

On the Validity of State Takeover Regulation: State Responses to *MITE* and *Kidwell*

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I. INTRODUCTION

On May 4, 1981, the Supreme Court noted probable jurisdiction of the appeal by the Illinois Secretary of State from the Seventh Circuit's decision in *MITE Corp. v. Dixon*.¹ The Seventh Circuit had held in *MITE* that the Illinois Business Takeover Act was preempted by the Williams Act,² and that it substantially obstructed interstate commerce in violation of the Commerce

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1. *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), *prob. juris. noted sub nom. Edgar v. MITE Corp.*, 101 S. Ct. 2043 (1981).

2. Williams Act, 15 U.S.C. § 78(i), § 78m(d)-(e), § 78n(d)-(f) (1976). The provisions of the Williams Act and the rules adopted thereunder have been summarized in detail elsewhere. See, e.g., Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 HARV. J. LEGIS. 409, 412-21 (1980). See also Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 FORDHAM URB. L.J. 912, 918-19 (1979-80) (hereinafter cited as *New SEC Rules*):

Section two of the Williams Act, adding section 13(d) to the [Securities] Exchange Act [of 1934], requires a person or corporation which becomes the owner of five percent or more of any class of equity securities of a registered company to file a schedule 13D with the SEC containing certain information and to send the same information to the target company. Filing of this information must occur within ten days after acquiring beneficial ownership of the above referenced five percent. The Williams Act also requires the offeror to disclose the amount and source of the funds for purchase, the offeror's background and identity, and the extent of the offeror's holdings in the target company. Where the offeror's purpose is to acquire control of the target corporation, the offeror must disclose whether it plans to liquidate the target, sell its assets, merge it with another company, or initiate any major change in the target's business.

In addition to this 13(d) filing, section 14(d) of the Exchange Act provides that an offeror which acquires more than five percent of any class of equity security by means of a tender offer must first file a statement with the SEC. This 14(d)-1 statement includes the same information required by section 13(d) and, in addition, requires disclosure of the source of funds used to purchase the target shares, past transactions with the target company, and other material financial information about the offeror. The offeror must also disclose any antitrust or other legal conflicts relating to the tender offer if such information would be material to the shareholders in deciding whether to tender their shares. The offeror must publish or send a statement of the relevant facts contained in schedule 14D-1 to the shareholders of the target company.

In addition to the filing and disclosure requirements, the Williams Act contains several provisions designed to protect target company shareholders. First, a tendering shareholder may withdraw his shares up to seven days after he has received the offer or after sixty days from the date of the original tender offer if the offeror has not already purchased the tendered shares. The commencement of the tender offer is measured from the filing of a schedule 14D-1 with the SEC. Second, if the offeror makes an offer for less than all of the outstanding securities and more securities are tendered within ten days after the offer has commenced, the offeror must purchase the additional shares pro rata. Third, when an offeror raises its premium before the expiration of the offer, the offeror must pay the increased consideration to all tendering shareholders. Finally, the Williams Act contains a broad antifraud provision which prohibits false or misleading statements and fraudulent, deceptive, or manipulative acts by the offeror, target company, or any other person. (footnotes omitted).

Clause.³ By noting probable jurisdiction in this case the Court has apparently decided to resolve, in some way, the issue left undecided by its 1979 decision in *Leroy v. Great Western United Corp.*⁴ In that case, the Court reversed on grounds of improper venue the Fifth Circuit's 1978 decision in *Great Western United Corp. v. Kidwell*, where the court had found the Idaho takeover statute was both preempted and in violation of the Commerce Clause.⁵

Judge John Minor Wisdom's opinion in *Kidwell* had ranged far beyond the particular provisions of the Idaho statute and had called into question the fundamental premises of state regulation of corporate takeovers.⁶ The Court's reversal on grounds of improper venue thus generated considerable uncertainty about the constitutional status of state takeover regulation in its various forms.⁷ That uncertainty, of course, spawned voluminous debate in the law reviews and a long series of cases in which the courts were forced to consider these preemption and Commerce Clause issues but were unable or unwilling to dispose of them directly.⁸

3. Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

4. *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979)(hereinafter cited as *Leroy*).

5. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978)(hereinafter cited as *Kidwell*).

6. *Id.* at 1274-86.

7. Thirty-seven states have enacted takeover legislation.

ALASKA STAT. §§ 45.57.010 to .120 (1980); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (1980); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1980); CONN. GEN. STAT. ANN. §§ 36-456 to -468 (West Supp. 1980) (amended 1981); DEL. CODE ANN. tit. 8, § 203 (Supp. 1980); FLA. STAT. ANN. §§ 517.35 to 363 (West Supp. 1978)(repealed 1979); GA. CODE ANN. §§ 22-1901 to -1915 (1977); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (1980 & Supp. 1981); ILL. ANN. STAT. ch. 121½, §§ 137.51 to .70 (Smith-Hurd Supp. 1981-1982); IND. CODE ANN. §§ 23-2-3.1-1 to -11 (Burns Supp. 1980)(amended 1981); IOWA CODE ANN. §§ 502.211 to .215 (West Supp. 1981-1982); KAN. STAT. ANN. §§ 17-1276 to -1284 (1974 & Cum. Supp. 1980); KY. REV. STAT. ANN. §§ 292.560 to .991 (Baldwin Cum. Supp. 1980); LA. REV. STAT. ANN. § 51:1500 to :1512 (West Supp. 1980); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (Supp. 1980-1981); MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1980)(amended 1981); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1981); MICH. COMP. LAWS ANN. §§ 451.901 to .917 (Supp. 1981-1982); MINN. STAT. ANN. § 80B.01 to .13 (West Supp. 1981); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1980); MO. ANN. STAT. §§ 409.50 to .565 (Vernon 1979); NEB. REV. STAT. §§ 21-2401 to -2417 (1977); NEV. REV. STAT. §§ 78.376 to .3778 (1979) (amended 1981); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (Cum. Supp. 1979); N.J. STAT. ANN. §§ 49:5-1 to :19 (West Supp. 1981-1982); N.Y. BUS. CORP. LAW §§ 1600-1614 (McKinney Supp. 1980-1981); N.C. GEN. STAT. §§ 78B-1 to -11 (1981); OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1980); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1981-1982); S.C. CODE §§ 35-2-10 to -110 (Supp. 1980); S.D. COMP. LAWS ANN. §§ 47-32-1 to -47 (Supp. 1980); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1980); UTAH CODE ANN. §§ 61-4-1 to -13 (1978 & Supp. 1979); VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1981); WIS. STAT. ANN. §§ 552.01-.25 (West Special Pamphlet 1980) (amended 1981); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, *reprinted in* 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671-55,682. For surveys of the different forms of state takeover regulation see E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 207-17 (1977); Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213, 219-40 (1977); Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 689-98 (1975). None of these surveys, however, reflect the changes in the state schemes effected in 1980 and 1981. Those changes will be discussed in Part III of this Article. For a more recent, although still incomplete, survey, see Shapiro, *State Takeover Laws*, in PRACTICING LAW INSTITUTE, TWELFTH ANNUAL INSTITUTE ON SECURITIES REGULATION 401-42 (1980).

The state statutes have always varied in their particular terms, and the recent changes have created even more disparity. They do, however, share the common feature of extraterritorial impact. If a corporation targeted for a takeover bid meets the state's jurisdictional criteria, the statute will apply to transactions with both resident and nonresident shareholders. Each state takeover statute, therefore, may have a virtually global impact. Other substantive and procedural affinities and distinctions among the state statutes will be discussed in detail throughout this Article.

8. See note 18 *infra* and accompanying text.

Some courts, of course, were willing and able to follow the Fifth Circuit in striking down a state takeover statute.⁹ Others, however, refused to follow *Kidwell*, and sustained the validity of the state takeover law in question.¹⁰ The Securities and Exchange Commission tried to inject some certainty into the matter by adopting a series of new tender offer rules that rendered simultaneous compliance with state filing and timing requirements impossible.¹¹ The Commission apparently contemplated that these new rules would create the kind of direct conflict needed to make a finding of preemption inescapable.¹² The Commission's hope, however, has been fulfilled only with respect to those provisions of state law directly affected by the new rules.¹³ The uncertainty generated by the Court's reversal in *Leroy* has thus been compounded by the conflicting pattern of decisions and the Commission's forceful action. The states, moreover, have vigorously responded with a series of statutory and administrative reforms.¹⁴

The Court's decision in *MITE* may finally end this confusion, insofar as a decision in a case involving a single state's statute may bring resolution to an area in which so many states have legislated. It is appropriate, therefore, to survey the law as it now stands prior to the anticipated decision in *MITE*. Part II of this Article will summarize the complex and contradictory pattern of post-*Kidwell* decisions. Part III will survey the recent statutory and administrative responses of several states¹⁵ to the challenges posed by *Kidwell* and its progeny and by the Commission's preemptive rules, and will suggest that these responses demonstrate that a constitutional, non-preempted state takeover law is indeed possible. In so doing, this Article will reexamine the familiar preemption and Commerce Clause analyses in light of the substantial regulatory reforms. These analyses may thus provide a limiting framework for the Court's decision in *MITE*.

9. See note 17 *infra* and accompanying text.

10. See note 20 *infra* and accompanying text.

11. This series of rules became effective January 7, 1980. They include Rules 14d-1 to -9, 17 C.F.R. §§ 240.14d-1 through 14d-9 (1980). Note that this Article will use the terms "takeover bid," "takeover offer," and "tender offer" interchangeably, thereby reflecting current usages in the statutes, the courts, and the literature. Strictly speaking, however, a "takeover" is the process of securing control of a corporation through a "tender offer" for the shares of the target company. See, e.g., ILL. ANN. STAT. ch. 121½, § 137.52-9 (Smith-Hurd Supp. 1981-1982): "'Take-over Offer' means the offer to acquire . . . any equity security of a target company, pursuant to a tender offer. . . ." With respect to the definition of a "tender offer," see note 168 *infra*.

12. See SEC Rel. No. 34-16384, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,583-84. See also text accompanying notes 42-43 *infra*.

13. See note 129 *infra* and accompanying text.

14. See Part III of this Article, which will discuss the key reforms in detail.

15. Reforms in the Connecticut, Indiana, Maryland, Nevada, New York, Pennsylvania, and Wisconsin laws will receive particular attention. The Proposed Uniform Takeover Act published by the North American Securities Administrators Association (NASAA) will also be discussed. The version of the NASAA act discussed in this Article was published for comment on April 27, 1981. See 602 SEC. REG. & L. REP. (BNA) K-1 (May 6, 1981). It is anticipated that NASAA's Tender Offer Committee will present a final version for adoption at NASAA's convention in Atlanta, Georgia in the fall of 1981. Letter from Orestes J. Mihaly, Chairman, NASAA Tender Offer Committee to Thomas Krebs, President of NASAA (April 23, 1981). This Article's analysis of the act thus may not reflect NASAA's final proposal.

Id. at 2442 n.23 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)).

II. FROM *Kidwell* TO *MITE*: A SUMMARY OF THE TREND AND THE ISSUES

Since the Fifth Circuit's decision in *Kidwell*,¹⁶ at least eleven courts have found that a state takeover statute excessively burdens interstate commerce or is preempted by the Williams Act.¹⁷ Two other decisions have upheld state statutes in the face of such challenges only insofar as they are interpreted and applied by the state securities administrator in a manner consistent with the Williams Act.¹⁸ In at least ten other cases courts acknowledged potential preemption or Commerce Clause problems with a state takeover statute, but have declined or were unable to rule on those problems in view of the procedural posture of the case at hand.¹⁹ Decisions in four other cases, however, have resisted this trend and sustained the validity of a state statute.²⁰

16. *Kidwell*, *supra* note 5.

17. *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980)(hereinafter cited as *Smith*)(New Jersey statute); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980)(Illinois statute); *Natomas Company v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981)(hereinafter cited as *Natomas*)(Nevada statute); *Crane Co. v. Lam*, [1981] FED. SEC. L. REP. (CCH) § 97,896 (E.D. Pa. 1981)(hereinafter cited as *Crane*)(Pennsylvania statute); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206 (D.N.J. 1981)(hereinafter cited as *Kennecott*)(New Jersey statute); *Canadian Pacific Enterprises (U.S.), Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981)(hereinafter cited as *Canadian Pacific*)(Ohio statute); *Hi-Shear Industries, Inc. v. Campbell*, [1981] FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. 1980)(hereinafter cited as *Hi-Shear*)(South Carolina statute); *Brascan Ltd. v. Lassiter*, [Current] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. May 3, 1979)(hereinafter cited as *Brascan*)(Louisiana statute); *Dart Industries, Inc. v. Conrad*, 426 F. Supp. 1 (S.D. Ind. 1978)(hereinafter cited as *Dart*)(Delaware statute); *Kelly v. Beta-X Corp.*, 302 N.W.2d 596 (Mich. Ct. App. 1981)(hereinafter cited as *Beta-X*)(Michigan statute); *Eure v. Grand Metropolitan Ltd.*, [1980] FED. SEC. L. REP. ¶ 97,694 (N.C. Super. Ct. 1980)(hereinafter cited as *Grand Met.*)(North Carolina statute).

18. *Hi-Shear Industries, Inc. v. Neiditz*, [1981] FED. SEC. L. REP. (CCH) ¶ 97,805 (D. Conn. 1980)(hereinafter cited as *Neiditz*)(Connecticut statute will not be invalidated on preemption or Commerce Clause grounds unless state administrator fails to exercise his statutory discretion to apply the statute's waiting period, hearing, and withdrawal provisions in such a way as to avoid conflicting with the Williams Act and impermissibly burdening interstate commerce); *Sun Life Group, Inc. v. Standard Life Ins. Co. of Indiana*, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. 1980)(hereinafter cited as *Sun Life*)(no conflict with Rule 14d-2(b) insofar as the state administrator construes the Indiana Insurance Company Holding Act, IND. CODE ANN. § 27-1-23 (Burns Supp. 1980), a state takeover statute applicable only to insurance corporations, as permitting a tender offer to commence prior to expiration of the thirty-day statutory waiting period so long as the offer is expressly conditioned upon approval by the administrator).

19. *Crane Co. v. Harsco Corp.*, 509 F. Supp. 115 (D. Del. 1981)(Delaware statute); *Ex rel. Krouse v. SEC*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,688 (S.D. Ohio)(Ohio statute); *Chromalloy American Corp. v. Sun Chemical Corp.*, 474 F. Supp. 1341 (E.D. Mo. 1979)(Missouri statute); *Tyco Laboratories, Inc. v. Connelly*, 473 F. Supp. 1157 (D. Mass. 1979)(hereinafter cited as *Tyco*)(Massachusetts statute); *UV Industries, Inc. v. Posner*, 466 F. Supp. 1251 (D. Me. 1979)(Maine statute); *S-G Securities, Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978)(Massachusetts statute); *Sheffield v. Consolidated Food Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981)(North Carolina statute); *GM Sub Corp. v. Liggett Group, Inc.*, 415 A.2d 473 (Del. 1980)(Delaware statute); *Unitrode Corp. v. Dynamics Corp. of America*, 399 N.E.2d 5 (Mass. 1980)(Massachusetts statute); *UV Industries, Inc. v. Sharon Steel Corp.*, [Current] BLUE SKY L. REP. (CCH) ¶ 71,466 (N.Y. Sup. Ct. 1979)(New York statute). *See also* *HB Holdings, Inc. v. Rosario Resources Corp.*, No. 80-1201 (S.D.N.Y., dismissed per stipulation Feb. 13, 1980)(New York statute).

20. *AMCA International Corp. v. Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979)(hereinafter cited as *AMCA*). This decision by Judge Kinneary with respect to the Ohio statute antedated the adoption of Rule 14d-2(b); the subsequent adoption of that Rule led him to rule in *Canadian Pacific* that the prenotification waiting period of OHIO REV. CODE ANN. § 1707.041(B)(1) (Page 1978) was preempted. *Canadian Pacific*, *supra* note 17, at 1197; *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980)(compare the same court's decision with respect to the Indiana Insurance Holding Company Act in *Sun Life*, *supra* note 18, at 97,117, a post-Rule 14d-2(b) case); *Strode v. Esmark, Inc.*, [1980] FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980)(hereinafter cited as *Esmark*)(also pre-Rule 14d-2(b)); *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980)(hereinafter cited as *Wylain*)(also pre-Rule 14d-2(b)). *See also* *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 (4th Cir. 1980)(hereinafter cited as *Telvest*), in which the Fourth Circuit ruled that the Eastern District

Some of the decisions invalidating state takeover statutes were broadside attacks on the statute in question, deploying the heavy artillery of preemption and Commerce Clause analyses to knock out the theoretical underpinnings of state takeover legislation, as well as individual provisions of a specific statute.²¹ Others have rested solely on a finding that a particular provision of the state statute cannot stand.²² The courts' approaches to this issue, therefore, have ranged from the audacious to the tentative, and do not leave us with a precise, consistent pattern of analysis. A case-by-case chronology of post-*Kidwell* developments would thus obscure more than it clarifies; a more schematic summary of the preemption and Commerce Clause problems emphasized by the courts may reveal the current trend and the underlying issues more vividly.

