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STATE TAKEOVER STATUTES: AN UNCONSTITUTIONAL APPROACH?

INTRODUCTION

Traditional methods of acquiring control of a corporation—mergers and proxy fights—have been supplemented to a large degree by the tender offer. This transition occurred during the favorable economic and legal environment of the

1) 1979 by Alan B. Ford.
3) For discussion of securities law as applied to tender offers before the passage of the Williams Act, see Bromberg, The Securities Law of Tender Offers, 15 N.Y.L.F. 462, 531 (1969); Fleischer & Mundheim, supra note 1, at 317.
1960's in which the tender offer experienced phenomenal growth as a tool of companies seeking diversification of profitable investments. In 1968, Congress responded to this relatively new method of acquiring control of a corporation by passing the Williams Act, which requires a minimum level of disclosure and prohibits fraudulent acts in connection with tender offers. The purpose of the Williams Act is to provide full and fair disclosure for the benefit of the shareholders while at the same time providing a regulatory balance between the offeror and the target company.

Despite the clear intention of Congress to balance the various competing interests, thirty-six states have passed legislation imposing more restrictions on tender offers and, in some respects, directly upsetting the balance established by the Williams Act. This trend has caused concern for the continuing existence of the tender offer as a viable tool for an insurgent corporation to acquire control of a target corporation. One commentator, in criticizing the Ohio act, stated:

> The real impact of the law, in my opinion, will be felt not so much in its application as in its hovering omnipresence. *I suspect, so far as Ohio and Ohio-based corporations are concerned, the corporate takeover as a form of corporate warfare is a thing of the past.*

Although called "investor-protection" statutes by their sponsors, the state statutes have been criticized as little more than "parochial [attempts] to protect incumbent management and local industry" by making completion of a successful tender

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4. In 1960 there were only 8 cash tender offers involving companies with securities listed on national securities exchanges as compared to 107 in 1966. Aranow & Einhorn, supra note 1, at 65 n.3.
5. For a comparative analysis of the English and American approach to tender offer regulation, see Branson, supra note 1, at 685.
10. Aranow & Einhorn, supra note 1, at 172. Sommer, discussing the Ohio statute, states:

   > The Ohio Act is perhaps unique in that its provisions create a strong impression that its purpose is not to improve disclosure in connection with tender offers, but rather to create a scheme of disclosure that will strongly inhibit, if not render impossible, the making of tender offers with respect to corporations which have the requisite relationship to Ohio, not
offer a near impossibility.

In this comment, the author will initially present the mechanics involved in tender offers. Second, the substantive provisions and legislative history of the Williams Act will be discussed. Third, the provisions of the various state takeover statutes will be analyzed, demonstrating their broad implications and inherent difficulties with the concurrent regulation by federal authorities. Finally, after a consideration of the interstate commerce and preemption implications, the author concludes that the state takeover statutes are unconstitutional.

TENDER OFFERS

Essentially, a cash tender offer is a public invitation to the shareholders of the target corporation to tender their shares to the aggressor corporation for purchase at a specified price, usually fifteen to twenty percent in excess of the current market price. The tender offer is occasionally preceded or accompanied by substantial open market purchases of the target corporation's shares. The offer is usually supplementary to direct negotiations for a consensual merger. However, if negotiations break down, a cash offer may immediately follow.

In planning a tender offer, a potential buyer will seek out a target corporation—usually a company with a poor operating record relative to the rest of the industry or a company undervalued by the market. The offeror must then analyze the amount of shares needed to gain working control of the target corporation. When a cash tender offer is made, the open mar-
ket price of the shares usually increases dramatically.15 Whether it equals or exceeds the tender offer price depends on a variety of factors, including the probability that a competing offer at a higher price might be made.16 Shareholders have the choice of selling their shares in the open market, retaining them, or tendering their shares. Most shares sold on the open market are ultimately tendered. A group of speculators, known as arbitragers,17 purchase shares in the open market at prices below the tender offer price in order to tender them and profit by the difference between the two prices. In some tender offers, the volume of transactions effected by arbitragers appears to have been very substantial.18

Typically, the offer is open for two to three weeks, during which time tendered shares are held by a depository bank.19 When the tendering period has expired, the offeror will purchase the shares through the depository, who will pay the shareholders for the tendered shares, return extra shares, and turn over the stock to the offeror.20

The tender offer situation may create conflicting goals on the part of the various parties involved and competing public policy judgments concerning the nature and role of the tender offer itself.21 The offeror has a direct economic interest in the tender offer. In addition to the consideration it must pay, there

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17. Arbitrage is the practice whereby broker-dealers purchase shares subject to a tender offer at the open market price, in the hope of tendering them at the higher offer price. See Aranow & Einhorn, supra note 1, at 173-91. It has been estimated that over 50% of all tenders in cash tender offers come from arbitragers. Id. at 173 n.2.

18. Id. at 173 n.2.

19. Shares are tendered to the depository or to its forwarding agent. See id. at 59.

20. Since the offeror wishes to purchase a definite number of shares, it usually reserves the right to refuse to purchase any shares if less than the number required to secure control are tendered. Further, if more than the desired number are tendered, he must take the desired number on a pro rata basis from each shareholder. Securities Exchange Act of 1934, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976).

21. For a detailed study of the various interests involved, see Bromberg, supra note 1.
are substantial costs, an economic stake in the profit of the acquired company, and the need for protection if the offer fails. The management of the target corporation must represent the interests of the shareholders, the interests of the corporation as an economic entity, and all too frequently, their own interest in retaining personal power and control. Furthermore, management may retain control through the use of various defense tactics. These may include driving up the market price of the target's shares so that the offer will appear unattractive, diluting the aggressor's position by issuing additional treasury shares or previously unissued shares and placing them firmly in friendly hands, finding a more congenial suitor, or litigating the matter. The target shareholder must decide whether to tender or to sell his or her shares on the open market, often with only the information presented in bits and pieces by both sides.

22. These costs include the fees and commissions for the dealer-manager, depository bank, and soliciting dealers. Further, if litigation ensues, counsel fees are another cost. See Aranow & Einhorn, supra note 1, at 10-11.

23. See Bromberg, supra note 1, at 658.

24. Id. at 641.

25. Id. at 656-57.

26. A complete discussion of defense tactics may be found in Schmults & Kelly, Cash Take Over Bids—Defensive Tactics, 23 Bus. Law. 115 (1967). See also Aranow & Einhorn, supra note 1, at 219-76; Hayes & Taussig, supra note 1, at 142-47. A few of the tactics are as follows:

(1) repurchase its own securities, to make it less likely for the tender offeror to obtain control of the company, Aranow & Einhorn, supra note 1, at 235;
(2) induce friendly third parties to make open market purchases of the company’s securities, id. at 242-43;
(4) announce dividend increases, or stock splits, id. at 245-47;
(5) take steps to create an incompatibility between the target company and the tender offeror, for example, in inducing possible anti-trust violations should the tender offer be successful, id. at 254-56;
(6) seek to arrange a defensive merger, id. at 256-58;
(7) enter into restrictive loan agreements, with default to occur should the tender offer succeed, id. at 274-76; and
(8) institute litigation, challenging either directly or collaterally, the conduct or effect of the tender offer, id. at 266-68.

27. Aranow & Einhorn, supra note 1, at 242-43.

28. Id. at 247-49.

29. Id. at 256-58, 266-68.

30. See Bromberg, supra note 1, at 658-59.

31. He must remember that even if he tenders his shares, some shares may be returned if the offeror receives more stock that it desires to purchase. Thus, even though he has decided to sell, a tendering shareholder may still find himself an involuntary investor in the target, now a subsidiary company. In fact, after a particularly attractive offer, so many shares may be returned, and the market price may fall so low, that the value of the shareholder’s returned shares plus the payment received from the
Overlying these various competing private interests are the social needs of providing an effective means of transferring control, while simultaneously protecting the investor. These concerns gave rise to the federal regulatory framework known as the Williams Act in which Congress attempted to accommodate the various interests and policies and to achieve a balance of protection for all involved in a tender offer.

FEDERAL LEGISLATION AND REGULATION

Legislative Background

Before the adoption of the Williams Act, there was little control over tender offers. Federal regulation was limited to those few offers subject to the disclosure requirements of the Securities Act of 1933. State regulation was limited to the common law restrictions of the corporate asset theory, unreasonable interference with economic relationships, libel, and fraud. As a result of this regulatory vacuum, a number of offeror is less than the value of his pre-offer holdings. This was a possibility in the tender offer made by Trafalgar House Inv. Ltd. for Dearborn-Storm Corp., N.Y. Times, Aug. 8, 1973, at 53, col. 5.

