State Interests And Interstate Commerce: A Look At The Theoretical Underpinnings Of Takeover Legislation

Theodore R. Boehm
STATE INTERESTS AND INTERSTATE COMMERCE: A LOOK AT THE THEORETICAL UNDERPINNINGS OF TAKEOVER LEGISLATION

THEODORE R. BOEHM*

I. INTRODUCTION AND TERMINOLOGY

The tender offer in today's economy is a formidable tool for effecting rapid corporate consolidations. In obvious hostile response to "quickie" takeovers, some 37 states have enacted some form of tender offer legislation. The basic thesis of this article is that these state laws have largely been improperly analyzed as a species of securities regulation or corporation law. Rather, they serve state interests that are largely different from the interest in investor protection manifested in the federal securities laws. Because the state and federal interests are not necessarily inconsistent, the existing federal statutes should not preempt most of the state tender offer laws. Nor do state takeover laws inevitably impose excessive burdens on interstate commerce. The relationship between an affected corporation and the regulating state, and the manner in which the regulation operates dictates the state laws' viability under the commerce clause. Moreover, because the need for tender offer regulation is essentially a legislative or political judgment, the views of the state legislatures are entitled to significant weight.

In general, and without regard to specific forms of regulation or the offers to which they apply, state laws regulating tender offers for all or controlling blocks of shares of widely owned corporations will be referred to as "takeover" legislation. A "takeover offer" — normally an announcement to the financial world that the offeror will pay a stated price in cash or securities for some or all of a "target" company's shares — triggers the operation of these laws. Several regulatory approaches recur in state takeover legislation,1 and most of the laws combine more than one. First, and simplest, is a pure prenotification provision, requiring the offeror to inform the target, the appropriate state administrator, or both, of his intentions before commencing the offer. Typically, some type of "disclosure statement" must be filed in connection with the notice. Second, there may be a minimum period for which the offer, once made, must stay open. Third, there may be a hearing procedure in which the state administrator reviews the offer, or more typically the offeror's disclosure of statutorily prescribed


1 For more in depth analyses of the similarities and differences among state takeover laws see M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 239-40 (1978); Nathan and Maloney, State Tender Offer Statutes: An Analysis of the Practical and Policy Considerations, 23 N.Y.L. Sch. L. Rev. 647 (1978); Note, The Constitutionality of State Takeover Statutes: A Response to Great Western, 53 N.Y.U. L. Rev. 872 (1978) [hereinafter cited as Response to Great Western].

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matters incident to the offer. Fourth, the same states regulate various substantive aspects of the offer such as proration of acceptances in the event of over-subscription. For convenience, these provisions will be referred to, respectively, as “prenotification,” “minimum period,” “hearing” and “substantive.”

II. THE PRESENT LEGAL AND BUSINESS CLIMATE

Many non-legal developments in the tender offer field necessarily bear on the practical consequences of state takeover legislation. Paramount among these are the tender offer techniques used by offerors and targets and the economic climate that has influenced the need for and scope of tender offer regulation. Offerors' techniques have been refined substantially since the late 1960's when Congress established the basic framework for federal tender offer regulation in the Williams Act, enacted in 1968 as an amendment to the Securities Exchange Act of 1934. The Williams Act requires offerors to file a disclosure document with the Securities and Exchange Commission (SEC) at the time the tender offer is made. It also includes some substantive provisions, notably a minimum seven day offer period. In 1967 the SEC advocated the enactment of federal legislation, advising the Congress that tender offers, then totally unregulated, were unfair to investors. The SEC described tender offers as “invitation[s] to the public security holder who ‘tenders’ the security to give the other party an option to be exercised only if certain minimum shares are tendered within a specified time and perhaps specifying a maximum which the original offeror is prepared to take.” Very few tenders were for 100% of the target shares, and at least one study concluded that exchange offers were generally more successful than cash offers.

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3 Id. § 78n(d)(5) (1976). If a tender offer is for fewer than all of a company's shares, the Williams Act's minimum offer period is 10 days. Id. (d)(6). Moreover, the Act then requires prorata acceptance of shares if more are tendered than the offeror solicited. Id.
4 Proposed Amendments to the Securities Exchange Act of 1934: 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. 11 (1968) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) [hereinafter cited as House Hearings]. The SEC characterized tender offers as one-sided documents. Early stockholder responses were said to limit their ability to take advantage of more attractive subsequent offers. Moreover, tendering shareholders had no assurance that the offerors finally would purchase their tendered shares.
6 Id. The SEC defines an exchange offer as “a tender offer for, or request or invitation for tenders of, any security in exchange for any consideration other than for all cash.” 17 C.F.R. § 240.10b-13(b) (1978).
7 See Austin & Fishman, The Tender Offer, May-June 1969 MERGERS & ACQUISITIONS 13-
More recently, offerors typically have resorted to unconditional cash offers at a premium in the range of 20%-50% above the market without limiting the number of shares they will accept. As a practical matter, the offeror thereby eliminates much of the doubt in the minds of the shareholders as to whether or when their shares will be taken up. Because no securities are offered in a cash deal, registration under the Securities Act of 1933, and the attendant delays, are eliminated. By the 1970's, offerors had added a short offer period to this general strategy, giving rise to the "Saturday Night Special." As offerors perfected their methods, they minimized incumbent management’s opportunities to mount significant defenses or attract alternative bids for the corporation. Meanwhile, the principal effect of the state takeover laws, where they applied, was to inject some delay in consummating the transaction. This delay could enhance the development of an auction market for the corporation's shares, driving their price up. Although someone other than the original bidder might end up purchasing the target, rarely would the target remain an independent entity.

A second major phenomenon in recent years is the growth of the arbitrage industry to the extent that some have called for federal regulation of arbitrage activities in connection with tender offers. In oversimplified terms, arbitrage activity places substantial blocks of the target's shares in the hands of professionals, who in general have no intention whatever of becoming long term owners. Rather, their objective is to make a quick profit on the transaction by reselling the shares, whether to the original offeror or a subsequent bidder, and go on to the next deal. Their evaluation of a tender offer turns on several variables. They estimate the probable length of time between their purchase in the open market and their successful placement of the shares with the original bidder or a competing bidder. The costs they will incur in the interim, and the risk that they will be unable to put the shares to the original or an alternative bidder must also be considered. In the typical case of an unconditional "any or all" offer, the arbitrage community evaluation of the tender offer is often substantially simplified because of the absence of any material risk of failure. The proliferation of this offer strategy undoubtedly has increased the level of capital and intellectual resources devoted to arbitrage over the past decade. In sum, increasingly sophisticated offeror strategies, and the

14 cited in Note, Should Tender Offer Arbitrage be Regulated?, 1978 DUKE L.J. 1000, 10009 n.44.
9 Id.
11 See text accompanying note 13 infra. See generally E. Aranow & H. Einhorn, Tender Offers For Corporate Control 173-203 (1973) [hereinafter cited as Aranow & Einhorn].
12 See note 7 supra.
13 For an expansive discussion of arbitrage activities in the tender offer market see Aranow & Einhorn, supra note 11.
emergence of an active arbitrage community represent forces that have aligned themselves on the side of the offeror to a much greater extent than was the case a decade ago.