A. Preemption

1. Basic Conflicts: Inconsistent "Philosophies" of Takeover Regulation

From *Kidwell* to *MITE* and beyond, the courts have emphasized that the underlying purpose of the Williams Act is the protection of investors and that Congress intended to protect investors by ensuring adequate and timely disclosure of material information about the takeover bid so that the investor may make an informed decision.²³ This "market approach," as the legislative history of the Williams Act seems to show, reflected Congress' belief that investor protection does not require prevention or discouragement of takeovers since some takeovers may, in fact, benefit investors.²⁴ Some courts, however, have gone farther and asserted that the Williams Act was also intended to protect investors by preserving a neutral balance between incumbent management and the offeror.²⁵

of Virginia had erred in entering an injunction against enforcement of the "creeping acquisition" provisions of the Virginia statute because the court "laid undue and mistaken emphasis on the [plaintiff's] likelihood of success, mistook the emphasis in balancing the hardships, omitted consideration of the other . . . shareholders [in the target company], found a conflict between the statutes where none may necessarily exist, and found an impermissible burden on interstate commerce on an insufficient record . . ." The court stopped short, however, of full affirmation of the statute's constitutionality and non-preemption. *Id.*

21. *MITE*, *supra* note 1; *Kidwell*, *supra* note 5; and *Kennecott*, *supra* note 17.

22. *Smith*, *supra* note 17, at 191 ("We have held no more than that the New Jersey provisions delaying 'commencement' of a tender offer beyond the five-day period conflict with the SEC regulations. . ."); *Canadian Pacific*, *supra* note 17, at 1196, 1197 (Ohio's twenty-day prenotification requirement found preempted by Rule 14d-2(b) without a ruling as to whether the Ohio statute, in its entirety, is preempted or is a burden on interstate commerce); and *Grand Met*, *supra* note 17, at 98,648 (North Carolina's thirty-day prenotification waiting period also found preempted by Rule 14d-2(b) without any further ruling).

23. *Crane*, *supra* note 17, at 90,534 ("[T]he function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.") (quoting *Kidwell*, *supra* note 5, at 1276).

24. See S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967) and H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3 (1968), both reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1017.

25. *MITE*, *supra* note 1, at 495; *Kidwell*, *supra* note 5, at 1279-80; *Natomas*, *supra* note 17, slip op. at 4; *Crane*, *supra* note 17, at 90,534; *Kennecott*, *supra* note 17, at 1218; *Hi-Shear*, *supra* note 17, at 90,032; *Dart*, *supra* note 17, at 12. The importance and persuasiveness of this assertion will be discussed *infra* in Part III of this Article, but for a decision rejecting the assertion, see *AMCA*, *supra* note 20, at 936-37 ("Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.")

Several of the decisions invalidating state takeover statutes have turned on the finding that a state statute embodies, in its entirety or in part, a philosophy of takeover regulation incompatible with that of the Williams Act. The fundamental question of whether state takeover legislation is genuinely incompatible with the Williams Act will be discussed in Part III of this Article, but the assertions of incompatibility in the cases should first be noted. The nature and extent of the incompatibility has, of course, varied from case to case, but two main strands may be isolated.

First, some courts have insisted that the delays incident to state precommencement waiting and hearing provisions²⁶ increase the chances that a takeover bid, once made, will not be successfully completed because delay may give incumbent management additional opportunity to employ a wide variety of defensive maneuvers.²⁷ This supposed tilt of the regulatory balance toward incumbent management has been held to create an unacceptable conflict with the Williams Act "because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection."²⁸ In short, some courts have seen the entire waiting period and administrative review process contemplated by several state statutes as creating an obstacle to effectuation of the policy of neutrality allegedly informing the Williams Act.²⁹ These findings of obstruction, moreover, have not depended upon the direct timing conflict created by the adoption of Rule 14d-2(b).

Second, administrative review of the substantive fairness of a takeover bid has been invalidated by some courts on the ground that such review "is in conflict with the market approach and frustrates the express congressional intent that the *shareholders* make *their* decision."³⁰ The conflict, at least

(quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977)). See also Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 NOTRE DAME LAW. 725, 734-35 (1979) (hereinafter cited as *Preemption*); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U.L. REV. 872, 914-15 (1978) (hereinafter cited as *A Response to Great Western*).

26. Many of the state statutes require or required the takeover bidder to make certain filings with the state administrator and to give notice to the target prior to actually commencing the takeover bid. That is, the aggressor must wait before actually commencing the offer to purchase shares of the target. See text accompanying notes 33-49 *infra*. Many states also require or permit a hearing by the state administrator at some point during the takeover bid. That hearing may involve review of both the substantive fairness of the offer and the adequacy of the disclosure, or of only the latter. See text accompanying notes 50-59 *infra*.

27. Smith, *supra* note 17, at 189; MITE, *supra* note 1, at 495; Natomas, *supra* note 17, slip op. at 4; Crane, *supra* note 17, at 90,534; Kennecott, *supra* note 17, at 1218; Hi-Shear, *supra* note 17, at 90,032; and Dart, *supra* note 17, at 12-13. But see Wylain, *supra* note 20, at 348 ("The waiting periods mandated by the Delaware Tender Offer Act do not necessarily have the incidental effect of favoring the target corporation. . . . These provisions therefore further the purpose of the Williams Act—protection of investors—through making sure that investors are timely furnished with relevant information.").

28. MITE, *supra* note 1, at 496.

29. MITE, *supra* note 1, at 499. Note that the Idaho administrator argued in Kidwell, *supra* note 5, at 1279, that the advance warning and additional time provided by the Idaho statute merely gave target directors "an opportunity to fulfill their fiduciary duties to shareholders by studying the offer and either negotiating better terms or making a recommendation based on the shareholders' interests." Judge Wisdom responded, however, that "Idaho's 'fiduciary approach' to investor protection may be one way to protect shareholders, but it is an approach Congress rejected." *Id.* The notion that the regulatory scheme should rely to some extent on the fiduciary duties of incumbent management has not, however, been uniformly rejected. See AMCA, *supra* note 20, at 938.

30. Hi-Shear, *supra* note 17, at 90,031. Accord, MITE, *supra* note 1, at 493, 494; Kennecott, *supra* note 17, at 1219-20.

according to the *MITE* court, was fundamental, since this “benevolent bureaucracy” approach would supplant the investor’s judgment with that of the state administrator.³¹ The conflict generated by the substantive fairness review, and the different conflict produced by delays tending to favor incumbent management were, furthermore, seen to merge when incumbent management was permitted to compel or request a fairness hearing.³²

These judicial critiques of the premises of state takeover legislation were the general conclusions derived from the courts’ examination of specific provisions of particular statutes. Our attention should thus focus on those provisions.

2. Specific Conflicts: Troublesome Provisions

a. Precommencement Waiting Periods

(1) *Before the fall: Pre-Rule 14d-2 cases.*—The Fifth Circuit’s decision in *Kidwell*, despite the Supreme Court’s ultimate reversal on grounds of improper venue, seemed to etch the handwriting on the wall for the state precommencement waiting period provisions.³³ The subsequent decisions in *AMCA International Corp. v. Krause*³⁴ and *Wylain, Inc. v. TRE Corp.*,³⁵ however, suggested that such provisions were not necessarily doomed. In *AMCA*, the court held that it was indeed possible for an offeror to comply with the timing requirements of both the Williams Act and the precommencement waiting period required by the Ohio statute. The direct conflict which would make a finding of preemption inescapable thus did not exist.³⁶ Similarly, the *Wylain* court found no direct conflict between the Delaware statute’s precommencement waiting period and the Act’s timing requirements.³⁷ Both the *AMCA* and the *Wylain* courts also found that the federal

31. *MITE*, *supra* note 1, at 494. This criticism of the “benevolent bureaucracy” approach is in one respect similar to criticism of provisions which cause delay, since such provisions supposedly give incumbent management, rather than investors, time to make the crucial decisions. Both criticisms, therefore, are directed at provisions which, in different ways, take the decision away from the investors.

32. *Id.* at 494–95 (Illinois provision indirectly permitted incumbent management to invoke the hearing process); *Kennecott*, *supra* note 17, at 1218, 1220 (New Jersey provision permitted target management to request a fairness hearing).

33. *Kidwell*, *supra* note 5, at 1279–1280. (the indefinite precommencement waiting period imposed by IDAHO CODE § 30–1506(5) (1980) found preempted).

34. *AMCA*, *supra* note 20.

35. *Wylain*, *supra* note 20.

36. *AMCA*, *supra* note 20, at 935. In sustaining OHIO REV. CODE ANN. § 1707.041(B)(1) (Page Supp. 1980), the court stated that “[t]he most patent sort of conflict occurs when simultaneous compliance with both federal and state regulations is impossible. In that event ‘[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design.’ *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). A close reading of the two statutes reveals, however, that it is possible for an offeror to comply with the Williams Act and the Ohio Act.” Simultaneous compliance with both the federal and state schemes was possible at this time because the notice and filing required under the state statute did not trigger commencement of the tender offer for purposes of the Williams Act.

37. *Wylain*, *supra* note 20, at 348 (sustaining DEL. CODE ANN. tit. 8, § 203(a)(1) (Supp. 1980)). *See also Esmark*, *supra* note 20, at ¶¶ 97,805, 97,807 (sustaining KY. REV. STAT. ANN. § 292.570(1) (Baldwin Cum. Supp. 1980)).

scheme of tender offer regulation was not so pervasive as to require an inference of preemptive intent on the part of Congress.³⁸ These findings, however, did not eliminate the possibility of preemption, since the courts were also required to determine whether the state statute in some other way posed "an obstacle to effectuation of congressional aims."³⁹

In applying this phase of the analysis, the *AMCA* and *Wylain* courts emphasized the traditional role of the states in providing additional protection for investors and found that the policy of neutrality implicit in the federal scheme did not foreclose use of this technique of investor protection.⁴⁰

Other courts, however, assessed that question differently. They found that the delays created by precommencement waiting periods did indeed pose an obstacle to effectuation of the federal scheme⁴¹ and ruled that the state provisions were preempted. Application of this more unpredictable phase of the preemption analysis thus produced inconsistent results; the state waiting period requirements were not simply swept away.

(2) *After the fall: Post-Rule 14d-2(b) cases.*—The Securities and Exchange Commission has acknowledged that its adoption of Rule 14d-2(b) appeared to produce a conflict with state precommencement waiting period provisions "so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist."⁴² In effect, the typical state filing and notice requirements would trigger the commencement of the tender offer for purposes of Rule 14d-2(b), while the state statute would forbid commencement of the tender offer until the end of the applicable waiting period and, in some states, a hearing process. In acknowledging this "direct and substantial" conflict, the Commission explained its action in these now familiar words:

While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes presently in effect frustrate the operation and purposes of the Williams Act and that, based upon the abuses in current tender offer practice discussed [in this Release], Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act.⁴³

38. *AMCA*, *supra* note 20, at 934; *Wylain*, *supra* note 20, at 347-48.

39. *AMCA*, *supra* note 20, at 937; *Wylain*, *supra* note 20, at 346. Examination of whether the statute posed an obstacle to effectuation of the congressional design was required after the courts determined: (1) that there was no direct conflict rendering simultaneous compliance with federal and state law impossible; and (2) that presumptive intent could not be inferred. This sequence of analyses reflects the rule that the absence of patent conflict between federal and state law does not eliminate the possibility of preemption. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For a more detailed discussion of these preemption analyses, *see* Part III of this Article.

40. *AMCA*, *supra* note 20, at 934-35; *Wylain*, *supra* note 20, at 346, 348. For a more detailed discussion of this traditional state role, *see* Part III of this Article.

41. *MITE*, *supra* note 1, at 495, 497 (the 20 day precommencement waiting period required by ILL. ANN. STAT. ch. 121½, § 137.54.E. (Smith-Hurd Supp. 1981-1982) preempted); and *Dart*, *supra* note 17, at 13 (the 20 day precommencement waiting period required by DEL. CODE ANN. tit. 8, § 203(a)(1)(Supp. 1980) preempted). The delays created by these waiting periods were seen to threaten the Williams Act's policy of balanced neutrality. *See* text accompanying notes 23-29 *supra*.

42. SEC Rel. No. 34-16384, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584.

43. *Id.*

The effect of Rule 14d-2(b)'s adoption was dramatic. In *AMCA*, Judge Kinneary had written that "[t]he Ohio Act in its present form will indisputably be preempted when [Rule 14d-2(b)] becomes effective. . . ." ⁴⁴ He thus concluded a year later in *Canadian Pacific Enterprises (U.S.), Inc. v. Krouse* ⁴⁵ that "an apparent impasse has been created since Rule 14d-2(b) took effect," ⁴⁶ and held that "the Court adheres to its prediction in *AMCA* and concludes that the Ohio twenty day provision is preempted if Rule 14d-2(b) is valid." ⁴⁷ Courts evaluating similar provisions in the Nevada, Pennsylvania, New Jersey, and North Carolina statutes reached the same conclusion. ⁴⁸

The Ohio Commissioner of Securities has vigorously challenged the validity of Rule 14d-2(b) in at least two cases, ⁴⁹ but no decision reported to date has sustained a state precommencement waiting period in the face of Rule 14d-2(b).

b. Hearing Provisions

State provisions requiring or permitting administrative review through a hearing mechanism have also received critical scrutiny. Some courts have described statutes allowing or requiring administrative review of the substantive fairness of the takeover bid as embodiments of the incompatible "benevolent bureaucracy" approach. ⁵⁰ Similarly, statutes that permit the target's incumbent management to compel any kind of administrative hearing have appeared, to some courts, as mechanisms for delay which tilt the regulatory balance toward the incumbent management. ⁵¹ Provisions allowing in-

44. *AMCA*, *supra* note 20, at 934 n.4.

45. *Canadian Pacific*, *supra* note 17.

46. *Id.* at 1196.

47. *Id.* at 1197 (the 20 day precommencement waiting period required by OHIO REV. CODE ANN. § 1707.041(B)(1)(Page Supp. 1980) preempted). Judge Kinneary held later in the same opinion that "the SEC adopted its preemptive rule with deliberate and rationally justifiable purpose to accomplish a permissible regulatory objective." *Id.* at 1203.

48. *Natomas*, *supra* note 17, at 193 (the 30 day precommencement waiting period required by NEV. REV. STAT. § 78.3771 (1979) preempted); *Crane*, *supra* note 17, at 90,533 (the 20 day precommencement waiting period required by PA. STAT. ANN. tit. 70, § 74(a) (Purdon Supp. 1980) preempted); *Smith*, *supra* note 17, at 191 and *Kennecott*, *supra* note 17, at 1219, 1222 (the 20 day precommencement waiting period required by N.J. STAT. ANN. § 49:5-3(a) (Supp. 1981-1982) preempted); *Grand Met*, *supra* note 17, at 98,648 (the 30 day precommencement waiting period required by N.C. GEN. STAT. § 78B-4(a)(Cum. Supp. 1979) preempted). *See also MITE*, *supra* note 1, at 499 n.25, in which the court's finding of preemption of ILL. ANN. STAT. ch. 121½ § 137.54.E (Smith-Hurd Supp. 1980-1981) did not rely on conflict with Rule 14d-2(b) since that Rule did not apply to the tender offer at hand, the offer having been made prior to the Rule's effective date. The court noted, however, that the Rule "directly conflict[s] with the Illinois Act." *Id.*

49. *AMCA*, *supra* note 20; *Ex rel. Krouse*, *supra* note 19.

50. *MITE*, *supra* note 1, at 493-94; *Kennecott*, *supra* note 17, at 1219; *Hi-Shear*, *supra* note 17, at 90,031.