32. As long as the concentration of economic power is not excessive, society has an interest in permitting and perhaps promoting corporate acquisition. Tender offers may present opportunities for improved corporate performance through more aggressive and imaginative management. Further, certain mergers can promote economic growth by introducing economies of scale and by combining complementary business units. Also, replacement of complacent or inefficient management promotes management accountability to shareholders and removes the insulation between shareholders and management. The mere threat of takeover performs a valuable function, and thus, the societal interest in promoting corporate accountability is served by the availability of practicable methods of corporate acquisition such as the tender offer.

33. Investor protection as expressed in federal statutes regulating the securities market has two dimensions: first, investors must have information about the enterprise in order to make an intelligent decision, and second, investors must be protected from victimization by persons who control securities markets or who are privy to important information by virtue of "insider" position. These concerns gave rise to the federal regulatory program instituted in the 1930's. See 1 L. Loss, Securities Regulation 121-31 (2d ed. 1961).

34. 15 U.S.C. §§ 78m(d)-(e), 78m(d)-(f) (1976).


37. Fleischer & Mundheim, supra note 1, at 321; see also Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975); Phillips Chemical Co. v. Hulbert, 301 F.2d 747, 750 (5th Cir. 1962).
abuses developed.

The secrecy with which the process was enshrouded produced additional problems. Senator Kuchel, a co-sponsor of the Williams Act, lamented the futile position of both management and shareholders stating that both were caught in the "tragedy" of the "rape" of the target corporation by corporate raiders acting under a "cloak of secrecy." This problem was compounded by the combatants' dissemination of "a rash of charges and counter charges," neither subject to existing disclosure requirements nor susceptible to control under existing antifraud provisions. Referring specifically to abuses by management in opposing a tender offer, SEC Commissioner Cohen emphasized:

If management does oppose the offer, the present lack of regulation leaves it with powerful weapons which it may wield with impunity, provided its activities fall short of fraud. Management tactics may include making all sorts of predictions and extravagant claims . . . .

Another abuse involved the "undue pressure on shareholders to act hastily and to accept before management or any other group has an opportunity to present opposing arguments or competing offers." Offers were announced under conditions creating the impression that a hasty deposit was required to participate in a transaction structured on a first come, first served basis. Those who succumbed were deprived of taking advantage of later and better offers.

Finally, offerors and target managements and their allies were found to have engaged in manipulative and deceptive practices as an integral part of their offensive and defensive strategies.

Seeking to remedy the abuses, Senator Harrison Williams of New Jersey proposed federal regulation of cash tender offers. Initially, the purpose was to protect incumbent management from "industrial sabotage" resulting from what were deemed

39. Id. at 19, 35.
40. Id.
41. Id. at 196.
42. Id. at 21, 35.
43. Id. at 17.
44. Fleisher & Mundheim, supra note 1, at 321.
to be reckless corporate raids "on proud old companies."

Throughout the hearings, however, it became evident that tender offers might in some cases promote the best interests of society by providing an effective method of removing inefficient, unimaginative and entrenched management. Thus, the focus of the legislation changed from one of protecting incumbent management to one of providing "full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." The final version became law on July 29, 1968.

The Congressional intent was clear—neither the incumbent nor the insurgent were to enjoy any advantage over the other. Senator Williams expressed this position, stating:

I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burdens in favor of management or in favor of the offeror.

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45. 111 Cong. Rec. 28257-60 (Oct. 22, 1965) (remarks of Senator Williams on S. 2731). Senator Harrison Williams analyzed the problem in this way when he introduced S. 2731 in the Senate:

In recent years we have seen proud old companies reduced to corporate shells after white collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves.

The ultimate responsibility for preventing this kind of industrial sabotage lies with the management and shareholders of the corporation that is so threatened. But the leniency of our laws place management and shareholders at a distinct disadvantage in coming to grips with the enemy.


49. 113 Cong. Rec. 854-55 (1967) (remarks of Senator Williams); see Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58-59 (1975). See also Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948 (2d Cir. 1969), where the court stated:

Congress intended to assure basic honesty and fair dealing, not to impose an unrealistic requirement of laboratory conditions that might make the new statute a potent tool for incumbent management to protect its own interests against the desires and welfare of the stockholders.
Major Provisions of the Williams Act

The Williams Act in 1968 added sections 13(d) and (e) and 14(d), (e) and (f) to the Securities Exchange Act of 1934. As amended in 1970, the act regulates tender offers in five areas: 1) disclosure in connection with certain stock acquisitions; 2) regulation of corporate purchases of its own stock; 3) regulation of tender offers; 4) fraud in connection with tender offers; and 5) reporting changes in majority of directors.

Disclosure in connection with certain stock acquisitions: section 13(d). Any person, acquiring directly or indirectly beneficial ownership of an equity security, registered pursuant to section 12 of the Securities Exchange Act of 1934.


51. Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976)). The amendments, designed for the benefit of the public investor, provide for the following:

1) reduction of the percentage of stock ownership needed to trigger the disclosure requirements of the Act from 10% to 5% in an effort to provide public disclosure at a more meaningful level;
2) extension of the Act to cover exchange tender offers in order to provide investors subject to such offers with the substantive protections of the Act;
3) extension of the Act to cover tender offers for insurance companies;
4) rule-making power for the SEC under the anti-fraud provision of the Act to enable it to deal more effectively with fraudulent practices; and
5) rule-making power for the SEC to create flexibility in regulation of persons in a control relationship with the issuer.

52. 15 U.S.C. § 78n(d)(2) (1976) defines a person as: "When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer . . . ."

53. The term beneficial owner as used by the Act parallels Rule 16a-2 by deeming a person to be the beneficial owner of shares of common stock underlying presently exercisable options, warrants or rights or convertible securities which are presently convertible. However, a case dealing with this problem concluded that, for purposes of the Williams Act, "in the context of a contest for control," any person who has the right to determine how stock is to be voted has "beneficial ownership" of the stock for purpose of Section 13(d). Bath Industries v. Blot, 427 F.2d 97, 112 (7th Cir. 1970).

54. The Act applies to any equity security: (1) of a class registered pursuant to Section 12 of the Securities Exchange Act of 1934 (including publicly-held over-the-counter securities registered under Section 12(g) as well as securities listed on an exchange); (2) of close-end investment companies registered under the Investment Company Act; or (3) (as a result of the 1970 amendment) of insurance companies which would have been required to be registered under Section 12(g) except for the Section 12(g)(2)(G) exception.

55. The corporations that are covered by the Act are those with assets over one million dollars and 500 shareholders, or those whose securities are traded on any national exchange. Securities Exchange Act of 1934, § 12(g)(1), 15 U.S.C. § 78l (1976).
in excess of five percent, must disclose certain information within ten days. Section 13(d)(2) requires amendments to be filed if any material changes occur in the facts set forth in the statement as well as setting forth various exceptions.

**Regulation of corporate purchases of its own stock: section 13(e).** The Securities Exchange Commission is given broad rule-making authority with respect to repurchases of securities by a corporation. Section 13(e) prohibits an issuer from purchasing its own stock in contravention of rules adopted by the SEC "to define acts and practices which are fraudulent, deceptive or manipulative" and "to prescribe means reasonably designed to prevent such acts and devices." Under section 13(e)(2), a purchase by "any person controlling, controlled by

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56. This percentage was reduced from 10% to 5%. 15 U.S.C. § 78m(d)(1) (1976). The proposal to reduce the threshold from 10% to 5% drew objections from various groups, in that they might be forced to file burdensome reports even though their stock purchases were not designed to influence control of the issuers. *Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearings on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. of Banking & Currency, 91st Cong., 2d Sess. 13, 108, 116 (1970).* To meet these objections, the House added section 13(g)(5), a grant of power to the SEC to permit a purchaser to file in lieu of a Schedule 13D, a short notice stating the name of the purchaser, the number of shares owned by him, and such other information as the SEC may require. *See Investor Protection in Corporate Takeovers, Increase in "Regulation A" Exemption: Hearings on H.R. 4285, S. 3431 & S. 336 Before the Subcomm. on Commerce & Finance of the House Comm. on Interstate & Foreign Commerce, 91st Cong., 2d Sess. 58-59 (1970).*

57. 17 C.F.R. § 240.13d-101 (1978). Schedule 13D outlines the information to be supplied to the SEC as follows:

1) identification of the security and issuer affected by the acquisition;
2) identity and background of the person filing the statement;
3) source and amount of funds to be employed for financing the acquisition;
4) the purpose of the transaction;
5) current rights or interest in the security or the issuer;
6) contracts, arrangements, or understandings with respect to the security;
7) persons employed or to be compensated for making solicitations or recommendations for the offer; and
8) copies of all public invitations or advertisements.


