1978


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Case Note

SECURITIES—STATE REGULATION—TENDER OFFER—VALIDITY AND CONSTITUTIONALITY OF STATE TAKEOVER STATUTES*


On September 2, 1977, in Great Western United Corp. v. Kidwell,1 the United States District Court for the Northern District of Texas invalidated the Idaho Takeover Act2 under both the supremacy clause3 and the commerce clause4 of the United States Constitution. The Act violated the supremacy clause by placing a burden upon tender offers5 contrary to the purposes of existing

* Author’s Note: Recently, in a two-to-one decision, the Court of Appeals for the Fifth Circuit affirmed the district court’s invalidation of the Idaho Takeover Act. Great W. United Corp. v. Kidwell, No. 77-2809 (5th Cir. Aug. 10, 1978). The appellate court adopted the lower court’s reasoning that the takeover statute was preempted by the Williams Act because it conflicted with the Act’s objectives. The court also held that the Idaho statute was invalid under the commerce clause. While departing from the district court’s view that the takeover statute effected no legitimate local interests, the appellate court found that what local interests the statute did serve were outweighed by the burdens imposed on interstate commerce. One member of the court dissented on jurisdictional grounds but accepted the majority’s preemption and commerce clause analysis.

4. Id. art. I, § 8, cl. 3.
5. Although not expressly defined either in federal or state laws and regulations, a “tender offer” is conventionally defined as a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price. Cash or other securities may be offered to the shareholders as consideration; in either case, the consideration specified usually represents a premium over the current market price of the securities sought.

federal regulation; it also violated the need implicit in the commerce clause for flexible interstate traffic in securities.

Despite the continuing controversy over the validity of state takeover statutes, *Great Western* presented a case of first impression. 6 The dispute originated with an announcement by Great Western United Corporation (GWU) on March 21, 1977 that it would make a cash tender offer for two million shares of Sunshine Mining Company (Sunshine) common stock. 7 Sunshine is a Washington corporation, having its principal place of business and substantial assets in Idaho. GWU, which already controlled six per cent of Sunshine stock, offered to purchase the additional amount for $15.75 per share, 8 a price exceeding that available on the exchange at the time. GWU had previously made a "friendly offer" 9 to Sunshine management of $16.75 per share. Concurrently with the announced offer, GWU filed both a Schedule 13D statement 10 with the Securities and Exchange Commission pursuant to the Williams Act 11 and a registration statement with the

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6. It is primarily the nature of the tender offer—requiring speed to be effective—which has precluded a time-consuming court challenge until now. Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Commission of the A.B.A. Section of Corporate, Banking, and Business Law, *State Takeover Statutes and the Williams Act*, 32 Bus. Law. 187, 192 (1976). In at least one instance, however, a court had opportunity to pass on some of the issues presented in *Great Western* and sidestepped them. See Copperweld Corp. v. Imetal, 403 F. Supp. 579, 606-07 (W.D. Pa. 1975) (court failed to discuss the issue of conflict with state law).

7. This represented approximately 35% of the outstanding Sunshine common voting stock. 439 F. Supp. at 424.

8. Sunshine stock opened at 15 and closed at 14 7/8 on March 21, 1977 on the New York Stock Exchange. Thus the premium offered amounted to between $.75 and $.875 per share. *Id.*

9. A "friendly" tender offer is one that is approved by the subject company's board of directors or solicited by the board to ward off a hostile tender offer. See E. Aranow & H. Einhorn, *supra* note 5, at 242-44.

10. 17 C.F.R. § 240.13d-1 (1977). Since commencement of the *Great Western* suit, offeror registration and disclosure has been brought under § 240.14d-1 and accompanying sections. See notes 152-54 *infra* and accompanying text.

11. 15 U.S.C. §§ 78 l(i), 78m(d)-(e), 78n(d)-(f) (1976), as amended by Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 94-210, § 202, 91 Stat. 1498. In a related action, Sunshine brought suit against GWU asserting inadequate disclosure under the 1934 Act. Sunshine Mining Co. v. Great W. United Corp., No. 77-1064 (D. Idaho 1977). The court in that suit determined that there were no omissions in GWU's SEC filing under the federal act. This litigation was dismissed following a settlement agreement between the parties on October 5, 1977. Settlement, however, does not appear to render moot the principal case discussed herein. See Brief for Appellee at 13-14, Great
Idaho Director of Finance pursuant to the Idaho Takeover Act. GWU also contacted representatives of the States of Maryland and New York regarding the possible assertion of jurisdiction over the proposed tender offer by virtue of their takeover laws. On March 25, 1977, GWU received notice from the Idaho Department of Finance that the disclosures made in the registration statement were inadequate and that the statutory twenty day waiting period for a hearing would not start until disclosure satisfactory to the director was made. Upon receipt of the directive, GWU promptly filed a complaint in the District Court for the Northern District of Texas against officers of the state agencies of Idaho, Maryland, and New York. The complaint sought declaratory and injunctive relief, charging that the takeover statutes of the three states constituted an "unconstitutional burden on interstate commerce in violation of the Commerce Clause... [and] intrude[d] unwarrantedly into an area preempted by federal regulation in contravention of the Supremacy Clause."


13. For Maryland's and New York's takeover provisions, see Md. Corp. & Ass'ns. Code Ann. §§ 11-901 to 908 (Cum. Supp. 1977); N.Y. Bus. Corp. Law §§ 1600-1613 (McKinney Cum. Supp. 1977). Maryland and New York, although joined as defendants in the complaint, did not remain parties to the litigation. Maryland was dismissed on the grounds that there existed no article III "case or controversy," because the state's administrators did not assert jurisdiction over GWU's offer. 439 F. Supp. at 424-25, 428. The court dismissed the complaint against New York as moot following a determination by that state that GWU would not be making a tender offer as defined in the New York statute and, as such, the tender offer would not be subject to New York's registration requirements. Id. at 425, 427-29.
15. Whether the Texas court could have subject matter and personal jurisdiction over the case and the parties constituted a major issue at trial. The court held initially that GWU, a Texas based corporation, properly brought suit in that state. It found subject matter jurisdiction under § 27 of the 1934 Act, permitting jurisdiction of district courts over suits for declaratory judgments, and under the doctrines of federal question, 28 U.S.C. § 1331 (1976), diversity, 28 U.S.C. § 1332 (1976), and acts regulating commerce, 28 U.S.C. § 1337 (1976), 439 F. Supp. at 429-30. The court further found, in considering its in personam jurisdiction, that there was nothing "unfair" about forcing the Idaho defendants to litigate where the actions had "predictable consequences." 439 F. Supp. at 430-33. The jurisdictional issues involved in this case constitute a complex and separate problem in challenges to state takeover statutes; this Note, however, will discuss only the merits of the constitutional claims.
The court granted a temporary restraining order on the basis of the complaint and arguments, summarizing what later would become the court's conclusion, that

immediate and irreparable injury . . . will result to Applicant unless Defendants are forthwith restrained as prayed for in the Complaint in that Applicant will be deprived of its federally protected right to make its proposed cash tender offer, will be subjected to conflicting laws, will be subjected to delay with [sic] disrupts the orderly trading of its securities and those of the target company on national securities markets, and may be denied the advantages of a uniform national system of regulation in making its interstate cash tender offer . . . . 17

Approximately six months later, Judge Robert M. Hill ruled that the Idaho Takeover Act was unconstitutional. His decision was based on both grounds of unconstitutionality alleged in GWU's complaint. First, he found the Idaho Act preempted by federal regulation of tender offers under the Williams Act and therefore violative of the supremacy clause. Judge Hill applied three basic tests for preemption:

First, a state statute is preempted if it is apparent from federal statutes, their legislative histories, or the pervasiveness of the federal regulatory scheme that Congress intended to occupy the field and displace state regulations. Second, a state statute is preempted if it affects a field in which the federal interest is so dominant as to preclude state laws regulating the same subject. Finally, a state statute is preempted if it conflicts with the federal law to such an extent as to be an obstacle to the accomplishment of the federal scheme. 18

The first two arguments for preemption were summarily dismissed. As to the pervasiveness of the federal scheme, the court discounted any intent to occupy the field based upon what it found to be an "impassable obstacle" created by forty years of coexisting state and federal securities regulation. 19 Applying its second test, the court denied any dominance of the federal inter-

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"Subject company" and "target company" are interchangeable concepts. Recently, the SEC in proposed rule 14d–1 changed the terminology from "target" to the more neutral "subject" to refer to the issuer whose stock is being sought pursuant to a tender offer. SEC Exchange Act Release No. 34–12, 676 (Aug. 2, 1976), reprinted in [1976–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 24,281 A. at 17,715-7B. In keeping with the SEC's proposed change, all references other than those in quotation will be to the more recent "subject company". See Note, The Creditor as a Participant in a Tender Offer Under the Williams Act, 28 CASE W. RES. L. REV. 910, 910 n.3 (1978).


19. "Such coexistence would be impossible if Congress has occupied the field." Id.
Using language very similar to that normally found in a pervasiveness argument, the court said, "Federal control of the securities field is not so 'intensive and exclusive' as is federal control over aviation. States have a valid interest in regulation of securities sold within their borders and state statutes have existed regulating this area for some time."21

The third test, conflict between the federal and state regulations, became the focus of the court's finding of preemption. The court quickly discredited the defendants' major defense to the preemption argument—that preemption based upon conflict requires an impossibility of compliance with both the federal and state provisions.22 Instead, the court undertook to examine and construe both the Williams Act and the Idaho Act to determine whether a conflict existed in the purposes of the two laws. It found that the purpose of the Williams Act is to strike a balance between the offeror and subject management; that is, to achieve shareholder protection without unduly impeding cash takeover bids, which Congress found beneficial. By examining the Act's legislative history, the court concluded that Congress, in an effort to maintain this balance, favored minimal disclosure and rejected preoffer disclosure requirements.23

On the other hand, the court found that the Idaho Takeover Act seeks to regulate the making of tender offers "primarily for the benefit of the management of the target company."24 First, the Act requires the offeror to provide more detailed information which the court concluded was "only collaterally related" to information necessary for a shareholder's decision.25 Second, it delays a potential takeover by requiring prior approval by the Idaho Director of Finance and by permitting subject management to call a hearing in order to "marshal its resources."26 Finally, the Act provides for disclosure by the offeror without similarly obligating the subject company.27 The court held that these provisions upset the careful balance struck by the Williams Act and concluded, therefore, that the Idaho Act was preempted by federal regulation.

20. Id.
21. Id.
22. Id. at 437.
23. Id. at 436.
24. Id. at 437.
25. Id. at 436.
26. Id.
27. Id.
As an alternative basis for its finding that the Idaho statute was unconstitutional, the court ruled that it violated the commerce clause by creating an excessive burden on interstate commerce without serving a legitimate local interest. Citing the general test found in *Pike v. Bruce Church, Inc.*, Judge Hill summarized the commerce clause analysis as follows:

In order to be valid, a state statute regulating commerce must, first, effectuate a legitimate local public interest; second, affect interstate commerce only incidentally and; third, if the first two criteria are met, meet a balancing test applied to determine whether or not the burden imposed on commerce is excessive in relationship to the alleged local benefits provided by the statute.

In determining that the Act serves no legitimate local interest, the court stated that the typical justification for state takeover laws is the "protection of shareholders of corporations which are incorporated in or have significant connections with the controlling state." Although the state may articulate this purpose in the legislative history or in the Act itself, the true purpose or "local interest" to be protected must be determined by viewing the "practical effects" of the statute. The court concluded that "the immediate purpose of the statute is to protect incumbent management." As evidence of "practical effects" demonstrating that, with respect to the Idaho statute, the local interest was not really the protection of shareholders, the court relied upon (1) delay procedures which frustrate tender offers, (2) dissuasion of offerors from making a tender offer to avoid the burden of one or more state takeover statutes, (3) discouragement of offerors from making the highest possible offer to the shareholders in an attempt to convince subject company management to approve the offer, and (4) the possibility that subject company management resistance might cause a *reduction* in the original offer made to shareholders.

After repudiating the legitimacy of the Act's articulated purpose, the court briefly discussed and ultimately rejected the state interest in preventing the removal of businesses from the state: "[A] statute [which regulates interstate commerce] may not be en-

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30. *Id.*
31. *Id.*
32. *Id.*
acted 'solely for protection of local economic interests.'”

In applying the *Pike* requirement that the state act pursuant to a legitimate *local* interest, the court criticized the extraterritorial impact of the Idaho Act. Referring particularly to section 30-1506(1) of the Act, Judge Hill determined that “[t]he Idaho statute . . . undertakes to regulate the offeror’s affairs not only within Idaho, but within all states in which the offeror might make a tender offer.” Furthermore, the court held that “[t]his intended extraterritorial effect distinguishes the takeover statute from state Blue Sky laws, which clearly do not intend to govern regulation of securities outside state boundaries.”