51. *MITE*, *supra* note 1, at 494-95 (ILL. STAT. ANN. ch. 121½, § 137.57.A. (Smith-Hurd Supp. 1980-1981) held to indirectly give management the ability to compel a hearing); *Kidwell*, *supra* note 5, at 1278-79 (IDAHO CODE § 30-1503(4) (1980 & Supp. 1981) preempted); *Neiditz*, *supra* note 18, at 90,037-38 (order entered requiring state administrator to interpret and apply the Connecticut statute in such a way as to avoid preemption, thus casting doubt on the validity of CONN. GEN. STAT. ANN. § 36-460 (1981), which permits management to compel a hearing).

cumbent management merely to *request* a hearing have received the same criticism.⁵²

Language in some cases, moreover, suggests that any provision for an administrative hearing stands as an obstacle to, and is thus preempted by, the Williams Act.⁵³ Note, however, that the Ohio, Kentucky, and Indiana statutes sustained in *AMCA*, *Wylain*, and *Strode v. Esmark*⁵⁴ all contained hearing provisions.⁵⁵

c. The "Friendly" Offer Exemption

Statutory provisions exempting from coverage takeover bids approved by the management of the target corporation have not been struck down as frequently as the waiting period and hearing requirements, but *Kidwell* characterized such provisions as "pro-management provisions"⁵⁶ evidencing a legislative purpose "to inhibit tender offers for the benefit of management."⁵⁷ This language from *Kidwell* represents the most specific attack on this kind of provision to date,⁵⁸ but such provisions would seem to be vulnerable if the *MITE* court's conception of regulatory neutrality is accepted.⁵⁹

d. Differing Disclosure Requirements

The Williams Act requires extensive disclosure of the tender offeror's identity and financial status, the amount and source of funds for the offer, any plans to alter the target's organization or operations, potential legal conflicts created by the offer, and any other facts material to the shareholder's decision whether to tender his shares.⁶⁰ Preemption findings with respect to state demands for additional or different disclosures have followed two different approaches.

In the first approach, Judge Wisdom found in *Kidwell* that more extensive state disclosure requirements are not necessarily compatible with the market approach to investor protection since "in the area of financial disclosure it can be true that 'less is more.' Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosure."⁶¹ He argued further that the requirement of additional disclosure may also tilt the regulatory

52. Crane, *supra* note 17, at 90,534 (PA. STAT. ANN. tit. 70, § 74(d) (Purdon Supp. 1981-1982) preempted); Kennecott, *supra* note 17, at 1218, 1220 (N.J. STAT. ANN. § 49:5-4(b) (Supp. 1981-1982) preempted).

53. MITE, *supra* note 1, at 494-95; Crane, *supra* note 17, at 90,535; and Kennecott, *supra* note 17, at 1220.

54. [1980] FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980).

55. See note 20 *supra*. Note that OHIO REV. CODE ANN. § 1707.041(B)(4) (Page Supp. 1980) provides for administrative review of the substantive fairness of the takeover bid.

56. *Kidwell*, *supra* note 5, at 1278 (referring to IDAHO CODE § 30-1501(5)(e) (1980 & Supp. 1980)).

57. *Id.* (quoting the lower court's opinion in *Great Western United Corp. v. Kidwell*, 439 F. Supp. 420, 437 (N.D. Tex. 1977)).

58. Cf. *Canadian Pacific*, *supra* note 17, at 1194 n.3, where Judge Kinneary referred to Ohio's "friendly" offer exclusion (OHIO REV. CODE ANN. § 1707.041(A)(1)(d) (Page Supp. 1980)), but did not specifically invalidate it.

59. See MITE, *supra* note 1, at 495.

60. Williams Act, § 14(d), 15 U.S.C. § 78n(d) (1976).

61. *Kidwell*, *supra* note 5, at 1280 (IDAHO CODE § 30-1503(2) (1980 & Supp. 1980) preempted).

balance since “[m]anagement may . . . be able to halt an offer because some material information required by excessive disclosure standards is missing or inaccurate.”⁶²

In a second approach, a federal court found that the New Jersey provision requiring an offeror to disclose the “method by which the fairness of the proposal to the offerees was arrived at”⁶³ was merely intended to help the state administrator determine whether or not to hold a hearing on the fairness of the offer.⁶⁴ As such, the disclosure requirement was ancillary to a proceeding incompatible with the Williams Act and was thus itself incompatible. Note that the conflict isolated in this case differs from that isolated in *Kidwell* since the New Jersey court in *Kennecott Corp. v. Smith*⁶⁵ found that “[i]t is the purpose of the disclosure and not its content which frustrates the purpose of the Williams Act.”⁶⁶

The *AMCA* and *Esmark* courts, however, found that more extensive disclosure is consistent with, rather than a hindrance to, the investor protection policy of the Williams Act.⁶⁷

e. Differing Withdrawal and Proration Provisions

The Williams Act and the regulations promulgated thereunder set forth specific time periods for the exercise of withdrawal⁶⁸ and proration rights.⁶⁹ Certain state provisions establishing different time periods have been found preempted, primarily on the ground that the state provisions create delays which give incumbent management additional time for defensive maneuvers.⁷⁰

The *Wylain* court, however, found that a Delaware provision permitting stockholders to withdraw their shares at any time during the pendency of the

62. *Id.* See also *Dart*, *supra* note 17, at 13.

63. N.J. STAT. ANN. § 49:5-3(b)(9) (Supp. 1981-1982).

64. *Kennecott*, *supra* note 17, at 1221.

65. *Kennecott*, *supra* note 17.

66. *Id.* at 1221.

67. *AMCA*, *supra* note 20, at 936, 938 (OHIO REV. CODE ANN. §§ 1707.041(B)(3)(g)-(h) (Page Supp. 1980) not preempted); *Esmark*, *supra* note 20, at 97,807 (KY. REV. STAT. ANN. § 292.570(3) (Baldwin Cum. Supp. 1980) not preempted).

68. See Williams Act, § 14(d)(5), 15 U.S.C. § 78n(d)(5), and Rule 14d-7, 17 C.F.R. § 240.14d-7, which provide, *inter alia*, that a shareholder depositing shares to be sold to a tender offeror may withdraw them within 15 days and after 60 days of the commencement of the offer.

69. See Williams Act, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976), which provides that if more shares are deposited than the offeror requested within 10 days of commencement of the offer, then the offeror must take up the shares pro rata; shares deposited after the tenth day may be purchased as submitted.

70. In *Kennecott*, *supra* note 17, at 1221-22, the court ruled that N.J. STAT. ANN. § 49:5-9(a) (Supp. 1981-1982), which permits shareholders the right to withdraw shares up to three days prior to termination of the offer, unless the state administrator determines that further withdrawal rights are necessary, was preempted. The court also found that N.J. STAT. ANN. § 49:5-9(b) (Supp. 1981-1982), which requires pro rata acceptance whenever the offer becomes oversubscribed, would prevent the purchase of any shares until the last day that the offer is open, thus creating a delay incompatible with the purposes of the Williams Act. In *Hi-Shear*, *supra* note 17, at 90,031, the court found that S.C. CODE § 35-2-70(4) (Supp. 1980), which also requires pro rata acceptance of all deposited shares upon oversubscription at anytime, was preempted. See also *Dart*, *supra* note 17, at 13, in which the court found preemption of DEL. CODE ANN. tit. 8, § 203(a)(2) (Supp. 1980) (withdrawal permitted any time during the pendency of the offer) and Section 203(a)(3) (proration rights extended through the duration of the offer).

offer was merely one of the "greater protections" which the states are entitled to provide since the provision did not, in fact, obstruct the congressional purpose.⁷¹

f. "Creeping Tender" Provisions

A state statute may apply to open market purchases which meet certain size and timing criteria, but which are not a formal tender offer.⁷² This effort to regulate "creeping tenders" has been found by at least one court to conflict directly with the "creeping tender" provisions of the Williams Act. In *Telvest, Inc. v. Bradshaw*,⁷³ the Eastern District of Virginia issued a temporary injunction against enforcement of Virginia's "creeping tender" provision on both preemption and Commerce Clause grounds.⁷⁴ The Fourth Circuit, however, vacated the order on appeal, with an opinion expressing serious reservations about the lower court's constitutional findings.⁷⁵

B. Commerce Clause Violations

Kidwell and its progeny have consistently applied the balancing test of *Pike v. Bruce Church, Inc.*⁷⁶ in order to determine whether the Commerce Clause of its own force, and irrespective of the Williams Act, invalidates state takeover legislation.⁷⁷ In applying the *Pike* test, these decisions have tried to define and assess the legitimacy of the state interest served by these statutes, and to weigh those interests against the burdens thereby imposed on interstate commerce. The state interests served by state takeover legislation have been defined in different terms, but they were typically characterized as interests in: (1) the protection of investors; and (2) the regulation of the internal affairs of domestic corporations or corporations with some significant presence with-

71. Wylain, *supra* note 20, at 348 (DEL. CODE ANN. tit. 8, § 203(a)(2) (Supp. 1980) "is obviously designed to permit the investor to deal with his investment intelligently and to give him the time which he needs to make his rational business decision, although it might enhance risk and depress the price arbitrageurs might pay for the stock to be tendered.").

72. See, e.g., VA. CODE § 13.1-529(b)(iii) (Supp. 1981).

73. *Telvest, Inc. v. Bradshaw*, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 97,154, at 96,371 (E.D. Va. (VA CODE § 13.1-529(b)(iii) (Supp. 1979) conflicts with Williams Act, § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1976)).

74. The Eastern District had also found in *Telvest* that the Virginia statute impermissibly burdened interstate commerce. *Id.*

75. *Telvest*, *supra* note 20, at 1035-36.

76. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The crucial language in *Pike* is by now familiar:

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

(Citations omitted).

77. See MITE, *supra* note 1, at 500-01; *Kidwell*, *supra* note 5, at 1282; *Natomas*, *supra* note 17, at 193; *Crane*, *supra* note 17, at 90,535; *Kennecott*, *supra* note 17, at 1223; *Hi-Shear*, *supra* note 17, at 90,032; *Dart*, *supra* note 17, at 13.

in the state.⁷⁸ The decisions following *Kidwell* have usually described these interests as legitimate but “weak” or “tenuously served” by the statute in question,⁷⁹ or as being of only an “incidental” local character.⁸⁰ The burdens on interstate commerce, however, were perceived as “weighty,”⁸¹ “substantial,”⁸² or “excessive,”⁸³ and were ultimately adjudged disproportionate to the state interests served.⁸⁴ These sweeping conclusions were derived principally from critical analysis of the extraterritorial impact of the state statutes.

This critical analysis has turned upon three interrelated assumptions:

(1) state takeover legislation is inherently interstate in character, and only incidentally local, since it seeks to apply a state process to an essentially national or global transaction;⁸⁵ (2) the state interests in protection of investors and regulation of internal corporate affairs are only tenuously served when the statute’s “protections” are extended to nonresident shareholders,⁸⁶ and when the statute purports to regulate the internal affairs of nonresident corporations;⁸⁷ and (3) the applicability of a state statute to foreign corporations with the principal place of business or substantial assets within the jurisdiction creates the possibility of conflict with other states’ statutes⁸⁸ and erects a maze of inconsistent requirements through which the takeover bidder must struggle.⁸⁹ This critical trend reflects considerable uncertainty

78. See, e.g., Crane, *supra* note 17, at 90,535. Part III of this Article will suggest that this distinction is misleading. The real question is whether state takeover laws achieve investor protection as a form of state securities regulation or as a form of traditional state corporate law.

79. *Id.* at 90,536. See also *Kidwell*, *supra* note 5, at 1286.

80. *Kennecott*, *supra* note 17, at 1223. See also *MITE*, *supra* note 1, at 500–02; *Hi-Shear*, *supra* note 17, at 90,033; *Dart*, *supra* note 17, at 14.

81. *MITE*, *supra* note 1, at 502.

82. *Kidwell*, *supra* note 5, at 1286; *Kennecott*, *supra* note 17, at 1224; *Dart*, *supra* note 17, at 14.

83. Crane, *supra* note 17, at 90,537.

84. Part III of this Article will offer a different assessment of the balance of benefits and burdens. Note also that some courts have resisted this critical trend. See *AMCA*, *supra* note 20, at 935–36, 938; *Esmark*, *supra* note 20, at 97,808.

85. *Kennecott*, *supra* note 17, at 1224:

In this case, if enforced, the New Jersey Takeover Law could have prohibited or impeded a nationwide, \$160 million tender offer for federally registered securities, in the face of federal laws that would permit it to go forward. The effect would not have been limited to New Jersey or its residents. On the contrary, every investor no matter where situate[d] would have been affected.

86. *MITE*, *supra* note 1, at 501; *Kidwell*, *supra* note 5, at 1283, 1285; Crane, *supra* note 17, at 90,535; *Kennecott*, *supra* note 17, at 1224; *Hi-Shear*, *supra* note 17, at 90,032.

87. *MITE*, *supra* note 1, at 501–02; *Hi-Shear*, *supra* note 17, at 90,033.

88. *MITE*, *supra* note 1, at 502 (“Where a number of states on various bases claim authority over a tender offer, any single state would have effective veto power over the offer even if it received the enthusiastic endorsement of all other states.”). See also *Kidwell*, *supra* note 5, at 1284–85; Crane, *supra* note 17, at 90,536.

89. *Kennecott*, *supra* note 17, at 1224 (“Since it is not uncommon for major companies to have plants, employees, offices, and shareholders in many states, each such state could impose varying hurdles over which the tenderor would have to leap.”). See also *MITE*, *supra* note 1, at 502 n.31. The *MITE* court conceded, however, that “[t]his criticism is somewhat muted with respect to the Illinois Act because of the Act’s comity provision, ILL. REV. STAT. ch. 121½, § 137.53 (1979),” which permits the state administrator to defer to other jurisdictions in appropriate circumstances. *Accord*, Crane, *supra* note 17, at 90,536–37 (noting that the takeover may also be subject to the Delaware statute); *Hi-Shear*, *supra* note 17, at 90,033 (noting that the offer may also be subject to the Connecticut statute).

about the constitutional validity of state takeover statutes applicable to foreign corporations⁹⁰ and, perhaps, some uncertainty about statutes applicable only to domestic corporations.⁹¹

III. CHALLENGE AND RESPONSE: REFORM OF THE STATE SCHEMES AND THE NEED FOR A REEXAMINATION OF THE ISSUES

The challenge to state regulation of tender offers posed by the SEC and several courts has caused some states to reconstruct, to some degree, their regulatory schemes. These reconstructions were apparently efforts to eliminate those aspects of the state schemes which conflicted with the Williams Act or burdened interstate commerce without serving any vital state interest, while preserving (in some form) those mechanisms essential to effective state regulation.⁹² Part III will reassess the preemption and Commerce Clause questions in light of these changes, and argue that they remove all obstacles to judicial recognition of the nonpreemption and constitutionality of state takeover legislation.⁹³

90. MITE, *supra* note 1, at 501 (under ILL. ANN. STAT. ch. 121½, § 137.52-10 (Smith-Hurd Supp. 1980-1981), companies subject to the statute include Illinois corporations, corporations with their principal executive offices in Illinois, and corporations for which 10% of the outstanding shares are held by Illinois residents); Kidwell, *supra* note 5, at 1263 n.12, 1283, 1286 (under IDAHO CODE § 30-1501(6) (Cum. Supp. 1977), companies subject to the statute included Idaho corporations, corporations with their principal offices in Idaho, and corporations with substantial assets in Idaho); Crane, *supra* note 17, at 90,536 (under PA. STAT. ANN. tit. 70, § 73 (Purdon Supp. 1981-1982), subject companies include Pennsylvania corporations, corporations with their principal place of business in Pennsylvania, and corporations with substantial assets in Pennsylvania); Kennecott, *supra* note 17, at 1223 (under N.J. STAT. ANN. § 49:5-2(m) (Supp. 1981-1982), subject companies include New Jersey corporations, corporations with their principal place of business in New Jersey, and corporations with substantial assets in New Jersey); Hi-Shear, *supra* note 17, at 90,033 (under S.C. CODE § 35-2-20(5) (Supp. 1980), subject companies include South Carolina corporations, corporations with their principal place of business in South Carolina, corporations with more than \$10,000,000 of assets in South Carolina, and corporations with 500 or more employees within the state).

91. The holdings in *Natomas*, *supra* note 17, at 193, and *Dart*, *supra* note 17, at 13-14, reflect such uncertainty, because the Nevada and Delaware statutes were held to burden interstate commerce excessively despite their applicability only to domestic corporations. See NEV. REV. STAT. § 78.3765 (1979); DEL. CODE ANN. tit. 8, § 203(c)(2) (Supp. 1980).