58. An acquisition of stock does not need to be reported under Section 13(d) if made by means of a registration statement under the Securities Act of 1933, § 13(d)(6)(A); or by the issuer of stock, § 13(d)(6)(C) (purchases by the issuer are regulated under § 13(e)); or if stock acquired during the preceding twelve months, does not exceed 2% of the class, § 13(d)(6)(B). The SEC also has the power under § 13(d)(6)(D) to exempt any acquisition "not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise not comprehended within the purpose of the subsection."

or under common control with the issuer, or a purchase subject to control of the issuer, or any such person, shall be deemed to be a purchase by the issuer." The 1970 amendments to the Williams Act give added supervisory power to the SEC to make rules and regulations implementing the rules regarding persons other than the issuer.61

Regulation of tender offers: section 14(d). A person making a tender offer,62 which would result in the offeror owning more than five percent63 of the target company, must concurrently file a 13(d) form with the SEC. In addition, no solicitation or recommendation may be made to shareholders until a 14(d) statement is filed with the SEC. Before that filing, the only communication which a target company is allowed to send to its shareholders with respect to the tender offer is that management is studying the offer and requests that shareholders defer their decision until they have heard from management. Section 14(d)(5) permits a depositor to withdraw his tendered shares within the first seven days of the offer and after sixty days from the making of the offer.64 Section 14(d)(6) requires that the offeror accept pro-rata all shares deposited during the first ten days of the offer.65 Section 14(d)(7) requires the offeror to pay, to the depositors any increase in price occurring before the offer expires.66 Section 14(8) addresses itself to various exceptions.67

Anti-fraud provisions: section 14(e). No person may make any untrue statement of a material fact or omission or act in any fraudulent, deceptive, or manipulative manner in connec-

61. Id.
63. See text accompanying note 59 supra.
65. Id. § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976). The purpose of this provision is to prevent shareholders from being stampeded into acceptance of an offer on a first come, first serve basis, giving the shareholder a time to assess the circumstances.
67. Id. § 14(d)(8), 15 U.S.C. § 78n(d)(8) (1976). Persons who purchase stock during the preceding twelve months, not exceeding 2%; purchases by the issuer of such security; and by rules proposed by the Commissioner are exempt from the requirements of section 14(d).
tion with any tender offer. The 1970 amendment granted power to the SEC to make rules to "define and prescribe means reasonably designed to prevent such acts and practices as are fraudulent, deceptive or manipulative."

Reporting changes in majority of directors: section 14(f). Persons who acquire more than five percent of stock through a tender offer subject to 14(d), or who otherwise plan to restructure the board of directors pursuant to an understanding, must provide the same information required by a proxy statement covering elections to all shareholders and the SEC at least ten days before such persons take office.

In general, the Williams Act reflects an explicit congressional decision to resolve the problems involved in the making of tender offers and in the tactics used in opposing them. The scheme established standards for all participants, without tipping the scales in favor either of incumbent management or in favor of insurgent groups seeking to gain control of the target company. In recent years, state legislatures have entered the same arena. That involvement has created confusion in the regulation of tender offers.

STATE LEGISLATION

State regulation of securities has generally followed the

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68. Id. § 14(e), 15 U.S.C. § 78n(e) (1976).
69. Id.
71. In August, 1976, the SEC proposed new rules to implement the policies of the Williams Act, 41 Fed. Reg. 33004 (1976). Among other things, the proposed rules would give offerors increased access to target shareholders lists, permit offerors to publish their offers in more summary form, require that offers be held open for at least 15 days, extend the amount of time that investors have to withdraw their shares from 7 to 10 days, and permit an offeror to accept shares tendered in a pro-rata basis throughout the life of the offer.
72. Section 7A of the Clayton Act, 15 U.S.C. § 18(a), as added by the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, §§ 201, 202, 90 Stat. 1383 (1976), requires persons contemplating certain direct or indirect mergers or acquisitions (including cash tender offers) to give the Federal Trade Commission (FTC) advance notice and to wait 15 days before consummation of the offer. Unlike state takeover statutes, the Antitrust Improvement Act imposes a rather minimal waiting period requirement prior to the acquisition of securities, rather than prior to the commencement of a tender offer. Thus, the effect of the Act is to require that offers be kept open prior to any purchases for 15 days from the date of notification, since the Williams Act effectively requires that most offers be kept open for at least 10 days regardless. § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976). In the deliberation over the Antitrust Improvement Act, the drafters expressed their desire to preserve the speed and secrecy element of the Williams Act, while at the same time allowing for effective antitrust analysis. See H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11-13, reprinted in [1971] U.S. CODE CONG. & AD. NEWS 4119, 4125-27.
philosophy of the Securities Act of 1933\(^7\) and the Securities Exchange Act of 1934\(^4\) by requiring issuers to make full disclosure to investors and by regulating the activities of those persons through whom securities are purchased and sold. In recent years thirty-six states have attempted to provide additional investor and issuer protection by adopting additional disclosure requirements, pre-offer filing requirements, and review procedures for tender offers.\(^3\) This proliferation of state legislation concerning takeovers may cause the premature death of tender offers. Various aspects of the state statutes examined below highlight the problem of integrating the state and federal regulations into a workable solution.

**Offers Subject to Regulation.**

The jurisdictional basis of the various state takeover statutes is uniformly broad. All states have required some combination of: 1) incorporation within the state, 2) location of the principal place of business within the state, and/or 3) existence of substantial assets within the state.\(^7\) All of the states' statutes apply when the target company is incorporated within the state. Hawaii\(^7\) and Virginia\(^7\) limit their jurisdiction to corporations incorporated and doing business within the state. Alaska,\(^8\) Kansas,\(^8\) and Ohio\(^8\) regulate tender offers of companies incorporated under the law of the state, having their principal place of business and a substantial portion of assets within the state. Indiana,\(^9\) Maryland,\(^9\) and South Dakota\(^9\) extend their jurisdiction to corporations incorporated within

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74. Id. §§ 78a-78jj.
76. The language varies from statute to statute. In some, it is in the disjunctive and in others it is in the conjunctive. In Copperweld Corp. v. Société Imetal, 75 Civ. 09-3836 (C.P. Franklin County, Ohio, Oct. 9, 1975), the Ohio statute, written in the conjunctive, was interpreted by the Attorney General of Ohio to equate substantial assets with the principal place of business.
80. KAN. STAT. § 17-1276(a) (1974).
82. IND. CODE § 23-2-3-1(j) (1976).
the state, having their principal place of business or substantial assets within the state. Louisiana asserts jurisdiction over corporations which have more than fifty percent of their employees within the state and aggregate assets of at least fifty million dollars.  

Many states have exempted what has commonly been called the "friendly offer," from the requirements of their tender offer takeover statutes. A friendly offer is an offer to acquire equity securities where the target company's board of directors has furnished the terms to the shareholders and recommended acceptance of the offer. Some states require that at least two-thirds of the shareholders consent, and that the offer be made to all shareholders on equal terms. Various other exemptions may apply such as offers of corporations not registered pursuant to the Securities Act of 1934, isolated offers not made to stockholders generally, repurchase offers, ordinary brokers' transactions, offers declared exempt by state commissioners, exchange offers not within the meaning of section 4 of the Securities Act of 1933, offers subject to approval by appropriate federal agencies, and offers that would result in the acquisition of less than two percent of any class within the past twelve months.

The broad jurisdictional basis and the various exemptions disclose the intent of the states to focus on unfriendly tender offers, thereby protecting local industry. This aggressive assertion of legislative jurisdiction points to an inconsistency with the professed purpose of the acts—investor protection. Traditionally, a local interest is sufficient under the broad rules just-

90. E.g., COLO. REV. STAT. § 11-51.5-102(5)(c) (Supp. 1976).
tifying extraterritorial jurisdiction. However, serious conflicts arise when jurisdiction is extended, and the interests of other states are affected.

**Major Provisions of the State Statutes.**

**Disclosure requirements.** All states require an offeror to disclose certain information to the target company and most states require disclosure to the state regulatory authorities as well. Some states follow the schedule 13(d) form of the Williams Act, while others go far beyond that. Pennsylvania, for example, requires disclosure of the identity and background of all persons involved in the offer, the sources and amount of its funds, its plans for the future of the target company, the number of target shares held by the offeror, and any contractual arrangements with respect to any equity security of the target company. Pennsylvania further requires information on the organization and operations of the offeror, including its financial statements, principal properties, employee relations, pending legal proceedings, and any other information that the corporations commissioner may require to make a full and fair disclosure. Although such additional disclosure may provide more information to the shareholders, the information really necessary to assess a tender offer is contained in the disclosure requirements of the Williams Act.

**Time requirements.** Most state statutes require the filing of the above information within a specified time period before the public announcement of the offer. This may range from ten days, as in Colorado, to sixty days, as in Hawaii. These waiting periods were specifically rejected by Congress in formulating the federal legislation and raise some problems in the operation of the tender offer process.

