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Controlling Corporate Takeover Bids: State Regulation and the Ohio Approach: Foreword

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FOREWORD

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Forewords to symposia of this sort perform substantially the same function — and are about as dispensable — as presentations of dinner speakers who "need no introduction." At best they don't hold up the program too long. And the worst is better left undescribed. One thing that can be said for them is that they afford an opportunity to write without the heavy annotation that is the curse of legal literature. To be sure, that is not altogether a boon: the absence of cosmetics tends to bring out the warts. Even so, writing without footnotes is almost as ideal as (one must remember the time of year for a professor) teaching without examinations.

With the student writing programs increasingly in vogue, and the recent tendency for law schools to publish multiple law reviews, one who tries to follow all the literature in a burgeoning field for fear of missing an occasional pearl of great price is sometimes tempted to call down the wrath of the gods on the printing press and all its works. The art form known as the symposium is apt to be a particular offender; for every editor knows the risks of *inviting* the submission even of isolated manuscripts, and anybody who has tried to put together a balanced tennis foursome or string quartet can only imagine the problem of achieving symmetry in a scholarly symposium. The editors of this collection, therefore, are to be congratulated the more warmly for coming up with three essays so timely, so complementary and, above all, so thoughtful.

I have no idea at this writing — since I have seen only the typescripts of the three articles — what order the editors will choose for their printing. But to me they follow a clear line of march:

First of all, Professor Bromberg — to whom the Bar owes a debt for his rationale of the peripatetic (dare one say "picaresque"?) Rule 10b-5 — gives us an almost Hohfeldian "interest analysis" of the tender offer (or take-over bid) from every conceivable point of view. One ventures the guess that this will be for some time the *fons et origo*. It reveals the writer's Yale motherhood at its best.

One should next read the piece by Mr. Sommer of the Cleveland Bar, which is a practitioner's description of the Ohio statute — a description that highlights with skillful advocacy not only a number

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of troublesome interpretative problems but also the special interest character of the legislation and its parochialism.

Finally, Professor Shipman, after comparing the Ohio statute with the provisions added to the Securities Exchange Act of 1934 by the Williams Bill in 1968, concentrates incisively on the state statute's novel extraterritorial coverage and the policy questions inherent in the idea of federal preemption.

It is no denigration of the contributions of the other two writers to say that for me these last are the critical questions.

The cry of states' rights is not to be ignored, especially in the field of securities regulation. If any reminder was needed, it came with the SEC's failure to win elimination of the intrastate exemption from broker-dealer registration in connection with the Securities Acts Amendments of 1964, even though there would have been no more *preemption* than there is today with *inter*state broker-dealers — which is to say, none at all.[1] Moreover, in view of the federal vacuum that existed when the state blue sky laws began to make their appearance in the years before World War I, as well as the fact that the federal legislation is still limited by and large to the disclosure philosophy, it is not easy to tell the states now to keep off the federal preserve.[2] And yet, if the "Balkanization" rhetoric that one has heard with respect to the Ohio legislation does not particularly advance the discourse, it is surely a simplistic view of the universe that considers federal versus states' rights in the abstract. History has its claims. True, Congress was initially laggard in the field of securities regulation. There might never have been any blue sky laws if the period (1890-1914) that produced the antitrust laws had been a bit more fruitful with respect to corporate controls generally.[3] On the other hand, Congress lost its shyness almost forty years ago — and its child, the SEC, has seldom been accused of suffering under that handicap.

Partly under the impact of the Uniform Securities Act, the emphasis in recent years has been on federal-state coordination. Indeed, presumably one of the major policy questions that will be faced by the American Law Institute in its preparation of a Federal Securities Code[4] will be the extent to which the federal-state lines

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[1] *See* 5 L. Loss, SECURITIES REGULATION 3357-58 (Supp. 1969).

[2] *See* 1 *id.* at 102-05 (2d ed. 1961).

[3] For a brief history of the federal incorporation movement, see 1 *id.*, c. 1C.

[4] *See* Loss, *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAW. 25 (1969).

should be straightened in the process. It also seems fair to suggest that state legislation of the Ohio variety may be running against the tide of the federal-state dichotomy that has been developing in corporation law. The considerable amount of legislative reform at the state level in recent years has been concerned primarily with the internal ordering of the corporation. That is to say, the states seem to be leaving to the world of the SEC those aspects of corporation law (not really *securities* law) that are represented by the fiduciary duties of corporations, their directors and other "insiders" to their stockholders and the marketplace generally. This, of course, is the "federal corporation law" to which courts and commentators have been increasingly referring.

These considerations are enhanced when one considers the conflict-of-laws problems that Professor Shipman discusses and — even more — the special interest aspects that are brought out by Mr. Sommer. Even at the federal level, the Williams Bill leaves a measure of philosophical disquiet as long as one result of full disclosure may be that, the better the reputation of the take-over bidder, the higher the price he will have to pay.[5] We do, after all, pretend to a corporate system in which "[t]he incumbent management has no protected interest in remaining in power."[6] And we have been reminded to keep on guard lest we "frustrate the reallocation of productive resources from less profitable to potentially more profitable uses."[7] So even the federal intervention gives pause. But, by contrast, the Ohio statute is shockingly one-sided, with all the onus on the take-over bidder and none on the management of the target company.

One is reminded of the "anti-strike-suit" legislation on security for costs that started in New York in 1944. Both are species of class legislation — the Ohio statute in the sense that it is frankly management-protectionist and the New York statute in the sense that it frustrates only the small stockholder. Moreover, both have managed to throw the baby out with the bath by simply putting the quietus on those take-over bids or derivative actions to which they extend.

Perhaps it is not too much to hope that the state legislation on

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[5] *See* 6 L. Loss, *supra* note 1, at 3665-66.

[6] General Time Corp. v. American Investors Fund, Inc., 283 F. Supp. 400, 403 (S.D.N.Y.), *aff'd sub nom.* General Time Corp. v. Talley Indus., Inc., 403 F.2d 159 (2d Cir. 1968).

[7] Taussig & Hayes, *Are Cash Take-Over Bids Unethical?*, 23 Fin. Analysts J. 107, 111 (Jan.-Feb. 1967).

take-over bids may have the same denouement. The drive for legislation of the New York variety spent its force soon after spreading to a handful of other states. Whether additional states will follow Ohio and the milder but still pro-management legislation in Nevada and Virginia[8] will presumably depend not only on the experience in those states but also on what eventuates by way of amendment at the federal level. Beyond that, there is always the possibility that, altogether apart from the impact of regulation, the growth of take-overs and conglomerates may come to be thought of as an economic phenomenon of the sixties.

Meanwhile, let us by all means join the ghost of Brandeis in watching the results of these three experiments. But let us also recognize that, if three laboratories are good, thirty are not necessarily better.

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[8] *See* Ch. 97, §§ 2-20, [1969] Nev. Acts 120-25; Comment, *Take-Over Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969).