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Sam Wolff

TOWARD A CONSTITUTIONAL STATE TENDER OFFER STATUTE

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In The Unconstitutionality of the Arkansas Tender Offer Statute, 36 Ark. L. Rev. 233 (1983), *the author examined the unconstitutionality of state tender offer statutes in light of* Edgar v. MITE Corp., *an important United States Supreme Court decision in the field of securities regulation. In this Article, the author posits a theory of limited state tender offer regulation and asserts that narrowly drawn state tender offer legislation may survive constitutional attack.*

I. BACKGROUND

A. *The History of Tender Offer Regulation*

The 1980's are the era of the "billion dollar takeover bid,"[1] or "mega-tender" in the parlance of takeover specialists.[2] In fiscal year 1982, bidders[3] commenced 117 tender offers[4] for registered target com-

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1. Securities and Exchange Commission Advisory Committee on Tender Offers Report of Recommendations 1 (1983) (hereinafter cited as "Advisory Committee Report"), *quoting* John S.R. Shad, Chairman of the Securities and Exchange Commission.

2. Participants in the takeover process have developed a parlance, some of the terms of which — "Golden Parachute" and "White Knight," for example — have appeared in the financial and popular press. Other terms are more obscure. For example, a "poison pill" is a "class of securities of the target company convertible upon consummation of any merger or similar transaction into the common stock of the acquiring entity." Advisory Committee Report, *supra* note 1, at 141. "Greenmail" is the "purchase of a substantial block of the subject company's securities by an unfriendly suitor with the primary purpose of coercing the subject company into repurchasing the block at a premium over the amount paid by the suitor." *Id.*

3. The company or individual making the tender offer is called the "bidder" or "offeror."

4. "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, *The Developing Meaning of 'Tender Offer' Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). "The offer normally consists of a bid by an individual or group to buy shares of a company — usually at a price above the current market price. Those accepting

panies[5] in the United States.[6] In fiscal year 1983, bidders commenced ninety-two tender offers for registered companies in the United States.[7]

One important factor in the development of the mega-tender offer is the demise of state tender offer statutes. Virginia enacted the first state tender offer statute in 1968,[8] followed by similar regulation in thirty-six other states.[9] Since state tender offer statutes impeded, and sometimes even thwarted, tender offers, bidders vigorously attacked the statutes in both state and federal courts. Bidders contended that the federal Williams Act[10] preempted the state laws by virtue of the supremacy clause of the United States Constitution. Bidders also argued that the state statutes violated the commerce clause of the United States Constitution by imposing unreasonable burdens upon interstate commerce.

Prior to the decision of the United States Supreme Court in *Edgar*

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the offer are said to tender their stock for purchase." H.R. REP. No. 1711, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811. Regarding the definition of "tender offer", *see generally* Proposed SEC Rule 14d-1(b)(1), Exchange Act Release No. 16,385 (Dec. 6, 1979), 44 Fed. Reg. 70,349; Note, *Defining Tender Offers: Resolving A Decade of Dilemma*, 54 ST. JOHN'S L. REV. 520 (1980); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

5. The corporation whose shares are sought for purchase is called the "target" or "subject" company.

6. The number of tender offers commenced in 1982 is listed in Advisory Committee Report, *supra* note 1, at 11 n.9. The figures are for the fiscal year of the Securities and Exchange Commission, which begins on October 1 and ends on September 30. The totals only include takeovers of companies the securities of which are registered under Section 12 of the Securities Act of 1934. *See infra* note 23.

7. Telephone conversation with staff of Securities and Exchange Commission, Office of Tender Offers, Washington, D.C. (Jan., 1984).

8. VA. CODE §13.1-528 (1978 & Cum. Supp. 1981).

9. *See* statutes collected in Sargent, *On the Validity of State Takeover Regulation: State responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 690 n.7 (1981).

10. The Williams Act, 15 U.S.C. §§ 78(i), 78m(d)-78m(e), 78n(d)-78n(F) (1976), enacted by Congress in 1968, established procedural and substantive regulations governing the conduct of tender offers for large, widely held companies. *See infra* note 23. The primary emphasis of the Williams Act is on disclosure by the bidder to the shareholders of the target company and the Securities and Exchange Commission ("S.E.C." or "Commission"). The bidder must disclose substantial information concerning matters such as its identity, background, financial situation, purposes and plans. *See* Schedule 14D.

The Williams Act also establishes a number of so-called "substantive rights" for the protection of investors. For example, the Williams Act gives a shareholder of the target company who tenders his shares to the bidder the right to withdraw his shares during specified time periods. Moreover, if target shareholders tender more shares than the bidder is willing to purchase ("an oversubscribed partial offer"), the bidder must prorate its purchases from the tendering shareholders. Furthermore, a bidder who increases the amount of consideration offered to shareholders during the tender offer must pay all tendering shareholders the increased consideration, even if some shares have already been tendered or purchased.

v. MITE Corp.,[11] bidders challenging state takeover laws received inconsistent results in the courts. Three United States Courts of Appeals invalidated state statutes,[12] but one appellate court upheld a state law.[13] Many lower courts held state statutes (or certain provisions thereof) unconstitutional,[14] while others sustained state Acts.[15]

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11. 457 U.S. 624 (1982).

12. Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980); MITE Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), *aff'd sub nom.* Edgar v. MITE Corp., 457 U.S. 624 (1982); Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979).

13. Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980). *Telvest* did not concern Virginia's substantive tender offer regulation but rather an amendment to the Virginia takeover statute which purported to regulate so-called "creeping tender offers." VA. CODE § 13.1-529(b)(iii) was added in 1979 to the Virginia takeover statute, VA. CODE §§ 13.1-528 to 13.1-541. The amendment required purchasers of a certain amount of stock in the open market to comply with the provisions of the tender offer statute. The district court, in effect, found the amendment unconstitutional, and granted the plaintiff-purchaser an injunction against enforcement of the amendment. On appeal, the Fourth Circuit vacated the injunction, finding insufficient evidence of an impermissible conflict with the Williams Act or burden on interstate commerce. Technically, the Fourth Circuit did not decide that the amendment was constitutional, but rather that the district court erred in preliminarily enjoining enforcement of the statute against the purchaser. The court stated that as a matter of policy, "the public interest is as well served by compliance with a valid State statute as it is by a free securities market." *Telvest*, 618 F.2d at 1036.

Its preliminary injunction vacated by the Court of Appeals, the District Court conducted a trial on the merits, and, guided by *MITE*, held the Virginia amendment unconstitutional under the commerce clause. Telvest, Inc. v. Bradshaw, [July-Dec.] 14 SEC. REG. & L. REP. (BNA) 1795 (E.D. Va. Sept. 9, 1982). The Fourth Circuit affirmed. Telvest, Inc. v. Bradshaw, [Jan.-June] 15 SEC. REG. & L. REP. (BNA) 157 (4th Cir. Jan. 6, 1983).

14. Agency Rent-A-Car, Inc. v. Connolly, [1982] FED. SEC. L. REP. (CCH) ¶ 98,637 (D. Mass. Apr. 12, 1982) (state officials preliminarily enjoined from enforcing Massachusetts Act based on finding of preemption), *vacated* and *remanded*, [1982] FED. SEC. L. REP. (CCH) ¶ 98,776 (1st Cir. Aug. 16, 1982); Vista Resources, Inc. v. Connolly, [1982] FED. SEC. L. REP. (CCH) ¶ 98,627 (D. Mass. Mar. 16, 1982); National City Lines, Inc. v. LLC Corp., 524 F. Supp 906 (W.D. Mo. 1981) (provisions unconstitutional under supremacy and commerce clauses), *aff'd*, [1982] FED. SEC. L. REP. (CCH) ¶ 98,778 (8th Cir. Aug. 17, 1982) (Mo. Takeover Act invalid under supremacy and commerce clauses); Joseph E. Seagram & Sons, Inc. v. Marley, [July-Dec.] SEC. REG. & L. REP. (BNA) No. 614, at F-1 (W.D. Okla. July 17, 1981); Empire, Inc. v. Ashcroft, 524 F. Supp. 898 (W.D. Mo. 1981); Natomas Company v. Bryan, 512 F. Supp. 191 (D. Nev. 1981); Crane Co. v. Lam, 509 F. Supp. 782 (E.D. Pa. 1981); Canadian Pacific Enterprises (U.S.), Inc. v. Krouse, 506 F. Supp 1192 (S.D. Ohio 1981); Hi-Shear Industries Inc. v. Campbell, [1981] FED. SEC. L. REP. (CCH) ¶ 97,804 (D. S.C. 1980); Brascan Ltd. v. Lassiter, [1981-82] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. May 3, 1979); Dart Industries, Inc. v. Conrad, 426 F. Supp. 1 (S.D. Ind. 1978); Kelley v. Beta-X Corp., 302 N.W.2d 596 (Mich. 1981); Eure v. Grand Metropolitan Ltd., [1980] FED. SEC. L. REP. (CCH) ¶ 97,694 (N.C. Super. Ct. 1980). *See generally* Sargent, *supra* note 9, at 692 n.17. *Cf.* Gunter v. AGO Intern. B.V., 533 F. Supp. 86 (N.D. Fla. 1981) (Florida Insurance Holding Company Act preempted by the Williams Act).