The original version of the Williams Act would have required the offeror to inform the target company of its intentions

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100. See Shipman, * supra* note 1, at 748-50.
103. 17 C.F.R. § 239.11 (1976).
to make an offer twenty days prior to the solicitation.\textsuperscript{107} Congress felt that such a proposal would tip the balance in favor of the target company, thus permitting undue delays and possible failure of the offer.\textsuperscript{108} Accordingly, the final version of the Williams Act provided disclosure to investors within a statutory framework favoring neither the offeror nor management of the target company.\textsuperscript{109}

In addition, advance notice requirements eliminate the advantage of secrecy and speed—major factors in a successful tender offer.\textsuperscript{110} During this waiting period, management has at its disposal various defensive tactics to defeat the takeover such as merging with a friendly corporation, obtaining alternative tender offers, and repurchasing its own shares.\textsuperscript{111} The waiting period combined with the available defense tactics increase the likelihood of failure of the offer and may have an adverse effect on the stock market. The New York Stock Exchange has objected\textsuperscript{112} to the delays occasioned by the waiting period stating:

During the twenty-day period, there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. In some cases, trading may be halted for the duration of the twenty-day period.\textsuperscript{113}

\textit{Administrative hearing requirements.} Most state statutes provide that the state securities commission may hold hearings on its own motion\textsuperscript{114} or on the motion of the target company.\textsuperscript{115} In these states, the target company may extend the waiting period by merely demanding a hearing. Ohio\textsuperscript{116} and Virginia\textsuperscript{117} require the hearing to be held within forty days of the filing, and Ohio further requires completion of the hearing within

\begin{footnotesize}
\begin{enumerate}
\item S. 2731, 89th Cong., 1st Sess., § 10(e) in 111 Cong. Rec. 28259 (1965).
\item See notes 47-49 and accompanying text supra.
\item See note 47 and accompanying text supra.
\item See Vorys, supra note 9, at 68.
\item See note 28 and accompanying text supra.
\item Id. at A-12.
\item E.g., S.D. Compiled Law Ann. § 47-32-23 (Supp. 1977). In these states the target company can extend the waiting period by demanding a hearing no matter how frivolous its objections are.
\end{enumerate}
\end{footnotesize}
sixty days. Massachusetts requires the hearing to be initiated within sixty days and completed within ninety days after filing. Thus, the tender offer may be delayed for a period of ninety days after publication of the offer.

The hearings are designed to determine whether the offeror has made a “full and fair disclosure.” Whether that standard is met is within the judgment of the corporations commissioner. Seven states allow the state commissioner to determine whether the offer itself is “fair and equitable.” A shareholder’s decision to take advantage of a tender offer may be blocked by the decision of a state official with whom the shareholder has little or no connection. The disclosure requirements, pre-filing notices, and administrative hearings may delay a tender offer thereby causing its failure.

Other substantive provisions. In large measure the state statutes follow federal regulation, although each of the states has added a few new wrinkles of its own. The Williams Act requires the offeror to make pro rata purchases of all shares tendered within the first ten days. A majority of the states follow this pro rata requirement, but others have varied the time periods from ten days as in Nevada and Virginia to the full period of the offer as in Connecticut. All states follow the Williams Act requirement that the offeror pay the increased price to all tendered shares when a price change occurs. Section 14(d)(5) of the Williams Act provides the shareholder with the right to withdraw his shares within the first seven days of the offer and sixty days after the date of the publication of the offer. Most state statutes provide for this right to withdraw tendered shares, although the time allowed may vary.

119. Ohio Rev. Code Ann. § 119.01.13 (Page 1978) establishes the prerequisites for hearings, such as notice (§ 119.07) and internal procedure (§ 119.09).
126. Idaho, Maryland, Pennsylvania, and other states have followed the Wil-
Massachusetts and Michigan require the offer to remain open for at least sixty days. Nevada and Virginia require the offer to stay open at least twenty-one days and not more than thirty-five days from the date of the offer. The Williams Act contains no similar provisions, but section 14(d)(6) has been interpreted so as to require the offeror to continue its offer for at least ten days if the offer is for less than all the outstanding shares.

The anti-fraud, enforcement, and remedy provisions of the state enactments are similar to those of the Williams Act. These similarities of the substantive provisions to the federal scheme illuminate the fact that the real effect of the state takeover statutes are in the jurisdiction, disclosure time period, and administrative requirements.

Effects of the State Legislation

A major effect of state takeover statutes lies in their extra-territorial application to shareholders in other states. For example, under the Ohio Act, an offer made in New York to a New York shareholder of an Ohio corporation comes within the Ohio statute. Consequently, state takeover legislation may extend jurisdiction to all shareholders wherever located.

Additional disclosure requirements may discourage essen-

liams Act, while Nevada and Virginia provide the shareholders with the opportunity to withdraw their shares any time within 21 days from the date of the offer. IDAHO CODE § 30-1506(2) (Supp. 1978); MD. CORP. & ASS'NS. CODE ANN. § 11-905(b) (Cum. Supp. 1978); P.A. STAT. ANN. tit. 70, § 77(b) (Purdon Supp. 1978-79); NEV. REV. STAT. § 78.3772(2) (1973); VA. CODE § 13.1-530(b) (1978). Indiana provides for withdrawal until three days prior to the expiration of the offer. IND. CODE § 23-3-3-5(a) (1976). Delaware provides withdrawal rights at any time during the offer. DEL. CODE tit. 8, § 203(a)(2) (Cum. Supp. 1977).


131. 15 U.S.C. § 78n(e) (1976). Most state statutes give the state regulating commission power to seek injunctive relief, and others empower the target company to seek an injunction as well. E.g., HAW. REV. STAT. § 417E-8 (1976); IND. CODE § 23-2-3-8(b) (1976). The remedies available to aggrieved shareholders consist of recission or damages upon proof of fraudulent activities by the offeror. E.g., WIS. STAT. ANN. § 552.21(1) (West Spec. Pamph. 1978). Furthermore, most state statutes provide for joint and several liability. Idaho makes controlling persons of the offeror, broker-dealers, partners, principal executive officers, and employees, if they materially aided in the transaction, liable to the same extent as the offeror. IDAHO CODE § 30-1511(2) (Cum. Supp. 1978).

132. See Commerce Clause, supra note 1, at 1150.
tial parties from participating in the offer. For example, a bank whose identity may be disclosed as a source of funds may be hesitant to advance credit for fear of being identified with any drawn out litigation. A participating broker-dealer may be unwilling to risk liability as a participant in an “illegal offer.” An arbitrageur may not be willing to participate if the threat of delay creates the possibility of failure. One commentator has stated:

Careful analysis of the Ohio Act would suggest that it is “special interest” legislation sailing under different colors, weighted obviously to protect incumbent management from attack. This is accomplished largely under the fiction of requiring fair disclosure to shareholders. This disclosure method, however, is of such a nature, and the procedures are so designed that they accomplish a substantive result not encompassed in the expressed purpose of the legislation—the discouragement, nay, the prohibition in effect, of tender offers. Disclosure is not the real aim. The real aim is the protection of incumbent management from intruders.

The delays occasioned by the disclosure, advance notice, and administrative hearing requirements destroy the essential secrecy and speed of a tender offer. The additional uncertainties and risks of exposure have made the tender offer no more attractive than the proxy battle, the struggle the tender offer was designed to replace. The practical effect of state takeover statutes may be to cause target companies to migrate to those states offering such protection, in turn, causing more states to enact takeover statutes in self defense.

133. See Langevoort, supra note 8, at 239. See also Aranow & Einhorn, supra note 1, at 173-74.
134. See Langevoort, supra note 8, at 239.
136. See Vorys, supra note 9, 68.
137. See generally E. Aranow & H. Einhorn, Proxy Contest for Corporate Control (2d ed. 1968).
138. For the advantages of cash tender offers, see D. Austin & J. Fishman, Corporations in Conflict—The Tender Offer 8-9, 110-12 (1970); Bromberg, supra note 1, at 621-22; Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 378-79 (1969). The takeover by proxy contest is a rarely used method of acquisition today. This is in part due to the difficulty and expense involved in mounting a proxy battle and to the great advantage of incumbent management in such a contest. See E. Aranow & H. Einhorn, Proxy Contests for Corporate Control 9-13 (2d ed. 1968); D. Austin & J. Fishman, supra, at 8-9. See also Brundney, A Note on Chilling Tender Solicitation, 21 Rutgers L. Rev. 609, 620-24 (1967).
139. See Langevoort, supra note 8, at 239.
State takeover statutes represent an impermissible attempt to cloak essentially chauvinistic economic concerns with the mantle of seemingly investor-oriented tender offer regulations. These statutes impose substantial and unequal burdens never contemplated by the Williams Act. Moreover, the fundamental provisions of the statutes—pre-filing notice and lengthy waiting periods—were expressly rejected by Congress. Because of this sharp divergence between the state and federal regulatory schemes, the inquiries essential to a challenge of the state takeover statutes are: 1) whether they violate the commerce clause of the United States Constitution and 2) whether the Williams Act has preempted the field.