The current inflationary economy is yet a third highly relevant development in the field of tender offers. Entry into a new market by acquiring an existing company always has been quicker than creating a new plant and facility and always has had the advantage of simultaneously eliminating one competitor from the point of view of the potential entrant. However, largely due to inflation, the shares of many well-managed companies trade at prices substantially below the present cost of duplicating the companies' facilities. The undervaluation of the shares thus provides an additional incentive for employing the tender offer as a means of entering a particular market.

Moreover, the contention that tender offers serve to displace inefficient management is of doubtful validity in today's economy. Indeed, many recent targets have been labeled well-managed, growing, productive operations, and many successful offerors retain the target's top management.

For all these reasons, the tender offer has become an increasingly popular mechanism for corporate expansion. Indeed, recent predictions of federal legislation limiting combinations of large companies have led to predictions of increased tender offer activity by those seeking to get through the door before Congress slams it shut.

The increasing inclination to undertake tender offers has been coupled with a generally decreasing effectiveness of corporate structural devices, such as staggered boards and supermajorities, as defensive mechanisms. Although these may retain some value as "shark repellant," signalling potential bidders that an offer will meet vigorous resistance in the hope of deterring the initial offer, generally more aggressive defensive maneuvers are required to be effective. Some potential or actual targets have issued shares that dilute the value of publicly available shares, or acquired regulated businesses. At this writing the "ferocious" defense apparently is gaining some popularity as a means of making an acquisition such a distasteful struggle that the offeror loses interest. However, management may be unwilling or unable to adopt many of these practices for various reasons. They often involve a combination of business considerations and regard for the proper exercise of management duties to the corporation that may render them unattractive or infeasible.

The net result of these admittedly conclusory judgments is that a large number of corporations are quite vulnerable to the Saturday Night Special in today's legal and business climate. Whatever "balance" existed between offerors and targets in 1968 has, through the evolution of refined tender offer technology and changing economic circumstances, become substantially "tipped" against incumbent management.15

III. STATE REGULATORY PATTERNS

Against this background 37 states have enacted some form of takeover legislation. Although certain common themes underlie the statutes, they vary substantially in a number of material respects. The imposition of additional delays on regulated offers is the dominant feature of all takeover statutes presently on the books. As a practical matter, delay facilitates management's search for a "white knight" or alternative bidder. Obviously a white knight's decision to enter the bidding to acquire a major publicly owned corporation involves complex considerations. The compatibility of the companies' management, products and marketing lines requires extended analysis. Larger and more diversified targets magnify these issues and usually carry a higher price tag. Although the investment banking community has become more sophisticated in facilitating shotgun weddings, a white knight's decision is difficult to make within a few days. Consequently, longer delays in the consummation of the tender offer increase the likelihood that the target will be able to identify alternative bidders and induce them to enter the auction.

A pure prenotification statute[15] that also establishes a minimum period during which the offer must stay open, effectively extends the arbitrage period from the date the offeror announces his intent to make the offer through to the expiration of the minimum period. After an offer has been open for an extended period of time, arbitrageurs likely will own major blocks of stock in the corporation.[16] They rarely will tender until the expiration date is imminent, obviously in the hope that an auction market for the shares will develop. There is no advantage to committing early to the initial offeror.

Hearing type statutes[17] inject a new consideration into the game. If the hearing statutes are valid, the arbitrage community must evaluate the offer in light of the risk that the hearing will result in either a disallowance of or perhaps an extended delay in the consummation of the offer. In the case of a cash tender offer at a substantial premium over the preexisting market price, disallowing the offer normally would produce a substantial drop in the trading price of the shares and could even induce panic selling at levels well below the pre-offer market price. Many state laws increase the level of arbitrageur uncertainty by not establishing a fixed time frame for the hearing.[18] As noted above,[19] arbitrageurs evaluate the time for which their investment will be tied up when they decide on the level to which they can profitably bid up the market price. Since time delays thereby become a de facto ally of the offeror, hearing type statutes may constitute a significant deterrent to arbitrage activity in the shares of the target.

during the early stages of the offer. However, if these uncertainties are resolved within definite periods, it is doubtful that the net result is changed by the hearings. Approval of the hearings or elimination of the uncertainties surrounding the consummation of the offer place the arbitra-
gueur in a position to evaluate the transaction as though the state statute did not exist except for the minimum period.

Finally, some states have chosen to enact a variety of substantive provi-
sions as part of their takeover legislation. For the most part, these provi-
sions have little practical consequence. In general, they tend to complicate otherwise innocuous transactions but do not affect the outcome of the tender offer in terms of the offeror's ultimate success or failure in acquiring the target.

Apart from employing different means to regulate tender offers, states have differed substantially in the selection of the corporations to which their laws apply. Delaware has made its takeover provision a part of its general corporation law. It applies to offers for targets that are Delaware corporations, regardless of their corporate headquarters or physical plant. On the other hand, many states have sought to regulate tender offers based on the target's incorporation in the state or having its principal place of business or substantial assets in the state. Some states have rendered any of the three sufficient. Others have required combinations of two or more. Finally, only Arkansas elected to apply its statute on the basis of shareholdings in the state. As of this writing, that statute was proposed to be amended to eliminate that provision.

Since many states apply their statute on only one of these bases, a state may seek to regulate a transaction to which its sole connection is through the corporation laws, or the fact that the target has one of its several plants in that state, or on the ground that it is headquartered in the state, even though its physical assets and operations are largely elsewhere. Moreover, these jurisdictional variations raise the possibility that the takeover of a single corporation could be subject to regulation by at least three and conceivably more states. This has led to the charge of duplicative, burdensome and unnecessary state interference with essentially national transac-
tions. Each of these statutory schemes has, in fact, been tried with varying degrees of success. Many of the cases litigated to date have involved one or more of their relatively bizarre applications.