15. AMCA International Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979); City Investing Co. v. Simcox, 476 F. Supp. 112 (S.D. Ind. 1979) (alternative holding), *aff'd on alternative ground* 633 F.2d 56 (7th Cir. 1980); Sharon Steel Corp. v. Whaland [July-Dec.] SEC. REG. & L. REP. (BNA) No. 613, at F-1 (N.H. Sup. Ct. July 2, 1981), *vacated and remanded sub nom.* Sharon Steel Corp. v. Ins. Comm'r, 102 S.Ct. 3474 (1982), *rev'd subnom.* Sharon Steel Corp. v.

In *Edgar v. MITE Corp.*,[16] the Supreme Court of the United States held the Illinois Business Takeover Act unconstitutional under the commerce clause of the United States Constitution. In part V-B of the opinion, the Supreme Court juxtaposed the benefits and the burdens of the state law and found a violation of the commerce clause. "[T]he Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits."[17] In part V-A, a plurality of the Court pointed out that while the commerce clause tolerates "incidental" regulation of interstate commerce by the states, it prohibits "direct" state regulation.[18] The plurality argued that the Illinois statute imposed a "direct restraint on interstate commerce" because it purported to regulate transactions between out-of-state bidders and non-resident shareholders.[19]

Since the *MITE* decision, courts have invalidated virtually every state tender offer statute which has been challenged.[20] Many post-

Whaland, ____N.H. ____, 466 A.2d 919 (1983); Strode v. Esmark, Inc., [1980] FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. 1980), *rev'd*, Esmark, Inc. v. Strode, 14 SEC. REG. & L. REP. (BNA) 1857 (Ky. Sup. Ct. Oct. 12, 1982); Wylain, Inc. v. TRE Corp., 412 A.2d 338 (Del. Ch. 1980). *See generally* Sargent, *supra* note 9, at 692 n.20. *Cf.* John Alden Life Insurance Company v. Woods, [1982] FED. SEC. L. REP. (CCH) ¶ 98,617 (D. Idaho Dec. 19, 1981) (Idaho Acquisition of control and Insurance Holding Company Systems Act neither preempted under supremacy clause nor invalid under commerce clause).

16. 457 U.S. 624 (1982).

17. *Id.* at 645.

18. *Id.* at 641.

19. *Id.* For a more extensive discussion of *MITE*, see Wolff, *The Unconstitutionality of the Arkansas Tender Offer Statute*, 36 ARK. L. REV. 223, 238 (1983).

20. Telvest, Inc. v. Bradshaw, [Jan.-June] 15 SEC. REG. & L. REP. (BNA) 157 (4th Cir. Jan. 6, 1983) ("creeping tender" provision); Martin Marietta Corp. v. Bendix Corp., [July-Dec.] 14 SEC. REG. & L. REP. (BNA) 1793 (7th Cir. Sept. 22, 1982) (Michigan statute impermissibly burdens interstate commerce); National City Lines, Inc. v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) ¶ 98,778 (8th Cir. Aug. 17, 1982) (Missouri takeover statute invalid under commerce clause and certain provisions invalid under supremacy clause); Mesa Petroleum Co. v. Cities Service Co., [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,064 (W.D. Okla. Dec. 21, 1982) (Oklahoma Statute imposed undue burden on interstate commerce), *aff'd*, 715 F.2d 1425 (10th Cir. 1983); Occidental Petroleum Corp. v. Cities Services Co., [1982-83 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,063 (W.D.Okla. Dec. 20, 1982 (same), *aff'd sub nom.* Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425 (10th Cir. 1983); Telvest Inc. v. Bradshaw, [July-Dec.] 14 SEC. REG. & L. REP. (BNA) 1795 (E.D. Va. Sept. 9, 1982) (Virginia statute imposed undue burden on interstate commerce); Bendix Corp. v. Martin Marietta Corp., 14 SEC. REG. & L. REP. (BNA) 1579 (D. Md. Sept. 3, 1982) (injunction issued against enforcement of law, on commerce and supremacy clause grounds); Heathcoat v. Sante Fe International Corp., No. LR-C-80-601 (E.D. Ark. July 2, 1982); Esmark, Inc. v. Strode, 14 SEC. REG. & L. REP. (BNA) 1857, (Ky. Sup. Ct. Oct. 12, 1982) (Kentucky statute found to violate commerce clause); *but see* Agency Rent-A-Car, Inc. v. Connolly, [1982] FED. SEC. L. REP. (CCH) ¶ 98,776 (1st Cir. Aug. 16, 1982) (preliminary injunction against enforcement of Massachusetts statute on grounds of preemption vacated; case remanded for determination of propriety of relief based on commerce clause).

MITE decisions rely upon the supremacy clause as well as the commerce clause in striking state statutes.

B. *The Future of Tender Offer Regulation*

State policy-makers who wish to regulate corporate takeovers affecting companies and people within their state face complicated issues of constitutional law and economic policy. However, state tender offer regulation is not inherently unconstitutional.[21] In drafting new legisla-

21. Many courts have opined that the states are not necessarily barred from all takeover regulation. The Seventh Circuit in Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), for example, concluded that all state tender offer regulation was not necessarily unconstitutional, notwithstanding the patent unconstitutionality of the Illinois Statute:

> We do not believe that all state legislation in this field, which imposes requirements going beyond the Williams Act, is unconstitutional merely because it is different. . . . It may very well be possible to draft state takeover legislation to supplement (rather than to contradict) the Williams Act . . . although the new SEC tender offer rules may provide crucial constraints, we perceive no inherent reason why the Williams Act may not be validly complemented. . . .

633 F.2d at 503. Nor was Justice Stevens, who joined the majority in *MITE*, persuaded that "Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management." Edgar v. MITE Corp., 457 U.S. 624, 655 (1982). Accordingly, Justice Stevens did not join Justice White's preemption analysis. Justice Powell, who also joined the majority, agreed that the neutrality policy of federal law "does not necessarily imply a congressional intent to prohibit state legislation designed to assure — at least in some circumstances — greater protection to interests that include but often are broader than those of incumbent management." *Id.* at 647. Justice Powell emphasized his continuing belief in the efficacy of state regulation: "I join Part V-B because its Commerce Clause reasoning leaves some room for state regulation of tender offers." *Id.* Justice Powell reasoned that in this period of "conglomerate corporate formations," *id.*, a bidder may often have an unfair advantage in a takeover battle with a small corporation. When a local target company loses to a hostile bidder, "[i]nevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and state." *Id.*

In addition, several commentators have expressed opinions that *MITE* does not necessarily exclude the states from the takeover arena. For example, Harvey Pitt, former General Counsel of the SEC, stated that "[s]ince the only consensus reached in MITE was that the Illinois Act, as drafted, impermissibly imposed an indirect burden on interstate commerce wholly out of proportion to any state interests . . . , the *MITE* decision by itself does not necessarily serve to invalidate all state tender offer legislation." Pitt, *Hostile Tender Offers Now Omnipresent Fact of Life*, Legal Times, July 19, 1982, at 25, col. 1. "[Harvey Pitt] said the [*MITE*] decision leaves open the possibility that states can regulate tender offers involving companies incorporated within their borders, or where a majority or near majority of shareholders are state residents." *Justices Void Illinois Law on Takeovers, Hurting States' Regulation of Tender Bids*, Wall St. J., June 24, 1982, at 3, col. 3. Another former General Counsel of the SEC, Ralph Ferrara, concurred. " 'Its a wide-open ballgame for any State that wants to pass legislation that just protects shareholders within its own borders.' " Wall St. J., June 24, 1982, at 3, col. 3. Robert Pozen, former Associate General Counsel of the SEC, opined that "states can revise their general takeover statutes to comply with applicable constitutional requirements." Pozen, *Making State Takeover Statutes Safe From Constitutional Attack*, Nat'l L.J., Aug. 2, 1982, at 18, col. 1.

tion, if they choose to do so, state legislatures must focus on the two principal defects of prior state legislation: conflict with federal law and extraterritorial application of state law. As documented below, virtually every current state provision conflicts with, and is therefore preempted by, federal regulation. Additionally, where a provision of federal regulation benefits shareholders, a similar state provision — which would benefit shareholders in the absence of federal law — is not deemed beneficial for purposes of the commerce clause. Therefore, the states should not, and indeed, may not regulate transactions already subject to federal regulation. Simply put, the time has come for states to concede defeat in the federal arena.

However, federal law only regulates takeovers of certain large, widely held companies.[22] Comprehensive as the federal scheme may be as to these transactions, present law leaves takeovers of smaller, more closely held companies unregulated. Preemption principles do not prohibit state regulation of non-federally regulated takeovers. State regulation which merely fills the interstices of federal law does not violate supremacy principles, because there is no federal law with which state law would conflict. Moreover, states may escape commerce clause objections by utilizing a restrictive concept of jurisdiction over target companies. Thus, by regulating only non-federally regulated takeovers, and utilizing a restrictive concept of jurisdiction over target companies, as explained below, states may regulate corporate takeovers unscathed by supremacy or commerce clause attack.

II. THE STATES SHOULD NOT REGULATE TAKEOVERS ALREADY REGULATED BY FEDERAL LAW

Federal tender offer regulation applies to takeovers of companies either having total assets of at least three million dollars and a class of equity securities held by at least five hundred people, or to takeovers of companies the stock of which is registered on a national securities exchange.[23] Existing federal regulation is a Congressional and adminis-

On the other hand, some have articulated the view that state tender offer regulation is no longer viable. Sparks, *State Law Developments with Respect to Defensive Techniques*, 14 INST. ON SEC. REG. 779, 788, 795 (1982). "In the writer's view (with two exceptions), there appears to be little of substance left for the states to do with respect to the regulation of any important aspect of tender offers." *Id.* at 788. "[N]one of the possible bases for invalidating state takeover statutes was eliminated by *MITE* . . ." *Id.*

22. *See infra* note 23 and accompanying text.