VIOLATION OF THE COMMERCE CLAUSE

Article I section 8 of the United States Constitution gives Congress the power "to regulate commerce . . . among the several states . . . ." This was added "in order to prevent unjustifiable local interference with the commercial intercourse among the states." The commerce clause is a major source of national power as well as a major source of conflict with state power. While the Constitution vests in Congress the power to regulate commerce among the states, it does not give adequate guidance to the states as to their permissible intrusion upon interstate commerce. The United States Supreme Court, in *H.P. Hood & Son v. DuMond*, focused on this problem, pointing out that the states may shelter their people from menaces to health and safety and fraud, but that they lack the power to retard, burden, or constrict the flow of commerce for their economic advantage. The Court stated:

This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety . . . .

The basic test of the validity of a state statute under the commerce clause was set out by the United States Supreme Court in *H.P. Hood & Son v. DuMond*.
Court in *Pike v. Bruce Church, Inc.*, in which the Court struck down an Arizona regulation barring the shipment of uncrated local cantaloupes out of the state. The Court stated:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.\(^\text{144}\)

Thus, in order to be valid, a state statute must: 1) effectuate a legitimate local interest; 2) affect interstate commerce only incidentally; and 3) not excessively burden interstate commerce in relationship to the alleged local benefits provided. Analysis of the state takeover statutes against this test demonstrates their invalidity.

**Legitimate Local Interest**

Several state interests have been attributed to state takeover statutes. The most common is the protection of shareholders of corporations incorporated in, or having significant connections with, the state.\(^\text{146}\) This interest is based primarily upon the rights of the states under their "blue sky laws" to protect their citizens from fraudulent securities transactions.\(^\text{148}\) If traditional blue sky laws are followed,\(^\text{147}\) jurisdiction is limited to offers or sale of securities made within the state, and the effect of state takeover statutes would be minimal.\(^\text{148}\) However, state takeover statutes have radically departed from traditional blue sky laws effecting shareholders outside the state boundaries. For example, in *Sparton Corp. v. Ward*, a New York corporation made an offer outside Ohio for securities of an Ohio corporation prior to the expiration of the statutory waiting period. The offer provided that it would not become effective as to Ohio residents until the expiration of the waiting period.

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144. Id. at 142.
145. Shipman, supra note 1, at 740.
146. L. Loss & W. COWETT, BLUE SKY LAWS 73 (1958) [hereinafter cited as Loss & COWETT].
149. No. 243,230 (C.P. Ct. Franklin City, Ohio, Jan. 8, 1971) (discussed in Aranow & Einhorn, supra note 1, at 172-73).
period. Under the blue sky laws, a state regulates all tender offers to its residents, and the offeror in *Sparton* simply planned to avoid soliciting in that state. Shareholders in that state who wished to participate in the offer would be able to tender their shares on the open market. The only effect of the state blue sky laws would be to deny local shareholders the full premium price.  

The target company in *Sparton* sued the Commissioner of the Ohio Division of Securities, alleging violations of the Ohio takeover statute and requesting the district court to issue temporary restraining orders and injunctions compelling recission of the offer. The court found that the offer raised substantial questions under the Ohio statutes, and ordered the Commissioner to hold hearings on the matter. All other requested relief was denied. On appeal, the target company's motion for a temporary injunction was granted pending final disposition of the matter. Shortly thereafter, the offer was withdrawn.

Such an aggressive assertion of legislative jurisdiction is inconsistent with the professed purpose of the takeover statutes—investor protection. Jurisdiction over the tender offer often depends on the contacts of the target corporation with the state, not the involvement of resident investors. In addition, if blue sky laws are being used for jurisdictional purposes, other states can protect their own citizens against fraudulent security transactions without having to rely on Ohio's or any other state's takeover provisions.

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150. In addition to the spread between the market price and the tender price, the sale of shares in the open market requires payment of brokerage commissions and possibly transfer taxes, further reducing the net proceeds of sale. Brokerage commissions and transfer taxes, if any, are normally borne by the offeror when shares are sold pursuant to the tender offer.

151. See Wall St. J., Dec. 16, 1970, at 27, col. 5. The offer provided in part as follows:

This Offer is not being made to, nor will tenders be accepted from, stockholders residing in Ohio until such time the Offer may be made to residents of Ohio in accordance with the Law of Ohio. Information has been filed with the Ohio Securities Division in compliance with that law. This Offer will become effective as to Ohio residents at 10:00 A.M., Eastern Standard Time, Monday, January 4, 1971, unless delayed by reasons of appropriate action by the Ohio Securities Division, and will remain effective until 5:00 P.M., Eastern Standard time, Friday, January 15, 1971, unless extended upon notice to the Depositary.


154. *Commerce Clause, supra* note 1, at 1153.
A second local interest mentioned justify takeover statutes is the state's legitimate interest in regulating the internal affairs of corporations formed within the state.\textsuperscript{155} This internal affairs doctrine permits a state to control "the relationship \textit{inter sese} of the corporation, its directors, officers, and stockholders,"\textsuperscript{156} and properly regulate such issues as shareholder liability, validity of stock issues, mergers, voting agreements, election of directors, relative rights and duties of officers, directors, shareholders, and issuing of dividends.\textsuperscript{157} Basically, the internal affairs doctrine applies to existing \textit{intracorporate} relationships.\textsuperscript{158}

The argument that the internal affairs doctrine legitimizes state regulation of tender offers for corporations incorporated within the state is not sound. The doctrine applies to existing intracorporate relationships and not to future relationships. The crucial distinction between the internal affairs of the corporation and the tender offer is that in the first instance the relationship between the corporation and shareholder is already formed, whereas in the tender offer situation the relationship is not yet formed. Thus, the internal affairs doctrine cannot logically apply.\textsuperscript{159}

One proponent of the global reach of the Ohio takeover statute acknowledges that takeover bids do not actually involve transactions that are purely internal corporate matters, but instead finds such offers sufficiently analogous to certain corporate acts that jurisdiction over them is justified.\textsuperscript{160} He relies on the similarities of the proxy solicitation to tender offers, stating that since both are used to acquire control, state regulation is in order.\textsuperscript{161} Although the transfer of control is the goal of both the tender offer and proxy solicitation, it is accomplished in two different contexts.\textsuperscript{162} In the tender offer situation, there may be a total transfer of ownership, whereas in a proxy solicitation only the right to vote is transferred. Therefore, the internal affairs doctrine supporting state regulation is not sound.

\begin{footnotesize}
\begin{enumerate}
\item Shipman, supra note 1, at 741.
\item Shipman, supra note 1, at 742.
\item Id.
\item Shipman, supra note 1, at 1154.
\item Id.
\item Shipman, supra note 1, at 745.
\item Id. at 745.
\item Id. at 743-44.
\end{enumerate}
\end{footnotesize}
A third state interest offered to support tender offer legislation is the "parochial attempt to protect incumbent management and local industry," which surfaces when the legislative declarations of investor protection are ignored and the practical operation of the statutes investigated.

A number of states feared that established local companies might, through the tender offer, be taken over by outside interests who would then close down plants and leave local residents jobless. For example in Ohio, Northwest Industries Inc. began what turned into a hotly contested battle for the Ohio based B. F. Goodrich & Co. After successfully defeating the offer, B.F. Goodrich joined with the Ohio Manufacturers Association to draft state legislation which would delay or block takeovers of corporations located in Ohio.

State legislation that has as its goal the promotion of employment opportunities is clearly a legitimate local interest. This point may be strengthened by analogy with favorable corporation laws that attract industry to a state. However, the United States Supreme Court has held that to benefit the business or economic life of the state, at the expense of the other states, does not supply an acceptable purpose. In Pike v. Bruce Church Inc., the Court stated:

The Court has viewed with particular suspicion state statutes requiring business operations to be performed in

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163. Aranow & Einhorn, supra note 1, at 172; Vorys, supra note 9, at 66.
164. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 144-45 (1970); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1929).
165. The bills were not academic exercises in the legislative process. In Pennsylvania, attempted takeovers of Sharon Steel Corp., Piper Aircraft Corp., and Westinghouse Air Brake Co. may have influenced the legislature to consider a bill requiring an offeror for shares of a company incorporated in Pennsylvania, or having its principal office in the state, to obtain approval of either the target's directors, the majority of its shareholders, or the Secretary of the Commonwealth of Pennsylvania. Pa. H.B. 841 (1969 Sess.). See Metz, Market Place: States Defiant on Take-Overs, N.Y. Times, June 3, 1969, at 62, col. 7.
the home state that could more efficiently be performed elsewhere. Even where the state is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal.169

It has been argued that under the Pike rational, state takeover statutes, having as their real purpose the protection of management and local industry, are per se illegal.170 Where states insulate local management through the regulation of tender offers they are conferring on them the advantage of protection from attack by out-of-state competitors. This type of advantage it is argued, was forbidden by Pike.