92. Part III of this Article will focus primarily on amendments to the following statutes: (1) CONN. GEN. STAT. ANN. §§ 36-456 to -468 (Supp. 1980), as amended by Pub. Act. No. 81-121 (1981); (2) IND. CODE ANN. §§ 23-2-3.1-1 to -11 (Burns Supp. 1980), as amended by Pub. L. No. 215 (1981); (3) MD. CORP. & ASS'NS CODE § 11-901 to -908 (Supp. 1980), as amended by 1981 Md. Laws ch. 776; (4) NEV. REV. STAT. § 78.376 to .3778 (1979), as amended by 1981 Nev. Stats. ch. 417; (5) WIS. STAT. ANN. §§ 552.01 to .25 (West Special Pamphlet 1980), as amended by 1981 Wis. Laws ch. 16. This Article will also discuss in detail NASAA's Proposed Uniform Takeover Act (see note 15 *supra*) and an "Interpretive Opinion" issued by the Pennsylvania Securities Commission on May 9, 1981, concerning compliance with certain provisions of PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1981-1982). Reference to changes already effected or pending in other jurisdictions will be made from time to time.

93. In reassessing these arguments in light of the recent changes, this Article will draw from the extensive list of articles and notes on the topic. The following articles and notes generally affirm the constitutionality and/or nonpreemption of state takeover regulation: Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733 (1979); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979) (hereinafter *Securities Law and the Constitution*); *Preemption*, *supra* note 25; *A Response to Great Western*, *supra* note 25; Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970). The following have generally argued to the contrary: Pozen & Lamb, *Rule 14d-2(b) Under the Securities Exchange Act and State Regulation of Takeover Bids*, in PRACTICING LAW INSTITUTE, TWELFTH ANNUAL INSTITUTE ON SECURITIES REGULATION 287 (1980); *New SEC Rules*, *supra* note 2; Tiger, *The Pennsylvania Takeover Disclosure Law: A Statute Waiting to be Invalidated*, 25 VILL. L. REV. 458

A. Preemption

1. The Sequence of Preemption Analyses

It is well established that the courts do not apply a single preemption analysis, but rather a sequence of analyses.⁹⁴ A sequence of analyses enables the preemption doctrine to encompass different kinds and degrees of conflict between state and federal schemes. A finding of preemption on the basis of any one of the following analyses would thus be sufficient for the federal statute to prevail.

First, a court will determine whether Congress has expressly declared its intent to exclude the states from a particular area of regulation. If such an expression of congressional intent is found, the court will make no further inquiry and will find preemption of the state statute on that ground alone.⁹⁵

Second, a court that finds no express congressional intent to exclude may still find that an intent to exclude is inferable and hold the state statute preempted on that basis.⁹⁶ Such intent will be inferred if the court finds that the federal scheme has a "pervasive nature" incompatible with additional state regulation⁹⁷ or that the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."⁹⁸

Third, a court may find that compliance with both the federal and state schemes is a physical impossibility; the existence of such a direct conflict would require a finding of preemption without any further inquiry, even in the absence of express or implied congressional intent to exclude.⁹⁹

Fourth, a court that fails to find a direct conflict between the two schemes and fails to identify either explicit or implicit intent to preempt may

(1980); Langevoort, *supra* note 7; Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 *FORDHAM L. REV.* 1 (1976); Moylan, *supra* note 7; Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 *S. CALIF. L. REV.* 1133 (1974)(hereinafter *Commerce Clause Limitations*). For discussions of individual state statutes, see Balotti, *The Delaware Tender Offer Statute*, 3 *DEL. J. CORP. L.* 230 (1978); *Legislative Developments: Take-Over-Bid Disclosure Act*, 12 *U. RICH. L. REV.* 749 (1978)(Virginia statute); Arsht, *The Delaware Takeover Statute—Special Problems for Directors*, 32 *BUS. LAW.* 1461 (1977); Bartell, *The Wisconsin Takeover Statute*, 32 *BUS. LAW.* 1465 (1977); Sommer, *The Ohio Takeover Act: What Is It?*, 21 *CASE W. RES. L. REV.* 681 (1970); Vorys, *Ohio Tender Offers Bill*, 43 *OHIO B.* 63 (1970). For a recent survey of developments in both federal and state takeover regulation, see Fogelson, Wenig & Friedman, *supra* note 2.

94. For preliminary discussion of this issue, see text accompanying notes 36–41 *supra*.

95. See *Rice v. Santa Fe Elevator*, 331 U.S. 218, 236 (1947)(Federal Warehouse Act expressly preempts all concurrent state regulation).

96. *Id.* at 230.

97. See *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973)("It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167 (1942)("The manufacture and distribution in interstate and foreign commerce of . . . renovated butter is a substantial industry which, because of its multi-state activity, cannot be effectively regulated by isolated competing states.").

98. *Rice v. Sante Fe Elevator*, 331 U.S. 218, 230 (1947). See also *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956)(alternative holding)(federal interest in sedition is so dominant as to exclude enforcement of Pennsylvania sedition law).

99. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility . . .").

still find that "under the circumstances of [the] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁰⁰

Application of each of these analyses to the state takeover statutes, taking into account the recent reforms, will show that Congress did not expressly intend to exclude state regulation of takeovers; that congressional intent to preempt cannot be inferred; that there is no direct conflict between federal and state schemes; and that the state schemes do not stand as an obstacle to effectuation of the "full purposes and objectives of Congress."

2. Applications

a. Express Intent to Exclude

Neither the Williams Act nor the Securities Exchange Act of 1934 contains any express bar to state legislation in the area of takeover regulation.¹⁰¹ To the contrary, it has been suggested that section 28(a) of the Securities Exchange Act of 1934 may create a presumption against preemption¹⁰² since it provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any State . . . insofar as it does not conflict with the provisions of this chapter."¹⁰³ The existence of such a presumption may perhaps be inferred from the Supreme Court's statement in 1979 in *Leroy v. Great Western United Corp.*¹⁰⁴ that "section [28(a)] was plainly intended to protect, rather than limit, state authority."¹⁰⁵

Section 28(a) was enacted, however, before the Williams Act's provisions were added to the Securities Exchange Act of 1934, and was designed to protect the state blue sky laws then in existence. Those laws, of course, did not then regulate tender offers, so the argument that section 28(a) creates a presumption against preemption of the current state takeover statutes is at least debatable.¹⁰⁶ Even if it does not give rise to a presumption, however,¹⁰⁷ it

100. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41 (1977).

101. MITE, *supra* note 1, at 491; Telvest, *supra* note 20, at 1035; AMCA, *supra* note 20, at 934.

102. *Securities Law and the Constitution*, *supra* note 93, at 519 n.63.

103. 15 U.S.C. § 78bb(a) (1976).

104. 443 U.S. 173 (1979).

105. *Id.* at 182.

106. See *Securities Law and the Constitution*, *supra* note 93, at 519 n.63. See also *Kidwell*, *supra* note 5, at 1275 n.39.

107. See *Boehm*, *supra* note 93, at 748-49, for a somewhat different version of this argument:

[T]he "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 . . . [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. . . .

See also Report of the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 190 (1976)(section 28(a) neither requires nor prevents preemption); *Langevoort*, *supra* note 7, at 247.

should be seen as contradicting any claim that the Williams Act or any other provisions of the Securities Exchange Act of 1934 expressly bar state regulation of tender offers.

b. *Implicit Intent to Exclude*

Even those courts most critical of the state takeover statutes have conceded that the federal scheme of regulation is not "so pervasive that an implicit congressional intent to preempt parallel state legislation may fairly be inferred."¹⁰⁸ Some commentators, however, have urged that the Williams Act does indeed embody a "national policy . . . so pervasive [that] one can infer the intent to exclude state regulation."¹⁰⁹

The arguments made in support of this point of view, however, are hardly convincing. For example, it has been suggested that the Williams Act should be seen as pervasive because the Williams Act was integrated into the Securities Exchange Act, which "is certainly comprehensive" since "it in effect controls every other facet of tender offers."¹¹⁰ The conclusory nature of this argument should be apparent, since it overlooks section 28(a), which, in itself, forecloses any assertion that the "comprehensive" nature of the Securities Exchange Act requires exclusion of state regulation of securities.

The other important argument adduced in support of this point of view is somewhat more plausible:

[T]he regulation of the timing of disclosure in tender offers is no mere procedural detail. Concurrent disclosure was found by Congress to be the only fair way to regulate tender offers, since advance disclosure gives such an advantage to the target company and severely limits the usefulness of the tender offer technique. It may thus be said that the timing of disclosure has a substantive effect on tender offers, and hence that Congress' delineation of one method was intended not as a minimum standard but as the standard to be applicable in every state.¹¹¹

While plausible, this argument is also conclusory and unpersuasive. It presumes that the neutrality mandated by the Williams Act¹¹² can be effected only through the specific timing provisions of the Act. As this Article will show, the Williams Act does not, indeed could not, provide an absolute and universally applicable definition of "neutrality" and does not prohibit the use of a different mechanism for achieving neutrality in the regulation of takeovers.

These arguments, furthermore, fail to account for the Supreme Court's

108. See MITE, *supra* note 1, at 491. See also Leroy, *supra* note 4, at 182; Telvest, *supra* note 20, at 1035; Crane, *supra* note 17, at 90,532; Neiditz, *supra* note 18, at 90,036; Hi-Shear, *supra* note 17, at 90,030; AMCA, *supra* note 20, at 935.

109. Wilner & Landy, *supra* note 93, at 25. See also *Commerce Clause Limitations*, *supra* note 93, at 1164-66. *Contra*, *Securities Law and the Constitution*, *supra* note 93, at 518-19 n.65; *Preemption*, *supra* note 25, at 727-29.

110. Wilner & Landy, *supra* note 93, at 29.

111. *Id.* at 30.

112. Note that there is also some question about whether the Act actually does mandate neutrality. See AMCA, *supra* note 17, at 936-37. See also *Securities Law and the Constitution*, *supra* note 93, at 522-23.

demonstration, in recent cases, of a reluctance to find preemption on the basis of pervasive federal regulation of the field.¹¹³ This reluctance to find pervasiveness,¹¹⁴ or to infer preemption¹¹⁵ when pervasiveness is found, makes it unlikely that the Supreme Court would infer congressional intent to preempt in this area, especially since the existence of section 28(a) may itself prohibit such an inference.¹¹⁶

The Williams Act also can be distinguished from those provisions of the Federal Aviation Act¹¹⁷ that the Court found in *City of Burbank v. Lockheed Air Terminal*¹¹⁸ to preempt a municipal ordinance regulating aircraft noise.¹¹⁹ In *Burbank* the Court found that the physical and technical requirements of aircraft noise control simply could not be met without "a uniform and exclusive system of federal regulation."¹²⁰ While it may be argued that conflict between the Williams Act and the state statutes exists, no one has shown that the regulation of tender offers, like the regulation of aircraft noise, can be effected *only* through a uniform and exclusive system of federal regulation.¹²¹

113. For a discussion of this trend, see *Preemption*, *supra* note 25, at 728.

114. See *Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978) ("[W]e find no 'clear and manifest purpose of Congress' to pre-empt the entire field of interstate waste management, either by express statutory command, or by implicit legislative design.") (citations omitted); *Goldstein v. California*, 412 U.S. 546, 568-70 (1973) (federal copyright legislation did not preempt state regulation of the field).

115. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132-34 (1978), in which the Court held that a Maryland statute requiring petroleum producers and refiners to extend voluntary price reductions uniformly to all service stations supplied was not preempted by either the Robinson-Patman Act's pricing provisions or the "broad implications of the Sherman Act." The Court added that it was "generally reluctant to infer preemption." *Id.* at 132. Implicit in this holding is the assumption that the comprehensive character of the federal antitrust laws does not preempt the states' power to engage in economic regulation. For discussion of *Exxon* in this context, see Boehm, *supra* note 93, at 750; *Preemption*, *supra* note 25, at 729.

The Court was more explicit in *New York State Department of Social Service v. Dublino*, 413 U.S. 405, 415 (1973), in which it stated that "[w]e reject . . . the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentive provisions." The Court continued: "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . . ." See also *DeCanas v. Bica*, 424 U.S. 351, 359-60 (1976) (comprehensive character of Federal Immigration and Nationality Act does not require inference of intent to preempt California alien employment statute); *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 429-30 (1963) (comprehensiveness of Federal Communications Act does not require inference of intent to preempt state regulation of radio advertising).

116. This is perhaps the real significance of section 28(a) for the preemption question. As noted before, section 28(a) does not alone protect state takeover laws from preemption, but it may foreclose the argument that the Williams Act, as part of the Securities Exchange Act, so occupies the field that a congressional intent to preempt must be inferred.

117. Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 *et seq.*, as amended by Noise Control Act of 1972.

118. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

119. *Id.* at 629.

120. *Id.* The Court continued: "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow." *Id.* See also *Securities Law and the Constitution*, *supra* note 93, at 519.

121. Wilner & Landy's assumption that "neutrality" can be achieved only through the Williams Act's timing provisions is merely an unsupported conclusion. See text accompanying notes 109-16 *supra*. See also MITE, *supra* note 1, at 491-92 ("[T]he absence of an exclusive federal interest in the field of securities regulation is persuasively demonstrated by the historically coordinate role of state regulation in the field.").

c. Direct Conflict Requiring Preemption

The absence of explicit or implicit congressional intent to preempt state regulation within a particular area does not, of course, end the question. The state law may still be preempted if it directly conflicts with the operation of the federal law.¹²² If the conflict is so direct that simultaneous compliance with both schemes is impossible, preemption will be found without any further inquiry into the congressional design.¹²³ Only if the conflict is indirect will a court conduct that type of inquiry.

The threshold question, then, is whether the Williams Act and the state statutes so directly conflict that a finding of preemption is inescapable. The decisions to date do not provide a complete answer. Those cases which found preemption of a state statute without consideration of Rule 14d-2(b) did so without finding that kind of direct conflict,¹²⁴ and only the application of Rule 14d-2(b) created such conflict.¹²⁵ The other conflicts identified in the cases were not characterized as direct in this sense, and findings of preemption were reached only after a careful scrutiny of the purposes of the state and federal schemes.¹²⁶

Only Rule 14d-2(b) prevented the courts from engaging in the kind of comparative scrutiny of the statutory schemes which might produce a holding of no preemption.¹²⁷ The Commission, of course, was fully aware of the "direct and substantial" conflict created by adoption of this Rule,¹²⁸ and it can only be granted that the Commission has achieved its purpose of achieving preemption of the incompatible state waiting periods.¹²⁹

Rule 14d-2(b) provides that public announcement of the offer is deemed the commencement of the offer unless the offer is withdrawn or certain filings are made within five days. At the time this Rule was adopted, the typical state statute required the offeror to announce the offer (through filing with the state administrator and notice to the target) and then defer actual commencement

122. See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). See also *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

123. See *AMCA*, *supra* note 17, at 935 (citing *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

124. See *Kidwell*, *supra* note 5, at 1275-76, in which the court's finding of preemption specifically did not rest on a finding that it was impossible to comply with the provisions of both the Williams Act and the Idaho statute, but upon a comparison of the policy bases for each scheme. See also *MITE*, *supra* note 1, at 498-99; *Dart*, *supra* note 17, at 13. In both of these cases the courts found that the state statute in question posed an obstacle to operation of the Williams Act, but did not find that simultaneous compliance with both statutes was impossible. The only anomalous holding may be that in *Telvest, Inc. v. Bradshaw*, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 97,154, at 96,371 (E.D. Va. 1979), in which the Eastern District of Virginia found that Virginia's "creeping tender" provision "is in direct conflict with the content, structure and objectives of the Williams Act." The Fourth Circuit's subsequent decision on appeal, however, diminishes the importance of this holding. See *Telvest*, *supra* note 20, at 1035-36.

125. See, e.g., *Canadian Pacific*, *supra* note 17, at 1197.

126. See, e.g., *Smith*, *supra* note 17, at 187-91; *Crane*, *supra* note 17, at 90,533-35; *Kennecott*, *supra* note 17, at 1218-22; *Hi-Shear*, *supra* note 17, at 90,030-32.

127. As such comparative scrutiny did in *AMCA*, *supra* note 20; *City Investing*, *supra* note 20; *Esmark*, *supra* note 20; *Wylain*, *supra* note 20. See also *Telvest*, *supra* note 20.

128. See text accompanying notes 42-43 *supra*.

129. Some courts have conceded such preemption, however, only with respect to the waiting period provisions. See, e.g., *Canadian Pacific*, *supra* note 17, at 1197; *Grand Met*, *supra* note 17, at 98,648.

of the offer for a period of up to thirty days pending administrative review.¹³⁰ In other words, the announcement that triggered the state waiting period also triggered the commencement of the offer for purposes of Rule 14d-2(b). Recent changes in some state schemes, however, removed this direct conflict.