Applying the second criterion of *Pike*—that a state statute must affect interstate commerce only incidentally—the court found that the Idaho Act had a substantial detrimental effect upon interstate commerce because it “purposefully precludes Great Western’s making a tender offer anywhere until the provisions of the Idaho statute are met.”

Because the burden on interstate commerce was direct and substantial, the balancing of federal and state interests was unnecessary. However, assuming *arguendo* that the third prong of the *Pike* test should be dealt with, Judge Hill continued the analysis, identifying five significant burdens on interstate commerce. First, “takeover statutes have a tendency to discourage offerors from making tender offers and . . . the very presence of state takeover statutes might eliminate the possibility of a tender offer being made.” Second, the problem of potential multiple and conflicting statutes “unquestionably” burdens interstate commerce. Third, the court referred to “evidence . . . that the takeover statutes encourage offerors to make lower offers than would have been made without the statute.” Fourth, the Idaho Act would disrupt the national market for Sunshine stock as a result of

33. *Id.* (quoting H.P. Hood & Sons v. DuMond, 336 U.S. 525, 531 (1940)). The language used by Judge Hill erroneously quoted from the *Hood* decision, which stated “by protection” rather than “for protection.” Compare 439 F. Supp. at 438 with 336 U.S. at 531.

34. *See* text accompanying notes 81 and 255–57 infra.

35. 439 F. Supp. at 439.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 37.

41. *Id.*
preoffer disclosure and hearing provisions. 42 Finally, the Act would hinder and perhaps eliminate the tender offer by permitting subject management an extensive period in which to thwart the offer through various defense mechanisms. 43 Together, these views of the Act moved the court to find that the burden imposed upon interstate commerce was not justified by the state’s proffered interest.

Great Western’s analysis of the validity of Idaho’s takeover law raises significant issues in the present scheme of two-tiered tender offer regulation in over one-half of the states. This Note analyzes the court’s treatment of the preemption and commerce clause issues. It then evaluates the Idaho Takeover Act and concludes by suggesting the narrowest range of possible changes needed to bring it into harmony with the objectives of the Williams Act and the commerce clause.

I. STATUTORY BACKGROUND

A. The Williams Act

Federal regulation of cash tender offers began in the late 1960’s in response to an overwhelming increase in their use as a means of acquiring control of corporations. 44 Among the advantages of the tender offer over other means was the secrecy and speed available to the offeror. 45 The advantages to the offeror, however, were fraught with danger for the shareholders of the subject company. Prior to the Williams Act, a cash tender offer could be made without any required disclosure upon which shareholders could base their decision to tender shares. In contrast, other forms of corporate acquisition have long been subject to federal regulation designed to provide adequate disclosure to share-

42. Id.
43. Id.
44. Indeed, the amount of subject company assets involved in tender offers increased five-fold during the early 1960’s. E. Aranow & H. Einhorn, supra note 5, at 64.
45. Other reasons to which the increased use of tender offers can be attributed are (1) greater corporate liquidity and available credit, (2) greater attraction for tender offers as a takeover technique because of depressed price/earnings ratio, book values, and cash or quick assets ratios, (3) faster results at less cost and with more flexibility than proxy contests, (4) the psychological appeal to shareholders more willing to deal in concrete dollar terms, and (5) lack of pervasive federal and state control. E. Aranow & H. Einhorn, supra note 5, at 64–66; Cohen, A Note on Takeover Bids and Corporate Purchases of Stock, 22 Bus. Law. 149, 149 (1966); Note, Cash Tender Offers, 83 Harv. L. Rev. 377, 386 (1969); Note, Commerce Clause Limitations upon State Regulation of Tender Offers, 47 S. Cal. L. Rev. 1133, 1138–39 (1974).
holders. For instance, an exchange offer, whereby the acquiring party offers securities in "exchange" for the desired shares, requires registration under the Securities Act of 1933\(^46\) and applicable Blue Sky laws.\(^47\) In these cases the shareholder would receive a prospectus containing material facts about the offer and offeror.\(^48\) A proxy contest is subject to the Securities Exchange Act of 1934\(^49\) and involves substantial disclosure of information regarding the offer and offeror.\(^50\) The cash tender offer could not be made to fit within the framework of existing regulation, either on the federal or the state level, and it was thereby effectively exempt from disclosure provisions, leaving a massive gap in the federal scheme of shareholder protection.\(^51\)

In an effort to close the gap, Congress passed the Williams Act\(^52\) which amended the Securities Exchange Act of 1934 "to provide investors with full disclosure and other substantive protections within a statutory framework favoring neither the tender offeror nor the management of the target company."\(^53\) The overall purpose was to protect investors without jeopardizing the viability of tender offers. Congress recognized the usefulness of tender offers as a means of checking entrenched, inefficient management\(^54\) and thus framed the Williams Act to provide sufficient disclosure without interjecting undue delay into the procedure.

The Williams Act imposed extensive disclosure requirements on anyone making an offer for a class of securities registered under section 12 of the 1934 Act if the offeror would be the beneficial owner of five per cent of that class.\(^55\) In accordance with section 14(d)(1), the offeror must file with the Securities and Ex-

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47. See generally 1 L. Loss, SECURITIES REGULATION 61-62 (2d ed. 1961).
52. Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78(1), 78m(d)-78(e), 78n(d)-78(t) (1976)).
change Commission information specifically required by section 13(d)(1),\textsuperscript{56} plus any other information that the Commission may deem relevant to protect the investor.\textsuperscript{57} Subject company management must also comply with the informational provisions of the Williams Act. It must file a Schedule 14D statement with the SEC when making a recommendation to shareholders concerning the offer.\textsuperscript{58} The purpose of this disclosure is also to protect the shareholder by providing the greatest amount of information available from all sources.\textsuperscript{59} Should disclosure be incomplete or the statute otherwise not complied with, the tender offeror may be subjected to a variety of sanctions. Either the SEC or the subject

\textsuperscript{56} 15 U.S.C.A. § 78m(d)(1) (Supp. 1972-77) requires the following information:

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss of guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.


\textsuperscript{59} In addition to disclosure, the Williams Act encompasses other protective provisions. Section 14(d)(5) permits shareholders who have tendered shares to withdraw them during the first seven days or after 60 days from the date the offer was made public. 15 U.S.C. § 78n(d)(5) (1976). Section 14(d)(6) provides for a pro rata takeup of all shares tendered during the first 10 days where the offer was made for less than all shares outstanding. Id. § 78n(d)(6). And, § 14(d)(7) requires that any increase in the purchase price over the course of the offer be paid to those shareholders who had previously tendered their shares. Id. § 78n(d)(7); Note, Commerce Clause Limitations upon Tender Offers, 47 S. Cal. L. Rev. 1133, 1140-46 (1974).
company may seek an injunction to prevent the offeror from making further purchases until compliance with the statute has been completed. In addition, shareholders may have a private action for rescission or for damages resulting from fraudulent or deceptive practices.

Recently, the number of state takeover statutes has grown in response to the increased use of tender offers. At last count thirty-three such statutes existed. The effect is a two-tiered system of regulation—the state acts superimposed upon the Williams Act. Generally, state regulation is benign, falling within the boundaries of the 1933 and 1934 Acts. Some states, however, have gone further and have adopted procedures and requirements in excess of those found in federal regulations. The takeover statute of one of those states, Idaho, has become the focus of the Great Western litigation.

B. The Idaho Takeover Act

In 1975 the Idaho legislature considered and adopted the Idaho Takeover Act to regulate the making of tender offers for corporate control. As defined, the Act triggers the state’s jurisdic-


67. IDAHO CODE §§ 30-1501 to -1513 (Cum. Supp. 1975). Idaho had never before concerned itself with tender offers; the passage of the 1975 Act was in response to intense lobbying by Morrison-Knudson Corporation which was apparently in imminent danger of being taken over itself. The bill eventually enacted was largely the work of Morrison-
tion over a tender offer whenever the subject company is (1) incorporated in Idaho or (2) has its principal office and substantial assets in the state.68 The offer is termed a “takeover offer” only if it would succeed in making the offeror the beneficial owner of five per cent or more of the subject company’s outstanding securities.69 Despite the Great Western court’s finding as to the Act’s purpose,70 the tone expressed in the words of the statute is the same as that of the Williams Act—investor protection.71

According to the Idaho Act, an offeror may not lawfully make an offer for any shares of a subject company without first filing a registration statement with the director of finance.72 Prior to or simultaneous with this filing, the offeror must file a copy of that statement with the subject company and publicly disclose the terms of the offer.73 In the registration statement the offeror must include (1) ownership information,74 (2) three copies of the proposed tender offer, and (3) material information75 concerning the organization and operations of any corporate or noncorporate offeror.76 Regardless of the efforts made at complete disclosure, an offer cannot become effective without the approval of the director, who may, at his discretion, order a hearing if he determines that the registration statement is insufficient.77 The hearing, which


69. Id. § 30–1501(5).
70. See note 22 supra and accompanying text.
72. Id. § 30–1503(1).
73. Id.
74. IDAHO CODE § 30–1502(1) (Cum. Supp. 1975). Paragraph (2) of this section gives offerors the option of filing the § 13(d) information required under the 1934 Act.
75. See text accompanying note 150 infra.
77. Id. § 30–1503(3). Although the scope of discretion vested in the director of finance appears broad, it remains limited by the Idaho Administrative Procedure Act, IDAHO CODE §§ 67–5201 to –5216 (1973), which provides for judicial reversal of an administrative decision which proves:

(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory authority of the agency;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 67–5215(g). Access to remedies under the Idaho Administrative Procedure Act has
can also be requested by the subject company, delays the effective date of the tender offer for a month or more. According to section 30-1503(5), it must be held within twenty days of filing the registration statement, and a determination on the merits of the offer must come within ten days thereafter. The offer may be postponed indefinitely, however, "for the convenience of the parties or for the protection of the offerees of this state."  

In addition to requiring disclosure, the Idaho Act restricts the nature of the offer itself. Section 30-1506(1) provides that "[n]o offeror may make a takeover offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state." This type of provision is most often construed as conferring extraterritorial power upon the state director of finance by preventing the offeror from bypassing the state and obtaining the necessary shares from other areas not possessing such restrictions. As construed, the provision raises serious constitutional questions concerning the ability of a state to regulate commerce beyond its borders.

Four major exceptions limit the otherwise expansive scope of the Idaho Act. First, ten subject company shareholders must reside in Idaho. The Act also exempts corporations with fewer than 100 shareholders, thereby removing the very small, primarily "single family" enterprises, from state regulation. Third, the Act waives requirements for disclosure and other protections where the board of directors of the subject company recommends acceptance of the tender offer. This "acceptance exemption" removes the state's jurisdiction from all but contested tender offers.
under the theory that the directors' decision acts as a substitute for
the statute. 86 Finally, the Act does not apply to offers by the sub-
ject company to acquire its own shares. 87 Because none of these
exemptions operated to prevent the assertion of jurisdiction over
GWU's offer to take over Sunshine, the constitutional attack
launched in the Great Western case was the only alternative to
compliance with the Idaho Act.

II. BASES FOR UNCONSTITUTIONALITY

As previously discussed, the district court invalidated the
Idaho statute on both preemption and commerce clause grounds.
In most recent Supreme Court cases involving both commerce
clause and preemption issues, the Court's decision has been based
on preemption grounds only, leaving the commerce clause argu-
ments untouched. 88 The court in Great Western, however, of-
tered alternative bases for the holding that the Idaho statute was
constitutionally infirm by addressing both claims of invalidity. 89

A. Preemption

The doctrine of preemption is used to invalidate a state law
under the supremacy clause 90 when the state and federal legisla-
tion expressly or impliedly conflict. 91 Although there is "no one
crystal clear distinctly marked formula," 92 it is generally recog-
nized that there are three situations in which there may be found
an implied congressional purpose to supersede state regulation.
First, "[t]he scheme of federal regulation may be so pervasive as to
make reasonable the inference that Congress left no room for the
States to supplement it." 93 Second, "the Act of Congress may
touch a field in which the federal interest is so dominant that the

86. See text accompanying notes 175-83 infra.
88. E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); City of
Chicago v. Atchison T. & S.F. Ry. Co., 357 U.S. 77 (1958); Cloverleaf Butter Co. v. Patter-
Douglas on Liberty in the Welfare State, 40 WASH. L. REV. 10, 52-53 (1965); Note, Pre-
emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208, 219
(1959).
89. 439 F. Supp. at 434-40.
90. "This Constitution, and all the Laws of the United States ... shall be the Supreme
Law of the Land; ... anything in this Constitution or Laws of any State to the Contrary
notwithstanding." U.S. CONST. art. VI, cl. 2.
91. See Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942).
federal system will be assumed to preclude enforcement of state laws on the same subject. 494 Third, "enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program." 495 These tests may be loosely referred to as pervasiveness, dominance, and conflict of purposes. 496

1. Pervasiveness

The court in Great Western almost summarily dismissed the pervasiveness argument. It concluded that the forty year history of simultaneous state and federal securities regulation indicated that Congress, by its inaction, acquiesced in state regulation of takeovers: 497 "Such coexistence would be impossible if Congress has occupied the field." 498

The court's reading of the facts is correct, but its application of the law is arguably inappropriate. The court assumed that the area under discussion was all of securities regulation, failing to distinguish that from the narrower area of tender offers. Analysis of preemption should begin by identifying the specific area that is preempted. If the issue in Great Western is the regulation of securities in general, then the court's analysis appears to be correct, and existing state securities regulation precludes a pervasiveness argument. However, if the issue is regulation of tender offers, and if there are appropriate reasons for distinguishing the narrower area, then the analysis of the pervasiveness preemption test would be different.