4 Ark. Stat. Ann. §§ 67-1264 to 1264.14 (Cum. Supp. 1977). Section 67-1264(6) defines "target company" to include any issuer of securities which has equity shareholders in the state and "is or may be involved in a takeover offer . . . ." The Arkansas law applies to offers for or acquisitions of shares of a target company pursuant to a tender offer that meets other substantive provisions. § 67-1264(6), .2.
5 See E. Aranow, H. Einhorn & G. Berlestein, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 222-33 (1977) [hereinafter cited as DEVELOPMENTS IN TENDER OFFERS].
6 See text accompanying notes 27-40 infra.
III. Litigation To Date

Any analysis of the current status of state takeover legislation must begin with *Great Western United Corp. v. Kidwell.* Among the issues presented to the Supreme Court was whether the officials of one state (Idaho) are susceptible to service of process and subject to the personal jurisdiction of a federal district court in another state (Texas). The Fifth Circuit's holding that the Idaho Securities Commissioner may be sued in Texas aroused substantial opposition from state enforcement authorities. Their concerns largely stemmed from the fact that state attorneys general often have limited or nonexistent out-of-state travel authorization and are ill equipped to engage in the slam bang megabuck litigation that tender offers produce. Many view a requirement to defend their actions anywhere in the nation as a practical imposition on state enforcement officials, particularly in light of the difficulties of keeping pace with litigation within their own borders. The issues raised by those points are not treated here except to observe that the Supreme Court's disposition of *Kidwell* leaves the Fifth Circuit's decision as the only federal appellate discussion of the issues raised by the application of any state's takeover law to an actual transaction. *Kidwell*, for reasons that will be examined later, held that (a) the Williams Act preempted the Idaho Act, and (b) the application of the Idaho Act to Great Western's tender offer for the target constituted an undue burden on interstate commerce. In that case the target, Sunshine Mining Company, was incorporated under the laws of the State of Washington and maintained its corporate headquarters in New York. A principal subsidiary had its major plant in Maryland. Under these circumstances the Fifth Circuit held that the federal district court in the Northern District of Texas properly enjoined the Idaho Commissioner, who asserted jurisdiction on the basis of Sunshine's silver mine in Idaho, from enforcing Idaho's takeover law.

The Fifth Circuit handed down its decision in *Kidwell* on August 10, 1978. On November 9, 1978, Dart Industries instituted a new era in state tender offer litigation by adopting a "Pearl Harbor" approach. Dart filed its own preemptive lawsuit against state securities officials and the target corporation and its shareholders, seeking a declaration that the Delaware and Indiana takeover statutes were unconstitutional as applied to the offer. Dart announced it intended to make the offer but would not do so unless and until the court issued a temporary restraining order and/or preliminary injunction against the enforcement of the state laws. Since the

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77 577 F.2d 1256 (5th Cir. 1978), rev'd, 99 S.Ct. 2710 (1979).
78 577 F.2d at 1272.
79 See text accompanying notes 63-109 infra.
81 Id. § 30-1503(4)-(5).
82 See text accompanying note 33 infra.
target, P.R. Mallory & Company, was incorporated under Delaware law, § 203 of the Delaware General Corporation Act regulated the proposed offer. Mallory maintained its corporate headquarters in Indianapolis, and thereby subjected the transaction to the Indiana statute as well. The Indiana Securities Commissioner promptly decided to exempt the offer from the Indiana statute’s application, taking the position that full faith and credit and/or comity rendered it appropriate for Indiana to defer to Delaware in view of Delaware’s conflicting timetable. The target’s operations were to some extent in Indiana, but largely in neither Delaware nor Indiana. Dart initiated the offer on November 10 when the district court entered the requested restraining order. The hearing on the issuance of a preliminary injunction was set for November 14. On November 16, while evidence was still being taken in the injunction proceeding, Dart increased its offer from $46 to $51, and Mallory’s management recommended that the shareholders accept the increased offer. Nonetheless, the hearing continued and the day after argument between Dart and Mallory, its de facto subsidiary, the court held the Delaware statute unconstitutional, relying principally on Kidwell.

Subsequently, at least two courts have declined to enter temporary restraining orders in circumstances similar to the Dart request. In Tyco Laboratories, Inc. v. Connelly, the district court set a hearing on Tyco’s application for a preliminary injunction, but the question of the validity of the Massachusetts statute was mooted when Tyco withdrew its offer.

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32 Delaware had created a 40-day period within which the offer must be made. Indiana might permit or force the offer to go forward outside that period. The Commissioner observed that the full faith and credit clause and doctrines of comity among the states might bear on the transaction. Without specifying his reasoning, the Commissioner exercised his exemptive power. Under standard doctrines of full faith and credit, a foreign corporation qualified to do business in another state generally imports the law of its domiciliary state as to such matters as the necessary votes for various types of transactions. Reese & Kaufman, The Law Governing Corporate Affairs, Choices of Law And The Impact Of Full Faith And Credit, 58 COLUM. L. REV. 1118 (1958). Delaware’s takeover act, as a part of its general corporation law, is perhaps most susceptible of treatment as a variety of corporate governance. So viewed, the law of the state of domicile may be regarded as controlling when a Delaware corporation becomes a takeover target. In the event of conflicting regulation, deference to the state of incorporation at least offers the virtue of predictability and enjoys some support in precedent from other areas.

33 462 F. Supp. 1 (S.D. Ind. 1978). Similar decisions were rendered by Judge Crowley of the Northern District of Illinois in Mite Corporation v. Dixon, No. 79-C-200 (N.D. Ill., Feb. 9, 1979); and Daylin, Inc. v. Unaco, Inc., No. 78-C-4246 (N.D. Ill., Nov. 27, 1978). Although Mite subsequently announced that it was withdrawing its offer based on its further investigation of the target, an appeal by the Illinois officials is still pending. The Illinois Act includes criminal penalties.


35 Tyco’s injunctive suit sought to enjoin enforcement of the Massachusetts takeover statute.

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Subsequently, in Davlin, Inc. v. Fratkin, although indicating an inclination to agree with Kidwell on the merits, the Eastern District of Pennsylvania found the matters raised by the application of Davlin's offer for Narco Scientific Industries sufficiently complex as to require a hearing before resolution. That court also refused to enter a temporary restraining order. Finally, in UV Industries v. Posner, the district court in Maine concluded that the target's application for a preliminary injunction under the Maine Takeover Act should be granted. It held that the defendant's actions clearly violated the Maine statute and that the balance of the injury tipped more strongly in favor of the plaintiff target which was requesting injunctive relief than in favor of the offeror which claimed unconstitutionality of the Maine statute. As of this writing, all of these cases, except Dart and Tyco, are still pending. An obvious conclusion is that the grant of a temporary restraining order against enforcement of a state statute, even though it can be outstanding for only ten days under Federal Rule of Civil Procedure 65, may be decisive in ensuring the immediate success of the offer, as happened in Dart. If no restraining order issues, the long term outcome is more problematic.