Deleted from the New York statute, for example, was its twenty day precommencement waiting period. The statute now contains a provision permitting the offeror to file its registration statement with the Attorney General "as soon as practicable on the date of commencement of the takeover bid."¹³¹ Note, however, that New York did not abandon its regulatory role in order to avoid direct conflict with Rule 14d-2(b). The precommencement waiting period has been eliminated, but the Attorney General has discretion, within fifteen days of the state filing, to schedule a hearing or conduct an investigation in order to determine whether the takeover bid complies with the requirements of the statute and whether the offeror has provided full and fair disclosure to the offerees of all material information.¹³² If the Attorney General schedules such a hearing or conducts such an investigation, he "may also, in his discretion issue an order prohibiting an offeror from purchasing or paying for any shares tendered in response to its takeover bid at any time prior to such purchasing or paying for shares tendered but in no event longer than fifty-five days after the filing of the registration statement."¹³³ The state, therefore, can review the tender offer and take action before the investors have actually sold their shares to the offeror. In effect, these revisions create a mechanism for timely review and control while avoiding direct conflict with Rule 14d-2(b). These simple revisions provided a model for the Proposed Uniform Takeover Act, which contains essentially the same mechanism.¹³⁴

The revised Indiana statute also avoids conflict with Rule 14d-2(b). It

130. See, e.g., ILL. ANN. STAT. ch. 121½, § 137.54.E. (Smith-Hurd Supp. 1980-1981); OHIO REV. CODE ANN. § 1707.041(B)(1) (Page Supp. 1980).

131. N.Y. BUS. CORP. LAW § 1602 (McKinney Supp. 1980-1981). Note that "takeover bid," for purposes of the New York statute, "means the acquisition of or offer to acquire, pursuant to a tender offer or request of invitation for tenders, any equity security of a target company . . ." (emphasis added). N.Y. BUS. CORP. LAW § 1601(a) (McKinney Supp. 1980-1981). For a summary of the changes in the New York statute which were effected by 1980 N.Y. Laws ch. 733, see Rich & McSherry, *Conflict between Federal and State Regulation of Tender Offers: The SEC's Challenge and New York's Response*, 52 N.Y. ST. B.J. 466 (1980).

132. N.Y. BUS. CORP. LAW § 1604 (McKinney Supp. 1980-1981). For a discussion of whether this hearing process, which does not directly conflict with the Williams Act or any of the rules adopted thereunder, nevertheless poses an obstacle to effectuation of the Williams Act's purposes, see Part II of this Article.

133. N.Y. BUS. CORP. LAW § 1605(a) (McKinney Supp. 1980-1981). Section 1605(b) provides further that:

Any order issued by the attorney general pursuant to subdivision (a) of this section prohibiting an offeror from purchasing or paying for any shares tendered in response to its takeover bid shall automatically expire unless within thirty days of the completion of a hearing or hearings held pursuant to section sixteen hundred four, or the conclusion of his investigation conducted pursuant to such section, or fifty-five days after the filing of the registration statement whichever is sooner, the attorney general shall determine that the requirements of this article have not been met, and shall have issued an order containing his findings of fact and conclusions of law prohibiting the purchase and payment for any shares tendered in response to the takeover bid or conditioning any such purchase and payment upon changes or modifications in the registration statement.

134. See Proposed Uniform Takeover Act, §§ 6-7.

now provides that “[n]o shares shall be purchased or paid for pursuant to a takeover offer within the first twenty (20) business days after the offer is made.”¹³⁵ In short, the Indiana statute has replaced a mandatory precommencement waiting period with a mandatory “prepurchase” waiting period, within which time a mandatory administrative hearing must be held.¹³⁶ A tender offer subject to the Indiana statute may thus commence when Rule 14d-2(b) provides that it must, while the state has twenty days to review the adequacy of the disclosures before the purchases are made and to issue an order prohibiting purchases if full and fair disclosure has not been made.¹³⁷ Indiana’s approach is thus similar to New York’s. It differs only in that Indiana’s administrative hearing and twenty day prohibition on purchases are mandatory for all tender offers, while use of these devices is within the discretion of the New York Attorney General.

Pennsylvania has responded to Rule 14d-2(b) in a similar, although less direct, fashion.¹³⁸ The Pennsylvania statute continues to require a twenty day post-filing, precommencement waiting period for all “takeover offers.”¹³⁹ A recent “Interpretive Opinion”¹⁴⁰ issued by the Pennsylvania Securities Commission, however, provides that an offer will not constitute a “takeover offer” subject to the waiting period if the offer is conditioned upon the state registration statement becoming “effective” and if no purchases are in fact made prior to such “effectiveness.” A registration statement becomes immediately effective twenty days after filing unless the commission schedules a hearing. If a hearing is scheduled, the offer does not become effective until it is “registered” by order of the commission.¹⁴¹

The net effect of this administrative policy is to enable the offeror to commence the offer in compliance with Rule 14d-2(b). Like New York, Pennsylvania retains some control over the process by prohibiting purchases during the period of time in which the state may exercise its discretion to review the takeover offer. New York, Indiana, Pennsylvania, and the drafters of the Proposed Uniform Takeover Act have thus taken the same basic approach: the tender offer may be made in conformity with Rule 14d-2(b), but

135. IND. CODE § 23-2-3.1-8 (Burns Supp. 1980), as amended by Pub. L. No. 215 (1981).

136. IND. CODE § 23-2-3.1-7(a) (Burns Supp. 1980), as amended by Pub. L. No. 215 (1981).

137. *Id.*

138. The Eastern District of Pennsylvania ruled in *Crane*, *supra* note 17, at 90,533, that Rule 14d-2(b) preempts the twenty-day waiting period required by PA. STAT. ANN. tit. 70, § 74(a) (Purdon Supp. 1981-1982).

139. “Takeover Offer” is defined in PA. STAT. ANN. tit. 70, § 73 (Purdon Supp. 1981-1982).

140. Pennsylvania Securities Commission, Interpretive Opinion, May 9, 1981. The Interpretive Opinion states specifically that:

An offer to purchase equity securities of a Pennsylvania target company will not be deemed a “takeover offer” in the context of the meaning of that term in [section 73] if the offer is conditioned upon:

- 1) either the registration statement becoming effective under [section 74] of the Disclosure Law or an exemption becoming effective under [section 78] of the Disclosure Law, and
- 2) in either of the above situations no purchases are made prior to such effectiveness.

141. PA. STAT. ANN. tit. 70, § 74 (Purdon Supp. 1981-1982). An “exemption,” as distinguished from a registration, apparently becomes effective upon: (i) the filing of a notice with the commission with respect to a “friendly” takeover; or (ii) the commission by regulation or order finding that registration is not necessary. PA. STAT. ANN. tit. 70, § 78(a)-(b) (Purdon Supp. 1981-1982).

actual purchase of the tendered shares is conditioned upon completion of the state review process. Direct conflict with Rule 14d-2(b) is thus avoided, while the state administrators retain the ability to review the disclosures *before* the transaction is consummated and to impose administrative sanctions before the major damage is done.¹⁴² These state schemes thus provide a *prospective* means for investor protection, since they ensure that full and fair disclosure is made at the time such disclosure is needed. This prospective remedy supplements the implied private rights of action available to investors under the Williams Act,¹⁴³ and the underlying purposes of investor protection through adequate and timely disclosure are consistent. It can, in fact, be argued that only a prospective remedy ensuring full and fair disclosure during the course of the tender offer truly furthers the purposes of the Act.

The conditional purchase approach derives, of course, from the Securities and Exchange Commission staff's own admission that:

Nothing in the rules prohibits offers under the terms of which the acceptance for payment is conditioned upon fulfillment of a condition requiring regulatory approval. The Commission recognized in Release No. 34-16384 that regulatory approvals may be required before a bidder will be permitted to actually purchase shares. The nature and extent of any such condition must be fully described in the bidder's tender offer materials.¹⁴⁴

The conditional purchase approach has, furthermore, been specifically approved by at least one court. In *Sun Life Group, Inc. v. Standard Life Ins. Co. of Indiana*, the Southern District of Indiana ruled that the Indiana Insurance Commissioner's policy of permitting "conditional" tender offers to proceed rendered the Indiana statute compatible with Rule 14d-2(b).¹⁴⁵

This approach to the Rule 14d-2(b) problem, sanctioned as it is by the Commission, at least three leading jurisdictions, and at least one court, will probably be seen as a model by other jurisdictions.¹⁴⁶ The different approach taken by Maryland, however, deserves serious consideration.

The Maryland statute continues to require the type of precommencement waiting period which Rule 14d-2(b) has been found to preempt,¹⁴⁷ but guidelines published in 1980 by the Maryland Securities Division have eliminated

142. The type of administrative review contemplated by these revised statutes, furthermore, does not reflect the "benevolent bureaucracy" approach which has been found incompatible with the Act's "market" approach. For a discussion of this issue, see text accompanying note 31 *supra*.

143. With respect to these private remedies under the Williams Act, see *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

144. SEC Rel. No. 34-16623, 544 SEC. REG. & L. REP. (BNA) G-1 (March 11, 1981).

145. See *Sun Life*, *supra* note 18, at 97,117. Recall that this decision pertained to the Indiana Insurance Company Holding Act, and not to the general corporate takeover statute. The issues were, however, essentially the same. That policy, of course, is now expressed in the Indiana statute. See note 135 *supra*.

146. It has already provided a model for WIS. STAT. ANN. § 552.05(1) (West Special Pamphlet 1981), which now permits exemption of "conditional" tender offers from Wisconsin's ten-day precommencement waiting period.

147. MD. CORP. & ASS'NS CODE § 11-902(a) (Supp. 1980) (written statements containing the information prescribed by § 11-902(b) must be filed with the Securities Division and delivered to the target at least twenty days prior to the time the offer is made).

the conflict. The guidelines provide that the bidder's filing requirement will be satisfied through the filing of a notice containing the name and address of the offeror, the name of the target company, and a "statement that the bidder intends to make a tender offer in the future for a class of equity securities of the target company."¹⁴⁸ The guidelines provide specifically that this information may be filed in lieu of the more detailed information required by the statute.¹⁴⁹ A notice containing that more detailed information need not be filed until "the date on which the offer is deemed to have commenced for purposes of Rule 14d-2(b)."¹⁵⁰

Maryland's approach reflects an explicit limitation contained in Rule 14d-2(b). That Rule provides that a public announcement constituting the commencement of a tender offer is one which "includes the information [contained in Rule 14d-2(c)] with respect to a tender offer. . . ."¹⁵¹ The information contained in Rule 14d-2(c) includes only the identity of the bidder, the identity of the subject company, the amount and class of securities being sought, and the price or range of prices being offered therefor.¹⁵² Since the Maryland guidelines do not require the offeror to file or make any other public announcement of the amount and class of securities being sought or the price or range of prices being offered, the filing does not constitute a Rule 14d-2(b) commencement. The twenty day precommencement waiting period thus does not conflict with Rule 14d-2(b), since Rule 14d-2(b)'s timing provisions are not triggered by the filing.

In short, the Maryland statute, as applied under the guidelines, prohibits the *offer* from going forward, while providing advance notice of the imminent offer to the target and the Securities Division and avoiding conflict with Rule 14d-2(b). The balance thus struck is a delicate one, and has not been sanctioned by the Securities Exchange Commission or any court. The rationale of this approach is, furthermore, different from that of the conditional purchase approach.

That approach, as described above, merely permits administrative

148. Maryland Securities Act Release No. 22, 1A BLUE SKY L. REP. (CCH) ¶ 30,563, at 25,578 (April 18, 1980)(hereinafter cited as Release No. 22). Release No. 22 provides in pertinent part:

GUIDELINES

I. The information requirement of § 11-902(b) shall be deemed satisfied provided that the offeror files a notice as required by § 11-902(a), such notice to contain the following information in lieu of the information required by § 11-902(b):

- (1) The name and address of the offeror;
- (2) The name of the target company;
- (3) A statement that the bidder intends to make a tender offer in the future for a class of equity securities of the target company.

149. MD. CORP. & ASS'NS CODE ANN. § 11-902(b) (Supp. 1980) requires a statement of the consideration to be offered; the duration of the offer; whether the offeror will unconditionally accept all or any part of the shares tendered; the conditions upon which acceptance will be made; the other contractual terms of the offer; and all information required with respect to tender offers by the Securities Exchange Act and the rules and regulations promulgated pursuant thereto.

150. Release No. 22, *supra* note 148, at 25,578.

151. Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b).

152. Rule 14d-2(c), 17 C.F.R. § 240.14d-2(c).

review and application of a prospective remedy before the transaction is consummated. The approach thus permits the crucial first steps to be taken—the offer and the tender of shares—within the post-filing waiting period. The investor's main protection is the state administrator's right to review the disclosures before the deal is consummated and to issue an appropriate corrective order. The intent of the scheme, therefore, is not to give the investor a longer time to evaluate his initial investment decision. He is merely protected, to some extent, from the consequences of his decision to tender his shares in response to the offer.

The Maryland scheme, on the other hand, will expand the time frame within which the takeover process will unfold since the Securities Division, the target company, and the investors will have some public notice of the imminent tender offer fifteen days before the filing which will commence the tender offer for purposes of Rule 14d-2(b). This more gradual evolution of the takeover process will give all three parties additional time to prepare their responses.¹⁵³

The assumption implicit in the Maryland scheme, of course, is that the takeover process *should* take more time to unfold than the current federal rules allow. It will be argued in this Article that this assumption does not create an obstacle to effectuation of the purposes of the Act. It suffices for now to say that this assumption, as it is embodied in the Maryland scheme, does not so directly conflict with Rule 14d-2(b) as to render a finding of preemption inescapable.¹⁵⁴

d. *State Regulation of Tender Offers as an Obstacle to Effectuation of the Congressional Purposes*

To recapitulate: neither the Williams Act nor the Securities Exchange Act contains an express bar against state regulation of tender offers, and no implicit congressional intent to exclude such regulation has or can be found.

153. Note that the Maryland statute also provides for administrative review of the filing. MD. CORP. & ASS'NS CODE § 11-905(e) (Supp. 1980), *as amended by* 1981 Md. Laws ch. 776. Note, however, that this de minimis notice merely alerts the Securities Division and the other parties to the imminent tender offer; it provides little real basis for review in itself.

154. Nevada has recently adopted a scheme similar in some respects to Maryland's. NEV. REV. STAT. § 78.3771, *as amended by* 1981 Nev. Stats. ch. 417, now requires that 20 days before the making of the takeover bid, the offeror file with the target company and make a public announcement of the identity of the bidder; the terms of the bid relating to withdrawal and proration; the source of the bidder's funds; the bidder's plans for the target; the extent of the bidder's stockholding in the target; and information as to any agreement with respect to the securities of the target. The announcement must not, however, "specify the amount of securities to be sought or the consideration to be offered for the securities." That information is to be announced "at least four business days before the making of [the] takeover bid." The withholding of the price and quantity terms is, obviously, designed to avoid triggering Rule 14d-2(b)'s timing mechanism; to that extent, then, Nevada's approach is similar to Maryland's. In addition, it takes Maryland's precommencement notice approach further by requiring more detailed disclosure. The disclosures required are, in fact, essentially those required by Schedule 13D. Unlike Maryland, however, Nevada makes no provision for administrative review of compliance with the statute's disclosure requirements. A model state statute might combine the best features of the Nevada and Maryland schemes by requiring both a Nevada-type public announcement (without disclosure of the price or quantity terms) and a filing with the state administrator for the purpose of timely review of these fairly detailed precommencement disclosures.

Only Rule 14d-2(b) has created the kind of direct conflict that makes a finding of preemption inescapable, but recent changes in the state schemes show that such conflict with that Rule can be avoided. The ultimate question, however, is whether a comparative scrutiny of the federal and state schemes will show that the state schemes stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁵⁵ Most of those courts that faced this issue found that one or more of the state provisions did indeed create such an “obstacle,” either because they diminished the neutrality required by the Act or because they tended to supplant the investor’s judgment with that of a state administrator.¹⁵⁶ The Supreme Court may use its decision in *MITE* to resolve this question. This is, therefore, the appropriate time to restate the question, to clarify the basic premises and to assess the impact of the recent statutory changes.

(1) *Investor protection, neutrality, and the role of the states.*—As the Fifth Circuit noted in *MITE*, two schools of thought have emerged with respect to the role of regulatory neutrality in tender offers.¹⁵⁷ On one hand, most courts have supported the reasoning enunciated in *Kidwell* and repeated in *MITE*:

[T]he Williams Act was designed both to protect shareholders and to preserve a neutral balance between incumbent management and offeror. Because state takeover statutes hinder the successful completion of tender offers by providing management with a powerful weapon of delay, such statutes “[disrupt] the neutrality indispensable for the proper operation of the federal market approach,” and therefore “[stand] as . . . obstacle[s] to the accomplishment and execution of the full purposes and objectives’ of the Williams Act.”¹⁵⁸

On the other hand, at least one court and several commentators have asserted that the sole purpose of the Williams Act is the protection of investors. The *AMCA* court buttressed this argument by invoking the Supreme Court’s comment in *Piper v. Chris-Craft Industries*¹⁵⁹ that “[n]eutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.”¹⁶⁰ If the state statute remains consistent with the Act’s purpose of protecting investors through mandating full and fair disclosure, then a departure from neutrality would not, according to this view, necessarily create a basis for preemption.¹⁶¹

155. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

156. See text accompanying note 31 *supra*.

157. *MITE*, *supra* note 1, at 495.