Tender offers should be considered a separate area of regulation because they differ both from the distribution of securities covered by the 1933 Act and from the trading of securities covered by the 1934 Act. Tender offers are different from distributions in

94. Id.
95. Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956). All three of these preemption tests were embraced in the Court's recent decision in Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978) (quoting, inter alia, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (state law preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").
96. Judge Hill clearly recognized and relied upon these three tests in his statement of the preemption standard. See text accompanying note 18 supra.
98. 439 F. Supp. at 435.
two respects. First, a tender offer is an offer to buy shares by a party other than the issuer rather than an attempt by the issuer to sell shares. Second, the investor does not have to make a decision to commit assets that will expand the capital base of a corporation. If the tender offer is for cash, the decision to accept or reject the offer is actually a consumption decision; the shareholder is not entrusting his property to the care of third party managers as is done in a true investment decision. The investor will be getting some or all of his invested assets back in the form of cash. If shares are exchanged for shares of the offeror, the investor decision in a tender offer may still be different than in an original issue of shares. Although some of the managers of the investor's assets may change, the assets will, in many cases, remain committed to the same type of business project that originally attracted the investor (in addition to any other businesses of the offeror corporation).

Tender offers are also different from the trading of securities in other contexts. The purposes of purchases and sales in ordinary trading are investment and profit; the result of the trading is simply to transfer the shares of a corporation. The same purposes and results obtain in a tender offer, but there is a major additional result. The fundamental goal of the transaction is to effect a shift in control of the subject company to the offeror. The atomized investors will still be able to accomplish their profit goal in a sale of shares in a tender offer, but afterwards a single person or entity will own all, most, or a substantial percentage of the shares—enough to gain control of the subject company. Unlike the ordinary trading situations regulated by the 1934 Act and state Blue Sky laws, the property that is being exchanged "in commerce" is not simply a security, but corporate control.

Thus, the investor decisions and the result of the trading in a tender offer are different from those situations which the federal and state securities laws traditionally covered. These factors indicate that the area of tender offers is an appropriate sub-area in which to analyze the proper roles of federal and state legislation.

This conclusion draws support from cases that have come before the Supreme Court under preemption and commerce clause challenges. In *Maurer v. Hamilton*,99 for example, the Court addressed the constitutionality of a Pennsylvania statute prohibiting the carrying of any other vehicle above the cab of a

truck. The Court held that the state regulation was not pre-
empted by the Motor Carrier Act of 1935100 because the federal
legislation regulated only the area of "safety and operation of
equipment,"101 and not the distinct area of "sizes and weights of
motor vehicles."102

Because GWU offered no cases excluding the states from the
field of securities regulation, the court determined that the Wil-
liams Act does not occupy the field of tender offer legislation.103
Had the court limited its consideration to the field of tender offer
regulation, both its conclusion and reasoning may have been dif-
f erent on the question of pervasiveness. It is not simply a ques-
tion of the number of provisions or the volume of regulation.
Rather, pervasiveness depends upon whether the provisions and
history of the federal law and the regulations promulgated there-
under, taken as a whole, create a balanced and plenary scheme.104
When this is reached, Congress may be said to have "taken the
particular subject matter in hand . . . and a State law is not going
to be declared a help because it attempts to go farther than Con-
gress has seen fit to go."105

The Williams Act and its attendant rules and regulations re-
veal a carefully balanced scheme for the regulation of tender of-
fers. This balance is most evident in the form and extent of the
regulation. In terms of extent, the Williams Act was meant to
"fill a gap in the existing scheme of investor protection;"106 however,
Congress specifically desired that its goal of investor protec-
tion should not unduly interfere with the usefulness of tender
offers as a mechanism for changing corporate control.107 In for-
mulating the Williams Act, Congress’ primary concern was pro-

101. 309 U.S. at 601.
102. Id. at 607. Even the State of Idaho referred to the relevant area as the "regula-
tion of tender offers." Memorandum of Defendants in Opposition to Motion for Declar-
tory Judgment and Permanent Injunction at 32, Great W. United Corp. v. Kidwell, 439 F.
103. 439 F. Supp. at 435.
104. See Note, Commerce Clause Limitations upon State Regulation of Tender Offers,
106. Takeover Bids: Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce
and Finance of the Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 10
(1968) (statement of Manuel F. Cohen) [hereinafter cited as House Hearings]; see GAF
Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972); H.R.
News 2811, 2814 [hereinafter cited as HOUSE REPORT].
107. House Hearings, supra note 106.
viding "full and fair disclosure" of specific information deemed necessary for an informed shareholder decision. In addition, the Williams Act sets out a comprehensive scheme of provisions to protect investors in the exercise of their decision to tender. First, where the offer is for less than all of the subject company's securities, the Williams Act provides that within ten days following publication of the offer deposited securities must be purchased pro rata. Second, shareholders who have tendered their shares may withdraw them within the first seven days after publication of the offer and at any time after the expiration of sixty days from the date of the original tender offer. Third, any increase in the purchase price must also be paid to all who tendered at a lower price. These provisions alone evince an integrated scheme of investor protection. The SEC regulations on tender offers, including the new disclosure requirements, represent additional evidence of the completeness of the federal tender offer scheme. Certainly nothing in the Williams Act, its enabling provisions, or the regulations indicates incompleteness or an intention that such regulation constitute only a minimum standard upon which states might add their own provisions. For a state to extend its laws beyond federal regulation evidences an unwarranted assumption that Congress left the subject free and open. In fact, it is arguable that these actions disturb the balanced federal scheme by raising impediments to tender offers which Congress sought to avoid. A state statute such as the Idaho Act that disturbs the balance should be preempted by the pervasiveness of the federal statute.

Pervasiveness analysis in this context would not be complete without addressing a final (and perhaps major) obstacle to the theory—section 28(a) of the Securities Exchange Act. To determine whether section 28(a) is truly an obstacle, it is necessary to consider both the meaning of the section and the effect of incorporating the Williams Act into the Securities Exchange Act. Section 28 provides: "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the

109. Id. § 78n(d)(5).
110. Id. § 78n(d)(7).
rules and regulations thereunder." It is logical to infer from the fact that the Williams Act provisions were incorporated in the "chapter" to which section 28 refers that section 28(a) is to apply to the tender offer provisions even though the Williams Act was passed many years after section 28(a).

If one assumes that section 28(a) applies to the tender offer provisions, the next issue is the meaning of the section. Clauses such as section 28(a) have been discounted as mere "make-weight arguments," and the presence or absence of such a clause is not sufficient to resolve a preemption question. In Pennsylvania v. Nelson, for example, the Court found unimportant a similar savings provision in the United States Criminal Code. It is not necessary to go beyond the language of the second sentence of section 28(a) to determine that it does not resolve any particular preemption question. In fact, it only articulates what is true of every area where there are both state and federal regulations: if the two do not conflict, they both stand; if they conflict, the federal rule supersedes.

It can be argued that Congress has left the determination of whether federal and state regulations conflict in a particular case to the judiciary. If this is the case, then the argument that Congress intended for state takeover statutes to be effective because it has remained silent in the face of their proliferation loses its force. Having impliedly stated that it will not make the decision on conflict, Congress' silence is meaningless.

This interpretation of the savings clause and congressional intent makes sense in view of the status of state takeover legislation and the political pressures on Congress. When the Williams Act was passed in 1968, only one state statute regulating tender offers was in existence. Congress could not foresee then, or in 1970 when it amended the Williams Act, the rapid growth of such statutes in the 1970's. Thus, the threat of conflicting state statutes

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113. Id.
114. If § 28(a) did not apply, neither would any of the other general sections such as § 27 (jurisdiction of offenses and suits), § 29 (validity of contracts), and § 32 (penalties). 15 U.S.C. §§ 78aa, 78cc, 78ff (1976). Without these sections the tender offer provisions would have little force. It is thus difficult to argue that they apply while § 28 does not.
116. Id.
118. Id. at 501 n.10. But see Sexton v. California, 189 U.S. 319, 324-25 (1903).
120. Defendants contend that Congress had sufficient opportunity during the 1970
was not then sufficiently present to prompt Congress to preempt state legislation explicitly. Furthermore, pressure from corporations fearful of takeover has been a factor in the growth of state takeover legislation.\textsuperscript{121} Congress, fearful of alienating corporate constituents by explicitly preempting state takeover statutes, made the tender offer provisions subject to the uncertain meaning of section 28(a). As takeover statutes grew in number, section 28(a) became the politically expedient means of addressing the conflict problem since it left resolution of that problem to the judiciary.

In sum, the district court in \textit{Great Western} too quickly dismissed the pervasiveness test for preemption. By not limiting the area under consideration to tender offer regulation and by not considering the relevance of section 28(a), the court did not properly analyze the plaintiff's potentially valid pervasiveness argument.

2. \textit{Dominance of the Federal Interest}

The district court even more perfunctorily rejected the pre-emption arguments based on dominance of the federal interest. The court was unmoved by the plaintiff's attempt to draw an analogy between this case and \textit{City of Burbank v. Lockheed Air Terminal}.\textsuperscript{122} There the Supreme Court invalidated a local ordinance which sought to prevent aircraft from taking off during certain hours of the night, holding that the Federal Aviation Act of 1958\textsuperscript{123} preempted the ordinance. While expressly stating that the federal system of aviation regulation was so pervasive as to preempt local aircraft noise laws, the Court also cited the need for uniformity in aviation regulation "to insure a delicate balance between safety and efficiency . . . and the protection of persons on the ground. . . ."\textsuperscript{124}

In \textit{Great Western} the court said that "Federal control of the securities field is not 'intensive and exclusive' as is federal control over aviation. States have a valid interest in regulation of securi-


\textsuperscript{121} See, e.g., note 67 supra.

\textsuperscript{122} 411 U.S. 624 (1973).


\textsuperscript{124} 411 U.S. at 638.}
ties sold within their borders and state statutes have existed regulating this area for some time."\textsuperscript{125}

This analysis has two major problems. First, the court, by using the language "intensive and exclusive," appears to have misread the test, treating dominance as synonymous with pervasiveness.\textsuperscript{126} On the contrary, the dominance test is based on the need for uniformity of regulation. Where there is a peculiar national concern that the states cannot handle individually, state regulation is precluded, whether supplementary or not. \textit{Cooley v. Board of Wardens}\textsuperscript{127} sets forth the basic test: "Whatever subjects of this power are in their nature national or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."\textsuperscript{128} Second, the court again failed to delimit the specific area of federal interest. If the area of concern is securities regulation in general, then, as with pervasiveness, the dominance theory would break down. In terms of traditional Blue Sky regulation, Idaho would have a local interest in protecting its citizens from fraudulent and deceptive practices in the sale of securities. However, assuming again that the federal interest involved is the regulation of tender offers, the need for uniformity may be more analogous to the \textit{Burbank} situation than the court admits.

