State Tender-Offer Legislation Interests Effects and Political Competency

Donald C. Langevoort
STATE TENDER-OFFER LEGISLATION: INTERESTS, EFFECTS, AND POLITICAL COMPETENCY*

Donald C. Langevoort†

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In the late Spring of 1976, Delaware enacted legislation to regulate takeover bids and tender offers made for domestic corporations.1 This action marks the most significant assertion of state power over transactions that had previously been subject only to the federal securities laws.2 Although Delaware was not the first

* The author wishes to acknowledge the assistance of Professor Louis Loss of the Harvard Law School in preparation of this Article.
2 On the relationship between state and federal law in the securities field, see 1 L. Loss, SECURITIES REGULATION 103-05 (2d ed. 1961); L. Loss & E. Cowett, BLUE SKY LAW 230-44 (1958); Armstrong, The Blue Sky Laws, 44 VA. L. REV. 713 (1958); Jennings, The
state to act, the number of businesses incorporated in Delaware makes its law especially important.

During the business "growth" years of the 1960's there developed substantial pressure for change in the securities laws to deal with takeover bids and tender offers. It was argued that shareholders of target companies desired more extensive information about the offeror and its plans for the target company in order to make informed decisions about whether to "disinvest" by tendering their stock, or to hold onto it and assume the risks brought about by a change in control. It was also hoped that offers made by "raiders"—those who seek control of the target in order to improperly loot or liquidate it—would be discouraged, or at least uncovered, by stricter disclosure requirements. Previously, the law required only insiders to make disclosure prior to trading in securities, thus providing little protection against raiders.

Congress responded to this concern in 1968 by adopting the Williams Act amendments to the Securities Exchange Act of 1934, which require a minimum level of disclosure and prohibit fraudulent practices in connection with takeover bids for corporations registered with the Securities and Exchange Commission (SEC) under section 12 of the 1934 Act. In the same year, Virginia passed tender-offer legislation, and by the end of 1976, twenty-two other states had followed suit. Tender-offer laws have unusual impor-

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See notes 9-10 infra.

4 Tender offers are public solicitations for shares of a "target" company, generally in exchange for cash at a price above the current market value of the shareholder's stock. For a discussion of the mechanics of tender offers generally, see E. Aranow & H. Einhorn, Tender Offers for Corporate Control (1973); I. Fлом, M. Lipton & E. Steinberger, Takeovers and Takeouts—Tender Offers and Going Private (1976); Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. PA. L. REV. 317 (1967); Hayes & Taussig, Tactics of Cash Takeover Bids, 45 HARV. BUS. REV., Mar.-Apr. 1967, at 135.


6 See, e.g., 113 CONG. REC. 24665 (1967) (remarks of Senator Kuchel).

7 See Brudney, A Note on Chilling Tender Solicitations, 21 RUTGERS L. REV. 609 (1967).


tance, for in contrast to blue sky regulation, which controls only transactions "occurring within the regulating state's borders," the takeover laws cover solicitations made anywhere in the world if the


The state insurance statutes are similar to the tender-offer statutes, except that they commonly grant the state insurance commissioner broader authority on which to disapprove bids. See, e.g., Md. Ann. Code art. 48A, § 494(e) (1972). These statutes involve issues of insurance law policy and federal-state allocations of competency that are beyond the scope of this Article. It is not likely that the state statutes fall within the ambit of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1970), which provides that the "business of insurance" shall be controlled by state legislation unless expressly preempted by federal law. The investor-protection rationale of the tender-offer statutes seems to take them outside of "business" regulation. See SEC v. National Sec., Inc., 393 U.S. 453, 457-61 (1969); E. Aranow & H. Einhorn, supra note 4, at 171 n.82. But see Shipman, Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act, 21 Case W. Res. L. Rev. 722, 725 n.17 (1970).

11 See, e.g., L. Loss & E. Cowett, supra note 2, at 17-21.
The target company has substantial contacts with the regulating state. These state laws tend to impose more restrictions than the federal legislation and hence have a greater impact on the offeror's conduct than the Williams Act when both state and federal law apply. Although called "investor-protection" statutes by their sponsors, they have been criticized as little more than "parochial [attempts] to protect incumbent management and local industry" by making completion of a successful tender offer a near impossibility.

This Article will discuss the nature and propriety of state regulation of tender offers. Part I, after briefly describing the Williams Act, examines the purposes and effects of the state legislation. Part II considers possible constitutional challenges to the validity of the statutes. Part III suggests ways in which Congress might deal with problems raised by the state laws in light of the American Law Institute's proposed Federal Securities Code.

I

THE LEGISLATION

A. The Williams Act

Section 13(d) of the Williams Act requires a person or corporation that becomes the owner of five percent or more of any class of the equity securities of a company registered pursuant to section 12 of the Securities Exchange Act of 1934 to file certain information with the Securities Exchange Commission and the "target" company. Filing must occur within ten days after reaching or exceeding the five percent ownership level. Certain purchases are exempted, most notably those failing to result in the acquisition of more than two percent of the relevant class of securities over a twelve month period. The purchaser must disclose its back-
ground and identity, its source of funds, and must state the purpose of the acquisition and any plans it might have for major changes in the operations or structure of the target.\footnote{Id. \S 13(d)(1)(A)-(E), 15 U.S.C. \S 78m(d)(1)(A)-(E) (1970).} Section 14(d) requires that an offeror required to file under section 13(d) also file with the SEC any solicitation materials prepared in connection with the offer, and that the solicitation materials contain certain information included in the 13(d) statement.\footnote{Id. \S 14(d)(1), 15 U.S.C. \S 78n(d)(1) (1970).} Such solicitation materials must be sent to the target and the target's shareholders simultaneously.\footnote{Id.} Section 14(d) also allows tendering shareholders to withdraw their shares during the first seven days of the offer or sixty days after the date of the offer.\footnote{Id. \S 14(d)(5), 15 U.S.C. \S 78n(d)(5) (1970).} When the number of shares tendered exceeds the number of shares sought in the offer, the offeror must buy from among the shares tendered in the first ten days of the offer on a pro rata basis.\footnote{Id. \S 14(d)(6), 15 U.S.C. \S 78n(d)(6) (1970).} If the offeror changes the terms of the offer during its course it must apply those changes to shares previously tendered.\footnote{Id. \S 14(d)(7), 15 U.S.C. \S 78n(d)(7) (1970).} Section 14(e) prohibits fraudulent acts in connection with a tender offer.\footnote{Id. \S 14(e), 15 U.S.C. \S 78n(e) (1970).} Section 14(f) requires that an offeror, who plans to replace a majority of the board of directors of the target without calling a shareholders' meeting, send to shareholders a statement substantially similar to the proxy solicitation required by the SEC in a normal election of directors.\footnote{Id. \S 14(f), 15 U.S.C. \S 78n(f) (1970).}

Like its counterpart state statutes, the federal act is designed as an investor-protection law. The legislative history of the Williams Act shows congressional concern for the interests of corporate management.\footnote{See Loomis, \textit{Purchases by a Corporation of its Own Securities}, 22 \textit{Record} of N.Y.C.B.A. 275, 279 (1967). \textit{See generally} Senate Comm. on Banking and Currency, \textit{Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids}, S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).} Indeed, it has been suggested that the initiative for the bill came from representatives of businesses subject to the
threat of takeover. Nevertheless, both the SEC and distinguished commentators supported the final bill.

The statute makes tender offers somewhat less desirable vehicles for acquiring control of a target since it forces the offeror to disclose information that he would normally prefer to keep confidential. Critics of the Act charge that it discourages beneficial takeovers because it does not distinguish takeovers that would remove inefficient management and offer a fair price to shareholders from those aimed at "looting" the target, the evil the Act sought to prevent. Clearly, the Act increases the possibility of litigation for the offeror, and thus threatens to increase the cost of an already expensive process. On the other hand, the federal law gives shareholders the benefit of certain information about the offeror and the offer, and such disclosure may induce other potential bidders to compete for control of the target, thus raising the price offered for the target's shares.

The amendments as finally enacted evidence a congressional desire to "avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." Although earlier versions of the bill were unabashedly anti-takeover, the final version balances the interests of offeror and target more evenly. Most importantly, the Act preserves the offeror's right to move secretly and to announce his offer suddenly. This balance has been abandoned in the "little Williams Acts."
B. State Law—Coverage

All the state takeover statutes apply to non-"private" offers to purchase equity securities of a corporation which has substantial contacts with the regulating state, if such a purchase would result in the ownership by the offeror of a defined percentage of those securities. Different state laws elaborate on this basic framework in varying and often complex ways.

The most striking feature of the state laws is their extraterritorial coverage: they apply to all transactions between the offeror and the target's shareholders, so long as the target is in some way a "local" enterprise. That no shareholders may live in-state is irrelevant: one of the first bids attacked and found wanting under the Ohio law complied with the provisions of that law as to Ohio shareholders, but failed to comply with the law as to out-of-state shareholders. Each of the statutes applies when the target company is incorporated in the regulating state. However some statutes, like Hawaii's, do not apply unless the target does business in-state. Most of the states regulate the takeover of targets incorpo-
rated elsewhere if they have an in-state principal place of business or some similar contact.\textsuperscript{38} New York regulates bids for corporations having their principal places of business and substantial assets in-state.\textsuperscript{39} South Dakota extends extraterritorial coverage the farthest by attempting to regulate the takeover of any target that is incorporated, has its principal office, or has substantial assets located in the state.\textsuperscript{40} Some states may attempt to regulate the takeover of the target parent based on the in-state contacts of its subsidiary.\textsuperscript{41}

This aggressive assertion of legislative jurisdiction points to an apparent inconsistency with the professed purpose of the acts. The legislation purports to be investor-protection oriented and is most often made part of the state "blue sky" legislative provisions. The ostensible purpose is to allow the investor to make an "informed" choice to tender or to remain in the potentially reorganized corporation. Yet jurisdiction over the tender offer depends solely on the contacts of the target corporation with the state, not on the involvement of resident investors. Effective regulation of takeover bids depends on regulatory statutes having extraterritorial scope; if the state regulated only in-state transactions, the offeror could avoid regulation by refusing to solicit from in-state shareholders.\textsuperscript{42} Clearly then, these laws should be analyzed as more analogous to state corporation laws than to narrower blue sky laws, even though the latter may occasionally apply to foreign corporations.\textsuperscript{43}

Traditionally, a local interest in the target is sufficient under the broad rule justifying jurisdiction when the "application of a

\textsuperscript{38} Delaware, Hawaii, Nevada, and Virginia are the exceptions. See \textsc{Del. Code tit. 8, § 203(a)} (Cum. Supp. 1976); \textsc{Haw. Rev. Stat. § 417E-1(5)} (Supp. 1975); \textsc{Nev. Rev. Stat. § 38.37} (1973); \textsc{Va. Code § 13.1-529(e)} (1973). The determination of a corporation's principal place of business is subjective. Thus, an offeror might be unable to determine whether its planned tender offer will be subject to state regulation. In discussing the Ohio law, one commentator has suggested that in determining a principal place of business, Ohio courts will look to the "identity and location of the principal center of operational control of the target's consolidated operations." Vaughan, \textit{State Tender Offer Regulation}, 9 Rev. Sec. Reg. 969, 970 (1976).