23. Sections 13(d) and 14(d) of the Williams Act apply to purchases or offers to purchase equity securities registered under section 12 of the Securities Exchange Act (and equity securities of certain insurance companies and investment companies). Section 12(g) requires registration if

trative response to those corporate takeovers perceived by federal policy-makers to have national economic consequences.

A. *The Economics of Tender Offers*

Commentators report conflicting evidence concerning the economic causes and effects of corporate takeovers. Some scholars maintain that takeovers benefit the nation's economy. The leading proponent of this theory, Professor Daniel R. Fischel of Northwestern University, argues that tender offers are beneficial because through this device "corporate control shifts to new managers who may more successfully operate the corporation."[24]

Fischel maintains that takeover targets tend to be companies which are not maximizing profits or realizing growth potential, and that bidder companies can more successfully utilize the assets of the target — otherwise the bidder would have no reason for the acquisition.[25] "Unless the company is more valuable to the bidder than it is to the target, the bidder would be acting irrationally in paying a premium."[26] The bidder might replace existing managers, spin off unsuccessful divisions, benefit from economies of scale, or better utilize the target's assets in other ways.[27] Professor Fischel summarizes his view:

> I believe that tender offers play an indispensable role in a free market economy by providing a mechanism for the transfer of assets from less-efficient to more-efficient users.[28] . . . The bottom line is that society benefits from the tender offer process, because assets move to more valuable users.[29]

Fischel maintains that there is a "market" for control of corporations and that regulation of tender offers makes the market less "efficient."[30]

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the issuer has total assets exceeding $1 million and a class of equity securities held by at least 500 persons. However, S.E.C. Regulations permit a company not to register if the company's total assets are less than $3 million. Rule 12g-1, 17 C.F.R. § 240.12g-1 (1982). Under section 12(b), an issuer may register a security on a national securities exchange. Companies with securities listed on a national stock exchange tend to be large, widely held companies. *See infra* note 88 for New York Stock Exchange listing requirements.

24. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 45 (1978) [hereinafter cited as *Efficient Capital Market Theory*].

25. *Id.*

26. Fischel, McKinney & Goldschmid, *The Responsibilities of Directors In Connection With Unfriendly Tender Offers*, 13 INST. ON SEC. REG. 131, 134 (1982).

27. *Id.* at 133-134.

28. *Id.* at 132.

29. *Id.* at 134.

30. *Efficient Capital Market Theory*, *supra* note 24.

"[L]egal rules should facilitate the making of tender offers at the lowest possible cost."[31] Tender offer statutes "pose a powerful threat to the operation of the market for corporate control."[32] In *MITE*, the Supreme Court of the United States indicated support for Professor Fischel's theory.[33]

On the other hand, some analysts maintain that, overall, corporate takeovers harm the economy. These commentators dispute Fischel's finding that target companies are generally poorly managed, inefficient companies. On the contrary, "[i]t is the better-run companies that have been the more attractive targets."[34] A study undertaken by Martin Lipton supports the propositions that target companies are frequently respectable, well-managed companies, and that shareholders are often in a better position if the takeover bid is defeated.[35] Another commentator summarized the argument that takeovers generally harm the national economy:

> Allegations have been made that [they] are economically harmful because takeovers represent a trend towards a concentration of wealth and power (footnote omitted). Commitment of corporate capital for takeovers means a loss of opportunity for the creation of new jobs and increasing productivity (footnote omitted). The lines of credit can be massive, leaving less funds available for small business which are [sic] unable to meet the interest requirements (footnote omitted).[36]

Another writer expressed his views regarding the deleterious effect on the national economy: "[a] takeover may result in a loss of independence for the target without compensating economies of scale, synergistic value, increased productivity or better technical capability to compete with foreign enterprises."[37] Takeovers of target companies are said

31. Fischel, McKinney & Goldschmid, *supra* note 26.

32. *Efficient Capital Market Theory*, *supra* note 24, at 28.

33. Edgar v. MITE Corp., 102 S. Ct. 2629, 2642 (1982). *See also Blue Sky Laws and State Takeover Statutes: New Importance For An Old Battleground*, 7 J. CORP. L. 689, 755, n.515 and accompanying text (1982) [hereinafter cited as *Blue Sky Laws*]; Jarrell & Bradley, *The Economic Effects of Federal and State Regulation of Cash Tender Offers*, 2 J. LAW AND ECONOMICS 371 (1980).

34. McCauloff, *Federalism And the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295, 307 (1981).

35. Lipton, *Takeover Bids In the Targets' Boardroom*, 35 BUS. LAW. 101 (1979). *See also* Lipton, *Takeover Bids In the Targets' Boardroom: An Update After One Year*, 36 BUS. LAW 1017 (1981); Lipton, *Takeover Bids In the Target's Boardroom: A Response to Professors Easterbrook and Fischel*, 55 N.Y.U. L. REV. 1231 (1980); E. HERMAN, CORPORATE CONTROL, CORPORATE POWER (1981).

36. *Blue Sky Laws*, *supra* note 33, at 755.

37. McCauloff, *supra* note 34, at 307.

especially to adversely affect local economies:

> Takeovers have their broadest effect upon the individual states. The local impact upon competition and efficiency of the target company, corporate offices and control, debt-equity structure, and the resultant effect on management, employees, customers, suppliers, and creditors, are all state concerns (footnote omitted). Plant closures, consolidations, and relocations will have an impact in the state economy. Ties with the local supplier of material and work may be cut. State banks may lose business and customers. Layoffs and employee policy changes affect community morale and the local tax base.[38]

B. *The Need for Federal Regulation*

In enacting the Williams Act, Congress weighed the public policy considerations and chose between competing alternatives. Insofar as the regulation of tender offers for widely held companies is concerned, Congress should be the institution making the policy choices. Tender offers for large, publicly held companies raise far-reaching issues with macroeconomic implications. Often shareholders are scattered throughout the United States or the world, and the companies involved often have a substantial presence in many states. The transactions raise issues concerning concentration of wealth, allocation of resources, and efficiency and ownership of the means of production. Since state lagislatures function to maximize the welfare of the local constituency, Congress is better equipped as an institution to resolve such national issues. A state legislature responding to adverse local effects of the corporate takeover process might not, as a political institution, recognize the possible countervailing benefits in other states. As the Commission puts it:

> There has always been a general recognition that certain aspects of securities regulation — for example, the exchanges and over-the-counter markets — are of such a uniquely national nature that they should be subject only to federal law. . . . It is the Commission's view that the transfer of a controlling interest in the equity securities of a publicly traded corporation is peculiarly infused with a strong national interest. When such a transfer is accomplished by means of a tender offer, . . . the national interest is ordinarily dominant.[39]

In sum, Congress perceived that tender offers for large companies have sufficient national economic consequences to warrant federal regula-

38. *Blue Sky Laws*, *supra* note 33, at 753.

39. Securities and Exchange Commission Report on Tender Offer Laws 73 (1980) [hereinafter cited as SEC Report].

tion. It is unconstitutional for states to tamper with the federal scheme.

C. *Present State Takeover Provisions Are Either Unconstitutional As Applied to Federally Regulated Transactions or Unnecessary As A Matter Of Policy*

The following discussion of state takeover provisions relates only to those provisions as they apply to companies and transactions already subject to federal takeover law.

1. Advance Filing Provisions

States simply may not require a bidder to announce its intention to make a tender offer in advance of commencement,[40] an approach Congress rejected on a number of occasions.[41] Federal law requires notification only by or on the date of commencement,[42] the laws of any state to the contrary notwithstanding.[43]

2. Increased Disclosure Provisions

"[The] federal securities laws put a price of disclosure upon access to the interstate capital markets."[44] "[T]he 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."[45] In addition to the "line item" disclosures the SEC requires in Schedule 14D-1, federal law makes it unlawful for the bidder (or other persons) to omit to state any material fact necessary to make the statements made not misleading in connection

40. *E.g.*, Edgar v. MITE Corp., 457 U.S. 624 (1982) (plurality opinion) (pre-commencement notification provisions frustrates the objectives of the Williams Act); Martin-Marietta Corp. v. Bendix Corp., [1982] FED. SEC. L. REP. (CCH) § 98,822 (6th Cir. Sept. 22, 1982); National City Lines, Inc. v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) § 98,778 (8th Cir. Aug. 17, 1982); Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980); Esmark, Inc. v. Strode, [1982] FED. SEC. L. REP. (CCH) § 98,828, 94,246 (S. Ct. Ky. Oct. 12, 1982).

41. *See* Edgar v. MITE Corp., 457 U.S. at 635-36. "Congress several times refused to impose a precommencement disclosure requirement." *Id.* "As The Senate Report explained, 'At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence.'" *Id., quoting* Senate Report at 4.