V. THE NATURE OF STATE TAKEOVER LAWS

Early in the development of state tender offer regulation, perceptive observers questioned exactly what the nature of these new state laws was. Many commentators and courts have taken the position, or assumed without explanation, that these statutes constitute a species of securities regulation grounded in a state interest in the protection of investors. Indeed, according to the Fifth Circuit, the Idaho officials defended the Idaho statute in Kidwell principally on the basis that it was justified as an investor protection measure. Most authorities who regard the statutes as a variety of securities regulation conclude that the statutes are unconstitutional, or at least undesirable, in that they create a crazy quilt of conflicting and obstructionist regulatory patterns. Other recent and thoughtful analyses, viewing the statutes as essentially securities regulatory laws nonetheless find them not preempted. Briefly stated their conclusion has been that the provisions are essentially consistent with the investor protection rationale of the Williams Act even though they may impose constraints beyond those adopted by Congress.

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42 577 F.2d at 1279.
43 See DEVELOPMENTS IN TENDER OFFERS, supra note 25, at 232-33; Moylan, State Regulation of Tender Offers, 58 MARG. L. REV. 687, 700-02 (1975); Wilmer & Landy, The Tender Trap: State Takeover Laws and Their Constitutionality, 45 FORDHAM L. REV. 1, 17-23 (1976); Note, Commerce Clause Limitations Upon State Regulation of Tender Offers, 47 S. CALIF. L. REV. 1133, 1152-62 (1974) [hereinafter cited as Commerce Clause Limitations].
44 See, e.g., Response to Great Western, supra note 1; Note, Securities Law and The
Certainly many, but not all, of the statutes currently on the books speak in terms of disclosure requirements and vest hearing jurisdiction in the state securities administrator. On the other hand, it has been observed that the statutes apply regardless of the residence of the shareholders of the target, raising the possibility that the investor protection rationale is a facade. Others have taken the view that takeover legislation is essentially analogous to organic corporate law. Delaware is consistent with this view. That state, in the absence of a blue sky law, adopted takeover legislation as a part of its general corporation laws. As such, the statutes apply only to targets incorporated under the law of that state regardless of the location of their assets or corporate domicile. On this basis, state regulation has been justified by analogy to the established principles that relegate the control of corporate management and relations among the shareholders and directors of the law of the state of incorporation. The doctrine of the "pseudo foreign" corporation, most prominently developed in California, has been urged as a basis for further extending the reach of state takeover regulation to corporations with substantial operations within a state that nevertheless are incorporated under the laws of a foreign state.

Assumptions regarding the nature of a particular takeover act obviously affect one's conclusions as to its constitutionality. Both the "investor protection" and "corporate law" approaches have substantial merit. Neither, however, paints the entire picture. In terms of general corporate law principles, it seems fundamental that Delaware possesses and has invoked a legitimate interest in protecting shareholders of Delaware corporations, wherever they reside, from overreaching by management. On the other hand, if viewed as essentially securities regulation


See text accompanying note 21 supra.

Under the "internal affairs" doctrine, matters affecting the relationships between the shareholders and a corporation, and legal doctrines of corporate governance are resolved under the law of the state of the company's incorporation. See generally Shipman, supra note 45, at 740-43.

See Shipman, supra note 45, at 751-55. The pseudo foreign corporation doctrine seeks to deal with the common phenomenon of a company incorporated in one state but doing business largely in a second state. The second state may seek to assert jurisdiction over matters historically governed by the law of the state of incorporation.

Commentators who agree on the fundamental nature of state takeover laws nevertheless have reached opposite conclusions regarding the laws' constitutionality. Compare Commerce Clause Limitations, supra note 43, at 1152-62 (state takeover laws are unconstitutional investor protection measures) with Securities Law and the Constitution, supra note 44, at 532 (constitutional investor protection measures). A similar dichotomy appears among writers who view the state laws as organic corporate law. Compare Langevoort, State Tender Offer Legislation: Interests, Effects and Political Competency, 62 Cornell L. Rev. 213, 241-46 (1977) (state takeover statutes are unconstitutional as corporate law) with Shipman, supra note 45 (state takeover statutes are constitutional as corporate law).
measures, state takeover acts cannot be justified. As stated in one recent comment, "a state cannot claim that it has an interest in protecting nonresidents and in regulating transactions that take place outside the state."50 A third body of law is also relevant. Under fairly well settled principles,51 each state has a significant interest, which may or may not be controlling, in regulating transactions "outside the state" insofar as they have an impact within the state.

The law of the state of incorporation is often held applicable to stock transfers, assessments, and agreements among shareholders of the corporation such as voting trusts, rights of first refusal and similar matters.52 In this sense the law of the state of incorporation regulates "transactions outside the state" without raising anyone's eyebrows. Similarly, no one would contend that a shareholder who is a nonresident of the state of incorporation has no rights under that state's fiduciary doctrines. These points are made not because they mandate the constitutionality of state takeover statutes, but simply to illustrate that sweeping statements about state regulation of transactions outside the state's borders, or protection of interests of nonresidents are often misleadingly simplistic.

In addition to their interest in being able to decide intelligently whether to buy or sell and how to vote their shares, shareholders have a more basic interest in being treated fairly by management. Many corporate law doctrines designed to protect shareholders' interests thus amount to efforts to prevent unfairness independent of any investor action.

Discussions of takeover legislation often do not distinguish between general shareholder interests and the more limited investor protection. For example, the Kidwell court concluded that Congress's failure to adopt a fiduciary approach to investor protection is a basis for rejecting the state scheme which the Idaho authorities argued was designed as a shareholder protective measure. However, Kidwell, which dealt with Idaho's efforts to regulate a takeover of the Washington corporation, did not directly present the shareholder issue, because the state of incorporation historically has assumed the role of providing general shareholder protections, regardless of the shareholder's residence.53 Legislatures certainly are competent to conclude that a tender offer accomplishes something more in the nature of a corporate transformation than simply a shift in ownership. Minimum time limits on transfers in response to a tender offer may be viewed as qualitatively the same as a prohibition against shareholder meetings on less than x days' notice. Both time periods reflect substantive legislative judgments that in a particular context state imposed delays are necessary for a proper, or "fair" result, even if they have the effect of suspending commerce. Finally, state takeover regulation may be viewed as not solely

50 Securities Law and The Constitution, supra note 44, at 528.
51 See text accompanying notes 95-99 infra.
53 But see note 48 supra.
a prohibition on the offeror, but also as a reciprocal limit on the shareholders’ ability to transfer their interests. To the extent the state laws subject the offeror to potential criminal liabilities, as most current versions do, they plainly fall outside this rationale. However, simply voiding, or making voidable, transfers under defined circumstances, seems consistent with traditional exercises of legislative judgment in the field of shareholder-corporate relations.

In addition to protecting shareholder and investor interests, states traditionally have enacted a variety of regulatory measures affecting corporations that have a substantial physical presence in the state, regardless of corporate domicile or residence of the corporation’s shareholders. The exercise of these powers may affect corporations whose actions outside the state have local impact. State antitrust laws present classic examples of this phenomenon. The Sherman and Clayton Acts may, under some circumstances, impose less significant restrictions than state antitrust law. Nevertheless, the federal statutes rarely preempt the antitrust field.