Unlike the Pike statutes which served only one purpose—requiring business operations to be performed in the home state—state takeover statutes serve multiple ends. The states, in choosing between the competing interests, have sided with the target company. This choice may have been one-sided and parochial; nevertheless, it probably serves a legitimate, though tenuous, state purpose. Assuming that, the takeover statutes must be analyzed under the second test in Pike; whether they effect interstate commerce only incidentally.

Effect on Interstate Commerce

Ever since Cooley v. Board of Port Wardens,171 it has been recognized that there are matters of local concern that may never be fully dealt with by Congress. Therefore, notwithstanding the commerce clause, if the interest is local in nature and the effect on interstate commerce is minimal, the statute will be upheld. Two seminal cases offer some guidance.

In Parker v. Brown,172 a California raisin producer attacked a marketing scheme established pursuant to the state Agriculture Prorate Act. The law compelled each producer to put most of his raisin crop under the marketing control of a program committee in order to eliminate price competition among producers. The United States Supreme Court noted that although ninety-five percent of the crop was marketed in interstate commerce—having a substantial effect on commerce—such regulations by the state are to be sustained, not because their effect is indirect rather than direct but because the matter is of local concern and may never be adequately

169. Id. at 145.
170. Commerce Clause, supra note 1, at 1159.
171. 53 U.S. (12 How.) 299 (1851).
dealt with by Congress.\footnote{\textsuperscript{173}}

In \textit{Huron-Portland Cement Co. v. City of Detroit},\footnote{\textsuperscript{174}} the United States Supreme Court upheld a city anti-pollution ordinance applied to shipping traffic on the Great Lakes. Noting that pollution was an acute local concern, the Court disposed of the commerce clause objection summarily by stating:

The claim that the Detroit ordinance, quite apart from the effect of federal legislation, imposes as to the appellant's ship an undue burden on interstate commerce needed no extended discussion. State regulations, based on police power, which do not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.\footnote{\textsuperscript{175}}

In upholding the validity of the state regulation, the Court in both cases relied upon the fact that the issues involved matters of local concern which Congress had not attempted to regulate. Tender offers, in contrast, are of national concern, and Congress has expressly regulated in the area by passage of the Williams Act. Additionally the state takeover laws which have tremendous extraterritorial reach have gone far beyond local concerns. They deny the citizens of other states the power to choose their own way of regulating tender offers. They may affect a remote shareholder. Further, the action taken by one state in respect to a tender offer may disrupt trading and the orderly regulation of the national securities market.\footnote{\textsuperscript{176}}

One commentator has argued that, although state regulation of securities through state blue sky laws have withstood constitutional objection in the past, they should be made uniform or be abolished.\footnote{\textsuperscript{177}} As the scope of interstate commerce has widened, it has become increasingly difficult to claim that any activity, particularly a security transaction, is wholly intrastate and within the exclusive province of the states. Whatever the arguments for restricting blue sky laws, they should apply with even greater force to state takeover statutes that present a far greater threat to interstate commerce.

\footnotesize{173. Id. at 362-63.  
175. Id. at 448.  
177. See Tender Trap, supra note 8, at 20. See also L. Loss, Securities Regulation 102-03 (2d ed. 1961); Loss & Cowett, supra note 146, at 170; Bateman, State Securities Registration: An Unresolved Dilemma And A Suggestion For The Federal Securities Code, 27 Sw. L.J. 759 (1973).}
Even if state takeover statutes provide a legitimate state interest and affect interstate commerce, they must satisfy the third criterion set forth in *Pike*: whether the burden imposed on interstate commerce is excessive in relationship to the alleged local benefits provided by the statute and whether there is a less intrusive alternative.

**Excessive Burden on Interstate Commerce**

It has generally been recognized that in the absence of conflicting legislation by Congress, there is a residuum of power in the states to make laws governing local concerns. However, even where the nature of the interest is local, states have not been given the authority to restrict commerce or to regulate those areas which require uniformity.

In *Southern Pacific Co. v. Arizona*, the United States Supreme Court struck down an Arizona law regulating the length of trains that could operate within its borders. The practical effect of such regulation was to control train operations beyond its borders by requiring the breaking up and reassembling of trains at the nearest terminal points before entering and leaving Arizona. Therefore, there was an excessive burden placed upon interstate commerce, as well as the prospect that each state might mandate different train lengths.

*Bibb v. Navajo Freight Lines Inc.* involved a conflict among the states over an Illinois statute requiring the use of rear fender mudguards on trucks operating on Illinois state highways. The Supreme Court invalidated the statute, concluding that, although the power of the state to regulate the use of its highways is broad and pervasive, the heavy burden which the law placed upon the interstate movement of trucks exceeded the permissible limits even for a safety regulation.

In comparing the situations involved in *Southern Pacific* and *Bibb* to tender offers, state takeover statutes that regulate tender offers outside their borders place too onerous a burden on interstate commerce. The extraterritorial reach of one state's tender offer legislation may deny citizens of another state the ability to participate in an offer by requiring the

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178. 397 U.S. at 142.
179. *Id.*
181. *Id.* at 761.
183. *Id.* at 529-30.
offeror to follow its extensive pre-filing disclosure requirements and hearing procedures to the point that the offer fails due to delay.\textsuperscript{184} Furthermore, such delay may cause price fluctuation\textsuperscript{185} and uncertainty\textsuperscript{186} in the national security exchanges. The differing state regulations compound the problems the SEC may have in controlling the national market.\textsuperscript{187} These burdens imposed by state takeover statutes substantially exclude consideration of any alleged local benefits the statutes might engender. In particular, the possibility of increasing the value of the stock after the announcement of the offer,\textsuperscript{188} and the disclosure requirements enabling the stockholder to make a more complete investment decision\textsuperscript{189} are very uncertain. Consequently, the burdens imposed on interstate commerce by state takeover statutes go far beyond the threshold permitted under commerce clause analysis. Although it may be argued that the effect of one state takeover statute might be minimal, thirty-six states\textsuperscript{190} have passed such legislation. With each asserting jurisdiction, the conflicting results, along with the delays incurred, may render the tender offer useless as an effective tool for acquiring control and removing ineffective management.\textsuperscript{191}

Traditional commerce clause analysis involves a consideration of whether a legitimate local interest exists, and whether the burden imposed on interstate commerce is excessive in relationship to the putative local benefit.\textsuperscript{192} However, in \textit{Pike}.\textsuperscript{184} For example, Delaware requires an offer to be made to the public not less than 20 days nor more than 60 days after the offer. If an offer is made for shares of a Delaware corporation with substantial assets in Ohio, the possible delay caused by the hearing may delay the effective date beyond the period permitted by Delaware law. \textit{See} \textit{Del. Code} tit. 8, § 203(a)(1) (Cum. Supp. 1977). For a good example, see Great Western United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), aff'd, 577 F.2d 1256 (5th Cir., hearing granted, 47 U.S.L.W. 3463 (1978)).


\textsuperscript{186} \textit{See Aranow} \& \textit{Einhorn}, \textit{supra} note 1, at 191, involving the function of the arbitrageur and the effects of state takeover statutes have with this important function.


\textsuperscript{189} Immaterial disclosure when required by the state gives the target company adequate time to defend against the takeover through various defense tactics. \textit{See generally Aranow} \& \textit{Einhorn}, \textit{supra} note 1, at 223-68.

\textsuperscript{190} \textit{See} \textit{notes} 8, 75 \textit{supra}.

\textsuperscript{191} \textit{See Brundney, A Note on Chilling Tender Solicitations, 21 Rutgers L. Rev.} 609, 624 (1967); \textit{Cohen, A Note on Takeover Bids and Corporate Purchase of Stock, 22 Bus. Law.} 149, 151-52 (1966).

\textsuperscript{192} 397 U.S. 137, 142 (1970).
the Court identified another possible criterion for determining the permissible burden on commerce: whether the "local interest involved ... could be promoted as well with a lesser impact on interstate activities." The avowed purpose of the state takeover statutes is to protect shareholders. This purpose may be better implemented through the provisions of the Williams Act without imposing the burdens inherent in the state takeover statutes.

In sum, although state takeover statutes supply a legitimate but tenuous local interest, the burdens imposed on interstate commerce are clearly beyond the permissible limit, thereby rendering them unconstitutional. In addition, there is a less intrusive alternative—the Williams Act—which represents all interests and provides a uniform system of regulation.