\textsuperscript{39} \textsc{N.Y. Bus. Corp. Law § 1601(a)} (McKinney Supp. 1976).

\textsuperscript{40} \textsc{S.D. Compiled Laws Ann. § 47-32-3} (Supp. 1976).

\textsuperscript{41} In the Imetal-Copperweld Corp. battle, Ohio based jurisdiction on the in-state location of Copperweld's major operating subsidiaries. [1975] \textsc{Sec. Reg. & L. Rep. (BNA) No. 329}, at A-6.

\textsuperscript{42} See note 36 and accompanying text supra.

\textsuperscript{43} The states vary in their manner of codifying the tender-offer legislation. For example, the Delaware proposal is part of the state's General Corporations law, while the Ohio law is codified as a state securities statute. \textit{Compare} \textsc{Del. Code tit. 8, § 203} (Cum. Supp. 1976), \textit{with} \textsc{Ohio Rev. Code Ann. § 1707.041} (Page Supp. 1975).
state's [law is] to an act or a transaction occurring outside the borders of the state but having significant repercussions and reactions within the state . . . ."{44} However, unless other policies supporting the state's power to act augment this jurisdictional basis, serious conflicts arise when the interests of other states{45}—the shareholder's home state, for example—differ from those of the regulating state. This problem is most serious when the target company has only its headquarters in the regulating state and has the major portion of its assets out-of-state.

In an important article focusing on the Ohio law,{46} Professor Shipman has invoked the internal-affairs doctrine to justify the global reach of these statutes.{47} That doctrine permits a dominant state to control "the relationships inter sese of the corporation, its directors, officers, and stockholders."{48} Shipman acknowledges that takeover bids do not actually involve transactions that are purely internal corporate matters, but he finds such offers sufficiently analogous to certain corporate acts to allow regulating states to exercise primary legislative jurisdiction over them. First, he notes that the tender offeror is an "incipient" controlling person who, if his bid is successful, will undertake fiduciary obligations under state law. Hence, the regulating states can require disclosure based on this potential relationship to the corporation.{49} Additionally, the local jurisdiction should have the right to protect against overreaching transactions because a successful bid causes the transfer of the "corporate asset" of control.{50} Finally, a successful takeover may cause major changes in the composition of the target's board of directors. Such shifts affect the voting power of shareholders—a traditional concern of corporate law.{51} Although Shipman finds none of these arguments alone "wholly satisfying,"

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{44} Kaplan, Foreign Corporations and Local Corporate Policy, 21 Vand. L. Rev. 433, 444 (1968).
{45} See Shipman, supra note 10, at 748-50.
{46} Shipman, supra note 10.
{47} The internal-affairs doctrine has significance for adjudicative jurisdiction as well as legislative jurisdiction. Courts consider the doctrine as a variation on the rule of forum non conveniens, and defer to the courts of the state of incorporation to decide matters of corporate policy.
{49} Shipman, supra note 10, at 744.
{50} Id.
{51} Id. at 744-45.
the cumulative effect indicates . . . that a takeover bid is similar enough to a proxy solicitation so that the state of incorporation can regulate the practices of insurgents in the former to substantially the same extent as in the latter.52

These analogies are persuasive, if somewhat too specific. An examination of the policies underlying the rule of primary jurisdiction strengthens Shipman's conclusion. The internal-affairs doctrine displaces otherwise controlling local law for a variety of reasons—some constitutional,53 but most pragmatic.54 Uniformity of participatory rights is necessary, for instance, to assure certainty in corporate affairs, to ease the burdens of corporate administration, and to provide a single structure for "corporate democracy."55 Otherwise, inter-forum conflicts might cause disruption in corporate affairs, discrimination among shareholders, and substantial "forum shopping" by litigants.56 For example, if each state in which a corporation's shareholders were domiciled could apply its proxy rules to the corporation, the validity of a corporate election might depend solely on the forum in which the election was contested. Such a rule would result in corporate chaos.

Similar arguments apply in the takeover-bid context.57 Although investor protection may be the responsibility of the investor's home state, the incorporating state may also protect the shareholders of a corporation in order to prevent corporate looting and other undesirable consequences of a takeover. Similarly, the state of incorporation might legitimately desire to promote equality of treatment for shareholders by extending equal participatory rights to all offerees in a tender offer. Since tender offers are usually made to every shareholder of a corporation, each shareholder should receive the same information, and should have consistent rights and remedies available for his protection.58 Thus,

52 Id. at 745.
54 See Reese & Kaufman, supra note 48, at 1125-27.
55 See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 306 (1969) (duty of controlling shareholders). These elements are present in case law and statutory law.
56 See Reese & Kaufman, supra note 48, at 1125.
57 But see Note, Commerce Clause Limitations upon State Regulation of Tender Offers, 47 S. CAL. L. REV. 1133, 1154-55 (1974). This discussion should not be confused with a consideration of the constitutional validity of such legislation which is discussed in Part II infra.
58 Otherwise, a judge applying local law to protect in-state shareholders could upset a successful tender offer, while a judge in another state applying different law to the same facts would be forced to uphold the offer. In this sense, shareholder rights would in fact be unequal.
although a transfer in control or ownership does not directly affect the internal governance of the corporation, the internal-affairs doctrine rests on policies suggesting that the one state with the most easily identified contact with the target—the incorporating state—should have "primary" legislative jurisdiction over tender offers for control of its domestic corporations.\textsuperscript{59}

These strong policy arguments in favor of "primary" jurisdiction for the state of incorporation do not apply with equal force to states asserting jurisdiction based on the in-state location of the corporation's "principal place of business" or assets. The difficulty in determining a "principal place" of business creates the likelihood that two or more states might assert their right to "primary" jurisdiction, thus removing the certainty the doctrine seeks to promote. Moreover, both the incorporating state and the "principal place" state are likely to assert a right to regulate. Therefore, justification here must rest solely on the state's interest in protecting the local assets of the target corporation from improper use. Most statutes, however, attempt to do much more than offer the limited protection this rationale suggests would be appropriate. In this sense, legislative jurisdiction based on the internal-affairs doctrine is problematic.

It is of course crucial to the offeror to determine whether its offer will be regulated in any particular state. Generally, a state will regulate any tender offer for an equity security of a target company that might result in the offeror acquiring more than a set percentage of the target's stock.\textsuperscript{60} Statutes cover both cash and exchange offers\textsuperscript{61} and usually define equity securities to include stock, convertible securities, warrants, and, in some states, any other right which the local securities commission, in the interest of

\textsuperscript{59} An exception is the case of "pseudo-foreign" corporations—those that are incorporated out-of-state but have all other significant contacts with the forum state. In this instance, the forum state can generally apply its own law governing corporate affairs. \textit{See generally} Kaplan, \textit{supra} note 44, at 447. California appears to be the most aggressive jurisdiction in imposing its corporate law on foreign corporations. \textit{See} Western Air Lines, Inc. \textit{v.} Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961). But California does not go so far as to regulate merely because of the in-state location of corporate headquarters or substantial assets.

\textsuperscript{60} \textit{See, e.g.}, KAN. STAT. § 17-1276(a) (1974) (20%); WIS. STAT. ANN. § 552.01(5) (West Spec. Pamph. 1976) (5%).

\textsuperscript{61} In most instances the Securities Act of 1933, 15 U.S.C. §§ 77a-77q (1970), will cover the exchange transaction, unless there is an exemption. If the transaction is federally regulated, there are sufficient pre-effective delays so that the advantages of speed and secrecy are lost, and incumbent management is well protected. Most of the discussion in the remainder of this Article is directed at cash tender offers.
In interpreting these definitions, many of the same problems and solutions existing in federal securities law will reappear in the state courts. The vagueness of the term "equity security" in the state acts parallels a similar difficulty in the Williams Act; thus, state courts may choose to follow federal court decisions defining "equity security." States may also follow federal law in defining "tender offer" as any solicitation for the target company's shares that might exert pressure on target company shareholders to make uninformed, ill-considered decisions to sell, even if such offers are not organized as traditional solicitations. Presumably, only offers made to all shareholders should be regulated. But in Utah, for example, the definition envelops all "offer[s] to acquire . . . made . . . directly or indirectly or through an agent by advertisement or any written or oral communication to offerees." Literally read, the Utah statute suggests that a private offer to purchase made by a single controlling shareholder may be regulated. That provision, and similar ones found in other statutes, may also be read to regulate the private purchase of a large block of shares from a controlling shareholder, especially if the purchase precedes or is followed by a traditional tender offer. The Delaware law, on the other hand, provides a clear definition of the kind of offer subject to regulation by reaching "any offer to purchase or invitation to tender equity securities for purchase made by an offeror to more than 30 of the holders of equity securities . . ." In most cases, however, the scope of state tender-offer statutes will depend on judicial and administrative interpretations.