The fact that federal law tolerates certain conduct does not necessarily mean there is an affirmative federal policy encouraging such conduct. For example, federal law may tolerate certain small mergers because (1) they do not seem harmful to competition, and (2) because they might achieve desirable economies or other redeeming virtues. The first reason for federal toleration implies no affirmative federal policy favoring such a merger. Because the second reason recognizes mere possibilities, it too does not seem to reflect an affirmative federal policy in favor of the small merger.4

The same is true in terms of other restraints imposed under state antitrust law. The fact that Congress elected not to forbid it does not preclude the states from taking that action.

In sum, states have an economic interest in regulating the corporations doing business within their borders. Obviously, there are major limitations on a state’s ability to regulate transactions that have substantial significance outside the state’s borders as well as within them. State legislation that allegedly infringes upon interstate commerce must meet a constitutional balancing test. The state interest in regulating the local economy is entitled to some consideration. At the other extreme, the parochial interests in protecting “local industry” or “incumbent management” often are viewed as per se unconstitutional.5 One may question the propriety or feasibility of attempting to divine the motives of the state legislatures in adopting takeover legislation.6 Expressing the state’s interest as protecting incumbent management carries overtones that specific individuals have somehow prevailed on the legislature to erect barriers to their invol-

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5 See, e.g., Developments In Tender Offers, supra note 25, at 229-30; Securities Law and The Constitution, supra note 44, at 528.
6 Response to Great Western, supra note 1, at 895-905.
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Voluntary retirement. Similarly, "protecting local industry" raises the spectre of laws prohibiting the export of unprocessed fish to promote local canneries. Yet the "protection" accorded "local industry" by takeover legislation differs significantly from the conventional tariff. Takeover legislation is aimed not at making local industry profitable, but rather at keeping it locally controlled.

These same interests may be described as the state's desire to prevent the corporate headquarters and centralized decision making process of significant economic entities within the state from being shifted precipitously. State legislatures are not concerned with preserving the jobs of specific individuals who happen to be "incumbent management." Rather, it seems obvious from the huge majorities that most takeover legislation received that the states are concerned with local control and localized decision making responsibility. To be sure, where the states have sought to assert jurisdiction over tender offers for corporations which have only "substantial assets" within the state, this rationale collapses. However, if the state's jurisdiction is grounded on the corporation's "principal place of business" or some similar test, the state's interest may fairly be viewed as attempting to promote polycentrism and localized control of economic entities. The legitimacy of this interest, and whether it is an economic interest or something else, calls for further analysis. \(^{57}\)

The Kidwell court recognized that corporations influence local life through such actions such as making charitable contributions and their commitments to social issues as pollution control or job safety. The Idaho securities administrator contended that a state's interest in promoting benevolent management serves to justify state regulation of the means by which non-residents can change local management. \(^{58}\) While admitting the legitimacy of this state interest, the Fifth Circuit found nothing in the record to support the conclusion that all incumbent managers are model corporate citizens or that "all offerers are vandals." \(^{59}\) Moreover, the court found that Idaho's disclosure requirement was not an effective means of encouraging civic responsibility, particularly where, as in Kidwell, most of the shareholders were not residents of the state involved. \(^{60}\)

To the extent that Kidwell's holding on this point merely reflects a failure of the state of the record in that case, it is of little consequence. However, to the extent it suggests that none of the state's principal interests is of a non-economic nature, it is debatable. Many national corporations undoubtedly are model corporate citizens of the communities in which they reside. However, one intuitively concludes that, as a group, locally based major businesses tend to be more involved in various aspects of their community than branch operations of comparable size. The reasons for this are many but some are fairly obvious. First, the branch opera-

\(^{57}\) See text accompanying notes 58-61 infra.
\(^{58}\) 577 F.2d at 1282-83.
\(^{59}\) Id. at 1286.
\(^{60}\) Id.
tions tend to be under the administration of a plant manager, or, at best, a vice-president of a national corporation who often sees his tour in that plant as a step on a corporate ladder. He sees himself as less likely to remain in the community forever, and therefore, is less committed to any long term projects. Second, his fiscal authority normally is restricted. Typically, his ability to make a financial contribution either in cash or by lending the services of skilled personnel to community projects is subject to approval outside the community where the value of given projects obviously may be less accurately perceived. The actual decision maker for the branch office does not have to spend Sunday afternoon on the golf course with other members of the community who have "done their part."61 The fact that a locally managed major business is more likely to be involved in community affairs than the same operation managed from outside the state affects many aspects of community life including conventional charities, cultural activities, local education instructions, and professional athletics. All of these activities in one way or another contribute to the "quality of life" in local communities just as much as clean air or the absence of billboards. To the extent the business community withholds its support, the vitality and attractiveness of life in the community as a whole undeniably deteriorates. The state's generally adverse response to increased concentration in the American economy can be viewed as a realistic effort to prevent this deterioration and upgrade the quality of their citizens' lives. Although this "quality of life" interest is not purely economic in nature, it still should be viewed as a major basis for the states' obvious concern at the growth of the tender movement.

In sum, a state's effort to regulate takeovers may be prompted by one or more of four different concerns. First, states wish to assure that resident shareholders are given enough time and information to make an informed judgment as to a transaction that is, in substance, a transformation of the corporate structure. Second, takeover legislation may be viewed as an exercise of the states' right to prescribe the attributes of a share of stock in a corporation organized under their laws. Third, to the extent the statute seeks to impede the departure of corporate plant and facilities, it is prompted by economic regulatory considerations. Fourth, to the extent statutes apply to corporations headquartered in the state, it reflects the states' desire to improve the quality of life within their borders.

VI. THE CONSTITUTIONAL ISSUES

Constitutional analysis of state takeover legislation presents two basic issues: first, whether a federal statute expressly or impliedly preempts state legislation in the area, and second, whether state takeover regulation serves interests sufficient to justify the burdens the statutes often impose.

61 A similar analysis of the role of local industry has been urged as a basis for stronger antitrust laws and enforcement policies. See Green, An Economic Analysis of Monopoly and Anti-Competitive Power, 10 Sw. U. L. Rev. 65, 72 (1978).
on interstate commerce.\footnote{The Supreme Court has employed the test which balances the burdens imposed on interstate commerce by state pursuit of legitimate local interests to assess state statutes attacked under the commerce clause. See text accompanying notes 91-109 infra.} Because the Williams Act is the only federal statute that arguably preempts state takeover legislation, the resolution of the first of these questions is generally the same for most, if not all, of the state laws. The Williams Act's legislative history, purpose and language impact relatively uniformly on all state statutes despite their varied provisions. All, to a greater or lesser degree, delay the offer beyond the period that the Williams Act imposes. The commerce clause analysis, however, varies considerably depending upon (a) the state statute's jurisdictional basis, which is directly related to the state interest involved, and (b) the substantive provisions of the state scheme and the degree of "burden" they impose upon commerce.