**Preemption by Federal Law**

Even though the federal securities statutes specifically eschew preemption, state legislation concerning tender offers raises the question of whether federal regulation of tender offers should be exclusive. Preemption, a judically developed theory, is derived from the supremacy clause of the United States Constitution, providing that the laws of the United States shall be the "Supreme Law of the land." Thus, under the supremacy clause a state law is invalid when it conflicts directly with federal law, making compliance with both impossible. In addition, a state law with a valid purpose consistent with federal legislation may nevertheless be invalid where its effect is to pose an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The traditional determination for preemption is whether Congress intended, in passing federal legislation in an area, to preempt state law. Where Congress has expressly declared that federal law shall be exclusive, there is no doubt that states are precluded from regulation of the activity. However, where Congress has not expressly prohibited dual regulation nor expressly declared

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193. *Id.* at 142.
194. U.S. Const. art. VI, § 2.
196. The test was established in *Hines v. Davidowitz*, 312 U.S. 52 (1941), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and reaffirmed by the Court in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).
its exclusionary exercise of authority, federal preemption may still be implied.198 This implied intent may be shown by: 1) a Congressional scheme of regulation so pervasive that it is reasonable to infer that Congress left no room for the states to supplement it; 2) when the nature of the subject matter demands exclusive federal regulation to achieve uniformity vital to national interests; and 3) where state law is in conflict with federal law so as to pose an obstacle to the accomplishments of congressional objectives.199 An examination of congressional intent and the operation of the state takeover statutes shows that the area should be preempted by federal law.

Expressed Intent

Congress has addressed itself to the preemption issue in section 28(a) of the Securities Exchange Act of 1934 which provides:

Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.200

It has been contended that the Securities Exchange Act of 1934, by its own terms, negates any inference of preemption, expressly "saving" all state legislation.201 This proposition is largely supported by the historical relationship between concurrent federal and state regulation of securities transactions.202 The applicability of section 28 to tender offers is questionable, for state laws regulating takeovers have radically departed from state blue sky laws.203 The question is also raised whether section 28 should be construed to apply to amendments, such as the Williams Act, particularly since the state takeover statutes may involve a type of jurisdiction not contemplated by Congress. Where, as here, subsequent state legislation is not of substantially the same character as those laws Congress intended to save, traditional preemption analysis supplants the

198. Id.
201. See Shipman, supra note 1, at 759-60.
203. The most obvious departure from the traditional blue sky laws is found in the extraterritorial impact of the statutes.
saving clause even if the clause might appear to protect the state statute.\textsuperscript{204} Since it is not expressly clear that Congress intended to save state takeover statutes from preemption, it is necessary to consider whether preemption is implied. The first inquiry under that doctrine is whether the congressional scheme of regulation under the Williams Act is so pervasive as to leave no room for supplemental state legislation.\textsuperscript{205}

\textit{Pervasive Federal Regulation}

The principle that pervasive federal regulation will impliedly preempt state legislative activity formed the basis of the decision in \textit{City of Burbank v. Lockheed Air Terminal Inc.},\textsuperscript{206} in which the United States Supreme Court struck down a city curfew ordinance regulating air traffic and noise pollution at certain times of the day. Congressional intent to create a comprehensive plan controlling air traffic and noise pollution was shown. One commentator has cited \textit{Burbank} as persuasive authority for federal preemption of state takeover statutes by the Williams Act.\textsuperscript{207}

The question of whether the Williams Act pervades the field of tender offers is a difficult one for the courts.\textsuperscript{208} The argument on one side is that the Williams Act, unlike the Noise Control Act of 1972 involved in \textit{Burbank}, is not a comprehensive regulatory scheme, but concerns only a minimum disclosure standard.\textsuperscript{209} The opposite argument contends that the Williams Act combined with the federal securities acts provides the necessary pervasive regulation to preempt state legislation.\textsuperscript{210} Accepting the latter argument's weakness, the second determination under preemption analysis is whether there is a dominant federal interest in national uniformity in the area of tender offers.\textsuperscript{211}

\textsuperscript{206} 411 U.S. 218 (1974).
\textsuperscript{207} See \textit{Commerce Clause}, supra note 1, at 1163-64.
\textsuperscript{209} The court held that the Williams Act was not a pervasive scheme preempting state takeover statutes. This decision was affirmed on appeal, 577 F.2d 1256 (5th Cir. 1978), and is presently before the United States Supreme Court, 47 U.S.L.W. 3463 (1978) (Docket No. 78-759).
\textsuperscript{210} See Shipman, supra note 1, at 759-60.
\textsuperscript{211} 411 U.S. 624, 638-40 (1973).
Dominant Federal Interest

One major obstacle looms in the way of preemption and the concomitant need for national uniformity. For forty years concurrent jurisdiction has existed between state and federal agencies in the field of securities regulation. Such concurrent jurisdiction was reaffirmed in Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. Ware where the United States Supreme Court held that New York Stock Exchange Rules calling for the arbitration of any controversies arising out of the termination of employment did not preempt wage relief available under California law. The Court determined that there was no need for national uniformity under federal securities policy in the area of wage claims, and more importantly, that Congress had expressly provided that the stock exchange should be subject to state regulation of the type involved. Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation. Given this traditional role of the states in the area of securities regulation, it has been argued that the federal interest in tender offers cannot be deemed so dominant that the area is one of exclusive federal concern.

However, the tender offer situation is not a case in which the contention is being made to federalize that which has traditionally been a matter of state law. On the contrary, federal legislation existed prior to parochial state takeover laws. With the sole exception of Virginia, all of the state takeover laws were passed after the adoption of the Williams Act. In this regard, the cases relied on by the states to support coexistence of state and federal regulation of tender offers are inapposite because they involve laws which existed prior to the enactment of federal securities legislation and governed transactions strictly local in nature.

214. Id. at 136.
215. Id. at 136-37.
216. Langevoort, supra note 8, at 247-48. See also Great Western United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977). The case was sustained on appeal, 577 F.2d 1256 (5th Cir. 1978), and is presently before the United States Supreme Court, 47 U.S.L.W. 3463 (1978)(Docket No. 78-759).
217. The Virginia takeover statute became effective March 5, 1968, while the Williams Act became law on the 29th of July, 1968.
218. See note 212 supra.
The Court in City of Burbank v. Lockheed Air Terminal, Inc.,\(^{219}\) discussed the need for uniformity concerning air traffic, reasoning that if independent jurisdictions were able to pass legislation controlling air traffic and noise pollution, the result would be a severe limitation on the ability of federal agencies to control congestion and confusion in air traffic.\(^{220}\) Similarly, if state takeover statutes in the area of tender offers are allowed to stand, the result may cause serious difficulties for a corporation to complete an offer successfully. For example, a tender offer for shares of a Delaware corporation with its principal place of business in Ohio and substantial portions of its assets in Ohio and Indiana, might be subjected to the takeover laws of all three states. The hearing, which could be required in Ohio and Indiana, could provide a delay that might conflict with Delaware's requirement that the offer be made not less than twenty nor more than sixty days after the delivery of a statement of intent to make the offer. These potential problems may be resolved in substance by reference to established choice of law doctrines and, in any event, by cooperation among regulatory agencies. Nevertheless, the argument for uniform control of tender offers has considerable force and lends support for preemption.\(^{221}\) The national scope of our securities market and the broad national ownership of publicly held companies combine to make the federal interest in the regulation of tender offers dominant.

**Conflicting Federal and State Laws**

The third test for implied preemption—whether state laws conflict with the efficient administration of federal laws—provides the most persuasive argument that the takeover statutes should be preempted. Although simultaneous compliance with the Williams Act and the various state statutes is possible, the latter prevent the full accomplishment of congressional purpose.\(^{222}\)

The congressional purpose in adopting the Williams Act was to insure a fair field of competition in connection with contests for corporate control.\(^{223}\) The Williams Act, therefore, reflects a careful balancing of the need for substantive regula-

\(^{219}\) 411 U.S. 624 (1973).
\(^{220}\) Id. at 638-39.
\(^{221}\) See Commerce Clause, supra note 1, at 1165-66.
\(^{222}\) 411 U.S. at 624.
\(^{223}\) See notes 45-47 and accompanying text supra.
tion of tender offers with the desire to preclude unnecessary restraints on the capacity of interested persons to make tender offers. Unfortunately, state takeover statutes upset this carefully balanced process and impose burdens on the offeror that either were expressly or implicitly rejected by Congress.\textsuperscript{224}

The additional disclosure required by the state statutes is of questionable materiality to securities holders in making an investment decision. Such additional disclosures can obscure the necessary information contained in the tender offer, and, if inaccurate, can provide incumbent management with an unwarranted defense.\textsuperscript{225} In addition, the disclosure requirements of the state laws are much more extensive for the offeror.\textsuperscript{226} This unequal regulation of the offeror and target company stands in sharp contrast to the regulation under the Williams Act. The waiting periods and the administrative hearings provided by state laws run directly contrary to the Williams Act,\textsuperscript{227} as do other substantive provisions.\textsuperscript{228}

While Congress intended to balance the interests of all parties by passage of the Williams Act, the state statutes benefit the target company at the expense of the offeror.\textsuperscript{229} In sum, state takeover statutes impose substantial and unequal burdens on the offeror never contemplated by the Williams Act. Moreover, the generic provisions of the state laws, pre-filing notices, and lengthy waiting periods were expressly rejected by Congress.