158. *Id.* (Footnotes omitted).

159. 430 U.S. 1 (1977).

160. *AMCA*, *supra* note 20, at 936 (citing *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977)). See also *Preemption*, *supra* note 25, at 734–35; *Securities Law and the Constitution*, *supra* note 93, at 522–23; *A Response to Great Western*, *supra* note 25, at 914–15.

161. A concise statement of this argument may be found in *Securities Law and the Constitution*, *supra* note 93, at 522–23:

Any balance that emerged from the Williams Act was neither a “purpose” nor an “objective” of its draftsmen, but rather a byproduct of the congressional desire to “require full and fair disclosure for the benefit of investors.” The fact that the state statutes may alter this balance is therefore an inappropriate basis for statutory preemption. Only if state regulation of tender offers conflicts with the true purpose and objective of the Williams Act—investor protection—should the state laws be held to be preempted.

(Footnotes omitted).

The recent decisions have consistently repudiated this point of view. The *MITE* court, for example, attacked the apparent assumption that the goals of investor protection and evenhanded, neutral regulation are separable:

It does not seem to us that they are. Rather, inhibitions on tipping the regulatory balance, particularly on tilting toward incumbent management, are important because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection. For if the weapons in management's arsenal are drastically augmented, the vigor of the tender offer device will at some point be impaired, denying protection to stockholders in an obvious dimension: the right to tender their shares at a premium. Thus, in its concern for investors, Congress was necessarily committed to maintaining, where appropriate, the basic capability of offerors to make successful tender offers (as well as, of course, maintaining the free flow of information to stockholders both from offerors and from management).¹⁶²

A federal court in *Crane Co. v. Lam*,¹⁶³ furthermore, criticized reliance on the language in *Piper* which suggested that regulatory neutrality was not a purpose of the Williams Act:

The question before the Court in *Piper*—whether the Williams Act confers a private right of action upon defeated offerors—was altogether different. The *Piper* court's objective was to determine *who* the Williams Act was designed to protect, and the Court concluded that the Williams Act was intended only to protect shareholders, not offerors. The *Piper* Court thus had no occasion to consider whether the neutral approach to tender offers adopted by Congress in the Williams Act was intended to establish a federal policy of neutrality with which the states cannot interfere.¹⁶⁴

These criticisms are probably sound. It is difficult to describe the Williams Act's policy of investor protection through full and fair disclosure without reference to regulatory neutrality, and the *Piper* language, when considered in context, does not support a contrary view. This concession does not, however, compel a finding of preemption of the state schemes; it merely creates the need to analyze what is meant by neutrality.

In other words, we may ask whether the Williams Act's policy of neutrality requires administrative definition and protection of one and only one balance among aggressor, investors, and target management, or whether this policy simply represents a general principle which may, to some extent, be expressed in different ways. If the question is put in those terms, the answer is clear. If the Williams Act contemplated some absolute balance, the Commission itself could not use its rulemaking power, as it already has, to alter the balance. If neutrality thus represents a general principle which may be effected in different ways, the central question becomes one of defining the permissible scope of variation.

The outer parameters of such variation are perhaps discernible. On one

162. *MITE*, *supra* note 1, at 496.

163. *Crane*, *supra* note 17.

164. *Id.* at 90,534-35.

hand, the regulatory scales cannot so tilt toward the aggressor as to create, in effect, "a right . . . to complete its tender offer successfully."¹⁶⁵ On the other hand, "tender offers may not be unduly hindered . . . to the detriment of investors."¹⁶⁶ Within those parameters, the criteria are even more elusive, and the courts have not been able to define them with any precision. *MITE* suggests only that the equitable balance will be threatened "if the weapons in management's arsenal are drastically augmented" and that Congress' basic commitment "to maintaining, where appropriate, the basic capability of offerors to make successful tender offers" should not be undercut.¹⁶⁷

The elusiveness of these criteria is, perhaps, inevitable. Takeover transactions are themselves elusive in form, timing, and impact. An attempt to define specific and uniform neutrality criteria would be an attempt to gather mercury by hand.¹⁶⁸ The permissible scope of variation may thus be broad. If a scheme of state regulation does not eliminate "the basic capability of offerors to make successful tender offers" and if the scheme is in fact designed to protect investors by ensuring an adequate opportunity to make an informed decision, then there would seem to be little basis for objection. The state schemes should thus be evaluated in terms of whether they give effect to this *principle* of investor protection through administrative neutrality, not in terms of whether the particular balance struck by a state scheme is different from that struck by the Commission acting through its rulemaking power.¹⁶⁹ This, in short, is the analytical premise which the Supreme Court should adopt when it decides *MITE*; and it is an analytical premise which certainly does not foreclose concurrent state regulation of takeovers.

The effect of the state schemes on the regulatory balance deserves reconsideration in light of that analytical premise. The most persistent claims with respect to the violation of neutrality have been that the state schemes tend to create delays; that such delays give management the opportunity to react defensively; that the regulatory balance, instead of remaining neutral, is thus tilted toward management; and that the market approach is undermined since

165. Kidwell, *supra* note 5, at 1277.

166. *MITE*, *supra* note 1, at 498.

167. *Id.* at 496.

168. Even the definition of "tender offer" has proven elusive. The Williams Act does not define the term, and the Commission itself has only recently proposed a definition. See Proposed Rule 14d-1(b), SEC Rel. No. 34-16385, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 82,374 (Nov. 29, 1979). The Commission's proposal has not, however, generated consistent results in the courts. Compare *Brascan Ltd. v. Edper Equities, Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979) with *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979). See also *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978). The question has received extensive commentary. See Note, *Private Solicitations under the Williams Act*, 66 CORNELL L. REV. 361 (1981); Fogelson, Wenig & Friedman, *supra* note 2; Einhorn & Blackburn, *The Developing Concept of 'Tender Offer': An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y. L. SCH. L. REV. 379 (1978); Note, *The Developing Meaning of 'Tender Offer' Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973).

169. It can be argued that the Commission's adoption of Rule 14d-2(b), which carried with it the effect, if not the intent, of rendering simultaneous compliance impossible, was an act inconsistent with this point of view. While the Commission may, as a matter of administrative law, have discretion "to adopt a rational preemptive rule," *Canadian Pacific*, *supra* note 17, at 1203, a serious question arises as to whether such action genuinely reflects the purposes of the Williams Act.

management's judgment replaces the investor's.¹⁷⁰ Three responses to this criticism come to mind.

First, the criticism is conclusory insofar as it seems to presume that *any* provision giving management time for defensive maneuvers is inherently non-neutral and incompatible with the Act. For the criticism to be serious it must show with particularity when a tilt toward management is of such a scale that it cannot be encompassed within the general principle of neutrality. Failure to analyze the question of delay in these nonconclusory terms is to ignore the serious and unresolved policy question of whether the takeover process should be accelerated or slowed. Through the use of precommencement waiting periods and extendible review periods, most states have tended to slow the takeover process down to allow more time for disclosures to be made, investment decisions to be reached, and the fundamental change in the corporation's status to take place. The Commission has expressed its belief that prolongation of the process interferes with the useful activities of arbitrageurs and destabilizes the market,¹⁷¹ but it also seems to have recognized the importance of some delay by expanding from ten to twenty days the period during which tender offers must remain open.¹⁷² In view of this ambiguity, the courts should hesitate to find preemption simply because the state scheme may tend to cause delays longer than those created by the Commission's rules.

Second, strong arguments may be made that any delays imposed by the revised versions of the state schemes do not violate the basic principle of neutrality:

1. Some states have eliminated the "friendly" offer exemption¹⁷³ and deleted provisions permitting management unilaterally to compel a hear-

170. See text accompanying note 31 *supra*.

171. See SEC Rel. No. 34-16384, [1979-1980] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,583-84; Brief for SEC as Amicus Curiae at 36, Leroy, *supra* note 4 ("[B]y artificially magnifying [through delays] the economic risks of arbitrageurs, the focal points of trading activity during the tender offers, the Idaho statute substantially distorts the free interplay of buying and selling interests in the national markets for the securities of bidders and target companies. . . ."). Note that the destabilization of the market referred to in the Leroy brief, and targeted for elimination through Rule 14d-2(b), was that allegedly caused by twenty or thirty-day precommencement waiting periods. Query: Would a pre-purchase waiting period combined with an expedited hearing procedure create the same kind of destabilization?

172. Rule 14e-1(a), 17 C.F.R. § 240 14e-1(a). This rule, which became effective January 7, 1980, reflects, to some extent, the states' recognition that the offeree needed more than ten days within which to obtain full and fair disclosure. The Commission's rules also contain other "delaying" provisions. For example, under Rules 14e-1(b) and 14d-7(a)(2) the initial twenty day period must be extended an additional ten business days if the offeror increases the offered consideration or if a competing offeror enters the arena.

173. The 1980 amendments to the New York statute, for example, repealed § 1601(b)(5), which had exempted any takeover bid approved by the board of directors of the target company. N.Y. BUS. CORP. LAW § 1601(b)(5), repealed by 1980 N.Y. Laws ch. 733. The Proposed Uniform Takeover Act, which is substantially modeled on the New York statute, also contains no friendly offer exemption. The 1981 amendments to the Wisconsin statute similarly repealed in part § 552.01(5)(e), which set out a friendly offer exemption. WIS. STAT. ANN. § 552.01(5)(e) (West Special Pamphlet 1981). Amendments to the New Hampshire statute pending as of this writing before the New Hampshire legislature would repeal N.H. REV. STAT. ANN. § 421-A:2(VI)(a)(6) (Cum. Supp. 1979), which currently provides for a friendly offer exemption. N.H. Senate Bill 44, 1981 Session, § 2.

ing.¹⁷⁴ The two provisions most clearly permitting management to control the process thus have been removed from those statutes.

2. The amount of additional delay created by the state statutes has been reduced through a shortening of the precommencement waiting periods,¹⁷⁵ requiring hearings to be scheduled and determinations to be reached more quickly,¹⁷⁶ limiting the duration of stop orders,¹⁷⁷ and either eliminating withdrawal and proration provisions or making them consistent with the federal provisions.¹⁷⁸

3. The remaining delays created by the prepurchase waiting periods or the hearings are needed for timely administrative review and effective use of the administrative remedies.¹⁷⁹ As such, their purpose is consistent with that of the Act; any adverse effect they may have on the offeror is an acceptable cost of effecting that purpose.

4. Without a showing of substantial empirical proof, it cannot be said that these relatively minor delays would give rise to market destabilization of a kind more unmanageable than that usually accompanying takeover bids. Even if market destabilization greater than that normally incident to takeover bids can be shown, it should still be recognized that the compression of the applicable time periods may force the investor to react too quickly, thus giving the offeror an unacceptable advantage.

5. It remains that the aggressor has an inherent advantage—he is offering a premium price for the investors' shares. Management has its own arsenal, but it must begin on the defensive and must try to circumvent

174. The Wisconsin statute, for example, was amended to eliminate target management's power to compel a hearing; management may now only "petition the commissioner to hold a hearing with respect to the take-over offer, except that the target company may not request a hearing if it has requested a hearing with respect to the take-over offer under a law of any other state similar to this chapter." WIS. STAT. ANN. § 552.05(4) (West Special Pamphlet 1981), as amended by 1981 Wis. Laws ch. 16. The proposed amendments to the New Hampshire statute would delete from N.H. REV. STAT. ANN. § 421-A:5 (Cum. Supp. 1979) language permitting management to compel a hearing. N.H. Senate Bill 44, 1981 Session, § 4. The Indiana, Maryland, New York, and Wisconsin statutes, as well as the Proposed Uniform Takeover Act, already do not permit management to compel a hearing.

175. See, e.g., the Nevada statute, which was amended in 1981 to reduce the precommencement waiting period from thirty to twenty days. NEV. REV. STAT. § 78.3771(6) (1979), as amended by 1981 Nev. Stats. ch. 417.

176. See MD. CORP. & ASS'NS CODE § 11-905(e) (Supp. 1980), as amended by 1981 Md. Laws ch. 776, which now provides that hearings be held within 20 days of the filing, and that determinations be reached within 30 days of that date. See also WIS. STAT. ANN. § 552.05(5) (West Special Pamphlet 1981), which provides that any extension by the commissioner of the time period within which a decision must be made "may not exceed offering period limitations relating to take-over offers prescribed by the securities exchange act of 1934 or rules and regulations under that act, if the take-over offer is subject to the securities exchange act of 1934."

177. See text accompanying notes 132-34 *supra*.

178. See the Proposed Uniform Takeover Act, § 8(c)-(d), which track the federal withdrawal and proration provisions; WIS. STAT. ANN. § 552.11(2) (West Special Pamphlet 1981), which now provides that offers subject to the Securities Exchange Act shall be subject only to that act's withdrawal provisions (WIS. REV. STAT. § 552.11(3)(West Special Pamphlet 1981) already tracked the federal proration provisions); Pennsylvania Securities Commission, "Interpretive Opinion," which provides that the Commission will view favorably requests that the Pennsylvania statute's withdrawal time period "be harmonized with the applicable time periods set forth in the analogous SEC rules"; and the proposed amendments to N.H. REV. STAT. ANN. § 421-A:7(I)-(II) (Cum. Supp. 1979), which would cause that section to substantially track the federal provisions.

179. See text accompanying notes 133-34, 142 *supra*.

the investors' fundamental desire to make a profit from a sale to the aggressor. It may be able to do so only by bringing in a somewhat more friendly offeror. The flat assertion that these minor state-mandated delays will tilt this balance so as to destroy rather than preserve neutrality thus underestimates the precariousness of management's position during a hostile takeover.¹⁸⁰

Finally, insistence upon the need to protect the investor's market decision from the self-interested manipulations of management represents a peculiar combination of sentimentality and cynicism. The sentimentality rests in the apparent belief that the investor simply needs information and time in order to protect his interests in the market created by the takeover bid. This belief is sentimental in that it ignores the distortions necessarily produced by arbitrageur activity, distortions which limit the ability of even the sophisticated investor to fend for himself.¹⁸¹ This sentimental view, in short, ignores the inherent limitations of the "market approach."

The cynicism rests in the suspicion that management's defensive maneuvers are inevitably self-interested. This cynicism ignores the possibility that management may be acting out of a lively (and legally enforceable) sense of fiduciary duty to the corporation and its shareholders. This fiduciary duty requires management to walk a fine line: it compels resistance when resistance is appropriate,¹⁸² and it compels surrender when it is not. And the failure to make the proper choice is, to some degree, subject to legal challenge.

The investor buffeted by the market pressures of a takeover bid thus may not be protected sufficiently by the disclosure and timing requirements mandated by the "market approach." He may need the limited administrative

180. Management's position is indeed precarious. Even if it has time to take defensive action, its sole recourse may be to bring in a "white knight." See *A Response to Great Western*, *supra* note 25, at 872-73 n.1. Management, and the target company, in general, may have a stronger bargaining position vis-a-vis the "white knight," but the "white knight's" position has its own considerable advantages, and the net result is still a takeover.

