INST. ON SEC. REG. 13, 16-18 (1981) (discussing the lockup technique as a defensive tactic); Nathan & Sobel, *Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids*, 35 BUS. LAW. 1545, 1557 (1980) (discussing the target's repurchase of its own shares as a defensive tactic).

97. Notably, in *Unocal Corp. v. Pickens*, 608 F. Supp. 1081 (D. Cal. 1985), a federal district court judge refused to hold that the Williams Act prohibited the discriminatory tender offer employed by *Unocal*.

98. 17 C.F.R. § 240.14d-2(b) (1982).

99. *Id.*

100. See *supra* note 46 and accompanying text.

101. See *supra* notes 44-47 and accompanying text.

However, rule 14d-2(b) allows the bidder to wait for sixty days from the commencement of the tender offer to consummate the tender offer before the shareholders may withdraw previously tendered shares. The bidder, at worst, will still have fifteen days during which to consummate the tender offer.¹⁰² Moreover, if the shareholders approve the tender offer, it is unlikely that they would subsequently withdraw their shares if the bidder is unable to complete the tender offer within the sixty-day period.

IV. CONCLUSION

Second generation takeover statutes, like their predecessors, may significantly affect the tender offer market. Unlike first generation statutes, however, second generation statutes avoid *Edgar v. MITE Corp.*'s constitutional pitfalls. The Missouri Act should survive constitutional challenges on either commerce clause or preemption grounds. State regulation of tender offers will continue to coexist with the federal regulatory scheme.

James G. Buell

102. See *supra* notes 12 & 44 and accompanying text.