42. Rule 14d-3, 17 C.F.R. § 240.14d-3 (1982).

43. U.S. CONST. art. VI, § 2.

44. In re John Doe Corporation, [1982] FED. SEC. L. REP. (CCH) ¶ 98,648 (2d Cir. 1982).

45. Sargent, supra note 9, at 698 (*summarizing* federal disclosure requirements) (footnote omitted).

with a tender offer.[46] One might contend that the only "additional" disclosures a state could require are "immaterial facts." In any event, in light of the thoroughness of federal disclosure requirements, additional disclosure required by state law is unlikely to be valuable. And state disclosure provisions significantly increase the cost of using the tender offer.[47] "Expanded disclosure requirements under state law also provide target management with increased opportunities to embroil offerors in protracted and expensive litigation that reduces the likelihood of a tender offer's success."[48] "[A] state may be doing long-run damage by its [disclosure] requirements that go beyond those of the Williams Act."[49]

Even if additional disclosure requirements were desirable as a matter of policy, the supremacy clause forbids state enactment of them. Two Courts of Appeals have found increased disclosure requirements inconsistent with the Williams Act.[50] The Eighth Circuit in *National City Lines v. LLC Corp.*,[51] for example, found that the Congress and the Commission made a policy judgment in deciding how much disclosure to require.[52] "Missouri's attempt to second-guess that judgment cannot stand."[53]

3. Merit Provisions

State provisions which purport to give state officials the authority to adjudicate the "merit" or fairness of a tender offer for a federally regulated company are unconstitutional. Courts have consistently found that fairness provisions either conflict with the philosophy of federal law,[54] impermissibly burden interstate commerce, or both.

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46. Williams Act, § 14(e), 15 U.S.C. § 78n(e) (1976).

47. *Efficient Capital Market Theory*, supra note 24, at 27.

48. *Id.*

49. *Blue Sky Laws*, *supra* note 33, at 755.

50. National City Lines, Inc. v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) ¶ 98,778 (8th Cir. 1982); Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 (5th Cir. 1978), *rev'd on other grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979); *see also* Dart Industries, Inc. v. Conrad, 426 F. Supp. 1, 13 (S.D. Ind. 1978); *but see* AMCA International Corp. v. Krouse, 482 F. Supp. 929, 936, 938 (S.D. Ohio 1979).

51. [1982] FED. SEC. L. REP. (CCH) ¶ 98,778 (8th Cir. 1982).

52. [1982] FED. SEC. L. REP. (CCH) ¶ 98,778, at 94,000 (8th Cir. 1982).

53. *Id.*

54. *E.g.*, Edgar v. MITE Corp., 457 U.S. at 640 (plurality opinion); MITE Corp. v. Dixon, 633 F.2d at 493-94 (Williams Act "contemplates unfettered choice by well-informed investors").

4. Hearing Provisions

Hearings which delay or otherwise impede tender offers conflict with the Williams Act[55] and burden interstate commerce, irrespective of their purpose. Even if no delay is involved, a hearing may not be held to adjudicate substantive fairness.

5. Take-down Provisions

Some states have enacted provisions which permit a tender offer to commence pursuant to SEC Rule 14d-2(b) but which do not allow the bidder to purchase or "take-down" the tendered shares until a hearing has been held.[56] "New York, Indiana, Pennsylvania, and the drafters of the Proposed Uniform Takeover Act have . . . taken the same basic approach: the tender offer may be made in conformity with Rule 14d-2(b), but actual purchase of the tendered shares is conditioned upon completion of the state review process."[57] In this statutory scheme, the state reviews the adequacy of disclosure before permitting the take-down.

While take-down provisions do not directly conflict with federal law (i.e., Rule 14d-2(b)), they probably violate "indirect" preemption rules of the supremacy clause. The statute under consideration by the Eighth Circuit in *National City Lines v. LLC Corp.* "upset the congressionally designed balance by creating delay in the commencement *and consummation* of the tender offer."[58] Take-down provisions operate to prevent bidders from purchasing shares from willing sellers. The delay, if long enough, could trigger federal withdrawal rights of the shareholders and thereby thwart the objectives of the Williams Act. The provisions could also delay or prevent an out-of-state bidder from assuming control of and operating a local company, a significant burden upon interstate commerce.

6. Withdrawal Provisions

Federal law gives shareholders the right to withdraw tendered shares within fifteen business days[59] or after sixty calendar days[60] from

55. Edgar v. MITE Corp., 457 U.S. at 639 (plurality opinion); National City Lines, Inc. v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) ¶ 98,778 (8th Cir. 1982).

56. *See* Sargent, *supra* note 9, at 708-12.

57. *Id.* at 709-10.

58. [1982] FED. SEC. L. REP. (CCH) ¶ ¶ 98,778, 93,999 (8th Cir. 1982) (emphasis added).

59. Rule 14d-7, 17 C.F.R. § 240.14d-7(a)(1) (1982).

60. Williams Act, § 14(d)(5), 15 U.S.C. § 78(n)(d)(5) (1976).

the date of commencement of the tender offer. State provisions sometimes purport to extend shareholder withdrawal rights. For example, the Delaware statute authorized shareholders to withdraw tendered stock any time during the pendency of the offer.[61] Even though the extended withdrawal privileges undoubtedly aid investors in some ways,[62] the provisions are preempted by federal law[63] because they "create delays which give incumbent management additional time for defensive maneuvers."[64] Additional withdrawal rights both "directly conflict with applicable federal statutes and regulations"[65] and "[frustrate] the operation and purpose of the Williams Act."[66]

7. Prorata Purchase Provisions

The Williams Act provides that bidders must prorate their purchases of shares tendered within ten days of either commencement of a tender offer or notice of an increased price given during a tender offer.[67] This short proration period resulted in several abuses. For example, the rule forced shareholders to tender within ten days in partial offers, or risk having none of their stock purchased. Also, bidders developed the so-called "two-tier offer," in which they offered cash to shareholders tendering "up front" in the proration period and stock or debt "paper" (debt) to shareholders deciding to sell later. Some states enacted longer proration periods, the constitutionality of which was very much in doubt.[68] Policy arguments supporting state proration periods are now moot, because the SEC recently promulgated a rule extending the proration requirement in oversubscribed partial offers to the entire

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61. DEL. CODE ANN. TIT. 8, § 203(a)(2) (Supp. 1980).

62. "[T]he state interests behind these substantive provisions are clearly investor protection." *Blue Sky Laws*, *supra* note 33, at 752. "The unsophisticated investor who tenders early would be protected by the extended time periods of withdrawal." *Id.* The burdens imposed on the tender offeror appear slight in comparison. *Id.*

63. National City Lines, Inc. v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) ¶¶ 98,778, 94,001 (8th Cir. 1982) (Missouri withdrawal provisions preempted); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1221-22, (D. N.J. 1981) (New Jersey withdrawal provision preempted); Dart Industries, Inc. v. Conrad, 426 F. Supp. 1, 13 (S.D. Ind. 1978). *But see* Wylain, Inc. v. TRE Corp., 412 A.2d 338 (Del. Ch. 1979, rev. 1980) (no preemption).

64. *See* Sargent, *supra* note 9, at 699.

65. National City Lines v. LLC Corp., [1982] FED. SEC. L. REP. (CCH) ¶ 94,001.

66. *Id.*

67. Williams Act, § 14(d)(6), 15 U.S.C. § 78(n)(d)(6) (1976).

68. *See, e.g.*, National City Lines v. LLC Corp., *supra* note 14, at ¶ 94,001 (Missouri provision requiring pro rata purchase of shares deposited anytime during the period of the offer preempted); Hi-Shear Industries, Inc. v. Campbell, [1981] FED. SEC. L. REP. (CCH) ¶¶ 97,804, 90,031 (D.S.C. 1980) (South Carolina proration period preempted).

period of the offer.[69]

8. "Creeping Tender" Provisions

"Partly to evade disclosure laws, bidders have turned increasingly to open market and privately negotiated purchases to secure a foothold in a target's stock before launching a formal tender offer."[70] Tender offers preceded by substantial market or private purchases are called "creeping tender offers" or "creeping acquisitions," because the acquisition proceeds slowly and almost imperceptibly. "The creeping acquisition involves the relatively gradual accumulation of target stock at or near market. . . ."[71] The prior accumulation is thought to make the subsequent tender offer easier or cheaper to consummate. State regulation of creeping tender offers is one of the most controversial aspects of state securities regulation.

In section 13(d) of the Williams Act, Congress addressed the policy problems it perceived associated with accumulations of stock by means other than a tender offer.[72] Many authorities believe that section 13(d) does not adequately protect shareholders of companies subject to creeping tender offers.[73] There is little question that new legislation is

69. *See Release on Revised Rule Limiting Two-Stage Tender Offers Issued By SEC*, [Jan.-June] 15 SEC. REG. & L. REP. (BNA) 4 (Jan. 7, 1983) (discussing SEC Rel. No. 34,19336) and Rule 14d-8, 17 C.F.R. § 240.14d-8 (1984).

70. *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, and Standstill Agreements*, 39 WASH. & LEE L. REV. 1095 (1982).

71. Atkins, *Defense Against Creeping Tenders*, 13 INST. ON SEC. REG. 58 (1982).

72. The Williams Act, § 13(d), 15 U.S.C. § 78m(d) (1976), requires any person acquiring more than five percent of the equity securities of certain companies to disclose material facts within 10 days.