Because of the rapid and overwhelming increase in the number of takeover acts, more than one state may assert jurisdiction over the offer. Jurisdiction may conceivably be claimed in any state in which the subject company is incorporated, has its principal place of business, and/or has substantial assets. Where a tender offer is made for shares of a relatively large corporation, with assets and subsidiaries\textsuperscript{129} spread across the country, any number of states may seek to regulate it. In the face of this problem of multiple burdens, the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Com-

\begin{footnotes}
\item[125] 439 F. Supp. at 435.
\item[126] See id. The court's confusion may stem from the fact that \textit{Burbank} speaks of regulations being "intensive and exclusive," but it does so in the pervasiveness argument. 411 U.S. at 633.
\item[127] 53 U.S. 299 (1851).
\item[128] Id. at 319; accord, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 625 (1973).
\item[129] A parent corporation's principal place of business is not necessarily that of its subsidiaries. This opens the door to jurisdictional claims by any state in which the subject company owns a subsidiary. See Inland Rubber Corp. v. Triple A Tire Serv., Inc., 220 F. Supp. 490 (S.D.N.Y. 1963) (court questioned only the principal place of business of the subsidiary, never mentioning it in terms of the principal place of business of the parent).
\end{footnotes}
mittee believed that there was a particular need for national uniformity in tender offer regulation. The Committee thought the existing statutes created a "mottled pattern," confusing at best, which "may even [have created] outright conflicts of regulatory patterns by multiple states asserting a right to regulate a given transaction." The result is uncertainties in regulation which may lead to the frustration of tender offers.

Furthermore, it is possible that review by several state securities commissioners and the delays of varying lengths could disrupt trading in the stock. Uncertainty as to approval of the offer could spark rumors, causing price fluctuations, or even a ban on trading. Local securities regulations should not contribute to the disruption of the national market any more than local noise ordinances should interfere with national air traffic flow. It would appear, then, that by not limiting the legislative "area" to tender offers, the court again made a hasty conclusion and did not confront a potentially legitimate preemption argument.

Should the appellate court invalidate the Idaho statute on "pervasiveness" or "dominance" grounds, the effect upon all state

130. See Note, State Takeover Statutes and the Williams Act, 32 Bus. LAW. 187, 193 (1976); accord, Sommer, Commentary—Takeover Statutes, 32 Bus. LAW. 1483, 1486 (1977) (former Commissioner of the SEC asserts that there ought to be preemption to avoid the problems of multiple claims on jurisdiction and to grant uniformity to an action directed at nationwide corporations and shareholders). But see Shipman, Some Thoughts About the Role of State Takeover Legislation: The Ohio Act, 21 CASE W. RES. L. REV. 722, 759–60 (1970), in which the author suggests that there is no existing national policy regarding tender offers.

131. Note, supra note 130, at 193; cf. Huron Cement Co. v. Detroit, 362 U.S. 440, 445 (Douglas, J., dissenting) (the City of Detroit issued regulations for air pollution standards in its port in excess of federal standards. Said Justice Douglas, "The variety of requirements for equipment which the States may provide in order to meet their air pollution needs underlines the importance of letting the coast guard license serve as authority for the vessel to use, in all our ports, the equipment which it certifies.").

132. For an example of a tender offer which failed as a result of a state takeover statute, see the offer by Thrall Car Mfg. Co. for Youngstown Steel Door Co., discussed in E. Aranow, H. Einhorn, & G. Berlstein, Developments in Tender Offers for Corporate Control 222–25 (1977). Thrall's offer failed as a result of subject company management accepting a competing offer during the period of administrative procedure. The offer by United Technologies Corp. for The Babcock & Wilcox Co., considered in Brown, Changes in Offeror Strategy in Response to New Laws and Regulations, 28 CASE W. RES. L. Rev. 843, 844–45, (1978), was withdrawn by United Technologies when, as a result of a competing bid solicited by subject company management, the offering price rose from $42 per share to $58.50 per share. United Technologies' offer for Otis Elevator Co. also failed. Quaker State Oil and Valley Camp Agree on Merger, Wall St. J., Mar. 9, 1976, at 2, col. 2. For evidence of delay and confusion caused by state takeover statutes, see the offer by Societe Imetal for Copperweld Corp., discussed in E. Aranow, H. Einhorn, & G. Berlstein, supra at 220–21.
takeover statutes would be devastating. Not only the Idaho Act, but all others regardless of their provisions would fall before a determination that the states, in effect, possess no right to legislate for tender offers. However, the last test for preemption—whether the state statute is "in conflict" with the purposes of the federal statute—does not lead to such drastic results. A determination of "conflict," as found by the district court in *Great Western*, has no immediate effect upon states other than Idaho; nor would that determination preclude Idaho from amending its takeover statute to harmonize with the Williams Act.

3. Conflict

Although section 28 of the 1934 Act may cast doubt upon the application of other preemption methods, it expressly provides for preemption where the state statute conflicts with the provisions, rules, or regulations of the federal law. The legislature does not, however, define what is meant by "conflict," leaving it to the courts to formulate the proper test. Either of two tests may be applied. The stricter test, argued for by the State of Idaho, defines conflict as existing only where it is impossible to comply with the provisions of both state and federal statutes. This test forbids only the most obvious violations of the supremacy clause. The Idaho Act does not appear to create this kind of conflict. However, there are other possible interpretations of "conflict" that are less stringent. The test for conflict most often applied by the Supreme Court was enunciated in *Hines v. Davidowitz*: the court's inquiry must be whether, under the circumstances of the particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Because the difference in purposes between the Idaho Act and the Williams Act is so great, the conflict may well be strong enough to meet this test of preemption. Under this test, the court first had to construe both the Williams Act and the Idaho Takeover Act before ruling on whether they conflicted. A major problem, however, in determining conflict in purposes of

133. *See* text accompanying notes 112-18 *supra*.
134. 439 F. Supp. at 437.
135. 312 U.S. 52 (1928).
tender offer regulation is that nowhere has any legislative body made an express value judgment regarding the desirability of tender offers. All analysis must be drawn by inference from the legislative history of the Williams Act or, in the case of the Idaho Act, from its practical effects.

The court discerned that the overall purpose of the Williams Act was to "balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." This interpretation is in keeping with a recent construction of the Williams Act by the Supreme Court in *Piper v. Chris-Craft Industries, Inc.* In *Chris-Craft*, the Court denied standing to an unsuccessful tender offeror who subsequently sued under section 14(e) of the Williams Act. The Court concluded that Congress "was . . . committed to a policy of neutrality in contests for corporate control . . ." and did not intend that the disclosure requirement favor either the offeror or subject company management.

*Rondeau v. Mosinee Paper Corp.* offered a similar construction of the Williams Act. There the subject company sought unsuccessfully to obtain an injunction against the offeror for harm alleged as a result of failing to file a Schedule 13D. In concluding that the subject company suffered no harm reachable by the Williams Act, the Court considered the purposes of the federal statute:

By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.

By taking "extreme care" to ensure that the regulation gave neither subject company management nor the offeror a tactical advantage, Congress ultimately preserved the tender offer from

138. 439 F. Supp. at 436 (quoting Introduction to S. 510, 90th Cong., 1st Sess., 113
Cong. Rec. 854 (1967)).
139. 430 U.S. 1 (1977).
140. Id. at 29.
141. Id. at 30.
142. 422 U.S. 49 (1975).
143. Id. at 58.
frustration or destruction. Thus, although the Williams Act contains no value judgment, per se, concerning the desirability of tender offers, Congress did recognize that they should not be discouraged "because they serve a useful purpose in providing a check on entrenched but inefficient management."  

The court in Great Western found that the purposes of the Idaho Takeover Act differed substantially from the objectives of the Williams Act. Rather than being a logical extension of the federal regulation, as some have characterized state takeover acts generally, the Idaho statute was found to preclude tender offers and give subject management a tactical advantage over the offeror. More specifically, the court found that the Idaho Act provides (1) more detailed information, (2) undue delay, and (3) an "acceptance" exemption, all of which are in conflict with the purposes of the Williams Act.

The court first found that the information required by the Act in excess of SEC regulations was "only collaterally related to that information that a shareholder would require in deciding whether or not to tender his stock." The court's analysis, however, was conclusory. It failed either to articulate what information required by the state extends beyond a Schedule 13D disclosure or to define the scope of information sufficient for a shareholder to reach a decision. Closer analysis reveals a greater correlation between federal and state disclosure requirements than the court implied. Section 30–1503(2) of the Idaho Act requires disclosure of

[m]aterial information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any mate-

144. See id. at 58–59; Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 945 (2d Cir. 1969); House Report, supra note 106, at 2813.

145. House Report, supra note 106, at 2813. The State of Ohio in its amicus brief to the Fifth Circuit argued that tender offers rarely result in ousting target management: "One of the primary assets which the offeror seeks to obtain in acquiring the target corporation is the management . . . ." Amicus Curiae Brief of the State of Ohio at 8, Great W. United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), appeal docketed, No. 77–2809 (5th Cir. Sept. 16, 1977). However, since Congress has determined that tender offers do have that effect, the possible existence of facts to the contrary does not change the federal purpose behind the Williams Act and thus should not preclude a finding of conflict between the federal and state purposes.

146. 439 F. Supp. at 436, 437.

147. See Shipman, supra note 130, at 758.


149. Id.
rial changes therein during the past three . . . years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three . . . years and financial statements of the offeror for its three . . . most recent annual accounting periods and any current period[.]

plus any further information deemed material by the director. Contrary to the court’s opinion, the disclosures under the Act are duplicative in material part of those required to be filed under the Williams Act. This is particularly so in light of the adoption by the SEC of new, more stringent rules regulating disclosure by the parties to a tender offer. The Commission amended Schedule 13D expressly “to make the information therein more meaningful to investors . . . .” The new Schedule 14D-1, which replaced Schedule 13D, does differ from the state statute in certain respects, however. For example, Schedule 14D-1 does not provide for a description of long-term debt, nor does it require information concerning the location of properties belonging to the offeror and its subsidiaries. The Idaho Act further requires, as the federal regulations do not, a description of business operations of the offeror and subsidiaries and any material changes in the past three years. The court specifically mentioned this addition to the Act as an example of information only “collaterally related” to a shareholder’s decision. As noted earlier, the court set no guidelines to indicate what it considered material to a shareholder. Under the 1934 Act materiality is defined in rule 12b–2(j): “The term ‘material’, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average pru-

151. Id. § 30–1503(3).
153. Id.
156. 439 F. Supp. at 436.
157. See text accompanying notes 149–50 supra.
dent investor ought reasonably to be informed before buying or selling the securities registered.”  

In a normal registration, the disclosure generally required is that which would be important to a sophisticated investor. Without further guidance from the court, it is difficult to conclude that the additional information required by the Idaho Act is not of interest to shareholders and thus, intended to give subject management extra information with which to block the offer.

The argument might also be raised that the additional disclosure required under the Idaho Act unnecessarily burdens the offeror, who must incur additional cost and time to prepare the information. Although the SEC, in promulgating the new regulations, sought to make disclosure more meaningful to investors, it also desired to make “to the extent feasible, the reporting of that information less burdensome to beneficial owners.” It should be noted, however, that the disclosure required by section 30–1503(2) of the Idaho Act is substantially equivalent to the disclosure requirements in Registration Form S–1 pursuant to the Securities Act of 1933. Assuming GWU is registered under the 1933 Act as a result of the issuance of its securities, the additional information required by the Idaho Act will have been filed with the SEC and perhaps even continuously updated both annually and quarterly under the 1934 Act. If so, GWU and other corporations similarly situated should have no great difficulty preparing the additional information required by the State of Idaho beyond updating for the immediate quarter and incorporating the S–1 reports into the section 30–1503(2) disclosure. Thus, the more stringent federal disclosure requirements and the possible existence of either a current S–1 report or periodic reports under

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160. Schedule 14D–1 extends beyond state requirements in other areas. Item four asks for a description of the offeror's source and amount of funds used in the tender offer. Item five requires the offeror to define in detail the purpose of the tender offer for subject company securities. And, Item seven asks for disclosure of all understandings, contracts, and arrangements between the offeror and subject company concerning subject company securities. Schedule 14D–1, 17 C.F.R. 240.14d–100 (1978).
163. Pursuant to § 13(a) and § 15(d) of the Securities Exchange Act of 1934 every registrant under the Securities Act of 1933 or falling within § 12 of the Securities Exchange Act of 1934 must file a form 10–K annual report and a form 10–Q quarterly report. 17 C.F.R. §§ 249.308a–310 (1977). In addition, the registrant is required to file a form 8–K current report upon the occurrence of any one of the events specified therein. 17 C.F.R. § 249.308 (1977).
the 1934 Act weaken the court's conclusion that the additional information required by the Idaho Act serves to favor incumbent management in conflict with the objectives of the Williams Act.