In \emph{Kidwell}, the Fifth Circuit held that the Idaho statute was preempted "because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible."\footnote{577 F.2d at 1279. The \emph{Kidwell} court also believed preemption was dictated by the fact that Idaho's disclosure requirements were especially burdensome, complex, and inconsistent with federal requirements. \textit{Id.} at 1280-81.} The \emph{Kidwell} court also observed the oft-quoted language in a Senate Report of the Williams Act that:

\begin{quote}
[t]he Committee has taken extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. The Bill is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.\footnote{S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).}
\end{quote}

Subsequent to \emph{Kidwell}, two commentaries, based on different analyses, have disputed the conclusion reached by the Fifth Circuit.\footnote{\textit{See Response to Great Western, supra note 1; Securities Law and the Constitution, supra note 44.}} In short form, the conclusion of one is that the purpose of the Williams Act was to protect investors. The legislative history of the Williams Act indicates that the "balance" was not an objective of the Williams Act, but at best a byproduct of its investor protection rationale. Since the state laws do not conflict with that purpose, there is no preemption. The second argues that the Williams Act does not represent a pervasive federal scheme to regulate tender offers. With this preliminary conclusion there can be little quarrel. The analysis concludes that no conflict exists between the state and federal legislation for three reasons. First, any conflict is, at most, indirect. Second, there is no federal policy against initiating tender offers, and the state laws actually restore the "balance" that Congress sought to avoid "tipping." Finally, the state law's "fiduciary approach" and the "market approach" of the Williams Act are really consistent because the delays
A third line of argument is that the Supreme Court's recent holding in *Piper v. Chris-Craft Industries*, 43 U.S. 1 (1977), that an offeror has no claim for money damages under the Williams Act implies no pro-offeror congressional purpose. From that it is argued that the state laws are not preempted, even if they are "pro-management." The conclusion that the Williams Act does not preempt all state takeover legislation seems correct. However, the analysis leading to that conclusion is somewhat different from those heretofore suggested.

Various authorities have taken the position that § 28 of the Securities Exchange Act neither requires or prevents preemption, because the state laws are or are not "in conflict" with the Williams Act. However, the "savings clause" embodied in § 28(a) has doubtful bearing on state takeover acts. The provision purports to protect the jurisdiction of state "Securities Commissions." Takeover legislation is qualitatively different from matters historically conferred upon securities commissioners. Analogously, 28 U.S.C. § 2283 precludes injunctions against proceedings in state courts. However, an entity designated a "court" as a matter of state law may not constitute a "court" for purposes of 28 U.S.C. § 2283. The deter-
minitive factor under § 2283 is whether the function the state entity performs is "judicial," and this is a question of federal law. Similarly, a state agency designated as the "Securities Commission" should not enjoy any special status under § 28 of the Securities Exchange Act simply by virtue of the fact that that office is the designated state agency. Rather, a functional analysis of the statute is required. Under that test, § 28 becomes largely irrelevant to a consideration of the preemption question in enforcing takeover statutes is different in kind from the matters traditionally entrusted to state securities administrators. Of course, to the extent the statute involved, like Delaware's involves no state securities administrator, § 28 is inapplicable by its terms.

Assuming § 28 is irrelevant to the analysis, the issue becomes, as Kidwell recognized, whether the state acts are in conflict with the federal regulatory scheme. If "conflict" means that compliance with one is impossible without violating the other, there is no direct conflict between the Williams Act and most state statutes. Consequently, preemption must hinge on whether state laws conflict with the federal scheme or purpose embodied in the Williams Act.

The Williams Act's legislative history demonstrates only that Congress intended to avoid imposing substantial federal regulation of tender offers except in a few areas such as proration. Although the Senate and House Reports express Congress's desire to avoid tipping the 1968 balance between offerors and targets, that desire is not equivalent to a legislative decision to perpetuate the existing situation. In urging the enactment of the Williams Act, the SEC focused entirely on disclosure to investors and investor protection. It expressly disclaimed the "social and economic" arguments urged in opposition to the Williams Act. Opponents argued that the Act would deter tender offers by generating litigation about the adequacy of disclosure which in turn would create the opportunity for delay. At the same time, these opponents viewed tender offers as desirable means of creating a market in corporate control and facilitating the removal of inefficient management. Accordingly, it was contended that a federal tender offer law was inappropriate or undesirable. On the other hand, some testimony supported prefiling requirements similar to those in some state laws, principally on the ground that incumbent management did not, under the existing law, have the time to organize a defense or to respond adequately to the offer. After hearing these positive and negative eco-

court's role in the recount process involved functions similar to those that "nonjudicial functionaries" often make while processing other kinds of applications. Id. at 21-22. The Court buttressed its position by noting that technically Hartke's complaint had sought to enjoin the recount commission's procedures, and not the state court's. Id. at 22, n.17.

See note 69 supra; Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908) (defining judicial function).

" Senate Hearings, supra note 5, at 196-97.

Id. at 137.

House Hearings, supra note 4, at 7.
nomic and business policy arguments, both the Senate and the House reported their desire to avoid “tipping the balance.”

In sum, the legislative history indicates that Congress merely desired to leave the situation as it found it, rather than to perpetuate the existing business balance to the exclusion of state legislation. Otherwise stated, the situation as Congress found it in 1968 was that the states could regulate tender offers within the confines of the commerce clause. Congress, by avoiding tipping the balance, left that situation intact.

Subsequent “legislative history” bears inconclusively on the legislative intent issue. Senator Williams, writing in 1977, appears to believe that all state legislation is inconsistent with the Williams Act. On the other hand, House Judiciary Chairman Rodino, in explaining the 1976 Hart-Scott-Rodino Antitrust Improvements Act, stated that a company could circumvent delays required by federal antitrust laws by reincorporating in a state with an antitakeover law. The viability of such a “defense” appears to assume that state takeover laws are legitimate.

The Supreme Court on two occasions has divined a purpose in the Williams Act not to favor either side in tender offers. More recently, in Exxon Corporation v. Governor of Maryland, the Court was faced with a Maryland statute prohibiting oil companies from owning gasoline stations. It also requires that any allowances given by refiners be given to all retailers in the state. Exxon contended that because § 2(b) of the Robinson-Patman Act does not prohibit the oil companies from granting all types of allowances, the Maryland statute could not accomplish that end. The Supreme Court rejected this argument and held that § 2(b) created no federal right to grant allowances. Accordingly, there was no preemption. The Fourth Circuit also has rejected a claim that a Virginia statute, regu-
lating locations of automobile dealerships, was preempted by the federal Dealers Day in Court Act. The fact that Congress rejected a proposal similar to that which Virginia enacted was not enough to create the direct conflict the Fourth Circuit found necessary for preemption. Although the Williams Act failed to "create a new federal right" in offerors for money damages, arguably it created some right in offerors, for example, to seek injunctive relief against inadequate management disclosures. Accordingly, even if Chris-Craft did not preclude preemption by rejecting a pro-offeror congressional purpose, the issue is not whether the Williams Act conferred any rights whatever on offerors. Rather, it is whether there is a federal right to be free of state legislated delay. The legislative history and language of the Act suggest a negative response.