73. The principal problem is that a potential bidder may acquire a large position in a company without disclosing its intentions with respect to the company for 10 days. The bidder's intention to make a subsequent tender offer or otherwise seek to acquire control is clearly material to shareholders who are confronted with investment decisions during the 10 day pre-filing period. Bidder purchases in the interim period may "deprive security holders of a fair opportunity to adjust their evaluation of the securities . . . " SEC Report, *supra* note 39, at 55. That is, purchases in this period "deprive shareholders of the premium they would otherwise receive if they were aware of the impending takeover." *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, and Standstill Agreements*, 39 WASH. & LEE L. REV. 1095, 1102 (1982). Also, a program of open market purchases often drives the market price of the stock up, which "exert[s] pressure on investors similar to that applied by tender offers." Glenn, *Rethinking the Regulation of Open Market and Privately Negotiated Stock Transactions Under The Securities Exchange Act of 1934*, 8 J. CORP. L. 41, 55 (1982). "A review of the present operation of Section 13(d) indicates that the existing notification system often does not provide shareholders with relevant information in a timely manner and a fair opportunity to evaluate the company when an acquisition of a potentially controlling interest in the company has been effected." SEC Report, *supra* note 39. *See also* Atkins, *Defense Against Creeping Tenders*, 13 INST. ON SEC. REG. 58 (1982) (creeping tenders deny control premiums to shareholders).

needed to correct problems inadequately addressed by the Williams Act.[74] Although arguably, then, there is room for state regulation in this area as a policy matter, the Constitution seemingly precludes such state involvement. Even the Tender Offer Committee of the North American Securities Administrators Association recommends state abstention: "It is suggested by the Committee that the issue of creeping tender offers is best regulated in the federal arena."[75]

The Fourth Circuit in *Telvest, Inc. v. Bradshaw*,[76] sustained a commerce clause challenge to state open market regulation on the ground that the statute violated V-B of *MITE*. Since the creeping tender provision at issue was not limited to transactions between Virginia residents, the statute on its face had an extraterritorial effect, which burdened interstate commerce.[77] Secondly, prohibiting the bidder's open market purchases in the specified circumstances could cause the market price of the target's stock to fall, thereby denying "both resident and nonresident shareholders an opportunity to sell their [target] stock at a premium."[78] Against these burdens upon interstate commerce the Court balanced the asserted benefit of the law, namely, disclosure by the purchaser. But since section 13(d) of the Williams Act already requires disclosure, the benefit of additional disclosure was speculative, according to the court.[79] "We think that the Williams Act provides all of the protection to an investor that the Virginia Act is claimed to afford."[80]The states may encounter another commerce clause objection in any regulation of open market purchases they attempt. State legislation which purports to prevent a willing buyer from purchasing stock from a willing seller on a national stock exchange (or even on a regional exchange, or over-the-counter) might even contravene V-A of *MITE*. "[T]o the extent states seek to assert the authority to preclude open market purchases on national stock exchanges, they may appear to be regulating interstate commerce transactions directly. . . ."[81] The Fourth Circuit in *Telvest* explicitly did not reach

74. In fact, the SEC proposed new legislation to Congress in 1980 which would have altered the existing scheme of open-market regulation, but Congress rejected the proposals. See SEC Report, *supra* note 39, at 84-86.

75. *Report of the Tender Offer Committee of the North American Securities Administrators Association, Inc.*, [July-Dec.] SEC. REG. & L. REP. (BNA) No. 626, at G-1 (Oct. 28, 1981).

76. [1982] FED. SEC. L. REP. (CCH) ¶ 99,044 (4th Cir. 1983).

77. *Id.* at ¶ 94,970.

78. *Id.* at ¶ 94,971.

79. *Id.* at ¶ 94,972.

80. *Id.* at ¶ 94,972.

81. Pitt, *Hostile Tender Offers Now Omnipresent Fact of Life*, Legal Times, July 19, 1982, at 26, col. 2. [hereinafter cited as *Hostile Tender Offers*].

the V-A issue, although the district court in *Telvest* grounded its decision on V-A as well as V-B.[82]

The supremacy clause also poses formidable, if not insurmountable, obstacles to states which desire to regulate creeping tenders. Congress addressed open market purchases in the Williams Act and despite the shortcomings of federal regulation, a differing state regulation would be highly susceptible to a preemption challenge. "Congress specifically enacted Section 13(d) in a less burdensome form than Section 14(d) so as not to unduly interfere with the free and open auction market in securities."[83] If a state statute sought to regulate open market purchases, "a cogent argument could be made that the resultant interference with normal market procedure would be preempted by the Williams Act. . . ."[84] While two Courts of Appeals opinions support the proposition that the Williams Act does not necessarily preempt state creeping tender regulation, the opinions are not considered dispositive.[85]

9. Antifraud Provisions

Many state takeover statutes prohibit fraudulent and deceptive practices in connection with tender offers. In light of federal antifraud proscriptions, however, state regulation of tender offer fraud is largely unnecessary. Section 14(e) of the Williams Act makes it unlawful for any person to make any false or misleading statement or omission, or to engage in any fraudulent, deceptive, or manipulative action, in connec-

82. Telvest, Inc. v. Bradshaw, [1982] FED. SEC. L. REP. (CCH) ¶ 98,833 (E.D. Va. 1982).

83. City Investing Co. v. Simcox, 633 F.2d 56, 62 (7th Cir. 1980).

84. *Id.*

85. The initial Fourth Circuit opinion in Telvest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980), found insufficient evidence of an impermissible conflict with the Williams Act to sustain an injunction against enforcement of the law. As mentioned above, *supra* note 13, however, the Court did not directly pass upon the constitutionality of the law, but rather found that the court below misapplied the preliminary injunction standard.

In Agency Rent-A-Car, Inc. v. Connolly, [1982] FED. SEC. L. REP. (CCH) ¶ 98,776, (1st Cir. 1982), the First Circuit, like the Fourth Circuit in *Telvest*, vacated the preliminary injunction of the district court. The statute involved in *Agency* barred a five percent shareholder from making a tender offer if, within the preceding twelve months, he purchased any shares without disclosing his takeover intention, if it existed. In *Agency*, "[t]he validity of [the statute's] regulation of creeping tender offers [was] not in itself attacked," *id.* at ¶ 93,946; rather, the one-year sanction was argued to be preempted. Although the Court found insufficient evidence to sustain an injunction based on preemption, "[i]t should be emphasized that Agency did not challenge the validity of the regulation of creeping tender offers" per se (but rather, the one-year sanction). Sparks, *State Law Developments With Respect to Defensive Techniques*, 14 INST. ON SEC. REG. 779, 799 (1982). "Hence, the First Circuit was not called upon to address the fundamental question raised by the cases. . . . This, together with the First Circuit's suggestion that a Commerce Clause challenge under *MITE* is likely to be successful, probably makes the opinion much less significant than it appears on a quick reading." *Id.* at 799.

tion with a tender offer.[86] Significantly, the federal rule is not limited to fraud occurring in transactions for Section 12 companies, but rather proscribes all fraud in connection with any tender offer. Consequently, state antifraud provisions serve little purpose.

In *Martin-Marietta Corp. v. Bendix Corp.*, the Sixth Circuit held that the antifraud provisions of the Michigan takeover statute could not constitutionally be enforced with an injunction granted to state officials:

> We find that to the extent that the state statutes confer power on state authorities to interfere with the timing of an interstate tender offer made under the Williams Act, or to compel the revision of the solicitation or tender offer as a condition of proceeding, they impose an unconstitutional burden on interstate commerce.[87]

In sum, with the possible exception regarding areas of traditional state regulation[88] states should refrain from regulating takeovers controlled by federal takeover law.

III. STATES MAY REGULATE NON-FEDERALLY REGULATED TAKEOVERS OF COMPANIES WITH SUBSTANTIAL PERCENTAGES OF RESIDENT SHAREHOLDERS

As noted above, federal tender offer regulation applies only to companies with total assets of at least three million dollars and a class of equity securities held by at least five hundred persons, or companies the stock of which is registered on a national securities exchange. Companies which have securities registered on a national exchange are large, widely held companies.[89] Takeovers of smaller, more closely held companies are unregulated by federal tender offer law. Apparently, federal regulators concluded that takeovers of these smaller companies did not have sufficient national consequences to justify federal involvement. While empirical research is necessary to determine the frequency and characteristics of takeovers of smaller, more closely held compa-

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86. Williams Act, § 14(e), 15 U.S.C. § 78n(e) (1976).

87. [1982] FED. SEC. L. REP. (CCH) ¶ ¶ 98,822, 94,218 (6th Cir. 1982). The court reserved the question whether a state could enact an antifraud provision and enforce it with a damage action. "[W]e find it unnecessary at this time to address the question of the viability of a provision assessing damages for non-compliance with the substantive anti-fraud provisions of the Act." *Id.*

88. *See infra* note 136 and accompanying text.

89. Following are the listing requirements for the New York Exchange: (a) pretax income last year: $2,500,000; (b) pretax income last two years: $2,000,000; (c) net tangible assets: $16,000,000; (d) shares publicly held: 1,000,000; (e) market value publicly held shares, minimum: $8,000,000; (f) number of round lot holders: 2,000. *See* N.Y.S.E. GUIDE (CCH) ¶ 2495(B).

nies, state regulation of non-federally regulated tender offers may serve a useful function in protecting shareholders.