181. See text accompanying note 171 *supra*.

182. The question of whether target's management should have either the right or the responsibility to resist tender offers was answered in the negative in Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981). The authors acknowledge, however, that the "courts typically have held that the target's management has the right, and even the duty, to oppose a tender offer if it determines to be contrary to the firm's best interests." *Id.* at 1163. For decisions so holding, see, e.g., *Lewis v. McGraw*, 619 F.2d 192 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 354 (1980); *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168 (N.D. Ill. 1980), *appeal docketed*, No. 80-1375 (7th Cir. Mar. 21, 1980); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978). See also *Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980), *rev'g in part* 490 F. Supp. 668 (S.D.N.Y. 1980). The commentators have also tended to assert the existence of such a right. See, e.g., Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 3 CORP. L. REV. 107 (1980); Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW 101 (1979); Steinbrink, *Management's Response to the Takeover Attempt*, 28 CASE W. RES. L. REV. 882 (1978). Time does not permit evaluation of Easterbrook and Fischel's argument in this Article. Note, however, that acceptance of their argument would cast additional doubt on the constitutionality of any state law which might create greater difficulties for hostile takeovers than does the Williams Act. Easterbrook & Fischel, *supra*, at 1163 n.8. The questions remain, however, of whether their argument will or should be accepted, and of whether the revised state schemes are significantly less hospitable to hostile takeovers. For purposes of this Article it will simply be assumed that the weight of authority imposes upon management the duty to resist tender offers in the appropriate circumstances.

review, the prospective administrative remedies, and the modicum of delay imposed by the state statutes. The state scheme may, in short, compensate for some of the inherent limitations of the Williams Act. Any additional opportunity for defensive maneuvering created by application of the state's provisions can be tolerated since the investor has a potential remedy for abuse of fiduciary duty by management.¹⁸³ The investor may, furthermore, gain a better price for his share from a "friendly" offeror brought in by management to compete with the aggressor,¹⁸⁴ or he may benefit from more unconventional financial reorganizations undertaken in response to a hostile tender offer.¹⁸⁵

(2) *Administrative review and the market approach.*—State provisions requiring or permitting administrative review of the substantive fairness of a takeover bid have, of course, generated substantial criticism.¹⁸⁶ Some courts have characterized these provisions as an obstacle to the Williams Act's "market approach" insofar as they tend to supplant the investor's judgment with that of the state administrator.¹⁸⁷

The force of these criticisms is considerable. If the Williams Act does in fact embody a "market approach," the state schemes can only compensate for the inherent limitations of that approach; they cannot superimpose a regulatory scheme that radically constricts the operation of the market.¹⁸⁸ Even if substantive fairness review is not inherently subject to preemption

183. See the cases cited in note 182 *supra*.

184. Consider Fluor Corp.'s recent acquisition of a controlling interest in St. Joe Minerals Corp. Fluor was brought in by St. Joe management as a competitor to Seagram Co., which had begun a hostile takeover bid. Seagram had made a \$45-a-share offer for all of the outstanding St. Joe's stock; Fluor countered with an offer of \$60-a-share for up to 45% of the stock, to be followed by a merger in which the remaining St. Joe stock would be exchanged for Fluor stock. The St. Joe shareholders thus were able to obtain either a substantially higher price for their shares, or to exchange their shares at a positive rate of 1.2 Fluor shares for each share of St. Joe. Wall St. J., April 1, 1981, at 3, col. 2; *id.*, April 2, 1981, at 15, col. 2; *id.*, April 6, 1981, at 6, col. 1; *id.*, April 8, 1981, at 3, col. 3; *id.*, April 9, 1981, at 4, col. 1.

185. Consider the employee stock ownership plan (ESOP) that Continental Airlines, as of this writing, intends to use as its principal defense against a hostile takeover bid by Texas Air Corp., the holding company for Texas International Airlines. This plan provides for Continental to issue 15.4 million new shares of stock to an employee trust, thereby doubling the amount of shares outstanding, giving the employees 51% control, and halving Texas Air Corp.'s 48.5% interest. Wall St. J., April 24, 1981, at 6, col. 2; *id.*, May 1, 1981, at 7, col. 3; *id.*, May 7, 1981, at 6, col. 3; and *id.*, May 8, 1981, at 12, col. 2. Two employees of Continental, both airline pilots, conceived the ESOP plan, presented it to management, and organized employee support. *Id.*, April 30, 1981, at 29, col. 2. Texas International's attempt to secure a preliminary injunction against formal adoption of the plan failed. *Texas International Airlines v. Continental Airlines*, No. 81-1831 (S.D. Cal. June 16, 1981), *aff'd*, (9th Cir. June 18, 1981). See Wall St. J., June 17, 1981, at 14, col. 2; *id.*, June 19, 1981, at 9, col. 3. The Civil Aeronautics Board also refused Texas International's request to block implementation of the ESOP. *Id.*, June 18, 1981, at 18, col. 2.

186. See text accompanying notes 30-32 *supra*.

187. See, e.g., MITE, *supra* note 1, at 494.

188. Note that this concession pertains only to the issue of preemption. Since the Williams Act does seem to embody a market approach, the state schemes must be consistent, but there is an underlying policy question as to whether the "market approach" is indeed the best approach to investor protection. That question is, however, beyond the scope of this Article.

It should be noted here that substantive review by a government agency of a proposed business combination is not unknown. The Hart-Scott-Rodino Act, 15 U.S.C.A. § 18a (Supp. 1981), and the regulations promulgated pursuant thereto at 16 C.F.R. §§ 801-803 (1980) require prior notification of certain mergers and a waiting period before consummation of the merger. The Federal Trade Commission will use that time period to review the proposed merger from the standpoint of substantive antitrust policy and to take any appropriate enforcement measures. For surveys of the Hart-Scott-Rodino Act, see Goolrick, *The End of the 'Midnight Merger': An*

challenge, the vague standards of review might themselves impose an obstacle to effectuation of the Act's purposes.¹⁸⁹

The Illinois statute's provision for substantive fairness review may thus fall in *MITE*, but those state statutes allowing review only of the adequacy of the disclosures and of compliance with the filing and timing requirements of the statute should not. This type of review, as has been shown,¹⁹⁰ complements the "market approach" since it merely ensures that full and fair disclosure is made and allows the use of prospective administrative remedies.

This type of hearing provision, furthermore, is the key mechanism through which the states provide an additional protection for investors. Since the mechanism is designed to operate in a manner consistent with the market approach, and since it does not impose significant delays on the takeover process,¹⁹¹ this additional protection should be seen as constitutionally permissible.¹⁹²

B. Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ."¹⁹³ It is well established, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation."¹⁹⁴ Indeed,

Overview of the New FTC Premerger Notice Rules, 34 BUS. LAW. 63 (1978); Katcher, *State Statute Considerations—Hart-Scott-Rodino Filings*, in PRACTICING LAW INSTITUTE, *TENDER OFFERS: MAKING AND MEETING THEM* (1979). Since a business combination subject to the Hart-Scott-Rodino Act may be effected by a tender offer subject to the Williams Act, the FTC's substantive review may take place during the waiting periods mandated by the Williams Act. See Goolrick, *supra* at 67.

The type of substantive review now contemplated by some state takeover statutes cannot simply be equated with that contemplated by the Hart-Scott-Rodino Act, since review under that Act will turn on reasonably well-defined principles of antitrust policy, while substantive review under the state statutes will turn on less well-defined principles of "fairness." The existence of substantive review under the Hart-Scott-Rodino Act may, however, be seen as support for the proposition that some kind of more precisely defined substantive review under either a federal or a state takeover statute may be possible, and, as a matter of policy, desirable.

189. The Illinois statute, for example, permits the Secretary of State to deny registration of the takeover offer if he finds that it is "inequitable." ILL. ANN. STAT. ch. 121½, § 137.57.E. (Smith-Hurd Supp. 1981-1982). The New Jersey statute provides for review of whether "[t]he terms of the takeover bid are unfair or inequitable to the security holders of the target company." N.J. STAT. ANN. § 49:5-4(a)(2) (Supp. 1981-1982) (see also subsections (1), (3)-(4)). The South Carolina statute permits the commissioner to determine whether "the price or any other substantial term is unfair to the offerees." S.C. CODE § 35-2-60(3) (Supp. 1980).

190. See text accompanying notes 132-34, 142 *supra*.

191. See text accompanying notes 175-78 *supra*.

192. Until amended, the Indiana statute provided that the commissioner could prohibit purchase of tendered shares if he found that the offer was "unfair or inequitable to the holders of the securities of the target company." IND. CODE ANN. § 23-2-3.1-7 (Burns Supp. 1980) (repealed 1981). That section now provides that the commissioner can issue such an order only if he "finds by a preponderance of the evidence that the takeover statement fails to provide full and fair disclosure to the offerees of all material information . . . or that the . . . offer is not made to all offerees on substantially equal terms." IND. CODE ANN. § 23-2-3.1-7 (Burns Supp. 1980), as amended by Pub. L. No. 215 (1981). Until amended, the Wisconsin statute permitted the commissioner to deny registration of the offer if he found that the offer was "unfair or inequitable to offerees." WIS. STAT. ANN. § 552.05(5) (West Special Pamphlet 1980). That section now provides for review of whether the offer has been made to all offerees on substantially equal terms, and of whether full and fair disclosure has been made. WIS. STAT. ANN. § 552.05 (West Special Pamphlet 1981). Among the other states that do not provide for review of substantive fairness are Maryland, New York, Ohio, and Pennsylvania. The Proposed Uniform Takeover Statute, § 6 similarly allows review only of "whether the offeror has provided full, fair and effective disclosure of all material facts necessary for the making of an informed decision about the take-over offer. . . ."

193. U.S. CONST. art. 1, § 8, cl. 3.

194. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 140 (1973).

the states “retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.”¹⁹⁵ Thus when

activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in absence of congressional guidance is called upon to make “delicate adjustment of the conflicting state and federal claims,” *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 553 (1949) [(Black, J., dissenting)]¹⁹⁶

The *Pike* test provides some more specific guidance for making those delicate adjustments: “Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”¹⁹⁷ While the sweeping language of the *Pike* test is frequently quoted, the Supreme Court has recognized that application of the test must be on a case-by-case basis.¹⁹⁸ Any assertion that all state legislation of corporate takeovers impermissibly burdens interstate commerce would thus need careful justification.

While several courts have found that one or more aspects of a state scheme of takeover regulation impose an unacceptable burden on interstate commerce,¹⁹⁹ the question remains open as to whether *some* form of state regulation of corporate takeovers is permissible under the Commerce Clause. Analysis of recent state responses to the Commerce Clause challenge will suggest that such state regulation is indeed permissible. That analysis requires a step-by-step application of the *Pike* test.

1. *Evenhanded Regulation*

There seems to be little question that the existing state schemes regulate evenhandedly. Even those cases which found a state statute unacceptable under the Commerce Clause did so only on the grounds that the local public interest served by the statute was questionable, and that the burden on interstate commerce was excessive.²⁰⁰

In fact, evenhandedness seems implicit in each state’s scheme since it will pertain equally to transactions with both resident and nonresident shareholders.²⁰¹ In the same way, each statute treats domestic and foreign offerors

195. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980). See also *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978).

196. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978).

197. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

198. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 (1978):

[E]xperience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.

199. See note 77 *supra*.

200. See text accompanying notes 79–84 *supra*.

201. See, e.g., N.Y. BUS. CORP. LAW § 1601(d) (McKinney Supp. 1980–1981).

alike, both procedurally and with respect to substantive determinations.²⁰² The only provisions potentially subject to challenge on this basis may be those which distinguish between hostile and friendly takeovers through allowing an exemption for takeovers approved by the target's management. The trend, however, is to eliminate those provisions from the state statutes.²⁰³

2. *Legitimacy of the Local Public Interest*

As noted in Part II of this Article, the local interests served by the state schemes have typically been characterized as interests in: (1) investor protection; and (2) regulation of the internal affairs of domestic corporations and corporations with substantial assets or their principal place of business within the state.²⁰⁴ It must be emphasized, however, that this formulation is misleading. All of the state takeover statutes are designed to protect investors. The real question is whether they protect investors as a form of state securities regulation or as a form of state corporate law. This Article will suggest that the state takeover statutes represent an attempt to protect investors through exercising the traditional state power to regulate the internal affairs of domestic corporations. If the state schemes can be so characterized, their validity under the Commerce Clause will be assured.²⁰⁵

a. *Investor Protection: State Takeover Laws as State Securities Regulation*

State takeover laws, arguably, may be described as a form of securities regulation, or, in other words, regulation of securities transactions *per se*. Securities regulation, as such, must be distinguished from traditional state corporate law, which protects the interests of investors after they have made the investment decision and become shareholders, both with respect to transactions in the corporation's securities and with respect to other aspects of corporate life.²⁰⁶ This distinction is more than academic. If the state schemes are defined principally as a form of state securities regulation, they will be vulnerable to a Commerce Clause challenge.

State securities regulation, as embodied in the blue sky laws, serves a legitimate state interest in protection of investors.²⁰⁷ The specific interest served by the blue sky laws, however, is the protection of *resident* inves-

202. See, e.g., N.Y. BUS. CORP. LAW § 1601(c) (McKinney Supp. 1980-1981).

203. See note 173 *supra*.

204. See text accompanying note 78 *supra*.

205. Note that a state interest in localized control of economic entities has also been asserted, although the specific nature of that interest remains indistinct and unsubstantiated. See, e.g., Kidwell, *supra* note 5, at 1286. See also Boehm, *supra* note 93, at 743-44; Moylan, *supra* note 7, at 690. Boehm's article in general analyzes the different public interests served by the state schemes in a very comprehensive manner. See Boehm, *supra* note 93, at 741-46.

206. For another statement of this distinction and an inquiry into its applicability to state takeover laws, see Sommer, *supra* note 93. See also Boehm, *supra* note 93, at 743.

207. See, e.g., Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917). See generally L. LOSS & E. COWETT, BLUE SKY LAWS 17-42 (1958).

tors.²⁰⁸ They serve that interest through regulating only intrastate securities transactions, thereby serving a local interest while not burdening interstate commerce. The need to comply with the different requirements of several state blue sky laws has a significant effect on a national stock offering,²⁰⁹ but an individual state's requirements will pertain only to transactions with investors resident in that state and will not directly affect transactions with investors resident in other jurisdictions. State regulation of takeovers, however, will inevitably have a direct impact on nonresident investors since the regulating state's requirements will pertain to tender offers made to all shareholders, wherever located. In short, it cannot be said that state takeover statutes, as a form of securities regulation, serve the state's interest in protection of resident investors with the same precision that the blue sky laws do. The takeover statutes have too direct an impact on nonresident investors, which the state has no interest in protecting as such.²¹⁰ If the state takeover laws can be characterized only as a form of state securities regulation, they will fail to pass this crucial phase of the *Pike* test.

The recent changes in the state takeover laws would not alter this result. For example, a state takeover statute may now be applicable only to domestic corporations or domestic corporations with some very substantial presence within the jurisdiction.²¹¹ While this narrowing of the definition of the target company will create a tighter nexus between the target and the regulating state, the statute will still apply to a significant number of transactions involving nonresident shareholders.²¹² The tighter nexus thus would not render state takeover statutes more closely analogous to the blue sky laws as a constitutionally permissible form of securities regulation.²¹³ The creation of a tighter

208. See, e.g., MITE, *supra* note 1, at 500 ("Protecting resident investors is indisputably a legitimate state objective.").

209. For explanation of the impact that state securities regulation may have on a national offering, see Shapiro & Sachs, *Blue Sky Law and Practice: An Overview*, 4 U. BALT. L. REV. 1, 2 (1974); Millonzi, *Concurrent Regulation of Interstate Securities Issues: The Need for Congressional Reappraisal*, 49 VA. L. REV. 1483, 1489 (1963).

210. *Accord*, E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL, *supra* note 7, at 231; Boehm, *supra* note 93, at 742; Wilner & Landy, *supra* note 93, at 20; *Commerce Clause Limitations*, *supra* note 93, at 1152-62.

211. See, e.g., CONN. GEN. STAT. ANN. § 36-457 (Supp. 1980), as amended by Pub. Act. No. 81-121 (1981) ("Target Company" means any stock corporation which is organized under the laws of this state, has its principal executive offices in this state, and has, on a consolidated basis, five hundred or more employees in this state and fifty million dollars of tangible assets in this state . . ."); IND. CODE ANN. § 23-2-3.1-1(j) (Burns Supp. 1980), as amended by Pub. L. No. 215 (1981) ("[T]arget company" means an issuer . . . which is organized under the laws of this state, has its principal place of business in this state, and has substantial assets within this state . . ."); MD. CORP. & ASS'NS CODE §§ 11-902(n)(2)(iv), (x) (Supp. 1980), as amended by 1981 Md. Laws ch. 776 (the target company must be organized in Maryland, be doing business in the state, and have at least thirty-five shareholders in the state). See also the Proposed Uniform Takeover Act, § 3(j) ("subject company" includes only domestic corporations; the state administrator is permitted to require additional criteria).

212. See MITE, *supra* note 1, at 501.

213. But see ALI FED. SECURITIES CODE PROPOSED OFFICIAL DRAFT § 1904(c) (1980). This section would expressly preempt state takeover laws except with respect to corporations having a majority of their shareholders holding a majority of the outstanding securities resident within the state, as well as their principal place of business there. The requirement of a large percentage of shareholders within the state might legitimate this type of statute as a form of securities regulation. Query, however, whether this approach narrows to an

nexus would, however, have a significant effect if the state takeover laws are characterized as a form of state corporate law.

b. *Investor Protection: State Takeover Laws as State Corporate Law*

Several commentators have suggested that state takeover laws can be considered an aspect of state corporate law serving the same legitimate local public interest.²¹⁴ This argument bears reexamination.