On February 2, 1979, the SEC issued a number of proposed rules under the Williams Act. These, to a large extent, replace proposed rules issued initially in 1976 but never adopted. They are the subject of extensive comment by the American Bar Association and others, in many cases questioning whether the proposed rules exceed the Commission's authority under the statutes. One provision is particularly significant for present purposes. The SEC, in proposed rule 14(e)-1(a), would require that a tender offer remain open for a minimum of 30 business days, or approximately six weeks. This requirement obviously is designed to meet the contentions that the tender movement had gone too far. The Commission asserted that it desired to promulgate a uniform national rule. Recognizing that the state statutes had been enacted in response to legitimate concerns, the Commission wished to avoid any problems that potentially could arise in the context of the conflicting and confusing state regulatory patterns. Since the proposed rule is promulgated pursuant to the Williams Act, the SEC is proposing a rule that, if valid, effectively eliminates the argument that a six week delay conflicts with the Williams Act. However, Congress manifested its intention not to impose time limitations beyond a seven or ten day minimum offer period. Whether the rule would be subject to

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82 American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219 (4th Cir. 1979), cert. pending. The Virginia statute prohibits automobile manufacturers from granting franchises for a particular line of cars in a trade area already served by other dealers in that line unless the manufacturer first notifies the other dealers. Va. Code § 46.1-547(d) (Cum. Supp. 1978). Moreover, if the Commissioner of Motor Vehicles determines that the trade area will not support additional dealerships, he may prohibit completely franchise grants in the area. Id.


85 See text accompanying note 66 supra.


87 State Takeover Statutes and The Williams Act, supra note 67, at 198.


attack on the grounds that its terms conflict with the dictates of the statute remains to be seen. Yet an offeror may be reluctant to initiate such a challenge. In order to do so, the offeror initially would have to proceed in violation of the rule, thereby risking significant civil liability and forced termination of the offer. At best the offeror would lose the advantage of going forward without advance public notice. Whatever the ultimate resolution of the potential conflict, we find in 1979 the SEC, having successfully argued as amicus curiae in Kidwell that the Williams Act preempts state imposed six week delays, now proposing a six week delay as an appropriate implementation of the Williams Act.

The Kidwell court found the commerce clause challenge to the Idaho statute persuasive. Most comments have dealt with the abstract compatibility of the commerce clause and state takeover legislation. However, the nexus between the particular target and the regulatory state is a basic consideration in any discussion of the compatibility of state takeover legislation and the commerce clause. As observed above, differing connections between the state and the target evince quite different state interests. If incorporation is the test, either the state interest in shareholder protection, its internal affairs, or both is involved. If principal place of business is the test, both economic and quality of life considerations become significant. If substantial corporate assets is the state contact test, then the state's interest more clearly approaches economic protectionism.

The residence of the target's shareholders is a factor that underlies all of these diverse state interests. Section 28 of the Securities Exchange Act arguably legitimizes an investor protection interest similar, if not identical, to that fostered by the Williams Act. Many of the existing state laws raise additional issues in that the investors they protect are not within the protecting state's borders. In recognition of this, the proposed Federal Securities Code expressly would preempt state takeover legislation except as to corporations with their principal place of business in the state and a majority of their shareholders in the state. This resolution is essentially a political compromise between the Code's draftsmen and the state securities administrators. It reflects concern for both investor protection interests (shareholder residence) and quality of life or "economic and social" considerations (principal place of business). Thus, at least impliedly, the proposed Code would recognize legitimate noninvestor considerations in establishing the appropriateness of state regulation.

Kidwell, on the other hand, expressly rejected the notion that anything other than economic considerations were involved in the Idaho takeover law as applied to Sunshine Mining. From this premise the court proceeded to apply the balancing test of Pike v. Bruce Church Inc.. In Pike,

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90 See text accompanying notes 41-56 supra.
91 AMERICAN LAW INSTITUTE, FEDERAL SECURITIES CODE PROPOSED OFFICIAL DRAFT § 1904(c) (1978).
92 577 F.2d at 1282 n.54.
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the Court capsulized the proper commerce clause analysis, stating that

[W]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.4

There can be no doubt that a state takeover law has an impact on interstate commerce in the sense that it prohibits interstate transactions in securities until the state's requirements are met. However, the same can be said of state regulatory measures that have been upheld against constitutional attack. Notable among these decisions is American Can Co. v. Oregon Liquor Control Commission,9 which validated a state environmental law prohibiting the use of nonreturnable containers. To be sure, the Oregon prohibition is not "extraterritorial" in the sense that state takeover legislation operates on stockholders who are outside the state. On the other hand, the legislation clearly was enacted without the participation of affected interests such as outside canners and bottlers, and it plainly has economic as well as noneconomic aspects. Similarly, state legislation directed toward protection of local employment opportunities has been described as almost as well insulated against constitutional attack as state laws having health and other nonfinancial aspects.6 In the case of state regulation justified by both principal place of business and substantial assets hooks, these "noncomparable state interests" may well justify more burdensome regulation than the more directly economic interests with which the Kidwell court believed it was dealing.

Moreover, the Supreme Court recently has evinced an increasing willingness to permit state economic regulation that has obvious national implications. A most noteworthy example is Exxon Corporation v. Governor of Maryland, which sustained Maryland's law prohibiting major oil companies from owning retail outlets in that state.9 Viewed from the point of view of the economy as a whole, rather than the shareholders, a tender offer's transformation of a locally managed independent corporation into a national corporation is substantially identical on a larger scale to the sale of an independent gasoline station to a major oil company. The Exxon Court observed the Maryland law did not "stop" interstate commerce, it merely regulated persons who send petroleum products through interstate

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4 Id. at 142.
7 See text accompanying notes 78-81 supra.
commerce into Maryland.\textsuperscript{48} Similarly, state takeover legislation affects target companies' ownership rather than their operations. The Maryland statute also effectively promotes independent ownership of gasoline stations. In this sense, the statute resembles the state takeover laws if one accepts the hostile characterization of the takeover statute as a means to protect management. Both state laws in some sense "restrict" the ability of the respectively affected shareholders to dispose of their property. Or, conversely, both restrict the affected companies' "right" to acquire property. Each law applies regardless of the citizenship of the affected corporation's owners.\textsuperscript{49}