Exemptions, varying from state to state, remove particular offers from the reach of the laws and thus narrow the scope of these

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definitional provisions. An interesting and significant exemption, found in some form in all but four of the statutes, exemption from regulation offers approved by the target board of directors; some states, however, condition exemption on the disclosure to shareholders of any inducements offered to the target's management or directors that might have affected a recommendation in favor of accepting the offer. Other states provide that an offer approved by the target is exempt only if it is made on the same terms to all shareholders. This exemption does not really protect investors because the position taken by the board of directors does not affect the investor's decision of whether to tender. At best, the exemption represents a legislative decision not to waste state supervisory resources on uncontested bids. More likely, it demonstrates the pro-management bias of the state statutes. Pennsylvania deviates slightly from the majority rule in this area by requiring at least some disclosure by the offeror in a "friendly" takeover, but otherwise exempting a friendly offer from statutory requirements.

Exemptions also typically apply to offers for control of corporations not registered under the federal securities laws, offers for corporations with less than some minimum number of shareholders and/or amount of assets, offers that would result in the acquisition of less than two percent of any class of the target's


73 See Shipman, supra note 10, at 750.


equity securities, ordinary brokers' transactions, isolated offers not made to shareholders generally, certain registered exchange offers, repurchase offers, and offers which the state securities commission believes are not made for the purpose or have the effect of influencing control over the target. Some states exempt from coverage takeover bids that are subject to approval by federal regulatory agencies. These exemptions have the net effect of focusing state regulation on contested battles for the control of important local industries.

In most regulating states, an "offeror" includes "each person who makes or in any way participates in making a take-over bid." Read literally, this definition might make anyone who participates in the planning or execution of an offer liable for violations of the state statutes. Thus, some states exempt certain employees, broker-dealers, attorneys, accountants, lending institutions, and the like.

C. State Law—Disclosure and Administrative Supervision

All of the acts require an offeror to make certain disclosures to offerees. In most of the regulating states, the state securities commission has the responsibility for monitoring disclosure. Most state laws require a disclosure process similar to that attending the public issuance of securities under the Federal Securities Act of 1933. In each state the offeror must file a detailed "registration

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80 E.g., Idaho Code § 30-1501(5)(b) (Supp. 1976).


85 E.g., Idaho Code § 30-1501(3) (Supp. 1976).


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statement” with the management of the target company and, in most states, with the state securities commission. Most statutes require filing within a specified time period—ranging from ten days in Colorado,88 to sixty days in Hawaii89—before the offer. Some other states require, in addition, public disclosure of the offer at the time of filing.90 This requirement is intended to eliminate the offeror’s tactical advantage of “secrecy and surprise.”91 During the period between the filing of the required statement and the beginning of the actual offer, the target company can execute defensive maneuvers, such as forcing charter amendments, issuing additional shares, arranging a “defensive” merger, or entering into competition with the offeror through an offer to repurchase.92 Only Colorado expressly forbids the target management from actively opposing the offer during the waiting period;93 in other states, the target can shower shareholders with adverse publicity warning them not to accept the offer well before the offeror is allowed to send its first mailing.94 During the waiting period, activity by arbitrageurs95 often raises the market price of the offeree’s stock, thus cutting down the value of the offeror’s premium for tender.

89 HAW. REV. STAT. § 417E-3(f) (Supp. 1975).
91 See Vorys, supra note 10, at 68. The Delaware law waives the waiting period requirement for offerors who enter into competition with a pre-existing offeror during the course of the latter’s offer. DEL. CODE tit. 8, § 205(b)(1) (Cum. Supp. 1976).
92 For general discussions of various defensive tactics, see E. ARANOW & H. EINHORN, supra note 4, at 219-76; Bromberg, Tender Offers: Safeguards and Restraints—An Interest Analysis, 21 CASE W. RES. L. REV. 613, 642-49 (1970); Hayes & Taussig, supra note 4, at 142-47. Improper acts by the target’s management may result in liability under federal or state law. Nonetheless, management has substantial freedom to act on its “business judgment.” See Cheff v. Mathes, 41 Del. Ch. 494, 504, 199 A.2d 548, 554 (1964).
93 COLO. REV. STAT. § 11.51.5-104(5) (Supp. 1975).
94 See Shipman, supra note 10, at 763.
95 Arbitrageurs purchase shares of stock subject to a tender offer on the open market at the lower market price in the hope of then tendering at the higher offer price. In doing this, they assume the risk that, for some reason, some or all of the tendered shares will not be accepted by the offeror. The increased demand for shares generated by arbitrage activity places an upward pressure on the market price of the stock. As a result, the difference between the offer and the market price is reduced—as is the incentive to tender. See E. ARANOW & H. EINHORN, supra note 4, at 177-80.
These possibilities increase the risk that the takeover bid will fail.

The waiting period allows the target's shareholders to consider the virtue of the offer free from the pressure that normally accompanies a tender decision and to make that decision after being fully informed of the target management's opinion of the merits of the offer. However, the waiting period may not rationally serve this purpose; it may cause a bid to fail for reasons unrelated to its merits. Presumably, the information management disseminates during the waiting period provides shareholders with some means of "valuing" the enterprise. The target's management might attempt, for instance, to prove that the offer price is too low, thus encouraging its shareholders to "wait it out." But there is no reason for disclosing this data only prior to a takeover, rather than at some other time. Shareholders selling shares on the open market are as much in need of any "undervaluation" data as those evaluating a tender request. In a consistent system of disclosure a corporation should periodically provide material data on valuation, not only before a takeover bid. Any information that the target management publicizes solely in response to a takeover bid is likely to be self-serving, and therefore suspect. A waiting period might provide other advantages to the target's shareholders, such as enabling them to consult their brokers on the desirability of tendering or giving the target company time to summarize previously disclosed data for those shareholders who had not previously considered selling their shares. Nevertheless, the undesirability of encouraging an incumbent management's defensive campaign may well outweigh these benefits.

The original pro-management version of the Williams Act,

66 For example, the book value or the liquidation value of the target corporation's stock may be well above the market price, either because of market expectations about the company's future or because of unrelated external economic factors. In the latter case, a change in external conditions may cause the market price of the shares to rise. In such a case, management may wish to inform shareholders of this fact and thereby encourage them to wait for "better times" rather than sell immediately.

67 Moreover, if management has a legitimate corporate reason for withholding the data, that reason should be no less compelling because of the tender offer. The information that shareholders need in making decisions about whether to buy or sell their shares is predictive, rather than historical data, and yet the securities laws do not compel full disclosure of predictions or projections. See Kripke, The SEC, The Accountants, Some Myths and Some Realities, 45 N.Y.U. L. Rev. 1151, 1197-1201 (1970). The waiting period does not remedy this shortcoming in disclosure.

68 But see P. ANISMAN, TAKEOVER BID LEGISLATION IN CANADA: A COMPARATIVE ANALYSIS (1974), reviewed in Coffey, Book Review, 124 U. Pa. L. Rev. 268 (1975). Given these arguments against the waiting period, the less restrictive alternative of an extended withdrawal period for prior tendered shares is clearly more desirable.
first introduced in 1965, contained a twenty-day waiting period requirement. The SEC objected to the provision on the grounds that it unfairly favored incumbent management, and also argued that the purposes of the waiting period would be better furthered if shareholders were permitted to withdraw their shares during some period in the course of the offer. The provision was then deleted and did not appear in the proposal debated in Congress.

The disclosure requirements vary from state to state. South Dakota's disclosure requirements are identical to those mandated by the Williams Act, and a copy of Schedule 13D may be filed in satisfaction of the state requirements. Ohio, by contrast, requires the filing of an extensive disclosure statement resembling a combination of a federal S-1 registration statement and a Schedule 13D. Ohio requires disclosure of the identity of the offeror, its source of funds for the offer, its plans or proposals for altering the structure or operations of the target, its prior ownership of target shares, and any contracts or arrangements it might have with respect to the target securities. Ohio also demands information about the offeror's organization and its capital structure. Copies of recent financial statements, descriptions of its major properties, any pending litigation that might create contingent liability for the offeror, descriptions of the business "done and projected" by the offeror, the names and biographical summaries of the offeror's directors and principal officers, and information concerning material transactions between the offeror and its officers and directors must be produced. Any other data deemed necessary by the Division of Securities for "full, fair and effective" disclosure will also be required. Pennsylvania requires disclosure of the effect of the proposed change in control on certain labor relations matters.

Proponents of the state statutes contend that disclosure may force tendering shareholders to look beyond the price offered for

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100 The SEC memorandum is reprinted in 112 CONG. REC. 19003, 19005 (1966).


104 See E. Aranow & H. Einhorn, supra note 4, at 159.


106 Takeover Disclosure Law, Act No. 19, §§ 5(4), 8, 1976 Pa. Legis. Serv. 37 (Purdon), [1977] 2 BLUE SKY L. REP. (CCH) ¶ 41,185, at 37,339, ¶ 41,188 (to be codified as PA. STAT. ANN. tit. 70, §§ 5(4), 8 (Purdon)).
their shares and consider the effect of the tender on the local community. They also argue that if the offeror is a known "raider," shareholders may refuse to sell. Shareholders might also retain their shares, hoping to participate in future earnings, if the offeror's management has a good reputation. But extensive disclosure does not assist the shareholder in making the key economic evaluation in deciding whether to tender. The shareholder must assess the relation of the price offered to the value of the target under current management. The target's management is more likely to have such information than is the offeror. Thus, the information disclosed is of little consequence except to the rare shareholder who places incumbent local interests above pecuniary gain. Such shareholders are generally privy to the operations of the target and are likely to obtain the desired information directly from the target without compulsory disclosure. Moreover, by disclosing the adverse consequences of refusing to tender, an offeror may "whipsaw" a shareholder into tendering. Disclosure of such adverse consequences need not and should not be compelled. In short, the financial cost of disclosure to the offeror outweighs any minimal benefit to the shareholder. At best, disclosure provides the "disinfectant" of publicity to discourage questionable bids. Yet, the Williams Act seems adequate for this purpose.

In Delaware, Colorado, Maryland, and Nevada, the offer may proceed without further supervision after disclosure. Idaho has no waiting period, but requires express approval of the securities commissioner before an offer can go forward. The remaining


109 See Brudney, supra note 7, at 616-20.

110 Id. Much of this data must be disclosed under the Williams Act. See 15 U.S.C. § 78m(d)(1)(A)-(E) (1970). To the extent that coverage overlaps, a state requirement is unnecessary.


states allow an offer at the expiration of the waiting period, unless the securities commissioner orders a hearing. The Commission may order this hearing on its own motion, and in some states must do so if the target's management requests it. In Minnesota and South Dakota a set percentage of the target's shareholders may also request a hearing. Virginia and Kentucky require the target's management to show good cause before their request for a hearing may be granted. A majority of the states grant a hearing simply if the target demands it. In these states, therefore, the target's management can extend the waiting period by demanding a hearing no matter how frivolous its objections. Most states set deadlines for the calling of the hearing and for the issuance of a decision by the hearing officer. In Ohio, for instance, a hearing must be held within forty days after the required information has been filed with the Division of Securities and the target company.