The court found stronger evidence of conflict in the delay imposed by the preoffer notification and hearing procedures of the Idaho Act. Under section 30–1503(1) the offeror must publicly disclose the terms of the proposed offer simultaneously with registration. Although there is no waiting period per se, the tender offer is not effective until it is approved by the state director of finance. At the very least, several days pass between public notification and the initial viability of the offer. It is very likely, however, that this waiting period will be extended. The director may, at his discretion or upon the request of subject management, further postpone the offer pending a hearing on the registration. The Idaho Act's preoffer notification and hearing provisions thus eliminate the elements of surprise and speed upon which an effective tender offer depends. A prime advantage of tender offers over proxy contests and mergers as a means of acquiring corporate control is that the latter two transactions are ultimately controlled by subject company management, while the tender offeror is able to deal directly with the shareholders. By providing advance warning of the offer, the Idaho Act grants subject company management time to marshal its defense tactics against the attempted takeover. During the delay, speculative purchases might drive the price of subject company shares to a level prohibitive for the tender offeror. The ultimate effect of delay, then, is to discourage tender offers from being made.

The delay tactics of section 30–1503 may also operate contrary to the best interests of subject company shareholders—a result inconsistent with the purposes not only of the Williams Act but also of the Idaho Act. Delay disrupts the securities market, causing

164. See id.
165. 439 F. Supp. at 436.
167. Several states have a nondiscretionary preoffer waiting period which may further be extended by a hearing on the adequacy of disclosure. See, e.g., MD. CORP. & ASS'NS. CODE ANN. § 11–902(a); N.Y. BUS. CORP. LAW § 1602 (McKinney Supp. 1977–78); OHIO REV. CODE ANN. § 1707.041(B)(1) (Page Supp. 1977), all of which require disclosure 20 days prior to the offer being made. VA. CODE § 13.1–531(C), disclosure is required 10 days prior to the offer being made.
169. Id. § 30–1503(4).
uncertainty and confusion over whether the offer will take place and at what price.\textsuperscript{172} As rumors of prices circulate, the shareholders may be left even more confused.\textsuperscript{173} Furthermore, they might be entirely denied access to the marketplace and its information if the New York Stock Exchange halts trading in the stock.\textsuperscript{174} It is important to keep in mind that under the Williams Act the decision to tender shares rests entirely with the shareholder, not with subject management. The price at which shareholders relinquish their shares cannot be arbitrarily manipulated via hearings to suit the director of finance or subject management, regardless of their intentions. By approving a delay which may force the Exchange to halt trading in the subject company shares for the duration of the investigation, the director can effectively prevent access to the market for all shareholders. Moreover, delay may result in no bid at all if the tender offer fails. Thus, not only could the shareholders not sell quickly at a profit they consider adequate, they may be prevented from realizing any profit.

However much the preoffer notification and hearing provisions may favor incumbent management, the Idaho Act's "acceptance exemption"\textsuperscript{175} appears to be more favorable still, and works even greater harm to the balance between offeror and subject company so carefully struck by the Williams Act. The court found that this provision, exempting from regulation any offer to which the management of the subject company consents and recommends acceptance, created a serious conflict with the purposes of the Williams Act.\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{172} See E. Aranow & H. Einhorn, Tender Offers for Corporate Control 161 (1973); Sommer, Commentary—Takeover Statutes, 32 Bus. Law. 1483, 1486–87 (1977).
\item\textsuperscript{174} Takeover Bids: Hearings on H.R. 14475, S.510 Before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 46 (1968) (statement of Donald L. Calvin) [hereinafter cited as House Hearings]. Mr. Calvin, vice-president of the New York Stock Exchange in 1968, testified that it is the policy of the Exchange to halt trading in a security where there are "rumors linked to a tender offer," \textit{id}, during the period in which the offer is under review. Even a 5-day preoffer requirement, he believed, would trigger sufficient market disruptions to stop trading in the subject company's securities. It is not inconceivable that the state director would take five days to approve the offer—at least there is nothing to prevent him from doing so. If five days will create havoc, how much more so would a 20-day or 60-day delay while awaiting the results of a hearing on the offer?
\item\textsuperscript{175} Idaho Code § 30–1501(5)(e) (Cum. Supp. 1975). This section exempts from the definition of tender offer "[a]n offer as to which the target company, acting through its board of directors, recommends acceptance to its stockholders if the offer is made to all stockholders on substantially equal terms." See text accompanying notes 85–86 supra.
\item\textsuperscript{176} 439 F. Supp. at 436–37.
\end{enumerate}
\end{footnotesize}
It has been argued by some that the subject company's board of directors would adequately serve as a substitute for the statute by investigating the fairness and adequacy of disclosures.\(^\text{177}\) This theory assumes that subject management, in response to a fiduciary duty, will always work in the best interest of its shareholders. Referring to an analogous provision in the Ohio Takeover Act, one commentator explained the problem with this assumption:

> Although under Subsection (F), the Division of Securities is not compelled to exempt a take-over bid which is approved and recommended by the management of a target company,\(^\text{178}\) there is at least a statutory indication that approval by management somehow carries with it a reduction of the need for adequate disclosure to the shareholders. One wonders why. This exemptive provision raises what can amount to a statutory authorization or sanction of conflict of interest situations. If management of the target company strikes a deal with the offeror, then the chances of an exemption are enhanced, even though such circumstances may create even greater reason for disclosure to the target company shareholders.\(^\text{179}\)

Conflicts of interest appear most clearly in proxy contests\(^\text{180}\) in which the board often uses the proxy machinery in violation of its fiduciary duty, as a means of perpetuating itself in office.\(^\text{181}\) Analogizing from the proxy situation, the potential exists for subject management to "strike a deal" with the tender offeror, contrary to the best interests of shareholders, to keep itself in power.\(^\text{182}\) If so, then shareholders need just as much protection from their own management as they do from an offeror.

This particular exemption is thus inconsistent with the articulated purposes of the Idaho statute—protection of subject company shareholders. It does not, by itself, create a conflict with the purposes of the Williams Act, as do the preoffer notification and hearing requirements, since the Williams Act provisions requiring information disclosure will still operate. However, when viewed in the context of the entire Idaho takeover statute, this exemption

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\(^{177}\) See Shipman, supra note 130, at 729.

\(^{178}\) It appears that the Idaho director has no choice not to exempt an approved take-over bid because an offer which is accepted is not defined as a "take-over offer." Idaho Code § 30-1501(5)(c) (Cum. Supp. 1975).


\(^{180}\) See Eisenberg, Access to the Corporate Proxy Machinery, 83 Harv. L. Rev. 1489 (1970).

\(^{181}\) Id. at 1495.

\(^{182}\) Id.
is another means by which the statute eases incumbent management’s maintenance of control. The Idaho “acceptance” exemption greatly contributes to the conclusion that the statute’s purpose is to protect and favor incumbent management.\textsuperscript{183} The overall conflict of purposes between the Idaho Act and the Williams Act then becomes apparent. A statute that protects or favors subject management is antithetical to the carefully balanced federal scheme which seeks to protect shareholders while maintaining the viability of tender offers as a means of ousting inefficient subject management.

After setting out these three general Idaho requirements—more disclosure, hearing provisions, and exemption from filing where management accepts the tender offer—without significant discussion, the court found it “evident” that the Idaho Takeover Act conflicts with the Williams Act “by destroying the careful balance struck in the Williams Act between the offeror and the management of the target company designed to protect the interests of the shareholders.”\textsuperscript{184} The court should have strengthened its conclusion by looking to other sections of the statute that more convincingly indicate a conflict between the state and federal regulation.

For example, section 30–1503(4) states that the “take-over offer becomes effective when approved by the director.”\textsuperscript{185} The director appears to have wide latitude in approving or disapproving a tender offer. Section 30–1503(5) provides three grounds for the denial of registration of an offer: lack of full disclosure, failure to make the offer to all shareholders on substantially equal grounds, or a violation of the Idaho Blue Sky law.\textsuperscript{186} The statute further permits the commissioner of securities to deny effectiveness if the offering is not in the “public interest.”\textsuperscript{187} Unfortunately, the statute provides no further development of the term “public interest.”\textsuperscript{188} The effect of this basis of disapproval is to turn the Idaho

\textsuperscript{183} One offeror has attempted to take this exemption one step further. In Scott v. Multi-Amp Corp., 386 F. Supp. 44 (D.N.J. 1974), the defendants contended that since they acquired control with the knowledge and cooperation of incumbent management, they had no obligation to file a Schedule 13D statement. \textit{Id.} at 53. The court held that even though management consented to the offer, defendants were required to file a Schedule 13D to protect both stockholders and the investing public. \textit{Id.} at 54.

\textsuperscript{184} 439 F. Supp. at 437.


\textsuperscript{186} \textit{Id.} § 30–1503(5).

\textsuperscript{187} \textit{Id.} § 30–1413.

takeover statute into the same kind of statute as the Idaho blue sky law— one in which the state decides the actual merit of the transaction and may forbid it even though some individuals would still choose to participate after full disclosure.

At first blush, merit regulation of tender offers would seem to be a natural companion to the Blue Sky statute. A closer look, however, indicates that this may not be so, because tender offer regulation would appear to be an area where a complementary system of merit regulation does not merely go beyond the federal scheme but conflicts with it. State Blue Sky laws will typically regulate at the time of the initial offering in that state, and, although time is important, it is not necessarily a key factor in the success of an issue of stock. By contrast, time is essential in tender offers,189 and congressional intent in the Williams Act was to allow tender offers to proceed.190 Taking away a key element of tender offers, as is possible under the provisions of the Idaho Act along the lines of Blue Sky merit regulation, would directly conflict with the federal act.

Nevertheless, the Great Western court’s absolute certainty that the Idaho statute conflicted with the federal act may create an erroneous impression that the issue is an easy one. Certainly, the controversy raised by these provisions cannot be lightly discarded by either proponents or opponents of the Act; the issue demands closer analysis than that afforded by the court. Questions left unanswered concerning the scope of material disclosure and the burden or lack thereof on the offeror to meet excessive disclosure requirements, as well as the failure to consider other relevant sections of the statute, weaken the court’s conclusion. On the other hand, evidence concerning the effects of Idaho’s preoffer notification and hearing provisions upon both shareholders and tender offers appears to contrast sharply with the federal regulation’s objective of protecting investors without inhibiting tender offers. For this reason, the court’s ultimate conclusion, if not its analysis, seems correct.

B. Commerce Clause

The court addressed as a separate issue the potential invalidity of the Idaho Takeover Act under the commerce clause. The court was not mandated to do so. Since federal legislation exists in the

189. See note 45 supra and accompanying text.
190. See text accompanying notes 106-11 supra.
field, the court might just as easily have subsumed the commerce clause issue under the preemption argument of "dominance." Both tests ostensibly require a balancing of local interests and the need for national uniformity of regulation.\textsuperscript{191} As one commentator observed,

\[\text{The Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed state regulation to stand.}\textsuperscript{192}

Thus, preemption is useful as an initial means of deciding the issue without resort to the more basic—and hence more permanent—grounds under the commerce clause. Preemption is a potentially less permanent bar to state regulation because, in the last analysis, Congress controls the extent of state power. While invalidation by means of a "dominance" preemption theory means that the state's right to legislate on a subject has been superseded by federal laws as a result of the need for a uniform national policy, nothing would prevent Congress from altering national policy expressly to permit concurrent state regulation.\textsuperscript{193} On the other hand, where a court has invalidated a state law strictly under the commerce clause, that flexibility diminishes significantly and perhaps disappears. The traditional doctrine of \textit{Cooley v. Board of Wardens}\textsuperscript{194} states explicitly: "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant or in any manner reconvey to the States that power."\textsuperscript{195} Occasionally in this century, however, the Court has spoken of the power of Congress to define the limit of its power under the commerce clause and, thereby, to consent to particular state action which the Court had


\textsuperscript{193} Note, \textit{supra} note 192, at 225.

\textsuperscript{194} 53 U.S. 299 (1851).

\textsuperscript{195} \textit{Id.} at 316.
This has not proven a consistent doctrine, and it is therefore uncertain how the Court would treat the issue today. If the Court follows the Cooley doctrine, the district court's finding of invalidity in this case might create an absolute prohibition of all state takeover acts. If it follows instead the more permissive rationale, the difference in impact between invalidation based on preemption and invalidation based on the commerce clause would shrink; however, the difficulty inherent in getting Congress to carve out power to the states would probably preclude that difference from disappearing altogether.

In invalidating the Idaho Act under the commerce clause, the court applied the general test found in Pike v. Bruce Church, Inc. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . ." The Pike test merely restates


198. Several reasons exist why the district court would want, and perhaps be obligated, to discuss the Act's effects upon interstate commerce as a separate issue. First, the court's incorrect reading of the "dominance" test for preemption—treating it as synonymous with "pervasiveness", see text accompanying notes 125-28 supra—may have precluded it from recognizing the congruence between the preemption and commerce clause tests. More importantly, Great Western presents a case of first impression. This court may have perceived its opportunity to set the stage for all subsequent litigation of state takeover statutes. As such, it was important that all issues be at least presented so that the decision would become precedent, absent a contrary ruling on appeal, for all significant issues raised. The commerce clause issue may be sufficiently similar to the "dominance" argument to be incorporated within it; yet the effects of invalidating the Idaho Act under one theory rather than the other differ enough so that the commerce clause issue merits independent consideration.