Several courts and commentators have stated that regulation of non-federally regulated takeovers may be constitutional. The Court in *Kelly v. Beta-X Corp.*, for example, invalidated the Michigan statute only insofar as it applied to federally regulated companies: "[t]he state provisions remain valid . . . as to those corporations not included in the Federal regulatory scheme."[90] Harvey Pitt opined:

> [T]he MITE decision would not appear necessarily to preclude the states from regulating tender offers for local companies closely identified with one state. . . . Similarly, the states may have close ties to other publicly held companies not subject to the Williams Act. . . . The difficulty with the states asserting tender offer jurisdiction over such companies is not with the concept; in fact, the SEC previously has endorsed state regulation of companies not subject to the Williams Act.[91]

This new state legislation must, of course, satisfy the commerce clause and the supremacy clause.

A. *The Commerce Clause: Herein of the Distinction Between V-A and V-B*

Had Part V-A of the *MITE* commanded a majority of the Supreme Court, the states would be much more limited in their ability to regulate corporate tender offers. In Part V-A, the plurality found that

90. 302 N.W.2d 596, 599 (Mich. Ct. App. 1981).

91. *Hostile Tender Offers*, supra note 81. Mr. Pitt cited the Securities and Exchange Commission's amicus curiae brief in Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom.* Leroy v. Great W. United Corp., 443 U.S. 173 (1979), regarding the SEC endorsement. "[T]he Commission stated that it [did] not dispute that, to the extent that states supplement the federal securities laws by filling in the interstices in federal law, no objection should properly be raised.' " *Id.*, quoting SEC brief in *Kidwell* at 51; "The Commission's brief then noted that, under appropriate circumstances, states properly could regulate, inter alia, tender offers for non-public companies; that are wholly intrastate in nature; and for Securities Exchange Act Section 15(d) companies that are not covered by the Williams Act." *Id.* at 34 n. 88, *summarizing* SEC brief in *Kidwell*, note 154.

See also Sparks, *State Law Developments With Respect to Defensive Techniques*, 14 INST. ON SEC. REG. 779, 790 (1982). Several states have, in fact, enacted new legislation regulating takeover offers. *See Legislative Brief*, [Jan.-June] 16 SEC. REG. & L. REP. (BNA) 873 (May 18, 1984) (new Wisconsin law); *Legislative Briefs* [Jan.-June] 16 SEC. REG. & L. REP. (BNA) 88 (Jan. 13, 1984) (new Pennsylvania law); 1982 OHIO LEGIS. SERV. §§ 5-395, 5-402 (Balwin) (new Ohio law); *Wisconsin Senate Unanimously Passes Revised Corporate Takeover Statute*, [Jan.-June] 16 SEC. REG. & L. REP. (BNA) 27.6 (Feb. 17, 1984) (discussing new Wisconsin, Ohio and Maryland statutes); *Legislative Briefs*, [Jan.-June] 16 SEC. REG. & L. REP. (BNA) 814 (May 11, 1984) (new Michigan Senate Bill).

the Illinois takeover statute imposed a "direct restraint" on interstate commerce.[92] According to the plurality, the statute directly regulated interstate commerce because it could apply to transactions between foreign corporate bidders and non-resident shareholders of target companies.

A Supreme Court holding premised upon part V-A would have limited state regulation to intrastate transactions, even if the takeover in question was not subject to federal regulation. While lower courts are, of course, free to employ a V-A analysis,[93] *MITE* indicates that so long as the statute bears a reasonable relation to the state, its constitutionality should be adjudged in accordance with V-B. If states adopt a restrictive concept of jurisdiction over target companies the new legislation should be viewed by courts as having an "incidental," rather than "direct," effect upon interstate commerce.

V-B, grounded, as it is, in the burden-benefit analysis of the commerce clause, permits the states to reformulate their approach to takeover regulation. The new legislation must completely alter the balance of the former legislation. In the new scheme, the benefits of the legislation will be high, since the provisions will not duplicate existing federal protections. The burdens on interstate commerce are of two general types. First, each specific provision burdens interstate commerce in some way; for example, a state provision which requires a bidder to prorate its purchases burdens interstate commerce to the extent the bidder would otherwise not prorate. However, the typical regulatory provision, per se, is generally not considered overly burdensome. The second, "most obvious,"[94] burden on interstate commerce is, as mentioned, extraterritorial application of state law. To bring their statutes into compliance with the Constitution, this is the burden which the states must address.

In 1980, the SEC submitted to Congress a number of proposed amendments to the Williams Act.[95] The Commission recommended that Congress explicitly preempt all state takeover regulation except that which is "truly local in character."[96] Even the Securities and Exchange Commission recognized that "[w]here the subject company is

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92. Edgar v. MITE Corp., 457 U.S. at 640.

93. Even though V-A was not adopted by the majority, states should still heed the V-A precedents. A state statute which purported to regulate interstate transactions bearing absolutely no relation to the state might still be found to constitute an impermissible "direct regulation," notwithstanding the lack of majority support for V-A.

94. Edgar v. MITE Corp., 457 U.S. at 641.

95. *See* SEC Report, *supra* note 39.

96. *Id.* at 124.

local in character, one state may have a sufficient interest to justify its exercise of some regulatory jurisdiction."[97] So the Commission proposed for Congress expressly to preempt all state takeover statutes, except those applicable to a company which (1) has its principal place of business in that state, and (2) has more than fifty percent of its beneficial owners, who in the aggregate hold more than fifty percent of the stock of the company, residing in the state.[98] "Such a company and its shareholders are so predominantly local in character as to warrant the exercise of some measure of control by the state."[99]

The Commission's 1980 proposal should be reevaluated in light of *MITE*. The takeover jurisdiction of a state should be restricted to target companies with at least sixty-six and two-thirds percent of their shareholders residing in that state. In light of *MITE*, the principal place of business test should be stricken as irrelevant, since the recognized objective of tender offer regulation is investor protection. The sixty-six and two-thirds percentage, necessarily arbitrary, represents an estimate of the extent of extraterritoriality the commerce clause will bear. Of course, this extent will vary according to both the *other* burdens imposed on interstate commerce by specific provisions and the benefits afforded residents by the law. For example, even if one hundred percent of the shareholders were state residents, a state could not enact a law which had the effect of actually prohibiting an out-of-state bidder from making a tender offer for the company — the burden on interstate commerce would be too great. The benefits, which will be high due to the absence of corresponding federal benefits, must still be judged only in relation to the residents, since a state has no interest in protecting nonresident shareholders. But the crux of the matter is this: as a consequence of the distinction between V-A and V-B, the commerce clause does not require in-state residence of one-hundred percent of the equity-holders, *if* the benefits are significant in relation to both that burden of the extraterritoriality which does exist, and other burdens imposed by specific provisions. It is submitted that the extraterritoriality which does exist under the above proposal would be outweighed by benefits to resident shareholders, assuming the statute did not unreasonably burden interstate commerce in other ways.

97. *Id.* at 73.

98. *Id.* at 98.

99. *Id.* at 78.

B. *The Supremacy Clause*

The supremacy clause poses no problems for states desiring to regulate below the federal threshold. As one commentator noted, "[t]he Williams Act clearly does not preempt the application of state anti-takeover laws to companies too small to be registered under the 1934 Act. Such companies are exempt from Williams Act coverage."[100]

The notion that the supremacy clause does not prohibit state regulation of non-federally regulated companies arises from traditional preemption analysis. Supremacy clause objections to state statutes are of three general types.[101] First, it could be argued that Congress "occupied the entire field" of tender offer regulation, leaving states absolutely no room to act, even in areas where Congress was silent. However, "[i]t is clear that [this] broadest preemption argument — that Congress intended that the Williams Act should 'occupy the entire field' of takeover regulation — is not available,"[102] because the legislative history indicates that Congress did not intend completely to eliminate the state's role in the area. Secondly, a "direct" conflict between federal and state law, which renders compliance with both regulatory schemes impossible, preempts a state provision.[103] But if state regulation remains below the federal threshold, there is no federal law with which state law would conflict.

A third theory of preemption is designated " 'indirect conflict' preemption:" an impermissible conflict is found where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[104] Certainly, state regulation which extends investor protections to shareholders of smaller companies does not contravene Congressional objectives, where investor protection *is* the goal of federal law. Preemption of state regulation which falls below the federal threshold would require a finding that Congress mandated smaller takeovers to be unregulated — which clearly was not the case. Rather, Congress undoubtedly considered that only the larger

100. Sparks, *State Law Developments With Respect to Defensive Techniques*, 14 INST. ON SEC. REG. 777, 790 (1982).

101. *Id.* at 780.

102. *Id.*; *see also* Edgar v. MITE Corp., 457 U.S. at 639; Rent-A-Car v. Connolly, [1982] FED. SEC. L. REP. (CCH) ¶¶ 98,776, 93,945 (1st Cir. 1982) (argument that Congress intended to occupy entire field not likely to be successful); Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510, 519-20 (1979); Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 NOTRE DAME LAW. 725, 731 (1979).

103. *E.g.*, Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980).

104. Edgar Corp. v. MITE Corp., 457 U.S. at 631 (plurality opinion) (*quoting* Hines v. Davidowitz, 312 U.S. 52 (1941)).

transactions were of sufficient national importance to warrant federal regulation.

The states should consider regulating all takeovers otherwise subject to their jurisdiction by virtue of the above shareholder residence rules if the company has fifty or more shareholders. While admittedly this number is arbitrary and the matter is particularly suited for legislative determination, the financial stakes of fifty or more shareholders are probably sufficiently important to justify the imposition of state protections.