The New York Stock Exchange has objected to the delay occasioned by the waiting period. With respect to the Ohio statute, the Exchange noted:

During the 20-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 20-day period.

The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.

The Exchange's arguments apply with even more force to the additional delay occasioned by the hearing procedure.

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113 E.g., ch. 121, § 2, 1976 Mass. Adv. Legis. Serv. 17 (Lawyers Co-op), [1976] 1A BLUE SKY L. REP. (CCH) ¶ 24,262 (to be codified as MASS. GEN. LAWS. ANN. ch. 110C, § 2 (West)).

114 E.g., Act No. 44, § 1501(E), 1976 La. Sess. Law Serv. 26 (West), [1976] 1A BLUE SKY L. REP. (CCH) ¶ 21,152, at 17,233 (to be codified as LA. REV. STAT. ANN. § 51:1501(E) (West)).


120 Id. at A-12.

121 See Sommer, supra note 10, at 700.
The hearing is designed to determine whether the offeror has made "full and fair disclosure."\textsuperscript{122} Under this standard, a hearing officer could conceivably look at the adequacy of disclosure not only for the reasonable investor, but also for the "ethical" investor or naïve investor.\textsuperscript{123} If the disclosure meets the statutory standards, the hearing officer must approve the offer; if it does not, he may require such additional disclosure as is deemed necessary to bring the offer into compliance with the statute.

Seven states—Hawaii, Indiana, Louisiana, Minnesota, South Dakota, Tennessee, and Wisconsin—also require that the offer as a whole be "fair and equitable,"\textsuperscript{124} a standard similar to that imposed on public issues of stock under some blue sky laws. Thus a hearing officer might disapprove of an offer if he determines that the price offered is inadequate. Fortunately, in the only published decision interpreting such a provision, the Wisconsin Securities Commission has held that the adequacy of the price offered is to be tested in the market and not in a hearing.\textsuperscript{125}

For attempted takeovers of local companies which are developing substantial mineral deposits in Louisiana, that state requires the State Mineral Board to find that the offeror has shown by clear and convincing evidence that the takeover offer "will provide a positive benefit to this state, its citizens, and its resources, particularly with respect to the discovery, development, preservation and utilization of the mineral and other natural resources of this state."\textsuperscript{126} This standard of review makes it unlikely that any out-of-state offeror will be permitted to make such a bid unless its political power outweighs that of the incumbent managers. In its candid abandonment of the investor-protection rationale, then, Louisiana has enacted the most "parochial" of all the state statutes.\textsuperscript{127}

\textsuperscript{123} See Vorys, supra note 10, at 72.
\textsuperscript{127} Id.
Several state statutes contain disclosure provisions other than filing and review requirements. For example, Kansas, Massachusetts, Ohio, and Tennessee forbid offers by an offeror who has purchased a specified percentage of the target's stock within the previous twelve months and has not disclosed an intention to make an offer at the time of the prior purchase. This provision restricts the power of the potential offeror to test the market or to buy a block of the target's shares without paying a tender premium. However, the provision has the healthy effect of assuring equality of treatment among the target's shareholders.

Idaho, Minnesota, South Dakota, and Wisconsin impose ownership-information filing requirements similar to those in section 13(d) of the Williams Act. These provisions require anyone purchasing large blocks of shares over a short period of time to file information substantially identical to that filed prior to a tender offer. Idaho, Minnesota, and Wisconsin augment this rule by providing that no tender offer may be made within sixty days after such a filing, if the filing was delinquent. Alaska, Virginia, and Nevada require the filing of an information statement substantially identical to that required by the SEC proxy rules, if the offeror intends to elect new directors or to replace a majority of the target's old directors. This provision parallels section 14(f) of the Williams Act.

D. State Law—Substantive Regulation

Each regulating state places limitations on the conduct of the takeover bid once it has been approved. Massachusetts and Michi-


129 See Hayes & Taussig, supra note 4, at 139 (discussion of need for prior purchases).


133 Even states with no takeover-bid legislation may require broker-dealers involved in a solicitation to register with the local securities commission if in-state shareholders are to be solicited. See Cal. Corp. Code § 25210 (West Supp. 1976); Nationwide Inv. Corp. v.
gan require that the offer remain open for at least sixty days. Delaware has a twenty-day period, with ten-day extensions each time the terms of the offer are changed. If there is any increase in offering price during the course of the offer, most states require prior tendering shareholders to share in the increase.

Massachusetts effectively requires the purchase of all shares tendered, even if the offeror states that he wishes only to purchase a certain percentage of the target's shares. All other states, except Delaware, Hawaii, and New York, require pro rata purchases if less than all tendered shares are purchased; some follow the Williams Act, however, and apply the pro rata requirement only to shares tendered during the first ten days of the offer. In states without the ten-day limitation, the rule may increase the carrying expense of maintaining an open line of credit, since the offeror will wait until the end of the offer period before making any purchases. The Delaware law forbids purchases during the first twenty days of the offer and during the ten days following any alteration of the terms of the offer.

Most states also permit tendering shareholders to withdraw their shares within set time limitations. The Williams Act permits withdrawal during the first seven days of the offer and sixty days after the date of the offer; Idaho, Maryland, Minnesota, Pennsylvania, South Dakota, Tennessee, and Wisconsin have adopted the same rule. Indiana allows withdrawal until three days prior


137 Ch. 121, § 7, 1976 Mass. Adv. Legis. Serv. 21 (Lawyers Co-op), [1976] 1A BLUE SKY L. REP. (CCH) ¶ 24,267 (to be codified as MASS. GEN. LAWS ANN. ch. 110C, § 7 (West)).


140 Of course, when the offer is for less than all of the target's securities, the offeror will have to wait anyway in order to determine if the stated percentage has been tendered. Thus, the pro rata rule will not be of major consequence to many offerors.


143 IDAHO CODE § 30-1505(2) (Supp. 1976); MD. CORP. & ASS'NS. CODE § 11-905(B) (Supp. 1976); MINN. STAT. ANN. § 80B.06(2) (West Supp. 1976); Takeover Disclosure Law, Act No. 19, § 7(a), 1976 Pa. Legis. Serv. 36-37 (Purdon), [1976] 2 BLUE SKY L. REP. (CCH)
to the expiration of the offer, and Nevada and Virginia permit withdrawals during the first twenty-one days of the offer. The Delaware provision permits withdrawals at any time during the offer.

Many states, in an effort to ensure personal jurisdiction over the offeror, require that offers to in-state shareholders be made on the same terms as those to out-of-state shareholders. These provisions do not guarantee personal jurisdiction over the target because in these situations personal jurisdiction is predicated on the offeror's contact with the target and not with the shareholders. If equality of treatment of shareholders is the goal, then the statute should simply require that an offer be made on the same terms to all shareholders. Protecting only in-state shareholders is the worst sort of parochialism.

Some states forbid the offeror from acquiring stock of the target during the course of the offer, except pursuant to that offer; others require the offeror to bid for all the target's shares. In some states a copy of the information statement must accompany or precede all offers. Some states grant the offeror access to the target's shareholder lists. Massachusetts prevents the use of intermediary brokers in the offer process by prohibiting the offeror from paying commissions or fees to any offerees. Finally, most statutes contain broad anti-fraud provisions similar to section 14(e) of the Williams Act.


148 Shipman, supra note 10, at 750.
150 E.g., Haw. Rev. Stat. § 417E-3 (Supp. 1975). Offerors often wish only to obtain a sufficient number of shares to be able to effect either a negotiated or short-form merger with the target.
152 E.g., S.D. Compiled Laws Ann. § 47-32-12(3) (Supp. 1976) (if offeror is also shareholder).
In a departure from the anti-takeover character of most of these regulatory provisions, nine states forbid controlling shareholders from selling their stock to the offeror at a premium above the general offer price during the course of the offer.\textsuperscript{155} Utah explicitly forbids a controlling person from selling at a price higher than the fair market value of the stock or the price offered generally.\textsuperscript{156} Other states achieve a similar result by requiring that the offeror treat all shareholders alike.\textsuperscript{157} These provisions may effectively bar "creeping acquisitions," where the sale of a controlling person's shares either immediately precedes or follows a general offer.\textsuperscript{158} The provisions preserve shareholder equality \textit{inter sese} and are in accord with recent suggestions that all shareholders should benefit equally from the sale of corporate control.\textsuperscript{159}

\textbf{E. State Law—Enforcement}

The state statutes contain various enforcement provisions.\textsuperscript{160} Most give the state securities administrator authority to seek in-


\textsuperscript{156} \textsc{Utah Code Ann.} § 61-4-7(3) (Interim Supp. 1976).

\textsuperscript{157} \textsc{E.g., Colo. Rev. Stat.} § 11-51.5-103(e) (Supp. 1975). Offerors often pay brokers and dealers a small commission for all shares tendered through them. \textsc{See E. Aranow \\& H. Einhorn, supra} note 4, at 187-91. These rules do not clearly prohibit such a practice; the policy of promoting shareholder equality suggests that a commission can be paid to one who purchases the shares solely in order to participate in the offer, for he is not a "shareholder" in the traditional sense of the term.