State corporate law protects investors by defining their rights as *shareholders* in certain transactions in the corporation's securities and their relations with directors, officers, and other shareholders.²¹⁵ For example, corporate law has traditionally protected shareholders' rights by regulating the techniques of effecting change in the corporation's structure, such as the transfer and voting of shares, shareholder agreements and voting trusts, mergers, dissolutions, and the use of proxies. A state's corporate law, furthermore, travels with the corporation since full faith and credit is given by other states to the law of the state of incorporation, at least with respect to matters of corporate organization.²¹⁶ The state of incorporation thus shoulders the burden of protecting both resident and nonresident shareholders.²¹⁷ A takeover bid should be seen as functionally equivalent to those other methods of effecting change in corporate control which have traditionally been subject to state regulation. State takeover statutes are thus simply a way of regulating the attempt to secure a fundamental change in the corporate ownership and organization through a series of securities transactions with the shareholders in the corporation.

The courts, however, have not hesitated to point out the central weakness of this argument as it applies to the state takeover laws in question. Specifically, courts have emphasized that the states have an interest only in regulating the internal affairs of corporations organized under their laws; the state takeover statutes in question, however, applied to foreign corporations otherwise present within the jurisdiction.²¹⁸ In effect, the statutory definition of certain foreign corporations as target companies within the purview of the statute undermines the argument that the state takeover law is simply an

unacceptable degree the class of corporations subject to state takeover laws. It should also be asked whether this approach makes any sense when vast amounts of stock are held in street names or in the names of nominees. See *The Street Name Study*, FINAL REPORT OF THE SEC ON THE PRACTICE OF RECORDING THE OWNERSHIP OF SECURITIES IN THE RECORDS OF THE ISSUER IN OTHER THAN THE NAME OF THE BENEFICIAL OWNER OF SUCH SECURITIES (1976).

214. See, e.g., Boehm, *supra* note 93, at 743, 756; Shipman, *supra* note 93, at 741-45; *A Response to Great Western*, *supra* note 25, at 931-34. *But cf.* Wilner & Landy, *supra* note 93, at 16-17; *Commerce Clause Limitations*, *supra* note 93, at 1153-55.

215. See text accompanying note 204 *supra*.

216. See generally *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947). See also Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806 (1971); Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958).

217. See *Cort v. Ash*, 422 U.S. 66, 84 (1975).

218. See, e.g., MITE, *supra* note 1, at 501; Crane, *supra* note 17, at 90,536; Hi-Shear, *supra* note 17, at 90,033. The state statutes under consideration in all three of these cases included within the definition of target company certain foreign corporations.

expression of the traditional state interest in the regulation of internal corporate affairs.

Some recent statutory reforms, however, have eliminated this weakness. Connecticut, Indiana, and Maryland, for example, now limit their definition of target company to certain corporations organized under that state's own laws.²¹⁹ These definitions, furthermore, require not only domestic incorporation, but also some kind of substantial business presence within the state or some amount of stockholding within the state.²²⁰ This additional requirement forecloses the possibility that such jurisdictions could function as a haven for corporations located elsewhere, but willing to reincorporate within one of those jurisdictions. These states have thus defined a narrow class of corporations of a genuinely local character in which they have a manifest, traditional interest. They have, in particular, an interest in regulating the type of fundamental corporate change effected through the peculiar device of a tender offer.

This type of state interest has, in recent years, been protected from "federalization" under the federal securities laws.²²¹ The same issue is present here. Congress has been able to regulate tender offers as securities transactions, but the far-reaching character of this regulation should not obscure the fact that tender offers are more than securities transactions. They are devices by which a frequently irreversible change in the ownership and structure of a corporation is effected; their amenability to federal regulation as securities transactions does not eliminate the possibility of or the need for state regulation of them as instruments of fundamental corporate change.

In short, state laws regulating takeovers of domestic corporations can meet *Pike's* threshold requirement—they can "effectuate a legitimate local public interest."²²² The key is definition of an appropriate nexus between the regulating state and the target company. The nonlocal impact of these laws, moreover, is essentially the same type of nonlocal impact that corporation statutes have traditionally created.²²³

219. See note 211 *supra*.

220. Query again whether the requirement of some fixed amount of stockholding in the state makes any sense. From a practical standpoint, the use of street names and nominee accounts makes the ascertainment of beneficial stock ownership difficult. See note 213 *supra*. From a theoretical standpoint, in-state stock ownership may be irrelevant. That is, if state takeover laws are a form of traditional state corporate law, their protections should and can extend to all stockholders wherever located. The residence of the shareholders would be important only if these laws had to be defined as a form of state securities regulation—which they do not.

221. See, e.g., *Burks v. Lasker*, 441 U.S. 471, 478 (1979); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975). Note the Court's statement in *Santa Fe* at 479:

Absent a clear indication of Congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. As the Court stated in *Cort v. Ash*, *supra*: "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." 422 U.S. at 84 (emphasis added [by the Court]).

222. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

223. See note 216 *supra*. See also the following Supreme Court decisions holding that a nonlocal effect does not necessarily vitiate a state scheme of regulation: *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *Huron Portland Cement Co. v.*

Wisconsin's approach to definition of the nexus differs from that taken by Connecticut, Indiana, and Maryland. Wisconsin has tried to tighten the nexus without requiring domestic incorporation. The definition of target company now includes both domestic corporations with substantial assets within the state and a certain number of shareholders within the state, and foreign corporations with their principal place of business, substantial assets, and the requisite number of shareholders in the state.²²⁴ The parallel New York provision applies the statute to an offer for "any equity security of a target company organized under the laws of this state or having its principal place of business and substantial assets within this state."²²⁵ Both of these provisions thus expand the class of corporations in which the regulating state purports to have an interest. Their failure to require domestic incorporation may, however, be seen as undermining the claim that the New York and Wisconsin statutes represent a form of state corporate law.

They may undermine that claim, but they do not necessarily destroy it. It has been argued that application of state corporate law to a company incorporated elsewhere but substantially located within the jurisdiction is a permissible extension of state authority. This argument, usually referred to as the "pseudo-foreign corporation" doctrine, presumes that certain foreign corporations should be treated as domestic corporations because they have a genuinely domestic character.²²⁶ While this doctrine has received considerable support in the literature,²²⁷ its application in this context is problematic.

A state may indeed have a legitimate local interest in a "pseudo-foreign corporation." That interest may even justify application of its takeover statute. If, however, the state of incorporation has its own takeover law, the possibility of conflict will arise. That possibility would diminish if only the state of incorporation could regulate the takeover. The approach taken by Connecticut, Indiana, and Maryland may therefore, as a matter of policy, be preferable.

That approach, nevertheless, may concede too much. If a state has a legitimate interest in regulating takeovers of "pseudo-foreign" corporations and if the only objection is the possibility of conflict with the state of incorporation, a comity provision allowing deferral of jurisdiction from one state to another could, perhaps, resolve the dilemma.²²⁸ State X could thus defer to State Y if the target company located in State X is incorporated in State Y and State Y has a takeover law. If State Y does not have such a law, State X

Detroit, 362 U.S. 440, 447 (1960). *But see* Kennecott, *supra* note 17, at 1223 (The New Jersey takeover statute is "Primarily regulation of interstate commerce with 'incidental' local effects, rather than the reverse."). This conclusion, however, reflects an inadequate appreciation of the necessarily extraterritorial application of the corporate law of the incorporating state. *See* note 216 *supra*.

224. WIS. STAT. ANN. § 552.01(6) (West Special Pamphlet 1981).

225. N.Y. BUS. CORP LAW § 1601(a) (McKinney Supp. 1980-1981).

226. *See, e.g.*, *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

227. *See, e.g.*, Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955).

228. *See* text accompanying notes 243-45 *infra*.

could retain jurisdiction. The remaining policy question would be whether reliance on discretionary comity provisions might create an uncertainty disproportionate to the advantages to be gained from state regulation of takeovers of "pseudo-foreign" corporations. The question is an open one; a takeover statute applicable to "pseudo-foreign" target companies, but also containing a comity provision, may still have constitutional validity.²²⁹

3. *The Balance of Burdens and Benefits*

Since the reformed state takeover laws express a traditional state interest in protection of investors through regulation of fundamental changes in corporate ownership and organization, and since the nonlocal effect of this regulation is not qualitatively different from that of other aspects of state corporate law, they will withstand a Commerce Clause challenge "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."²³⁰

Those cases which have found a state statute to be an impermissible burden on interstate commerce have defined the burden in dramatic terms. In *Kidwell*, for example, Judge Wisdom stated that "Idaho's law halted over 31 million dollars of interstate commerce."²³¹ Similar language can be found in other cases, as can the conclusion that such a burden is "clearly excessive in relation to the putative local benefits."²³²

That conclusion is debatable. First, while enforcement of a state statute may put a temporary halt to a large-scale transaction, it will not necessarily kill the transaction. The potential duration of any delays caused by one of the revised statutes, furthermore, is not disproportionate to those created by the Williams Act.²³³ The burdens imposed by the different state takeover laws cannot, therefore, be described in simple terms. A more careful assessment of the financial and tactical costs of compliance is needed.

Second, those cases which have found state statutes to burden interstate commerce impermissibly have typically found that the statute did not serve a legitimate state interest or that it furthered a legitimate state interest in a tenuous or inefficient manner.²³⁴ This Article, on the other hand, has suggested that certain state takeover laws are simply a novel means of expressing state corporate law's legitimate interest in the protection of those investors holding shares in domestic corporations.²³⁵ Recognition of the legitimacy of

229. See Shipman, *supra* note 93, at 754-55, for an argument that coverage of foreign-based corporations is valid and proper.

230. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Cf. Kennecott, *supra* note 17, at 1224 ("There is no occasion for this court to balance local benefits against interstate burdens, because . . . the New Jersey Takeover Law does not evenhandedly effectuate a legitimate local public interest with only incidental effects on interstate commerce.").

231. *Kidwell*, *supra* note 5, at 1286.

232. See, e.g., MITE, *supra* note 1, at 502; Crane, *supra* note 17, at 90,536; Hi-Shear, *supra* note 17, at 90,033.

233. See notes 175-79 and accompanying text *supra*.

234. See text accompanying notes 79-84 *supra*.

235. See text accompanying notes 206-29 *supra*.

this interest in itself requires a different perception of the balance of burden and benefit.

This Article has also suggested that the reformed statutory schemes, insofar as their timing provisions are consistent with those of the Williams Act, further that local interest in an efficient manner by providing for timely administrative review and timely application of administrative remedies.²³⁶ Finally, this Article has suggested that state takeover laws not only carry the traditional weight of state corporate law, but provide investor protection additional to that provided by the Williams Act.²³⁷ This reassessment of the benefits conferred by the state takeover laws alter the balance of benefits and burdens, making it very difficult to describe the burden on interstate commerce as "clearly excessive."²³⁸

This reassessment of the local interest served by the state schemes, however, does not in itself resolve the question. As the courts have pointed out since *Kidwell*,²³⁹ and as was discussed above,²⁴⁰ more than one state's statute may now apply to a given takeover bid, thereby creating the risk of conflict among those states with some interest in the target company.

The recent trends in state takeover legislation discussed above suggest that this risk may be avoided. The Proposed Uniform Takeover Act, for example, contemplates that only the state of incorporation will have jurisdiction over the takeover process.²⁴¹ If that type of provision were to become uniformly adopted, the risk of conflict would simply disappear since only the state of incorporation could have jurisdiction.²⁴² Alternatively, comity provisions like those included in some takeover laws can be used to reduce the risk of conflict. The Wisconsin statute, for example, now permits the state administrator to defer jurisdiction to another state when the other state's takeover law would provide protection to shareholders substantially equal to that provided by the Wisconsin law.²⁴³ The New York²⁴⁴ and Illinois²⁴⁵ statutes contain similar provisions.

236. See text accompanying notes 133-34, 142 *supra*.

237. See text accompanying notes 183-85, 190-92 *supra*.

238. *Accord*, AMCA, *supra* note 20, at 939-41; Esmark, *supra* note 20, at 97,806; Wylain, *supra* note 20, at 344-45.

239. *Kidwell*, *supra* note 5, at 1284-85; MITE, *supra* note 1, at 502; Crane, *supra* note 17, at 90,535; Kennecott, *supra* note 17, at 1224; Hi-Shear, *supra* note 17, at 90,033. See also Tiger, *supra* note 93, at 482; Wilner & Landy, *supra* note 93, at 21, 23.

240. See text accompanying notes 219 & 229 *supra*.

241. See text accompanying note 211 *supra*.

242. Connecticut, Indiana, and Maryland, as noted above, already limit target companies subject to the statute to certain domestic companies. See note 211 *supra*.

243. WIS. STAT. ANN. § 552.08 (West Special Pamphlet 1981). Note that amended section 552.05(4) provides that a target company would be prohibited from requesting a hearing under the Wisconsin law if the target company has "shopped around" seeking to have the takeover laws of another jurisdiction applied to a proposed offer. See note 192 *supra*.

244. N.Y. BUS. CORP. LAW § 1614 (McKinney Supp. 1980-1981) provides that the Attorney General may waive the registration statement required

in connection with any takeover bid (other than a takeover bid with respect to a target company organized under the laws of this state) when it appears to him that (i) the takeover bid is subject to the jurisdiction of a state (or the District of Columbia) having a statute or regulation similar in effect to this article; (ii) such statute or regulation, or the state official, commission or other such body empowered

The differing approaches of the Proposed Uniform Takeover Act and the comity states reflect, of course, the underlying question of whether the states should be able to regulate takeovers of "pseudo-foreign" corporations. That question, as noted above,²⁴⁶ remains open, and the ability of the states to regulate "pseudo-foreign" corporations cannot be easily dismissed on Commerce Clause grounds.

IV. CONCLUSION

This Article has suggested that state regulation of corporate takeovers can withstand challenge under the Commerce Clause. A state takeover statute limited in its application to domestic corporations with a substantial presence in the jurisdiction, or, perhaps, to "pseudo-foreign" corporations, will effectuate a legitimate local purpose. That local purpose is the protection of investors through regulation of fundamental changes in corporate ownership and organization. State takeover laws are thus part of the traditional sphere of state corporate law and not a form of state securities regulation designed to protect nonresident investors.

The extraterritorial impact of the state takeover law is thus analogous to the impact of other aspects of state corporate law which govern the role of shareholders in effecting fundamental corporate changes. The burden on interstate commerce created by the state takeover laws is not "clearly excessive in relation to the putative local benefits" since: (1) the local interest served is both legitimate and weighty; and (2) the conflict among interested states can be avoided through the use of comity provisions or the approach adopted by the Proposed Uniform Takeover Act. The key reforms discussed in this Article will substantially eliminate the Commerce Clause objections. Such state statutes will stand, therefore, unless it is found that they are preempted by the Williams Act.

Neither the Williams Act nor any other part of the Securities Exchange Act of 1934 contains an express bar to such concurrent state regulation. The Williams Act and the rules adopted thereunder do not constitute a pervasive scheme of federal regulation requiring or permitting an inference of preemptive intent, and the direct conflict between the state and federal schemes

by such statute or regulation, and acting pursuant to such statute or regulation, has required the filing, by the offeror, of a registration statement, or other similar document, in connection with the takeover bid; (iii) such state (or the District of Columbia) has a greater interest in regulating the takeover bid than this state; and (iv) the purposes of this article will be accomplished by such waiver.

245. ILL. ANN. STAT. ch. 121½, § 137.53 (Smith-Hurd Supp. 1980-1981) provides that the registration and filing requirements of the statute

shall not apply to a take-over offer if the Secretary has determined that another jurisdiction has, or other jurisdictions have, statutes or rules, which are applicable and are being applied and which afford protection to security holders located in this State substantially equal to that afforded such security holders by this Act.

See MITE, *supra* note 1, at 502 n.31 (The court conceded that criticism of the negative effects on conflicting state takeover statutes should be "somewhat muted with respect to the Illinois Act because of the Act's comity provision.").

246. See text accompanying note 229 *supra*.

created by Rule 14d-2(b) can and has been avoided through either the conditional purchase approach or the limited disclosure approach.

The revised state schemes, furthermore, do not violate the Williams Act's principle of neutrality. Any minor delays which they may impose are essential to timely administrative review and timely application of administrative remedies. The administrative review permitted by these acts is designed to ensure only the type of full and fair disclosure contemplated by the Williams Act. The administrative remedies simply provide a useful prospective remedy for disclosure violations.

In short, the revised takeover laws express a traditional state interest in a novel context without creating an obstacle to the effectuation of any congressional purpose. They serve, instead, as a rational and useful supplement to the Williams Act.