C. *The Form of Regulation*

1. Jurisdiction

To summarize, a particular state's statute should apply only to a takeover attempt of a target company:

> (a) that has at least sixty-six and two-thirds percent of its shareholders resident in the state; and
> (b) that has at least fifty shareholders: *Provided*, the Act will not apply if the Williams Act applies to the transaction.

2. Provisions States May Not or Should Not Enact

a. Advance Filing Provisions

A state statute requiring an out-of-state bidder to file a registration statement with a state commission prior to the commencement of a tender offer would probably violate the commerce clause, even where a restrictive concept of state jurisdiction over target companies is employed, and even where the Williams Act is inapplicable. Advance filing provisions impose a tremendous burden on interstate commerce because they give substantial advantages to target companies. Since time is of the quintessance in tender offers, and delay inherently redounds to the benefit of the target company, states should avoid advance filing provisions.

b. Merit Provisions

As to companies subject to the Williams Act, Congress made a policy decision with which states may not tamper: the fairness of the transaction is not a regulatory concern. Where the Williams Act is inapplicable, it would not violate the supremacy clause for the state to adjudicate the merit of a tender offer. However, the burden on interstate commerce of these provisions would be tremendous: merit provisions would completely halt the progress of interstate tender offers. Although there are some policy arguments in favor of merit determinations,[105] and some blue-sky laws do allow states to adjudicate the merit of public offerings of securities within the state, merit provisions involving interstate tender offers are probably unconstitutional — even where extraterritoriality is minimized, and the Williams Act is inapplicable.

c. Hearing Provisions

Assuming no state enactment of merit provisions, the only purpose of a hearing would be to adjudicate the adequacy of disclosure. Precommencement disclosure hearings would delay the tender offer process and thus would impermissibly burden interstate commerce. Post-commencement, pre-consummation hearings (i.e., take-down provisions) are probably unconstitutional as well. The better course is simply to make inadequate disclosure a civil wrong with a private right of action for damages and rescission.

3. Provisions States Should Adopt

a. Tender Offer Disclosure

When a bidder makes a tender offer for a local target company that has a class of equity securities held by at least fifty shareholders, the state should require the bidder to file a disclosure document with the state securities commission as soon as practicable on the date of commencement and send the statement to the shareholders. The document should resemble the SEC Schedule 14D, although increased disclosure provisions would not necessarily be unconstitutional as applied to these companies.

b. Withdrawal

Investors should be given withdrawal rights similar to those provided by Section 14(d)(5) of the Williams Act and SEC Rule 14d-7.

c. Proration

The states should enact proration rules similar to Section 14(d)(6)

105. The central argument in favor of the merit standard is that under the present system, if the price is high enough, shareholders will sell — regardless of the best interests of the corporation.

and SEC Rule 14d-8.

d. Minimum Offering Period

The new legislation should require a minimum offering period analogous to that required by SEC Rule 14e-1.

e. Antifraud

The states could duplicate the antifraud proscription of Section 14(e). Additionally, state legislation could prohibit fraud in connection with "takeovers," "creeping acquisitions," and "attempted takeovers," since the tendency of some courts to require an extant tender offer under Section 14(e) has led to a number of unremedied abuses. The legislation should make fraud a civil wrong, with a private right of action for damages and rescission.

f. Insider Trading

The states should proscribe transactions in the target's securities on the basis of material, nonpublic information in a manner analogous to SEC Rule 14e-3.

4. Provisions States Should Consider

a. Creeping Tender Regulation

States should consider regulating creeping acquisitions of non-federally regulated companies subject to their jurisdiction. At a minimum, the states could enact a provision similar to current Section 13(d). As an alternative, states could consider legislation analogous to that proposed to Congress by the SEC in 1980.[106] Under that proposal, an acquirer of more than five percent of a class of equity securities would be required to announce publicly the acquisition and his purpose no later than one business day after the purchase.[107] The purchaser would not only be required to file with the SEC within five business days after the purchase and send the issuer more extensive disclosures,[108] but also:

> The proposed section 13(d) would prohibit further stock purchases from the time the five percent threshold was passed until two days

106. SEC Report, *supra* note 39, at 84-86.

107. Glenn, *Rethinking the Regulation of Open Market* and *Privately Negotiated Stock Transactions Under the Securities Exchange Act of 1934*, 8 J. CORP. L. 41, 55 (1982) (*summarizing* the SEC proposal).

108. *Id.*

> after the required statement was filed with the SEC (footnote omitted). . . . This regulation of open market and privately negotiated purchases has no precedent in section 13(d) as presently written.[109]

The state creeping tender regulation would apply to non-federally regulated companies, so the legislation would not be preempted by Section 13(d). It must be noted, however, that the provision might be vulnerable to a V-A challenge to the extent the regulation is applied to purchases by an out-of-state buyer on a national stock exchange. A V-B objection could also be expected, and might prove dispositive, because interference with open-market purchases is a substantial burden on interstate commerce, even when extraterritoriality is minimized.

b. Regulation of Risk Arbitrage

The term "arbitrage" comprises "classical" arbitrage and "risk" arbitrage.[110] "Risk" arbitrage involves the privately negotiated or open

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109. The text of the proposal provided as follows:

> (3) Every person, other than the issuer thereof . . . who, as a result of the . . . acquisition of the beneficial ownership of any security of a class . . . becomes the beneficial owner, in the aggregate, of more than 5 percent of the class, shall:
>
> (A) as soon as practicable, but in no event later than one business day after such acquisition, make a public announcement, which shall be limited to disclosure of his identity, the amount of securities of the class beneficially owned by him, the identity of the issuer of that class and a brief description of the purpose of such acquisition;
>
> (B) within five business days after the date of such acquisition, file with the Commission and send a statement . . . ;
>
> (C) not acquire, . . . any additional securities of the class, otherwise than pursuant to a "statutory offer" as defined in section 14(d)(1)(B) of this title, from the time of such acquisition until the expiration of two business days from the date of filing of the statement. . . .
>
> (4) Any person who, . . . is the beneficial owner of more than 5 percent of a class of securities . . . other than either the issuer thereof . . . shall file within the Commission and send a statement . . . within 10 business days of achieving such status, or within whatever other period the Commission may prescribe by rule or regulation. . . .
>
> (5) If a material change occurs in the information set forth in a statement filed pursuant to paragraphs (3) or (4) of this subsection, the person filing such statement shall:
>
> (A) within five business days or such shorter or longer period as the Commission may prescribe . . . , file with the Commission and send an amendment to such statement, . . . disclosing such material change; and
>
> (B) not acquire, . . . any additional securities of the class . . . from the time such material change occurs until the expiration of two business days from the date of filing of the amendment, or such shorter period as the Commission may prescribe by rule or regulation. . . ."

110. Aranow and Einhorn explain the traditional meaning of "arbitrage":

> Arbitrage may be broadly defined as the purchase of property in one market and the simultaneous or near simultaneous sale of the same property, or its equivalent, in either the same or a different market for the purpose of generating a profit resulting from the differential in price for such property or its equivalent.

market purchase of a target company's securities during a tender offer.[111] The risk arbitrageur hopes subsequently to tender the securities he purchased to the bidder, thereby profiting on the differential between his purchase price and the tender price.[112] As the SEC explains:

> The term 'risk arbitrage' is itself a misnomer in that the transactions to which it is generally applied to do not involve arbitrage in the classic sense of an effort to 'lock in' a profit resulting from an existing spread, or differential, between the prices of the same security in different markets or by one security and a second security convertible into the first. Rather, risk arbitrage involves a risking of capital on a contingent event.[113]

Risk arbitrageurs are not specifically regulated by federal law — to the detriment of the investing public, according to at least one commentator.[114] A strong case has been made that the activity of arbitrageurs not only upsets the efficiency of the securities markets,[115] but also "creates an intense pressure on investors to sell into the market without regard for the underlying merits of the tender offer."[116] It is imperative, one commentator concluded, that tender offer arbitrage be regulated.

In 1980, the SEC proposed that Congress amend the Williams Act by adding a new Section 14(f). The amendment would have given the SEC rulemaking authority over risk arbitrage "including authority to require persons engaged in such activity to provide the Commission with post-acquisition information about their actions."[117] The legislation would also have given the Commission authority to promulgate substantive rules to govern risk arbitrage,[118] but Congress never

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B. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 174 (1973). Regarding arbitrage, *see generally* M. EVANS, ARBITRAGE IN DOMESTIC SECURITIES IN THE UNITED STATES (1965); Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. PA. L. REV. 466 (1971); Wyser-Pratte, *Risk Arbitrage*, BULL., May, 1971, (N.Y.U. C.J. Devine Institute of Finance); Comment, *Should Tender Offer Arbitrage Be Regulated?*, 1978 DUKE L.J. 1000 (1978) [hereinafter cited as *Arbitrage*]; Rubin, *Arbitrage*, 32 BUS. L. 1315 (1977); *Arbitrage: It's The Hottest Game In Town*, BUS. WEEK, Jan. 17, 1977, at 71.

111. SEC Release No. 18050 (Aug. 21, 1981).

112. *Id.*

113. SEC Release No. 15533 (Jan. 29, 1979). The use of the term "arbitrage" to describe the above activity in tender offers may derive from the fact that the practice "involves differing prices for the same security in what may be viewed as two markets, the current market price and the contingent parity value if the risk arbitrage event is consummated. *Id.*

114. *See Arbitrage, supra* note 110, at 1000.