\textsuperscript{159} \textsc{See, e.g., Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 Harv. L. Rev. 505 (1965).}

\textsuperscript{160} In addition to procedural methods of enforcement, most states give the state securities commission the authority to promulgate substantive rules. \textsc{See, e.g., Wis. Stat. Ann.} § 552.13(2) (West Spec. Pamph. 1976).
junctive relief against offerors who violate the law.¹⁶¹ In Indiana and Michigan, the target company is also empowered to seek an injunction.¹⁶² In Hawaii and Utah, the administrator may issue a stop order suspending the effectiveness of the offeror's registration statement.¹⁶³ The statutes effect no change in the normal equitable powers of the courts; hence, the target may be able to enjoin an illegal offer even in states where it is not specifically authorized to do so. In most states willful violation of the law by the offeror or the target management leads to criminal sanctions.¹⁶⁴

Finally, the states generally provide civil remedies for aggrieved shareholders.¹⁶⁵ Shareholders in most states may sue for rescission or damages upon proof that the offer was either fraudulent or not made in compliance with the law.¹⁶⁶ These provisions usually contain no scienter requirement; they cover "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . ."¹⁶⁷ Indiana and Louisiana allow non-tendering shareholders to sue.¹⁶⁸ The civil remedies are designed to force the offeror to disclose any fact that might be remotely relevant to the decision to tender.

Most states also provide for joint and several liability of participants in the offer. 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; the provision, however, permits a

¹⁶¹ E.g., HAW. REV. STAT. § 417E-8 (Supp. 1975).
¹⁶⁴ Penalties vary from state to state. Idaho provides up to a $5,000 fine and/or three years in prison for violation of its law. IDAHO CODE § 30-15101 (Supp. 1976). Indiana has a system of graded offenses for different types of violations. The maximum penalty is imposed on those who knowingly make fraudulent statements during the course of an offer. This offense carries up to a $10,000 fine and/or five years in jail. IND. CODE ANN. § 23-2-3-9 (Burns Supp. 1976).
¹⁶⁵ Most, but not all, states require an offeror about to make a regulated offer to consent to service of process. See, e.g., UTAH CODE ANN. § 61-4-11 (Interim Supp. 1976).
¹⁶⁶ E.g., WIS. STAT. ANN. § 552.21(1) (West Spec. Pamph. 1976).
¹⁶⁷ Id.
¹⁶⁸ IND. CODE ANN. § 23-2-3-10(b) (Burns Supp. 1976); Act No. 44, § 1510(B), 1976 LA. Sess. Law Serv. 29 (West); [1976] 1A BLUE SKY L. REP. (CCH) ¶ 21,161 (to be codified as LA. REV. STAT. ANN. § 51:1510(B) (West)).
due diligence defense. In addition, in states where “offeror” has been defined broadly, strict liability without the defense of due diligence may attach to certain parties connected with the offeror. The Kansas and Ohio statutes do not provide specific enforcement mechanisms for tender-offer violations, but incorporate by reference the state’s blue sky enforcement provisions.

F. The Effects of State Regulation

Although state tender-offer regulation aims to “protect investors,” the measures designed to afford this protection do little to serve the interests of the investors who the law is supposed to benefit. The primary effect of this legislation lies in the added burdens it imposes on the offeror. Moreover, the “waiting period” and “hearing” provisions of the law place in the hands of hostile target management the most potent weapon in a tender-offer fight: time. State tender-offer legislation fails to balance the competing interests involved in a tender offer. Potential offerors facing restrictive laws are discouraged from proceeding with a takeover bid since losing can be extremely costly in terms of time, effort, and money. Furthermore, the statutes also invite burdensome suits against the offeror. Thus, one can reasonably predict that state regulation will discourage offerors from engaging in takeover attempts. In fact, as risk and expense increase, the tender offer becomes no more attractive than the cumbersome proxy battle, which the tender offer was designed to replace as the primary method of gaining corporate control.

These benefits to incumbent management may in turn induce

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172 See notes 42-43, 96-98 and accompanying text supra.
173 See Brudney, supra note 7, at 624; Cohen, supra note 5, at 151-52.

Some evidence suggests that state takeover-offer statutes are having this restrictive effect. An offer made in 1975 by the General Cable Corporation for control of Microdot, Inc., was effectively defeated by the Ohio legislation. During the waiting period Microdot threatened to liquidate and make a liquidating distribution to shareholders that purportedly would have exceeded the tender-price. This effectively "whipsawed" the company's own shareholders. One Microdot official stated that "without the protection of Ohio law, we'd be dead now. We wouldn't have had time to toss up this defense." Forbes, Feb. 1, 1976, at 24, 27-28. Of course, the offeror or a Microdot shareholder might sue Microdot's management for breach of fiduciary duty or for fraudulent practices; the offer, however, was dead.
potential target corporations to reincorporate in regulating jurisdictions. Indeed, a number of major corporations allegedly have already done so.° Moreover, other states may adopt tender-offer legislation in self-defense. As more states adopt such regulation, federal policy will be displaced, and thus become increasingly irrelevant.

State legislation may also discourage other necessary parties from supporting the offeror’s bid. Banks, whose identity will be disclosed as a source of funds, may hesitate to make credit available to an offeror for fear of collateral consequences. Arbitrageurs—indispensable if an offer is to succeed generally make a profit only if an offer is successful; hence, state regulation limiting the probability of an offer’s success will discourage arbitrageurs. Finally, participating broker-dealers may be unwilling to risk liability as participants in an “illegal offer.” Even if these persons do not abandon their support of an offer, they will at least demand more in return—in increased interest, premium demands, and commissions—for the additional risks incurred as a result of the regulation.

The resulting decrease in the attractiveness of tender offers may have undesirable repercussions. Shareholders of companies with inefficient management lose the opportunity to sell their undervalued shares at a premium. Diminished use of tender offers may ensconce inefficient management. The realization that takeovers may promote economic efficiency led the Attorney General’s Committee on Securities Regulation in Ontario, Canada to reject proposals that would have placed limits on the offeror’s tactical advantages. At least the Williams Act makes some effort to balance the interests of the target’s management, target’s shareholders, and the offeror. In this sense, the state legislation may

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176 Williams Act § 13(d)(1)(B), 15 U.S.C. § 78m(d)(1)(B) (1970), specifically allows the offeror to refrain from naming any bank as its source of funds, presumably in order to protect against the possibility of adverse reaction to the bank’s support of an unpopular offeror.
177 See Forbes, Feb. 1, 1976, at 24, 25. See also E. Aranow & H. Einhorn, supra note 4, at 173-74; note 95 supra.
178 See E. Aranow & H. Einhorn, supra note 4, at 184-85; Note, supra note 57, at 1134-35.
179 See Brudney, supra note 7, at 632-34.
180 Id. at 627-34; Metz, supra note 174.
182 See note 31 supra.
indeed, as SEC Commissioner Loomis has noted, conflict with federal securities policy, if not with the Williams Act itself.

Of course, state takeover-bid statutes do not signal the death of all tender offers subject to state regulation. The claim of one of the proponents of the Ohio law is clearly overstated:

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. Acquisitions will hereafter be negotiated. If management is unresponsive to the desires of shareholders it will be removed by proxy contest carried on in the open rather than by the secretly organized surprise attack which has, up to now, characterized the take-over bid.

Contested takeover bids made in compliance with state law have been attempted with some instances of success. The Wisconsin state securities commissioner has, by his administrative interpretation of that state's law, demonstrated a desire to harmonize state and federal law and to accommodate the reasonable interests of the offeror. Moreover, the target is still limited in its defensive activities by anti-fraud and fiduciary duty rules under state and federal law. Thus, the outlook must not be one of total pessimism.

But the "chill" produced by the state statutes remains. The protection afforded by the statutes will prevent shareholders from making decisions for themselves. On the whole, then, the state statutes are not in the best interest of the investor nor in the public interest. They are designed primarily to serve the interest of entrenched incumbent management, and they conflict with federal securities policy. And, they may be unconstitutional.

184 Vorys, supra note 10, at 73.
185 Indeed, the EZ Paintr case was a successful bid made in compliance with the Wisconsin law. Nonetheless, the successful offeror settled with certain plaintiffs to extinguish various anti-fraud claims. See EZ Paintr v. Newell Cos., 65 F.R.D. 372 (E.D. Wis. 1974).
186 In re EZ Paintr Corp. & Newell Cos., [1976] 3 BLUE SKY L. REP. (CCH) ¶ 71,063 (Wis. Comm'r of Sec., Jan. 30, 1973). More recently, however, the Wisconsin securities commissioner has questioned whether the various state tender-offer statutes—including that of his own state—are really in the public interest, and urged legislative reconsideration. See [1976] SEC. REG. & L. REP. (BNA) No. 375, at A-10 to -11.
THE CONSTITUTIONALITY OF THE STATE LEGISLATION

The anti-takeover bias of the twenty-three state tender-offer statutes, their extraterritorial scope, and their chilling effect on nationwide bids for corporate control raise constitutional questions. The federal system tolerates a "dual sovereignty" between the federal government and the states: matters affecting interstate commerce are primarily a federal concern, but the state legislatures in exercising their police power may assert control over matters relating to the welfare of their citizens. Both commerce clause and preemption analysis focus first on the balance between state sovereignty and the need for national action to meet national needs. More precisely, if the effect of tender-offer legislation on interstate commerce outweighs the competence of the states to account for national interests, then only the federal government should be empowered to regulate in this area. Moreover, if Congress has acted in the same field as a state, the question is whether the national legislative body is more competent to react politically to the interests affected by the legislation than the state legislatures. States may regulate the governance of corporations and act to prevent fraud, but tender-offer legislation does not serve those interests. Rather, these laws stem from a desire of certain states to provide protection for local industry against "foreign" raiders. Such legislation may impair significant national interests. If those interests are unduly sacrificed to parochial concerns, then state tender-offer legislation cannot withstand constitutional challenge.

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188 See South Carolina State H'wy Dep't v. Barnwell Bros., 303 U.S. 177, 184-85 n.2 (1938), where the Court stated:
Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

See Kelly v. Washington, 302 U.S. 1, 15 (1937); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 HARV. L. REV. 682, 712-13 (1976). There are also other matters of concern in both commerce clause and preemption analysis, e.g., problems of motivation and frustration of legislative purpose. But inquiry, at least in the hard cases, usually focuses on whether the regulating state can reasonably be said to have something to add to the legal system because of its unique ability to consider problems, concerns, and interests that, due to some local characteristics, are not amenable to nationwide solution.
A. The Commerce Clause

In 1917 the Supreme Court held that blue sky laws were constitutional;189 opponents of the laws unsuccessfully argued that the legislation imposed a "negative burden" on interstate commerce. The Court rejected this argument, finding that in the absence of federal legislation the police power of the states allowed only them to protect investors from fraud.190 When Congress passed the first federal securities laws in 1933 and 1934, it expressly provided that blue sky laws were not preempted by the congressional action.191 But state tender-offer legislation is more analogous to general corporation law than to blue sky law.192 Therefore, the commerce clause problems raised by these new forms of securities regulation must be freshly examined, and unfortunately, precedent provides little guidance for an adequate disposition of the issue.