Another significant aspect of state legislation is the potential for conflicting state regulation. Obviously, if multiple states regulate the same transaction under different timetables, and impose inconsistent substantive requirements, that potential exists with its attendant impermissible burden on commerce.\textsuperscript{100} However, to the extent the law is limited to targets incorporated in the regulating state, full faith and credit should require that the state's laws be honored.\textsuperscript{101} Whether in fact such conflicts exist to any material degree under present state legislation is unclear. No case has yet invalidated a state's laws on the basis of such a conflict. However, as discussed above, in at least one case a state commissioner has declined jurisdiction over a takeover on the basis that the law of the state of incorporation had a conflicting timetable.\textsuperscript{102}

If there is a conflict between the takeover law of the state of incorporation and that of any other state, both the commerce clause and full faith and credit seem to dictate that the law of the state of incorporation should control.\textsuperscript{103} Historically, corporations qualifying to do business in a foreign state, have entered the foreign state clothed with their own corporate law. Moreover, the right to impose, in effect, a restraint on alienation of the shareholders' property, which is one way of viewing the effect of the takeover legislation, historically has been viewed as resting with the state of incorporation. In \textit{Order of United Commercial Travelers of America v. Wolfe},\textsuperscript{104} the Supreme Court invoked this doctrine to give "worldwide" effect to the law of the state of a mutual insurance company's domicile in determining the enforceability of the company's bylaw that established a

\textsuperscript{48} 437 U.S. at 125-29.

\textsuperscript{49} See also \textit{New Motor Veh. Bd. v. Orrin W. Fox Co.}, 439 U.S. 96 (1978). In \textit{Orrin Fox}, the Court upheld California's law that closely paralleled the Virginia statute at issue in \textit{American Motors}. See text accompanying notes 82-83 supra. Both cases evidence a more benign judicial attitude towards state regulatory schemes in general.


\textsuperscript{51} See text accompanying note 34 supra.

\textsuperscript{52} See text accompanying notes 32-34 supra.


\textsuperscript{54} 331 U.S. 586 (1947).
six month time limit for filing claims.\textsuperscript{105} The criticism that the “extraterritorial” impact of some state statutes is not justified by a legitimate state interest derives from viewing the state legislation exclusively as investor protection measures.\textsuperscript{106}

The Idaho statute at issue in \textit{Kidwell} applied to companies with substantial business in the state.\textsuperscript{107} Consequently, the statute principally effectuated the state economic interests.\textsuperscript{108} The corporate law justifications, major investor protection considerations, and the factors involved in shifting a corporate domicile were all lacking. In this context the \textit{Pike} balancing test is appropriate and may well require invalidation of the state regulation under the commerce clause. However, it is doubtful whether balancing is appropriate at all where the statute involves noneconomic considerations.\textsuperscript{109} In any event, the states’ noneconomic interests at least are entitled to greater weight than the \textit{Kidwell} court accorded them. This is particularly true if the regulating state is the target’s state of incorporation as well as the physical situs of its operations and headquarters. Against these must be balanced the degree of regulation sought. In order to accomplish anything in the nature of permitting more time for allowing an auction market to develop in the event an offer is made, or to increase the risks of success and thereby deter offers, it is necessary that the state regulate all shareholders wherever situated. The manner of regulation is the only point of flexibility. To take an extreme example, if a state were to seek to prohibit tender offers altogether, although no state has sought to do so, it would obviously require some unusual degree of regulatory purpose such as insurance regulation. At the other end of the spectrum, statutes with built in limitations on the time delays inherent in compliance and with no significant overlay of inconsistent substantive or disclosure requirements may withstand attack. They may be considered essentially noneconomic, or in the words of \textit{Kidwell} “noncomparable,” regulation. Alternatively, the burdens they impose on interstate commerce may not be deemed sufficiently great to outweigh the state’s interest.

The numerous combinations and permutations of underlying state interests, and the various possible corporate presences within a state make it virtually impossible to reach an abstract conclusion as to propriety of state takeover regulation. It is fair to say that much of the existing legislation on the books is constitutionally defective under \textit{Kidwell} as applied to some corporations to which it might be applied. However, even in light of the Supreme Court’s decision not to address the substantive issues \textit{Kidwell}...
raised, more restrained exercises of state power, both in terms of limitation upon the corporations to whom the statute applies, and the burden the regulatory scheme imposes on interstate commerce, should be sustainable. This is particularly true in the case of those state statutes that apply only to corporations incorporated under the enacting state's laws, thereby eliminating the possibility of duplicative state schemes, and those whose minimum time limitations do not render success highly doubtful. The 30 business days suggested by the SEC, and the 30 day minimum period recommended by a committee of the American Bar Association appear to be within the acceptable range.

VII. Conclusion

There is certainly a legitimate basis for reaching an affirmative conclusion to the question posed in Arthur Liman's 1978 Article: Has The Tender Movement Gone Too Far? Whether one agrees or disagrees that statutory restraints should be placed upon the tender offer as a tool for corporate consolidation, there can be no doubt that there is room for legitimate debate on the point as the SEC acknowledged in proposing Rule 14(e)-1(a). Until Congress acts, as the ALI Federal Securities Code suggests, or until the SEC itself adopts rules designed to curb the Saturday Night Special, states should continue to serve legitimately as Brandeian little laboratories, as Professor Shipman suggested they should do almost a decade ago. It is obvious that the tender offer has not been put in the deep freeze by the "chilling effect" of state legislation as some predicted. No documentation of the claimed chilling effect has been offered. Given the business confidentiality accorded to offers considered but never made, any such documentation likely will not be forthcoming. In this climate of conflicting value judgments as to the desirability of the tender offer, a state's interests should justify minimal regulation, at least as to those corporations incorporated under the law of the state, and with their corporate headquarters and significant assets there in the state. Actual shareholder residence is virtually impossible to identify in a tender offer's time parameters due to the large number of institutional holdings of securities of most publicly owned companies. Accordingly, that jurisdictional hook should not be required. In the case of a company incorporated in the state of its corporate headquarters, it will be a rare case in which there are not substantial shareholdings in the state. As to these corporations in which they have a major stake, states should be allowed to continue to regulate the pace at which an acquisition may be accomplished.

If the basic premise of this article is correct, some corporations may

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11 State Takeover Statutes, supra note 67, at 194.
13 See Shipman, supra note 45.
have no single state to whom they have a sufficient nexus to warrant the application of that state's laws to the exclusion of others. Under present constitutional and state choice of law doctrines, the state of incorporation is entitled to deference to the extent regulation is viewed as "corporate laws." However, a realistic view is that the dominant state interest is in the preservation of independent economic entities. As a result, the legislative judgment reflected in the proposed Federal Securities Code is correct that the state in which the target has its principal place of business should be permitted to regulate to the exclusion of all others. That, however, will take an act of Congress. Its resolution by courts remains to be seen.