115. *Id.* at 1023.

116. *Id.* at 1027.

117. SEC Report, *supra* note 39, at 118.

118. The text of the proposal provided as follows:

adopted the proposals.

The commentator cited above recommends a forceful approach to the regulation of tender offer arbitrage and rejects disclosure as inefficacious: "There is nothing of substance for the arbitrageur to disclose. . . ."[119] Rather, "the most effective mode of regulation . . . would consist of imposing across-the-board volume limitations upon purchases of target shares during the pendency of the tender offer."[120]

In any event, if a state legislature concludes that, as a policy matter, arbitrageurs present in the state should be regulated, state legislation would not necessarily be unconstitutional. The supremacy clause is not at issue because of the absence of pertinent federal regulation. And commerce clause objections could be defeated if the state enacted limited, reasonable legislation analogous to state regulation of broker-dealers. For example, a state might provide that any person employed within the state who engages in a risk arbitrage transaction register with the state securities commission. The state could require an arbitrageur to file a disclosure statement with a state official a certain number of days after the arbitrage transaction. The disclosure, in turn, could be studied by the state in an effort to identify abuses which occur in the arbitrage process.

As a constitutional matter, then, the states may regulate non-federally regulated takeover bids for target companies with a large percentage of resident shareholders. Whether a state embarks upon this course will depend upon the frequency and characteristics of such takeovers in a particular state.

IV. STATE REGULATION OF FEDERALLY REGULATED TAKEOVERS OF COMPANIES TRADITIONALLY SUBJECT TO STATE REGULATION

It may be desirable, as a matter of policy, for states to regulate changes of control in special industries, as the states have regulated certain industries for many years. "[T]here is a long history of judicial and congressional acceptance of state regulation of . . . banking, insur-

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> The Commission may, by rule, require persons engaged in arbitrage activity in connection with any offer or acquisition subject to Sections 13(d) or 14(d) of this title to provide it with such information about their activities, and to act in accordance with such standards, as the Commission deems necessary in the public interest or for the protection of investors.

Id. at 96.

119. *Arbitrage, supra* note 110, at 1033.

120. *Id.*

ance, and utility business."[121] Whether present state statutes regulating these special industries are constitutional is a matter of considerable controversy.[122] However, many commentators believe that new, carefully drafted statutes will be able to survive constitutional scrutiny.[123] The banking, insurance, and utility industries are said to deserve special treatment because the local interest is significantly greater. Most bank depositors, for example, reside within the state in which the bank is chartered.[124] Because the state interest is higher, the commerce clause will tolerate a greater burden on interstate commerce.

V. STATE CORPORATION LAW: THE "INTERNAL AFFAIRS" DOCTRINE AND THE NEW OHIO LAW

Before *MITE*, proponents of state takeover regulation frequently invoked the so-called "internal affairs" doctrine as a justification for state regulation. The thrust of the doctrine is that tender offers are "functionally equivalent to a variety of other methods designed to effect changes in corporate control, e.g., proxy contests and mergers, which have traditionally been subject to regulation by the state of incorporation."[125] But in *MITE*, the Supreme Court distinguished tender offers from other types of changes in corporate control.[126] "Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."[127] Mergers and similar fundamental corporate changes, on the other hand, involve the relationship of all shareholders to the corporation and to each other. Statutes regulating mergers and similar matters "do not purport to govern one-on-one transactions between buyers and sellers of securities."[128]

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121. *Hostile Tender Offers, supra* note 81.

122. *Compare* Gunter v. AGO Intern., B.V., 533 F. Supp. 86 (N.D. Fla. 1981) (Florida Insurance Holding Company Act preempted by Williams Act) *and* National City Lines, Inc. v. LLC Corp., 524 F. Supp. 906 (W.D. Mo. 1981) (Missouri Insurance Companies Act preempted by Williams Act), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982), *with* John Alden Life Insurance Co. v. Woods, [1982] FED. SEC. L. REP. (CCH) ¶ 98,617 (D. Ida. Dec. 19, 1981) (Idaho Acquisition of Control and Insurance Holding Company Systems Act neither preempted by Williams Act nor invalid under commerce clause).

123. *See e.g., Hostile Tender Offers, supra* note 81 at 26; Pozen, *Making State Takeover Statutes Safe From Constitutional Attack*; Nat'l L.J., Aug. 2, 1982, at 18, col. 4.

124. Pozen, *supra* note 123, at 18, col. 4.

125. MITE Corp. v. *Dixon*, 633 F.2d at 501.

126. Edgar v. MITE Corp., 457 U.S. at 645.

127. *Id.*

128. Kreiden, *Fortress Without Foundation? Ohio Takeover Act III*, 52 CIN. L. REV. 108, 121 (1983).

Approximately six months after the Supreme Court decided *Edgar v. MITE Corp.*, Ohio enacted new takeover legislation seemingly based upon the internal affairs doctrine.[129] The new legislation does not separately regulate tender offers, but rather, applies to any "control share acquisition."[130] "[T]he Act eliminates distinctions concerning the method of acquisition so that it applies not only to the traditional tender offer but also to open market purchases and privately negotiated block transactions."[131]

The Ohio Act applies to all Ohio corporations with either a principal place of business, principal executive office, or substantial assets within the state, if the corporation has fifty or more shareholders.[132] Generally, acquisitions governed by the Ohio Act must be approved by a vote of the majority of shareholders as well as a majority of disinterested shareholders.[133]

Although an extensive analysis of the Ohio Act will not be undertaken here, the Act is certainly ripe for constitutional challenge. "Thus, for example, the Act would control the ability of a California resident to sell a twenty-one percent interest in an Ohio-based company to a New York resident in a transaction taking place in Florida."[134] Aside from possible violation of V-A principles, the extraterritorial impact of the statute may impermissibly to burden interstate commerce under V-B analysis.

Although the Supreme Court has held that a sale of stock by a target shareholder to a bidder does not implicate the internal affairs of the target company, and thus regulation may not be justified by the internal affairs doctrine,[135] the tender offer process creates many other responses which do involve the internal affairs of both the target and the bidder. For example, hostile tender offers raise fiduciary questions regarding whether the expenditure is in the best interest of the bidder, and whether the sale of the target company is in the best interest of target shareholders. The fiduciary issues involved in hostile corporate takeovers have become increasingly evident during the mega-tender pe-

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129. 1982 Ohio Legis. Serv. 5-395, 5-402 (Baldwin). *See* Kreiden, *supra* note 129, at 108 n.2. Several other states have enacted new takeover legislation, some of which is based upon Ohio's approach. *See supra* note 91.

130. 1982 Ohio Legis. Serv. 5-395, (Baldwin) (OHIO REV. CODE ANN. § 1701.01(2)(1) (Baldwin 1982).

131. Kreiden, *supra* note 129, at 112.

132. 1982 Ohio Legis. Serv. 5-395 (Baldwin) (OHIO REV. CODE ANN. § 1701.01(y)).

133. *Id.* (OHIO REV. CODE ANN. § 1701.831(E)(1)).

134. Kreiden, *supra* note 129, at 121.

135. Edgar v. MITE Corp., 457 U.S. at 645.

riod of the 1980's. Invariably, bidder management is charged with wasting corporate assets, just as target management is accused of safeguarding its position at the expense of the shareholder.

The states have long been entrusted with the task of regulating corporate officers and directors. "Presumably, appropriate state takeover laws could be drafted, in reliance upon the 'internal affairs doctrine,' to cover . . . the standards applicable to target company directors in responding to an unsolicited, hostile acquisition offer."[136] The state also could consider enacting a standard (more specific than the "business judgment rule") to judge the reasonableness of a bidder's decision to make a tender offer. Moreover, many corporations adopt provisions in their articles of incorporation or bylaws designed to discourage potential bidders or defeat bids once they are made. *MITE* would not preclude the state of incorporation from regulating the propriety of these defensive charter provisions.[137] Similarly, the states could regulate "golden parachute" proposals,[138] as well as the fiduciary duties of persons who become majority shareholders of a corporation by means of a tender offer.[139] Finally, the state could regulate "the standards and terms applicable to so-called back-end, or second step, transactions,"[140] in addition to "the standards governing appraisal rights in voluntary freezeouts."[141]

VI. CONCLUSION

In charting the future course of tender offer regulation, state policy-makers should first examine the frequency and characteristics of non-federally regulated tender offers for companies with large percentages of shareholders in their state. The historical number of takeovers or attempted take-overs in a given state may not be sufficiently high to warrant further state tender offer legislation. Given a minimum level of takeover activity, however, it would be in the economic interest of most states to enact the type of takeover legislation discussed in this article. State regulation of non-federally regulated tender offers would enhance shareholder protection. The legislation would ensure that shareholders

136. *Hostile Tender Offers*, *supra* note 81, at 24, col. 4, 25, col. 1.
137. *Id.*, at 25, col. 1.
138. *Id.*
139. *Id.*
140. *Id.* A merger or similar corporate event following a tender offer, in which the bidder attempts to cash-out or otherwise eliminate the minority shareholders, is called the back-end or second step of the transaction.
141. *Id.*

would be given sufficient time and information to consider their investment decision whether to hold, tender or sell into the market. In the long run, state tender offer regulation of the type described above would lead to a more efficient and fair securities market in the state. Enhanced investor protection and increased market efficiency will ultimately facilitate the processes of capital formation and economic development.