One can argue that the anti-takeover bias of the laws alone renders them constitutionally suspect. Such a challenge would force courts to examine the motivation of state legislators in passing a law, a difficult task that courts are not well-equipped to handle.193 In Pike v. Bruce Church, Inc.,194 the Supreme Court struck down an Arizona statute that required cantaloupes grown in-state to be processed in-state, finding that the sole purpose of the act was to boost the state's agricultural reputation. The Court stated that it "viewed with particular suspicion state statutes requiring operations to be performed in the home state that could be more efficiently performed elsewhere."195 One commentator has suggested that state tender-offer legislation must be invalidated if its only purpose is to maintain local management.196 Even though the original impetus for the legislation might be suspect, the statutes nevertheless do serve a proper legislative objective—protection of both shareholders and the corporation from fraud or overreaching in the course of tender offers. Thus, unlike the Pike

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190 Id. at 552-57.
192 See note 43 and accompanying text supra.
195 Id. at 145.
196 See Note, supra note 57, at 1158-59.
statute which served only one purpose, these statutes serve multiple ends. The states have chosen between the interests of the target and the offeror. This choice may have been one-sided and unwisely parochial, but it is doubtful that courts would intervene merely because the legislation did not sufficiently weigh the interests of all parties involved. *Pike* provides no support for striking down laws that arguably serve a rational and legitimate state end.

*Southern Pacific Railroad v. Arizona* has also been relied on in attacking the validity of the takeover-bid statutes. The United States Supreme Court struck down an Arizona law limiting the length of railroad trains moving through the state. The Court held both that the law burdened interstate commerce because it forced a carrier to conform to a new set of regulations each time it crossed into a new state and that the need for a uniform national system of railroad regulation outweighed any Arizona interest in protecting the safety of its citizens. *Southern Pacific* is not dispositive either. The need for uniformity in securities regulation is not compelling. Thus, there is little to distinguish the tender-offer problem from the commerce clause issue raised by blue sky law generally. Nor does the state legislation discriminate against other states, thereby motivating them to retaliate against the regulating state; hence, no "balkanization" effect results.

Although the major precedents for attacking the state legislation are not compelling, those supporting state regulation of tender offers are hardly persuasive. In *Huron-Portland Cement Co. v. City of Detroit*, the Supreme Court upheld a city anti-pollution

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200. Indeed, corporations law has traditionally been viewed as primarily a state law concern. H. HENN, HANDBOOK ON THE LAW OF CORPORATIONS 18-22 (2d ed. 1970).

201. The "balkanization" concept (see H.P. Hood & Sons v. DuMond, 336 U.S. 525, 537-39 (1949)) suggests that if one state is allowed to erect "hostile economic barriers" inhibiting free trade with other states, those states will erect retaliatory barriers. This is absent in the takeover-bid context, for the states do not directly infringe on the interests of other states. When other states are forced to adopt their own anti-takeover laws in order to preserve their attractiveness as incorporating states, it is more a result of "healthy" competition than hostility between states.

ordinance as applied to shipping traffic on the Great Lakes. Noting
that pollution was an acute local concern, the majority opinion held
that "[s]tate regulation, based on the police power, which does not
discriminate against interstate commerce or operate to disrupt its
required uniformity, may constitutionally stand."203 And in Parker
v. Brown,204 the Court upheld California's scheme of raisin market-
ing regulation, even though ninety-five percent of the regulated
raisins were sold out-of-state. These cases deal with efforts to solve
problems of legitimate local concern. In both instances, the Court
noted that the problems involved consideration of peculiarly local
interests to which Congress could not adequately direct its atten-
tion.205 Tender offers, in contrast, are remarkably similar wherever
made; local knowledge of geography or agricultural conditions is
not germane to legislative regulation of tender offers. Moreover,
Congress has attempted to deal with the problem.

In the absence of dispositive analogy, then, balancing the rel-
relevant state and federal interests central to commerce clause
analysis of tender-offer legislation is necessary. This Article has
demonstrated that the need for equal treatment of shareholders
and state interests in assuring the orderly transfer of corporate
control gives the target's state of incorporation the primary interest
in regulating tender offers.206 The same interests carry over into
commerce clause analysis. Additionally, no alternative forms of
regulation, less global in reach and less burdensome on interstate
commerce, could effectively serve the legitimate state interests in
this area.207 These arguments support the right of the state of
incorporation to regulate tender offers under a commerce clause
analysis, but the arguments lose force when a state other than the
state of incorporation is involved. A commerce clause challenge to
the law must not be so broad as to threaten the undoubted power
of the state to enact general corporation laws.208

203 Id. at 448.
204 317 U.S. 341 (1943).
205 In terms of the competency model, neither the raisin marketing methods in Cal-
ifornia, nor the pollution characteristics of the Detroit area were subjects that Congress
could be expected to investigate adequately or act upon. See Huron Portland Cement Co.
Since the regulations were directly effective only in-state, local legislation was permissible.
206 See text accompanying notes 53-59 supra.
207 The impact of the Williams Act is not yet being considered in this analysis, even
though it may be seen as a "less intrusive alternative" to the state regulation. See Note,
supra note 57, at 1161-62.
208 See also note 55 supra.
Indeed, the Supreme Court has accepted the primacy of the incorporating state's legislative jurisdiction over the rights and duties of shareholders. Such jurisdiction is a prerequisite to a workable system of law that places responsibility for corporate regulation on the states. For instance, in *Broderick v. Rosner*, New York law made shareholders of a banking corporation liable for certain corporate debts. Since New York, the state of incorporation, was the dominant corporate legislator, the full faith and credit clause required New Jersey courts to entertain an action brought by the Superintendent of Banks of New York, even though a New Jersey statute barred the action. Although interstate commerce was affected, the commerce clause was not an issue in this case. It would have been anomalous, however, to require the incorporating state to police the extraterritorial actions of the corporation while denying it out-of-state enforcement.

On the other hand, the extraterritorial reach of one state's tender-offer legislation may deny citizens of another state the power to choose their own way of regulating tender offers. For instance, one state legislature might wish to promote tender offers, yet other states could effectively thwart that goal by imposing restrictive regulations on companies making nationwide offers. Thus the will of the citizens of some states would bend to the will of the citizens of more restrictive states. Where the relevant transactions are individual rather than corporate, a single governing law is not essential, but a parochial constituency should not be the governing source of rules. The proper choice between the two sets of interests is not obvious, and no answer is forthcoming. The solution would be easier if our legal system presumed that federal corporation law controlled "national" corporations.

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210 Id. at 643.
211 Id. at 647.
212 Indeed, the commerce clause might compel the choice of a single state's corporate law. See Horowitz, *supra* note 53, at 816.
213 Arguably the target company's shareholders' choice to become owners of an enterprise incorporated outside of their home state implies their acceptance of the law governing that jurisdiction, even though they have no voice in its formulation. But this theory presupposes that the corporate management will act as the shareholders' representative in the political process. This is a questionable assumption when, as here, such representation would involve an element of self-dealing.
214 But see Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 702 (1975); Note, *supra* note 57, at 1173; note 258 and accompanying text infra.
215 A policy analysis of this question using the competency model would conclude that Congress is the appropriate body for consideration of much corporate regulation, since the
When jurisdiction is based on factors other than the place of incorporation, the outcome is clearer. The state of the target company's corporate headquarters does not traditionally have the responsibility of assuring equality among the target's shareholders. Moreover, if more than one state may regulate, conflict is inevitable and the stricter law will control corporate actions. In this situation, the policies favoring application of the internal-affairs doctrine—fairness, convenience, and certainty—disappear. Only the state's interest in the local assets of the target corporation remains, and it is doubtful that persuasive reasons exist to justify comprehensive regulation based only upon this interest. On the other hand, the commerce clause arguments against validity apply equally to any state regulation, and the balance must then be struck against the state's power to regulate.

B. Federal Preemption

Federal law preempts state law if state law conflicts with the letter or intent of a federal law, or if the federal law so occupies the regulated field that no local legislation is permissible. Preemption law, like commerce clause analysis, requires a balancing of state and federal interests. In preemption analysis, however, the federal interest is not inchoate but concrete; the only question is whether a state law can be effectively reconciled with an existing federal regulatory scheme. Preemption analysis of state tender-offer legislation presents the narrower problem of analyzing federal and state laws that contain identical subject matter, rather than the more common conflict between varying national and local policies.

effect of that regulation is felt nationwide. See Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 701-03 (1974). However, firmly-established state law practice would be politically difficult to displace.

See Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). Furthermore, the state probably has a "less restrictive alternative" (Dean Milk Co. v. Madison, 340 U.S. 349, 355 (1951)) to the extent that the state can regulate the target's assets directly by rules relating to improper use.


Thus, some of the more difficult problems in preemption analysis are absent; i.e., those created when both the state and national regulations are directed at valid and important but nonetheless different concerns, with resulting frustration of the federal policy. The competency allocation model is most helpful in the takeover-bid context, where the
Several commentators contend that the Williams Act does not pose a preemption question because section 28(a) of the Securities Exchange Act of 1934 expressly "saves" all state securities legislation.\textsuperscript{220} That section states:

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.\textsuperscript{221}

But the applicability of this provision to state tender-offer legislation is extremely questionable because section 28(a), written in 1934, acknowledged concurrent jurisdiction between the federal laws and state blue sky laws. State blue sky laws were well-established before 1934,\textsuperscript{222} and Congress understood their operation when it drafted the federal legislation. Therefore, Congress intended that the states retain their traditional jurisdiction.\textsuperscript{223} State takeover-bid statutes radically depart from localized blue sky practice: they are more akin to "corporation" law than to "securities" law.\textsuperscript{224} It is therefore too mechanical to suggest that the savings clause was intended to save this more aggressive state legislation. Furthermore, since the tender-offer laws did not exist when the Williams Act was adopted, Congress may not have given tacit approval to concurrent state regulation. When, as here, subsequent state legislation is not of substantially the same character as those laws Congress intended to save, traditional preemption analysis supplants the savings clause, even if the clause might literally appear to protect the state statute.\textsuperscript{225}

A number of tenuous analogies have been drawn to settled preemption principles in challenging the constitutionality of tender-offer statutes. For example, the preemption doctrine applies state and federal laws deal with exactly the same problem, reaching facially similar solutions. Yet, on occasion, the state laws are broader in intent and relate to duties which are not the subject of federal regulation. In this case, the more common preemption questions are apposite.\textsuperscript{226} See Shipman, supra note 10, at 759-60; Vaughan, supra note 10, at 881; Comment, supra note 10, at 335.