Proponents of the state statutes argue strongly that the Williams Act established only minimum standards and stricter state legislation does not require preemption.\textsuperscript{230} They cite

\textsuperscript{224}For example, the advance disclosure and filing provisions would have prevented persons from making cash tender offers or certain other acquisitions of securities until twenty days after filing information with the SEC. However, this was expressly rejected. 113 Cong. Rec. 854-57 (1967).

\textsuperscript{225}The institution of lawsuits charging faulty compliance with disclosure requirements have become a popular defensive tactic by target companies, hopefully buying additional time with which to defeat the offer. E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control 206 (1977).


\textsuperscript{227}See notes 106-120 and accompanying text supra.

\textsuperscript{228}See notes 121-131 and accompanying text supra.

\textsuperscript{229}See Forbes, Feb. 1, 1976, at 24-25; see note 185 and accompanying text supra. See also Aranow & Einhorn, supra note 1, at 173-74, 184-85.

\textsuperscript{230}See Shipman, supra note 1, at 759-60.
Florida Lime & Avocado Growers, Inc. v. Paul as persuasive authority for additional state regulation of tender offers. In Florida Lime, the United States Supreme Court upheld a California regulation governing the content of avocado oil sold within the state. Federal regulation pursuant to the Agriculture Adjustment Act gauged the maturity by a standard other than oil content, and thus a conflict existed between the state and federal agencies. The Court ruled that the supremacy clause did not prohibit California from excluding Florida avocados certified as mature under the federal regulations but containing less than minimum oil content for California. The Court concluded that "there is neither such actual conflict between the two schemes of regulations that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." The Court reasoned that state regulation may stand so long as dual compliance is possible, and no demonstrated need for national uniformity exists. The Court held that the stricter standard, although in actual conflict with federal regulation, withstood the constitutional challenge, basing its decision on "minimum" rather than "uniform" standards.

In response to the above analysis, a more recent case has given added direction concerning the importance of national versus local impact. In Jones v. Rath Packing Co., the United States Supreme Court found that California weight labeling requirements on certain processed foods were in conflict with federal law and thus preempted. Under the California regulation, the only permissible variations from the stated weight were those caused by unavoidable deviations in the manufacturing process, whereas the federal regulation permitted variation caused by distribution losses as well. Accordingly, packages complying with federal regulation risked state action for noncompliance. Although it was possible to comply with the state law without triggering federal enforcement, the Court felt that the state law would impede a purpose of the federal regulation, that of facilitating value comparisons by shoppers, and therefore should be preempted.

The somewhat conflicting results reached by the Court in Florida Lime and Jones may be reconciled. The distinguishing fact involved the extraterritorial impact of the state statutes

232. Id. at 145.
233. Id.
and the need for national uniformity. To the extent that state takeover statutes supplement federal securities laws by filling in the interstices in federal law, no objection should properly be raised.\textsuperscript{235} But, as has been shown, the state statutes go far beyond that to the point of frustrating the purpose of the Williams Act. Therefore, preemption analysis of state takeover statutes cannot stop with the possibility of concurrent jurisdiction, but must look to the immediate impact of the statutes on other jurisdictions.

In \textit{Northern States Power Co. v. Minnesota},\textsuperscript{236} the court dealt with a state nuclear radiation safety regulation which was stricter than regulations established by the Atomic Energy Commission. In acknowledging that concurrent jurisdiction was feasible, the court struck down the state regulation emphasizing that the plant was part of an interstate nuclear power transmission system which made possible the purchase and sale of electric power between major systems across the nation, and concluded that only through the application and enforcement of the uniform standards of a national agency would those objectives be assured.\textsuperscript{237} The court, in strengthening its position, stated:

> Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power.\textsuperscript{238}

Since national energy policy was directly affected by any attempt to regulate nuclear safety standards, the court concluded that the appropriate body to deal with such standards

\textsuperscript{235} It is beyond the scope of this comment to delineate with particularity the areas in which the states properly could regulate tender offers. Nevertheless, assuming the absence of any attempt to upset the balance between a tender offeror and the target company, and assuming the existence of a jurisdictional prerequisite not burdensome on interstate commerce, it appears that the states may regulate tender offers:

- for non-public companies;
- that are wholly intrastate in nature;
- for Securities Exchange Act Section 15(d) companies which are not covered by the Williams Act;
- insofar as tender offers are unduly burdened by internal corporate machinations; and
- by proscribing fraud in connection with a tender offer by either the offeror or the target company.

\textsuperscript{236} 447 F.2d 1143 (8th Cir. 1971).
\textsuperscript{237} \textit{Id.} at 1154.
\textsuperscript{238} \textit{Id.}. 
was an agency serving a national interest—the Atomic Energy Commission.

A similar analysis of state takeover legislation leads to the conclusion that the Williams Act is preemptive, and the SEC is the appropriate body to deal with tender offers. Because of the sharp divergence between the state and federal approaches, there is no room for adherence to the requirements of both regulatory schemes. Various conflicts will result if the state statutes are allowed to stand. Unlike the securities market, the challenged statute in *Florida Lime* involved local industry, was enacted and administered by a local agency, and was not supported by a clear federal intent to regulate.

In considering the national scope of the securities market, the broad national ownership of publicly held corporations, and the extraterritorial coverage of state takeover statutes, the need for uniform regulation of tender offers is evident. Congress has set forth a statutory framework under the Williams Act in which the tender offer may proceed. The Williams Act provides uniformity, convenience, and certainty in regulating tender offers, and assures that the offeror, management, and shareholder interests will be protected. In disrupting this framework through extensive disclosure requirements, pre-filing, and hearing procedures, state takeover statutes have tipped the balance in favor of the target company. This legislative imbalance poses an "obstacle to the accomplishments and execution of the full purpose and objectives of Congress"239 and should be preempted.

**A Federal Solution**

Resolution of the conflicts reflected in the different approaches of the Williams Act and the state takeover statutes could be dealt with at the federal level by judicial or legislative action.

Judicial resolution of these issues may be long in coming. Obviously, the matter will not be laid to rest by the decision of a single district court turning on the peculiarities of the state statute involved.240 Given time, the preemption and constitu-

240. The court in Great Western United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), held that the Idaho takeover statute is unconstitutional, placing an undue burden on interstate commerce, and is preempted under traditional preemption analysis. The case was sustained on appeal, 577 F.2d 1256 (5th Cir. 1978), and is presently before the Supreme Court of the United States, 47 U.S.L.W. 3463 (1978) (Docket No. 78-759).
tional issues will be resolved. In the meantime, congressional action should be taken to nullify state legislation concerning tender offers.

Congressional action might take the course of total preemption, expressly providing that "no state or political subdivision thereof may adopt or enforce tender offers." This approach is probably not politically feasible at this time, for it would prohibit states from regulating even those bids not subject to federal regulation. A more reasonable approach would be for Congress to preempt state legislation when federal law is applicable. This position has been adopted by the American Law Institute which stated:

(a) the state legislation tends to be pro-management in contrast to the neutral tone of the Federal Provisions . . .; 
(b) the application of state legislation to foreign corporations . . . introduces needless complexity in an area already regulated by Congress; and (c) it is just as well to make this area exclusively federal before this sort of state legislation spreads.

Conclusion

The two tiers of legislation which now exist have injected considerable confusion into the tender offer area. While the Williams Act was designed to create a balanced scheme of regulation, state takeover statutes are anything but even-handed. Some impose substantial and unequal burdens upon tender offers never contemplated by the Williams Act. The fundamental provisions of these statutes—pre-filing notification, disclosure requirements, administrative hearings, and the extraterritorial reach of the statutes—are in conflict with the established purpose of the Williams Act. These statutes upset the delicate balance of forces in tender offer contests, and constitute a regressive and conflicting regulatory scheme.

Even though state takeover statutes serve a legitimate though tenuous local interest, the burden imposed upon interstate commerce is too onerous. There are less intrusive means of protecting investors, while allowing the offeror and management an equal opportunity to fairly present their cases. There-

241. *Commerce Clause*, supra note 1, at 1173 (emphasis omitted).
fore, these statutes are unconstitutional under the commerce clause.

In order to inject more certainty into the economic process, of which the tender offer is a part, judicial or congressional action should be taken to preempt state takeover statutes, thus restoring the balance of forces Congress deemed so essential to the conduct of takeover contests.

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