If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

Judge Hill's choice of Pike as the standard for determining a commerce clause violation was unexplained, but it appears to have been vindicated by the Supreme Court's recent reliance on Pike in Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978). In Raymond, only four members of the Court joined the opinion in which the Pike balancing test was quoted as controlling. Id. at 797. However, the concurring opinion questioned
more clearly the basic uniformity versus locality test applied by the Court in *Southern Pacific Co. v. Arizona*:

In the application of these principles some enactments may be found to be plainly within and other plainly without state power. But between these extremes lies the infinite variety of cases in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.

The court in *Great Western* interpreted *Pike* to impose a three-pronged test for validity of a state statute.

1. **Legitimate Local Interest**

Under the first prong of the test, the court concluded that the Idaho Act was "neither legitimate nor local in its application." Unfortunately, in reaching this conclusion the court either omitted steps in the analysis or misinterpreted the established tests. It omitted steps by not exploring all the possible state interests. It misinterpreted the established tests by finding an interest—as opposed to a burden—illegitimate, and by scrutinizing the "local application" of the statute.

The court interpreted the "local interest" phrase to require a statute's effect to cease at the state lines. A statute that affects citizens outside the state could not, therefore, be achieving a "local" interest. This statement taken to its extreme is not necessarily true. For example, state corporation laws govern the relationship between the shareholders and the corporation and its directors, no matter where the shareholders live. The state's interest in regulating that relationship is still legitimate and local.

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the appropriateness of balancing state with national interests only in the context of state safety regulations. *Id.* at 798. Otherwise, it appears to have been presumed in *Raymond* that in nonsafety areas, such as in *Pike* itself, balancing national interests with legitimate state interests is the proper method of analysis. *Id.*

201. 325 U.S. 761 (1945).
202. *Id.* at 768-69.
203. According to the court, the Idaho Act must first, effectuate a legitimate public interest; second, affect interstate commerce only incidentally and; third, if the first two tests are met, meet a balancing test applied to determine whether or not the burden imposed on commerce is excessive in relationship to the alleged local benefits provided in the statute.
439 F. Supp. at 438.
204. *Id.*
205. *Id.* at 438-39.
even though it may affect people outside the state. As with pre-
emption, the Great Western court rejected the Idaho Act's articu-
lated purpose—the "protection of shareholders of corporations
which are incorporated in or have significant connections with the
controlling state"—in favor of examining the "practical effects"
of the statute on interstate commerce. Support for the "prac-
tical effects" test can be found in numerous decisions of the
Supreme Court. In Foster-Fountain Packing Co. v. Haydel, the
Court held that an express legislative purpose did not necessarily
govern the validity of a state enactment. Rather, "[i]t is open
to [the plaintiff] to show that in their practical operation [the stat-
ute's] provisions directly burden or destroy interstate com-
merce."

In looking beyond the express statutory purpose and applying
the "practical effects" test, the court made two analytical errors.
First, it hypothesized effects. Second, it assumed that the purpose
it discerned—protection of incumbent management and of the
state's economic welfare—was illegitimate.

While it is true that the court was hampered in its search for
effects by the lack of administrative history under the Idaho Act
and was forced to turn to hypothesis, the degree of uncertainty
associated with each hypothesis weakens the analysis. The only
certain effect the court pointed to was the fact that a subject com-
pany could delay the offer by requesting a hearing, which must be
granted. The other "effects" were simply possibilities for
which the court supplied little or no supporting evidence or analy-
sis. It was suggested that the statute "might dissuade a potential
offeror from making an offer" if it has to comply with one or
more "onerous" state statutes. Neither evidence nor authority
was cited for this conclusion. The court went on to say that a
statute might keep the initial offer low. The court overlooked an

(Court recognized that the state had a local interest in assuring the safety of its highways
even though the exercise of its legislative authority pursuant to that interest created effects
beyond state borders and into interstate commerce).

207. 439 F. Supp. at 438.
208. Id.
209. 278 U.S. 1 (1928).
210. Id. at 10.
211. Id.; accord, Pike v. Bruce Church, Inc., 397 U.S. 137, 144 (1970); Shafer v. Farm-
ers Grain Co., 268 U.S. 189, 198, 200 (1925); Binderup v. Pathe Exch., Inc., 263 U.S. 291,
309 (1923); Lemke v. Farmers Grain Co., 258 U.S. 50, 59 (1922); Swift & Co. v. United
States, 196 U.S. 375, 398 (1905).
212. 439 F. Supp. at 439.
213. Id. at 438.
equally logical cause for a company making a lower offer to shareholders than to management. It is true that management acceptance of an offer will obviate compliance with the Idaho statute, but it can be argued that a greater incentive for sweetening the offer to management would be a significant reduction of the risk of failure, regardless of the existence of state statutes. Thus, although freedom from compliance is an ancillary benefit of management’s acceptance of an offer, it can hardly be said to be a large enough motivation so as to create a causal connection between the offering price and the statute.

As another practical effect, the court suggested that the offeror might reduce its original offering price as a consequence of delaying tactics permitted by the statute. This effect would not seem to be an expected result of the market process. News of a takeover attempt usually contributes to a rise in market price as arbitrageurs buy up shares. The price rise would diminish the margin between the market price and the offering price. Any reduction in the offering price further reduces that margin, provides less incentive for shareholders to tender, and lowers the chance of success. It would not make sense for an offeror to lower the probability of success by reducing the offering price. This “practical effect” thus has little connection with reality. Of the court’s four suggested effects, only one—the subject company’s ability to delay—is either present or reasonably grounded in reality. Although the court’s analysis may not be sound, its conclusion that the statute’s purpose is protection of incumbent management is not so unreasonable. Since the management of an Idaho-based corporation provided the Idaho legislature with a draft of the statute, there is at least circumstantial evidence that the law was designed to protect the interests of incumbent management in limiting the use of tender offers in Idaho.

The court’s second analytical error—assuming that protection of the state’s economic well-being is illegitimate—is more serious and created further problems in the court’s reasoning. Certainly the arguments against a legitimate state purpose are not so overpowering as to preclude the necessity for further analysis.

214. Id.
216. See note 67 supra.
The Idaho Act may be a reaction to an underlying fear that the acquiring corporation after takeover will either liquidate the subject company or move it out of state, resulting in loss of business and employment. By apparently seeking to protect incumbent management, the legislature may have attempted to protect the state's economic well-being. Citing to language in *H.P. Hood & Sons v. DuMond*, the court held this interest to be per se illegitimate. The court is not alone in its conclusion. At least one commentator has offered an extensive list of Supreme Court decisions to prove that a statute which preserves a state's interest in its economic welfare is per se illegitimate. This position finds more specific support in the language of *Pike v. Bruce Church, Inc.*: "[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually per se illegal." This analysis appears to be misleading. Legislation which seeks ultimately to protect a state's economic opportunities is not necessarily an illegitimate exercise of the state's power. In *Pike* the Court did not declare the state's interest illegitimate. On the contrary, it recognized the state's interest, if tenuous, "in having the company's canteloupes identified as originating in Arizona," but held that the burden on commerce imposed by the statute was "per se illegal." In other cases as well, the Court did not question the legitimacy of the state's interest in keeping business and employment. Rather, the Court has generally applied a balancing test to measure the legitimate economic interest of the state against its effect on interstate commerce. Applying to tender offers the general principle that a

221. Note, supra note 217, at 1159.
223. Id. at 145. This analysis was also followed in Langevoort, State Tender Offer Legislation: Interests, Effects, and Political Competence, 62 CORNELL L. REV. 213, 252 (1977).
224. 397 U.S. at 145.
state may legitimately protect its economic welfare, the state might arguably effectuate that interest by protecting incumbent management who would keep both jobs and businesses in state.\footnote{226} A successful tender offer, particularly by a foreign offeror, raises a legitimate concern of both job and business displacement. Certainly, the State of Idaho could be said to have a legitimate interest in legislating to prevent possible adverse economic effects resulting from the acquiring corporation taking such action.

Once the court determined that the statute's purpose of protecting incumbent management was illegitimate, it ended its search for statutory purposes. It did not investigate the possibility that the State of Idaho may also have a legitimate interest in regulating tender offers pursuant to its power to regulate the internal affairs of corporations. Though this constitutes the appellant's major argument on appeal,\footnote{227} the court failed to discuss its merit. It has been argued that a takeover bid is essentially just such an internal affairs transaction which a state may reasonably regulate.\footnote{228}

The theory concerns regulation under the substantive law of corporations of matters involving ownership and control similar to a proxy contest. According to the major proponent of this theory, the relationship between offeror and offeree in a tender offer creates a "de facto proxy solicitation";\footnote{229} the decision to tender shares effectively elects officers and determines policy. The internal affairs argument has the added benefit of justifying the possible extraterritorial reach of the Idaho Act, since the state's protection is based not on territoriality but on the internal workings of an in-state corporation.\footnote{230}

Criticism of the internal affairs doctrine traditionally focuses on two arguments: the lack of an existing relationship between the offeror and offerees, and the propriety of regulation by a state of foreign corporations. First, opponents of the doctrine maintain that a tender offer does not concern the internal affairs of the cor-

\begin{itemize}
\item 356 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 531–40 (1949); Toomer v. Witsell, 334 U.S. 385, 403–06 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); Johnson v. Haydel, 278 U.S. 16, 16–17 (1928); Bethlehem Motors Co. v. Flynt, 256 U.S. 421, 426 (1921).
\item 229. Id. at 744.
\item 230. Id. at 750.
\end{itemize}
poration, governed by the fiduciary relationship existing between the managers and shareholders.231 Such a relationship arises in a proxy contest in which the successful party, usually a controlling shareholder, will acquire a fiduciary relationship to the corporation and other shareholders. It is argued, however, that a proxy contest occurs within the framework of existing corporate relationships, whereas in the tender offer situation, the offeror is an outsider, a potential shareholder, who has not yet formed a relationship with the subject company.232

Nonetheless, a tender offer may be more analogous to a proxy contest than critics recognize. Both are often used to acquire control over the corporation. The regulation of tender offers may be construed as the regulation of the internal affairs of a corporation by the application of the anticipatory fiduciary duty doctrine. Judge Learned Hand first articulated this doctrine in Gratz v. Claughton.233 In that case, the Second Circuit imposed a fiduciary duty on insiders—directors, officers, and beneficial owners of ten percent or more of the corporation’s securities—in the sale of securities to persons not yet shareholders.234 The doctrine envisions a transaction, not with an existing corporate beneficiary, but with one whose purchase makes him a beneficiary.235 The reason for the doctrine is that a director, officer, or beneficial owner possesses information not readily accessible to existing or potential shareholders.236 Judge Hand argued in Gratz that a potential shareholder has a right, before final commitment of his assets to the corporation, to rely upon the seller to act with complete candor and in the best interests of the potential shareholders.237 If this duty of candor exists after the shareholder’s assets are committed to the enterprise, then that relationship will exist before, as well, because that is where it is most needed to protect the purchaser who reasonably relies upon the representations of the seller.238 The SEC has approved the doctrine of anticipatory fiduciary duty in Cady, Roberts & Co.239 with regard to rule 10b-5

231. See Greenfield, Regulation of Contested Cash Tender Offers, 46 Texas L. Rev. 915 (1968); Note, supra note 217, at 1154-55.
234. Id. at 49.
235. Id.
236. Id.
237. Id.
238. Id.
239. 40 S.E.C. 907, 914 n.23 (1961).
actions by a defrauded purchaser against directors, officers, or others with "inside" information. As the Chairman noted:

There is no valid reason why persons who purchase stock from an officer, director or other person having the responsibilities of an "insider" should not have the same protection afforded by disclosure of special information as persons who sell stock to them. Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.\textsuperscript{240}

Although nominally a purchasing outsider, the acquiring corporation in a tender offer arguably stands in the position of the insider beneficial owner of \textit{Gratz} because it has information not readily accessible to shareholders. The doctrine can be extended to cover a new class of beneficiaries: those shareholders who do not tender some or all of their shares and those whose shares are taken up pro rata. The purchasing corporation which knows of its plans for fitting the acquired corporation into its business (which information is not readily accessible to shareholders) would have a fiduciary duty to those who sell a portion of their shares to it. Analogizing from \textit{Gratz} and \textit{Cady}, prior to making a final commitment to retain their assets with the corporation, the shareholders (at least those who keep some shares) have a right to rely on the acquiring corporation to act to further their best interests by disclosing all information material to the shareholder's decision. A fiduciary relationship between remaining subject company shareholders and the offeror would begin when the offer is made, since that is when the shareholders need the information to make a decision. If this argument is accepted, a corporate relationship based on state common law doctrine would be in existence at the time of the actual sale of shares. The sale transaction in a tender offer would then be sufficiently analogous to the proxy situation to justify state regulation under the internal affairs doctrine.