\textsuperscript{222} See generally Smith, supra note 191.

\textsuperscript{223} See Crosby v. Weil, 382 Ill. 538, 48 N.E.2d 386 (1943).

\textsuperscript{224} See note 43 and accompanying text supra.

when "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."226 Thus, it can be argued that the requirement of national uniformity in tender-offer regulation is so necessary that even in the absence of express congressional intent, no state laws are permissible. This principle formed the basis of the Supreme Court's decision in City of Burbank v. Lockheed Air Terminal, Inc.,227 in which the Court struck down a system of local aircraft noise pollution laws because of the paramount national interest in a standard aviation policy.228 A student commentator has cited Burbank as persuasive authority for federal preemption of state tender-offer statutes.229 But the Williams Act, unlike the Federal Aviation Agency regulations at issue in Burbank, is not a detailed, comprehensive regulatory scheme. The Williams Act merely provides minimum disclosure standards230 for the conduct of tender offers and is not so comprehensive that stricter state rules are necessarily inconsistent with national policy.

A second principle—that state laws must not conflict with a federal statutory scheme—is more apposite.231 Although simultaneous compliance with the Williams Act and any of the state statutes is possible without risk of inconsistent liability,232 preemption may still be a problem when the application of state law frustrates the purposes or policies served by a federal statute.233 But the "purposes or policies" underlying the Williams Act are not clear, making the preemption analysis more difficult. For instance, the federal statute's legislative history shows that Congress wished disclosure to be "educative" but did not wish to destroy the incen-

228 Id. at 633.
229 Note, supra note 57, at 1165.
230 See Shipman, supra note 10, at 759-60.
231 Moreover, if the § 28(a) savings clause does apply to state takeover-bid statutes, it is still possible to argue that the laws "conflict" with the federal legislation, and therefore are not saved. See Note, supra note 57, at 1168. However, the federal savings clause may still protect state legislation unless there is an actual conflict between the statutes (see Smith, supra note 191, at 1160-61), which is not the case here. From a policy standpoint, once it is clear that the savings clause covers a particular state act, the conflict standard should be literally construed, i.e., requiring an actual conflict. Inquiry into more subjective possibilities of conflict is precisely the purpose of general preemption analysis that would render the savings clause meaningless if undertaken in every case.
232 See Shipman, supra note 10, at 741; Note, supra note 10, at 334.
tive for takeover bids.\textsuperscript{234} Indeed, the concept of disclosure prior to making a bid was expressly rejected.\textsuperscript{235} By contrast, state statutes providing for expensive pre-bid disclosure may effectively destroy the incentive to bid. If state statutes conflict with the balance struck between offeror and offeree interests by federal takeover-bid disclosure law, then the state laws are invalid.\textsuperscript{236}

This may prove too much for some. Most federal laws are limited to certain circumstances, and those limits are often selected for substantive policy reasons. Even though there are perceived reasons for the federal government's failure to extend the regulation to its permissible limits, to infer preemption would permit invalidation of most state laws that operate in the same field, and tend to eviscerate the distinction between the "occupation" and "conflict" preemption standards. In \textit{Florida Lime & Avocado Growers, Inc. v. Paul},\textsuperscript{237} the Supreme Court upheld a California regulation governing the oil content of avocados sold in-state. Out-of-state growers challenged the state scheme on the grounds that federal law had preempted the stricter state standards by establishing a minimum oil content for avocados. The Court ruled that more stringent state statutes might stand even when they dealt with the same problem as a federal law and effectively replaced the federal legislation on a local level.\textsuperscript{238} "Minimum standard"-type national regulation is not per se indicative of preemption.\textsuperscript{239} The state regulation may stand so long as dual compliance is possible, no demonstrated need for national uniformity exists, and the local law rationally deals with a legitimate local problem.

The federal avocado regulation provided standards that attempted to balance consumer and producer interests. The stricter state standards rejected that balance but withstood constitutional challenge. If the Williams Act merely sets minimum standards for tender-offer regulation, then states may be free to strengthen them without facing preemption.\textsuperscript{240} The persuasive authority of \textit{Florida Lime} does, however, have limits; the legislative history of the Wil-

\begin{footnotes}
\textsuperscript{235} \textit{Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce}, 90th Cong., 2d Sess. 44 (1968); see also note 99 and accompanying text supra.
\textsuperscript{236} See Note, supra note 57, at 1168.
\textsuperscript{237} \textit{373 U.S.} 132 (1963).
\textsuperscript{238} \textit{Id.} at 145.
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} See \textit{Shipman, supra} note 10, at 759-60.
\end{footnotes}
lions Act clearly expresses the desire not to destroy tender offers in toto. The Act concerns a matter of national importance, whereas the avocado regulation challenged in *Florida Lime* related to a local industry, was enacted by an administrative agency, and was not supported by a clear statement of purpose.\(^2\)\(^4\)\(^1\) If preemption analysis of state takeover-bid legislation is directed only at the actual provisions of the Act, the state laws would survive because there is no facial conflict between state laws and the Williams Act, and compliance with both the state and federal statutes is possible.

Recent cases suggest that under current preemption theory, state laws will be presumed valid where there is only a potential conflict with federal law.\(^2\)\(^4\)\(^2\) For instance, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*\(^2\)\(^4\)\(^3\) the Supreme Court allowed California to refuse to enforce a compulsory arbitration clause in an employment contract. The New York Stock Exchange, exercising administrative authority delegated by the federal securities law, required such a clause in securities dealers' contracts to limit adverse publicity arising from public airing of employment disputes in the securities industry. Although the Court's decision seems to rest in part on the semi-private character of the "federal" rule,\(^2\)\(^4\)\(^4\) the decision at least evidences an "accommodationist" perspective toward state interests.

Despite these difficulties, the state statutes should fall under preemption attack if only because they frustrate the clear legislative intent of the Williams Act.\(^2\)\(^4\)\(^5\) There is, however, an even stronger reason to support preemption. The "accommodationist" preemption decisions have upheld state laws primarily local in scope. But in the takeover-bid context, the state statutes operate extraterritorially and impose their formulation of the proper balance among

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\(^{241}\) In the language of the competency model, the affected interests in *Florida Lime* were better voiced in the state legislature than in Congress or the administrative agency.

\(^{242}\) See *The Preemption Doctrine*, supra note 218, at 651-52.


\(^{244}\) See *The Preemption Doctrine*, supra note 218, at 649.

\(^{245}\) In addition, § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970), gives the federal courts exclusive jurisdiction over federal securities law violations, suggesting at least some congressional desire to confer "protective" jurisdiction over claims that are nationwide in effect. Of course, state courts are also expressly given the power to hear certain claims dealing with the same subject, e.g., blue sky law violations. State securities and state corporations law standards can be distinguished on the basis of the latter's wide-ranging and extraterritorial effect. In this sense, it may be impermissible to allow a state court to find that an entire tender offer violates a rule prohibiting fraudulent practices in the course of takeover bids; according to § 27 that sort of ruling is the exclusive responsibility of the federal court under § 14(e) of the Williams Act.
interests on affected but “unenfranchised” parties. The role of extraterritoriality in preemption doctrine has not been carefully considered in the cases or commentary, but it has clearly been significant in judicial attempts to weigh state against national interests in constitutional law.

In *Goldstein v. California*, the Supreme Court upheld a California record-piracy statute against arguments that the federal copyright laws preempted the field. The Court approvingly noted that the laws had no real extraterritorial effect: they would not “prejudice the interest of other States” that might wish to allow free appropriation of nonprotected intellectual property. The Eighth Circuit decision in *Northern States Power Co. v. Minnesota* is even more persuasive. There the court struck down state nuclear radiation safety standards that were stricter than those promulgated by the Atomic Energy Commission (AEC). The court cited a number of independent reasons for finding the state rule preempted but emphasized that the nuclear facility in question, although located in and affecting the safety of the regulating states, provided energy for a three-state region and formed part of a national power grid. The state regulation was effectively extraterritorial, and hence was impermissible in the presence of adequate federal standards. The court wrote:

> 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.

Since national energy policy was directly affected by any attempt to regulate safety standards, the Eighth Circuit concluded that the appropriate body to deal with standards was an agency serving a national constituency—the AEC.

The court in *Northern States* echoed the reasoning of the Supreme Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, in which the Court refused to allow Iowa to require

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247 Id. at 558.
248 447 F.2d 1143 (8th Cir. 1971).
249 Id. at 1153.
250 Id. at 1154.
251 328 U.S. 152 (1946).
a permit for the construction of a dam on a navigable state river, where the applicant had already received a permit from the FPC. The opinion clearly rested on the notion of political competency, concluding that "[i]t is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others."**252**

A similar analysis of state tender-offer legislation leads to the conclusion that the Williams Act is preemptive. State takeover-bid statutes increase the risk that tender offers will fail when made for corporations with the requisite contacts in regulating states. But the affected states and persons whose interests favor takeovers are given no opportunity to participate in the legislative decision. If Congress, where all such interests are represented, has already legislated in a particular area, and state regulation in the same area protects only parochial interests,**253** then the congressional scheme ought to be preemptive. This result is especially appropriate where there has been no demonstration that peculiarly local needs are served by concurrent state regulation, and where it is clear that Congress took account of all potentially relevant interests affected by the law at the time of passage.**254** It may on occasion be difficult to tell when a statute has an extraterritorial reach justifying the application of the preemption doctrine. However, it is clear that the state tender-offer statutes are well beyond the fringe.**255**

Furthermore, the existence of the Williams Act removes many of the internal-affairs interests that might justify state regulation under commerce clause analysis. The federal law provides uniformity, convenience, and certainty for supervising tender offers and assures that every shareholder will be protected. Practical choice-of-law considerations justifying the extraterritorial application of state law have disappeared. Moreover, state responsibility for the

**252 Id. at 182.**  
**253** This would be true even if all 50 states were to adopt anti-takeover statutes, for national economic interests cannot be sufficiently represented in any single state legislature.  
**254** The same conclusion can probably be reached with regard to preemption of state takeover-bid statutes relating solely to insurance companies. See note 10 supra. Although issues such as policyholder protection may be primarily a concern of the states, it seems preferable for states to provide such protection directly by attacking insurance company abuses, rather than indirectly through regulation of sales by shareholders pursuant to tender offers. See generally Wilder, Regulation of the Insurance Industry Under the Proposed Federal Securities Code, 7 CONN. L. REV. 711 (1975).  
**255** Naturally, all state regulation of commerce is extraterritorial to some extent, for it inevitably affects interests operating both inside and outside the state.
governance of corporations has been effectively assumed by the federal law. Thus, states cannot claim that their interest in protecting the integrity of domestic corporations will be totally unprotected if state law is preempted. In this sense, there is preemption only when Congress has expressly acted to deal with a problem; state corporation laws generally, though equally extraterritorial, are not affected.

The balance, then, favors federal preemption of state takeover-bid legislation. Courts or Congress can act to declare the Williams Act preemptive, but congressional action would damage state sensibilities less. It is therefore appropriate to examine federal

256 The argument that a state always has responsibility for the "creatures" that it has created, i.e., its domestic corporations, rests on an anachronistic fiction and should give way to the idea that corporate regulation should be allocated to various jurisdictions on the basis of convenience and certainty. See Reese & Kaufman, supra note 48, at 1126.

257 Of course, preemption would arise only in an "as applied" context. To the extent that a particular state's law applies to companies not regulated under the Williams Act, that regulation is permissible. As to specific provisions in the state statutes for which there are no counterparts in federal law (e.g., the controlling shareholder responsibility rules), there would presumably be no preemption either because such provisions are usually proper subjects for state law fiduciary duty analysis, which state legislatures are apparently more "competent" to consider. On the other hand, those provisions relating to supervision of the tender-offer process itself would fall.

258 This recommendation has been echoed by the American Bar Association's Subcommittee on Proxy Solicitations and Tender Offers of the Federal Securities Regulation Committee. See [1976] SEC. REG. & L. REP. (BNA) No. 370, at A-5. See generally Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208 (1959). In testimony before the Senate Committee on Banking, Housing and Urban Affairs, in February, 1976, then SEC Commissioner Loomis expressed his opinion that state tender-offer legislation is unconstitutional, and that Congress should act to preempt it. His testimony is reproduced in 1 J. FLOM, M. LIPTON & E. STEINBERGER, supra note 4, at 255-69. Moreover, there are procedural difficulties to mounting a successful judicial attack on the state statutes. To the extent that the dominant effect of the legislation is to "chill" even attempts to make takeover bids, it may be hard to find plaintiffs with the requisite standing to bring the case. Those planning bids will not wish to go into court and announce their plans as a method of gaining standing, for that would weaken their chances of success just as if they had complied with the statute. The costs of noncompliance if the constitutional challenge is lost make it unlikely that offerors will disregard the statutes and challenge their constitutionality only in an enforcement proceeding. Finally, complying with the statute and simultaneously attacking it in court is problematic because compliance makes it more likely that the bid will fail and that the case will become effectively, if not legally, moot. The only hope is to obtain an immediate injunction or declaratory judgment against enforcement of the state law, a course that is itself filled with both procedural and constitutional difficulties.

In its attempt to take over the Youngstown Steel Door Company, the Thrall Car Manufacturing Company complied with the Ohio statute and then filed suit in United States District Court for the Southern District of Ohio seeking a declaratory judgment against that statute on commerce clause, preemption, due process, and equal protection grounds. N.Y. Times, Aug. 25, 1976, at 47, col. 3. However, soon thereafter Thrall announced that
legislation that could deal with the "hovering omnipresence" of the state statutes.

III

POSTSCRIPT: LEGISLATIVE PREEMPTION

The reasons that should lead the courts to hold state tender-offer statutes unconstitutional should also encourage Congress to preempt them expressly, before judicial intervention is necessary. Conveniently, Congress will have an opportunity to do so when it considers the American Law Institute's proposed Federal Securities Code.259

The proposed Code revises some of the definitional provisions of the Williams Act, but makes no major change in its substance.260 The offeror's advantages of speed and secrecy are preserved; no advance notice or waiting period requirements are imposed. Accordingly, it can be assumed that the drafters of the Code intend to strike the balance between offeror and target along the lines of the Williams Act.

The proposed Code could deal with the preemption question in several ways. Borrowing the Brandeisian idea that states should be "laboratories" for social experimentation, Professor Shipman has recommended against federal preemption for the present.261 Shipman would not have courts or Congress act until empirical evidence shows that the state laws do in fact reduce the number of desirable tender offers. This recommendation is questionable, for it is possible that the state legislation's dominant effect is a "chill."262 Potential offerors may decide that the increased risks of failure are not worth the expected benefits of success, and simply not engage in regulated bids. It is doubtful that the impact of this chill could ever be properly measured or evaluated when so many other factors influence the takeover-bid decision. Moreover, as states react to existing laws by adopting similar legislation in self-defense, these "experiments" could become de facto national policy. States would control bids for local companies during the trial it was ending its bid for Youngstown. Wall St. J., Aug. 31, 1976, at 31, col. 4. It is therefore uncertain whether the suit will be prosecuted.

259 See generally Loss, supra note 15.
261 Shipman, supra note 10, at 760-61.
262 See text accompanying notes 173-78 supra.
period, even though the political interests of the states are most closely aligned with those of incumbent management. This problem would be highlighted in those states where an administrative agency can effectively defeat a takeover bid by using its supervisory power. Delaying preemption would threaten national policies expressed in the Williams Act without corresponding "educational benefit" for the federal system.

Another suggestion, approaching the other extreme, recommends a federal rule that "[n]o State or political subdivision thereof may adopt or enforce any regulations respecting tender offers." This provision would prohibit states from regulating even those bids not subject to federal regulation, and therefore preempts too much. The incorporating state has a legitimate interest in protecting against improper takeover attempts. The non-registrant exemption from federal control does not represent a policy choice that bids for smaller companies should be uncontrolled, but instead reflects a judgment that, as a matter of convenience, federal regulation cannot govern all corporations. Lack of a federal-state conflict in policy with regard to nonregistered corporations permits the states freedom to legislate in the field.

The middle course—preemption only when the takeover bid is federally regulated—has been adopted in section 1603(c)(1) of the Code. The Comment to the preemption provision contains a number of the arguments against state legislation discussed above:

(a) the state legislation tends to be pro-management in contrast to the neutral tone of the federal provisions . . . ; (b) the application of the 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.

This approach is preferable for establishing the proper federal
role in the regulation of takeover bids.\textsuperscript{268}

Congress should consider incorporating some of the more useful provisions of the state laws into the Code, although anti-takeover bias should not play any part in this consideration. Thus, the state law "waiting period" should be abandoned, since its primary purpose is to discourage takeovers.\textsuperscript{269} To the extent that the waiting period provides the opportunity for information to reach the shareholders, an extended period during which shares may be withdrawn would serve the same objective without substantially increasing the offer's risk of failure.\textsuperscript{270} The Code could require confidential pre-offer review by the SEC of the adequacy of the offeror's disclosure, although it is not certain that such additional compelled disclosure would be sufficient to outweigh increased administrative burdens.\textsuperscript{271} Aspects of state laws merely implementive of the disclosure policy—the durational requirements or the rules granting access to shareholder lists, for instance—can be left to the rule-making authority of the SEC. Finally, limiting the rights of controlling shareholders to sell furthers the desirable end of assuring shareholder equality. Matters touching the relationship of shareholders \textit{inter sese} should remain the province of state law, unless Congress is willing to acknowledge the propriety of federal corporations law. In sum, little can be done to accommodate further the interests of incumbent management unless the Code becomes an anti-takeover law; this would be neither desirable nor politically necessary.\textsuperscript{272}

\textsuperscript{268} The Code's draftsmen may wish to revise the preemption provision so that only the target's state of incorporation would be allowed to regulate bids not covered by federal law. This would eliminate the uncertainty and conflict that can arise when more than one state attempts to supervise a particular offer. Alternatively, the draftsmen may wish to require those states regulating tender offers for nonregistrants to enact statutes consistent with the federal disclosure standard. \textit{See} Bateman, \textit{State Securities Registration: An Unresolved Dilemma and a Suggestion for the Federal Securities Code}, 27 Sw. L.J. 759, 789 (1973). Nevertheless, these suggestions do not deal with pressing problems and may be considered too great an intrusion on state sensibilities.

\textsuperscript{269} \textit{See} text accompanying notes 88-98 \textit{supra}.

\textsuperscript{270} \textit{See} note 100 and accompanying text \textit{supra}.

\textsuperscript{271} \textit{See also} text accompanying notes 109-10 \textit{supra}.

\textsuperscript{272} From a political standpoint, the "bandwagon" of states that have adopted takeover-bid laws (\textit{see} note 10 \textit{supra}) might suggest that Congress should deal more strictly with tender offerors. Two points argue against such a reaction. First, the incumbent management interests that lobbied so effectively on the state level will have less impact in a national forum, where scrutiny of their positions will be much more intense. Second, many states appear to be adopting anti takeover legislation solely as a means of staying competitive as
CONCLUSION

State tender-offer statutes—global in scope and restrictive in effect—are natural political responses in jurisdictions where the interests of local enterprise are better represented than the interests of the national economy. These laws frustrate federal policies expressed in the Williams Act, and therefore contravene the Constitution, which allocates to Congress primary responsibility for regulating those aspects of commerce that cannot be effectively confined to a single geographical area. Congress should act to preempt state laws insofar as they regulate the takeover of targets registered under federal law, for only the federal government is politically competent to regulate those takeover bids having a major impact on the national economy.

attractive states in which to incorporate. To the extent that this is true, it is unlikely that those states would object strenuously to a provision prohibiting all states from enacting or enforcing local tender-offer statutes.