Critics also question the propriety of applying to a corporation the laws of a state other than the state of incorporation.\textsuperscript{241} Traditionally, the state of incorporation is the only one that regulates

\textsuperscript{240} \textit{Id.} at 913–14.

the internal affairs of a corporation.\textsuperscript{242} By basing its jurisdiction over a corporation on the place of incorporation or principal place of business and substantial assets, the Idaho takeover statute creates the possibility that more than one state will control this particular "internal affair" of corporations. Since the laws of the state of incorporation control the internal affairs of a corporation because the corporation is a creation of the laws of that state, it would be conceptually inconsistent for more than one state to regulate the internal affairs. Although adhering to the conceptually consistent theory of internal affairs would no doubt result in less complicated administration and fewer conflicts of law problems, such adherence elevates form over substance. Often the certificate of incorporation is the only contact a state has with its "home" state.\textsuperscript{243} The corporation's promoters choose a state for incorporation not because it has its principal place of business there, but because the state corporation laws are more favorable than those of other states.\textsuperscript{244} GWU is an example of this "forum-shopping." It was incorporated in Delaware but all its other contacts are west of the Mississippi. To insist that a state cannot regulate tender offers pursuant to an internal affairs theory is to ignore reality. It is therefore appropriate that there is not absolute prohibition on regulation of internal affairs by another state.\textsuperscript{245}

This is not to say that there should not be some criteria by which to restrict the application of the internal affairs doctrine. Most takeover statutes base jurisdiction over the subject corporation on a formula which considers its place of incorporation or principal place of business and/or substantial assets. The Great Western court read the latter part of the Idaho test disjunctively to be "principal place of business or substantial assets,"\textsuperscript{246} assuming the coverage by the statute was greater than it really was. The Idaho Act, as it should be read "principal place of business and substantial assets,"\textsuperscript{247} appears to base jurisdiction on reasonable

\textsuperscript{242} H. HENN, LAW OF CORPORATIONS § 98 (2d ed. 1970).
\textsuperscript{244} H. HENN, supra note 242, § 95.
\textsuperscript{245} See Shipman, supra note 228, at 752, 754–55; cf. Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 321 (5th Cir.), cert. denied, 361 U.S. 885 (1959) (laws of forum apply when only contact with incorporating state is incorporation itself and neither the corporation's charter nor the statutory laws of the incorporating state apply.).
\textsuperscript{246} 439 F. Supp. at 436.
economic realities.

In what could be considered a corollary to or subcategory under the internal affairs doctrine, the State of Idaho may have a third legitimate interest in regulating tender offers to allow corporate directors to fulfill their fiduciary duties under traditional state regulation of corporations. Assuming a tender offer can be made a matter concerning the internal functioning of the corporation, the task of responding to the offer would fall to the board of directors. The board is charged with exercising its management duties in the best interests of the corporation and the shareholders.248 It may be argued that the board could best fulfill its duties as fiduciary by being given the opportunity to pass on the merits of the offer and to recommend acceptance or rejection of the offer, along with providing even more information to the shareholders.249 By protecting the directors and giving them time and information before the offer becomes effective to decide the merits of the offer, the state may simply be permitting the fulfillment of the board’s duty to protect its shareholders.

No matter what theory is accepted, the State of Idaho arguably possesses a legitimate interest in the regulation of tender offers. Whether or not the Idaho Act appears to effectuate an interest in investor protection, it does appear to protect subject company management and may thereby serve legitimate state interests: protection of economic welfare and regulation of corporate internal affairs. For these reasons, it appears that the Idaho interest was sufficiently legitimate to meet the first prong of the Pike test, despite the court’s conclusion to the contrary.

2. Incidental Burden on Interstate Commerce Through Extraterritorial Effect

Having found that the Idaho Act was not protecting a legitimate local interest, the court summarily asserted that the statute had a substantial effect on interstate commerce.250 In so doing, the court seems to have made a distinction between “burden” and “effect” on commerce, discussing “burdens” only when it reached the balancing portion of the analysis. This distinction, based on a rigid adherence to the language of the text in Pike, would not ap-

pear to be valid since it is necessary to determine whether the extent of the "burden" is merely incidental before proceeding with the balancing analysis described in Pike.251

Although the court was correct in its statement that the Idaho statute prevents a tender offer from going forward until the offeror had complied with its provisions, this statement, even with the later list of burdens added in the third step of the test, is not a sufficient analysis of the burdens on commerce. To be sufficient the burdens must be considered in light of the state interests protected by the statute.252 The burden which will be tolerated depends upon the nature of the state interest.253 Thus, there are three steps in a complete analysis of burdens on interstate commerce. The first step is to ascertain exactly what the burdens are; second, to compare those burdens with the legitimate state interests; and third, to determine whether the burdens are merely incidental or per se illegal.

The Act prohibits the making of a cash tender offer anywhere unless it is made as well to all shareholders in Idaho.254 In so doing, the Act prevents the interstate movement of three things: the offer itself, the securities for which the offer is made, and the control of the corporation. Similar provisions255 have been criticized as granting the state extraterritorial regulatory powers.256 The court adopted this criticism, stating: "The Idaho Statute thus undertakes to regulate the offeror's affairs not only within Idaho, but within all states in which the offeror might make a tender offer."257

Concededly, the Act has the potential to frustrate or destroy tender offers once made and discourage others from being made. Its provisions impede the very elements which make a tender offer

251. The Pike test states: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. 137, 142 (1970) (emphasis added). See text accompanying notes 192-209 supra.

252. Pike goes on to explain that the tolerable burden "will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

253. Id.


256. See E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 172 (1973); Sommer, supra note 241, at 714.

257. 439 F. Supp. at 439.
successful: secrecy and speed.\textsuperscript{258} Even several proponents of
takeover statutes have acknowledged the potential adverse effects
upon tender offers.\textsuperscript{259}

While these predictions may be realistic, it is difficult to prove
that the Idaho Act would in fact discourage or frustrate a tender
offer. The GWU offer did not proceed far enough to test the
Act's effects; nor did the court present evidence to back its opinion
as to the “tendency” of takeover statutes. The absence of proof
concerning the Idaho Act opens the door for evidence of other
states' experience. In an amicus brief filed with the Fifth Circuit,
the State of Ohio argued against the court's assumption; the Ohio
brief contended that in the eight years since the Ohio Takeover
Act was enacted, it "has not prevented a single corporate tender
offer."\textsuperscript{260} Ohio's conclusions as to its own statute, while perhaps
probative, cannot be applied universally to assume \textit{ipso facto} that
no state takeover statute delays or prevents tender offers. Only
ten takeover bids have been administered under the Ohio Act in
its eight year history.\textsuperscript{261} Between 1970 and 1976 there were
nearly 300 tender offers made in the United States.\textsuperscript{262} Without
further statistical evidence testing the effect of takeover statutes on
tender offers, it is difficult to draw any conclusions from the Ohio
experience. Since the court presented no evidence to support its
conclusion and the Ohio information is insufficient, it is difficult
to accept conclusively the position of either the court or of the
State of Ohio.

Should the amicus brief be correct in assuming that state stat-
utes generally do not cause tender offers to fail, the Idaho Act
may nonetheless impose a burden on the interstate tender offer.
The delay inherent in administration under the Idaho Act may
cause an increase in the price, forcing the offeror to pay more for
subject company shares than it would otherwise have been re-

\textsuperscript{258} See text accompanying notes 165–71 \textit{supra}.

\textsuperscript{259} Referring to the Ohio Act, Arthur Vorys stated, "I suspect, so far as Ohio and
Ohio-based corporations are concerned, the corporate takeover as a form of corporate war-
Morgan Shipman, as well, believed that "[t]he takeover movement is now largely mori-
bund because . . . [of] the state laws governing takeover bids. . . ." Shipman, \textit{supra} note
228, at 722–23.

\textsuperscript{260} Amicus Curiae Brief for the State of Ohio at 19, Great W. United Corp. v.

\textsuperscript{261} \textit{Id.} at 6.

\textsuperscript{262} Appleton, \textit{The Proposed SEC Tender Offer Rules—The Proposed Requirements},
quired to pay. Additional information required in Idaho may also place a burden on the offeror to update and include with tender offer filings information found in its SEC record of Form 10-K and Form 8-K reports. Finally, the Idaho Act together with other takeover statutes might impose a burden on the offer by forcing the acquiring corporation to comply with multiple or conflicting statutes. In Great Western, GWU faced the potential of having to comply with three takeover acts: Idaho, New York, and Maryland. Although the Great Western court refused to assert jurisdiction over the challenge to the statutes of the latter two states, all three states had claimed jurisdiction over the offer based upon Sunshine assets found within their borders. To the extent that states claiming jurisdiction over an offer differ in their requirements, the offeror faces the added burden of meeting the aggregate of all requirements imposed by those statutes. Regardless of the content of other statutes, the simple fact of forcing the offeror to file in two or more states imposes a burden on the offeror, at least to the extent of the additional time spent in preparing and filing pursuant to multiple state statutes.

To the extent that the Act either destroys or impedes the making of a successful interstate tender offer, it burdens interstate commerce. By raising barriers to the offer itself, the Idaho Act also impedes the traffic in securities and corporate control, both of which depend upon the unfettered functioning of the offer.

Implementation of the Act, however, might still further burden interstate commerce, irrespective of its actual impact on the offer itself. Through its preoffer notification and hearing provisions, the Idaho statute potentially disrupts the market for subject company shares. The court noted the possible disruption, reasoning that "there would be little market for the stock while the waiting periods were complied with." In a statement by the New York Stock Exchange arguing against the Ohio Takeover Act, the Exchange considered in more detail the effects of preoffer notification and delay:

While this [advance notice requirement] would provide an extended period during which the Division could review the offer

263. See text accompanying notes 161–63 supra.


266. 439 F. Supp. at 439.
and entertain protests by the target company management, it would also create difficult conditions in the market for the target company's stock. . . . [T]here could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. In some cases trading may be halted for the duration of the . . . period. The impact of the . . . law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the . . . company.267

Market disruption is likely to occur during the postoffer waiting period because there is no uncertainty about the viability of the offer. Where the frustration of tender offers acts to impede existing subject company shareholders from trading their securities outside the normal channels of trade, the potential effects of state-imposed delay upon the market would prevent those wishing to become subject company shareholders from gaining access to those channels during the period of review. As a result, a burden of some sort appears to cover all aspects of an interstate tender offer: the offer, the shift in corporate control, and the trading of securities.

But merely because a statute has a more than local effect and creates a burden on commerce does not mean ipso facto that it is an illegal or unconstitutional burden. A burden may be illegal in three ways. First, it may be per se illegal because the state statute discriminates against interstate commerce in favor of local business.268 Those statutes which impose a heavier obligation on out-of-state transactions or out-of-state parties doing business in-state will be imposing per se illegal burdens on commerce.269 So also will those state laws which require business to be done in-state.270

Second, where a state regulates in an area where there are likely to be conflicting and/or multiple state laws, it will have to

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269. Id.
270. Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970); see, e.g., Toomer v. Witsell, 334 U.S. 385 (1948); Johnson v. Haydel, 278 U.S. 16 (1928). In Toomer, the Court paid close attention to the cost burden placed on the company, saying: "There was also uncontradicted evidence that appellants' costs would be materially increased by the necessity of having their shrimp unloaded and packed in South Carolina ports rather than at their home bases in Georgia where they maintain their own docking, warehousing, refrigeration and packing facilities." Id. at 403.
make a detailed and persuasive showing that its interest offset the burdens on commerce in order for the burden to be sustained. Finally, if there is not a danger of multiple inconsistent burdens, a burden may be illegal if the benefits under the statute do not counterbalance the burdens on commerce.

As stated above, the burden which will be tolerated depends upon the nature of the state interest protected by the statute. In the case of the Idaho Act, the degree of the burden may vary depending upon which theory of legitimate state interest is used. If the legitimacy of Idaho’s tender offer regulation hinges on the state’s right to regulate the internal affairs of its corporations, then any extraterritorial effects could be viewed as being on the same level as those which result from the state’s traditional regulation of corporate internal affairs. The fact that the regulation affects subject company shareholders beyond the state borders would not necessarily be an improper application of the statute, but rather the result of internal regulation. However, the difficulty in arguing the legitimacy of the regulation under an internal affairs theory lessens the likelihood that the Act would escape invalidation as an unconstitutional overreach in derogation of the commerce clause.

On the other hand, if the legitimacy of Idaho’s tender offer regulation rests on the protection of local economic interests or on shareholder protection, then the burdens on interstate commerce may be more difficult to justify. First, protecting local economic interests would appear to be a relatively weak state interest because the Supreme Court appears to treat those interests less favorably than state interests in the protection of local health and safety. Second, the state's interest in shareholder protection is rather small where only eleven resident shareholders are required to trigger the statute.

Balanced against this, the Act imposes multiple burdens—the interference with the interstate movement of the offer, the securities, and corporate control; the inconvenience of multiple filings for the offeror; and the potential for market disruption.

The Great Western court addressed the multiple burdens issue in conclusory fashion: "[C]ompliance . . . with one state statute interferes with commerce; compliance with many state statutes (as in a tender for a large company) would unquestionably have a deleterious effect on interstate commerce." The next two sections suggest the analysis that would be more appropriate in deciding the commerce clause issue.

3. Multiple Burdens

As previously stated, if a statute regulates in an area where there exists the potential for multiple and conflicting statutes, then the state must show that the interest protected is sufficiently important to justify the regulation. The first question to be answered is whether there are in fact multiple conflicting state statutes in the area of tender offer regulation. The answer depends upon the extent of jurisdiction asserted by the statutes. There are thirty-three state takeover statutes. Some apply where the subject corporation is incorporated in the state or has its principal place of business and substantial assets in the state. Others apply when the subject company is incorporated in the state, or has its principal place of business or has substantial assets in the state. If all statutes were of the latter type, more states would have jurisdiction over tender offers, particularly those for the larger corporations, and there would be a greater likelihood of conflict among state statutes. But not all takeover statutes assert such broad jurisdiction; in such cases, only tender offers for the largest corporations are likely to involve more than two state statutes.

Even though the statutes governing a given takeover are few in number, there are many possibilities for conflict. The waiting periods vary, as do disclosure and hearing requirements.

276. See note 64 supra.
278. E.g., IND. CODE § 23 (Supp. 1975); MD. CORP. & ASS'NS. CODE ANN. § 11-901(i) (Supp. 1976).
279. For instance, the Ohio Takeover Act, OHIO REV. CODE ANN. § 1707.041(B)(1) (Page Supp. 1977), has an automatic 20-day waiting period and the Idaho Act, IDAHO CODE § 30-1503(4) (Cum. Supp. 1975) has no specified waiting period beyond that necessary to obtain the director's approval.
280. Under the Idaho Act, IDAHO CODE § 30-1503(4) (Cum. Supp. 1975), subject company management may order that a hearing be held, while under the Ohio Act, OHIO REV.
Standards of approval for the offer itself also differ. The opportunities for delay in one state could spell defeat for a tender offer made to shareholders in other states whose statutes have different provisions. It has been suggested that these burdens will disappear when states coordinate their efforts and when conflicts of law principles are applied. State coordination is not guaranteed and conflicts of law principles will not preliminarily restrict the number of state statutes with which an offeror must comply.

It would seem that even with few states actually regulating a tender offer, the multiple burdens on interstate commerce would require the state to show that it is protecting a substantial state interest. The state would have to demonstrate that either its interest in investor protection, internal affairs regulation, or protection of local economic well-being is important enough to justify multiple burdens on interstate commerce. This would be a difficult task. Since there are already federal laws that protect investors, those three state interests would arguably not be sufficient. It is also doubtful that Idaho will be able to show that tender offers present a real economic threat in terms of loss of jobs or removal of the business from the state. The state's interest in internal affairs presents the strongest state interest because the tender offer will result in a change of corporate control, which has traditionally been a matter of state control. The tender offer method of acquiring control avoids state regulation because it is not a shift which originates from within the corporation. It may be elevating form over substance to have the place of origin of the change govern the application and constitutionality of state law. A problem may arise, though, when a state other than the state of incorporation asserts jurisdiction. The other state may have difficulty

Code Ann. § 1707.04(B)(1)(B) (Page Supp. 1977), subject company management may request a hearing, but the commissioner may deny the request if he finds it unnecessary. 281. For instance, registration may be denied under the Minnesota Act, Minn. Stat. Ann. § 803.03 (subd. 5) (West. Cum. Supp. 1977), if the takeover bid (1) fails to provide for full and fair disclosure of all material information, (2) is unfair and inequitable to shareholders, (3) is not made to all shareholders on equal terms, and (4) is in violation of the Blue Sky Law. Other statutes require somewhat less. The Idaho Act, Idaho Code §§ 30-1501 to -1513 (Cum. Supp. 1975), contains no provision requiring the offer to be found “unfair and inequitable.” The Pennsylvania Act, Pa. Stat. Ann. tit. 70, § 74 (Purdon Supp. 1978), includes all standards but that forbidding the offer to be made on other than equal terms.


283. Cf. id. at 8 (The Ohio Attorney General argues that the offeror, rather than wishing to remove management following a takeover, seeks to maintain existing management.).
proving a need for its additional regulation where the incorporation state already regulates or has chosen not to regulate. This makes the state's interest in internal affairs regulation a weaker interest, perhaps too weak to tip the balance against the multiple burdens.

4. **Balancing**

To proceed to the balancing analysis, it must be assumed that the effect on interstate commerce is merely incidental to the protection of state interests. When the state's interest rests on the regulation of the internal affairs of a corporation, it would be reasonable to conclude that the effect on commerce is incidental. The third criterion of *Pike* balances these incidental burdens against the benefits, focusing solely upon that benefit to shareholders which might accrue from the Idaho Act's implementation.\(^{284}\) It found the sole benefit to shareholders to be an increase in the value of their stock during the waiting period.\(^{285}\) As the stock's price rises on the market, the acquiring corporation must also raise its offering price to maintain sufficient incentive for shareholders to tender.

After weighing this minimal benefit against the state statute's tendency to discourage tender offers, the court found that the balance was tipped against the validity of the statute.\(^{286}\) The court's analysis may be somewhat incomplete. Given the general presumption in favor of constitutionality, the court should have raised every possible benefit and should have evaluated the extent of those benefits. The totality of benefits could then have been weighed against any burden on interstate commerce.

The court was correct in weighing the benefits to the shareholders, but it stopped short of considering all possible shareholder benefits. There may also be a shareholder benefit in the increased disclosure required under the Idaho Act. However, it is doubtful that shareholders would derive any actual benefit from the greater disclosure, since the amount or kind of information is not substantially different from the information required under section 14(d) of the 1934 Act.\(^{287}\)

The benefit gained from a price rise can be challenged in the same way. The federal requirement that any increase in offering

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285. *Id.*
286. *Id.*
287. *See* text accompanying notes 149–60 *supra.*
price must be paid retroactively to all shareholders who have already tendered\textsuperscript{288} assures equal benefits to all shareholders in the same manner as the Idaho Act requires. Furthermore, if the waiting period results in the offer failing or being withdrawn, either through the market price increasing to a level prohibitive for tender offers or the subject company management being given time to defend successfully against the offer, not only will the shareholder not receive the benefit of an increased price, but he will also lose any benefit of profit on his investment.\textsuperscript{289} Thus, whatever benefit could be derived from the Act by virtue of the state's express interest in shareholder protection appears all but neutralized in light of other circumstances.

Since the court did not recognize the protection of local businesses and jobs to be a legitimate state interest, it would not have considered any benefits flowing from such regulations. To the extent the Act prevents the liquidation or removal of corporations from the state, it would benefit the citizens and the state in general by preserving employment opportunities and tax revenues for the State of Idaho. By providing protection for subject corporations, the Idaho Act might succeed in drawing threatened corporations to Idaho, thus possibly creating greater revenue and employment for the state. However, this state benefit also pales when countered by a lack of evidence that acquiring corporations generally liquidate or transfer subject companies.\textsuperscript{290} Without such proof it is equally likely for acquiring corporations to allow the subject company to continue as before, changing only management to operate more efficiently. The loss of a few positions would not be a sufficient economic loss to warrant the burden on interstate commerce. The benefit also weakens when viewed in light of the congressional purpose of maintaining tender offers—to allow efficient companies to take over the less efficient. Thus, Idaho's economy could benefit from a more efficient use of both human and natural resources.

\textsuperscript{288} 17 C.F.R. § 240.14d-7 (1978).
\textsuperscript{289} Of course, the shareholder might still be able to sell his stock on the open market before the offer failed and take advantage of the increased price. If the New York Stock Exchange halted trading in the subject company stock, however, this avenue would close as well. \textit{See note 174 supra.}
\textsuperscript{290} \textit{Cf.} Amicus Brief of the State of Ohio at 8, Great W. United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), \textit{appeal docketed} No. 77-2809 (5th Cir. Sept. 16, 1977) (The Ohio Attorney General argues that the acquiring corporations desire to maintain existing management, implying that they would not liquidate the subject company).
One last possible benefit may be gleaned from the state's interest in regulating tender offers as part of the general regulation of corporate internal affairs. That benefit arises from the protection afforded shareholders as a result of the fiduciary duty imposed on subject company managers to operate in the shareholders' best interest. This theory requires offerors, pursuant to the doctrine of anticipatory fiduciary duty, to act in the best interests of subject company shareholders. It also gives subject company directors more time and information with which to evaluate the offer for the benefit of their shareholders. Any benefit that may result from subject company management having more time and information with which to evaluate the offer may be counteracted by the conflict of interest aspects of the decision. Directors and management must make a decision which could well affect their positions, and state law may not afford adequate remedies for defects in these types of decisions. Similarly, any benefit which accrues from imposing a fiduciary duty on the offerors with respect to the offerees is contingent upon a court extending the anticipatory fiduciary duty doctrine to cover the tender offer situation, an extension that may be reasonable and appropriate, but by no means certain at this time.

The putative benefits to be derived from the Idaho Act are contingent and thereby, weak. The benefits of a price rise may be neutralized by the threat that the offer might fail; that protection or enhancement of economic welfare hinges on the propensity for acquirers to loot or liquidate subject companies; and that extending to the offeror the obligation under general corporation law to act as a fiduciary is contingent upon the applicability of the internal affairs and anticipatory fiduciary duty doctrines. These are the benefits to be weighed against the burdens discussed in the preceding section, i.e., interfering with the interstate passage of the offer itself, the securities for which the offer is made, and the control of the corporation for which the securities are sought. Where the Idaho Act does not apply, as in the case of uncontested tender offers, any burden imposed by the state on the free flow of these intangibles is at a minimum. Where the Act does apply, however, it may be considered as burdening interstate commerce

291. See notes 233–40 supra and accompanying text.
292. The commerce clause protects the interstate traffic of intangibles to the same extent as it protects tangible items. See Freeman v. Hewitt, 329 U.S. 249, 258–59 (1946).
by impeding or frustrating the tender offer and disrupting the trading of securities in the national market. Given benefits that are so contingent, if not ephemeral, they would not seem to provide a sufficient counterweight to the burdens imposed. Even when one assumes that the basis for state regulation of tender offers is the governance of internal corporate affairs, the burdens would seem to outweigh the benefits. Where the state's purpose is to protect shareholders or economic well-being, the scales tip more heavily to the burden side. Thus, applying the balancing test of Pike, the burdens are greater than the benefits and would be an impermissible interference with interstate commerce.

Indeed, there are positive benefits of tender offers that further support this conclusion. From the legislative history of the Williams Act it is clear that Congress meant to preserve the flow of tender offers in interstate commerce at the same time it sought to protect shareholders. Congress may have recognized the benefits—in terms of bringing more efficient management to the subject company—obtainable by shifting control from the subject company management to the acquiring corporation. Permitting a shift in control through the tender offer benefits the subject company shareholders as a result of more efficient management producing greater wealth maximization.

A thorough commerce clause analysis reveals that although legitimate local interests are protected by the Idaho statute, the statute does burden interstate commerce, and those burdens are not constitutionally permissible, either because of the existence of multiple, conflicting burdens or because the interference with interstate commerce outweighs the contingent and speculative benefits to the state. Once again, as with the preemption issue, the court's conclusion appears to be correct, but in reaching that conclusion, the court did not employ the correct analysis.

III. Great Western and Tender Offer Legislation

The constitutionality of tender offer legislation is an issue that demands more than the cursory analysis undertaken in Great Western. A significant cause of the difficulty in reconciling state and federal regulation may stem from the differing policy concerns adopted on each level. Tender offers reflect aspects both of

investment and disinvestment. In other words, a tender offer may appeal to those shareholders wishing to remain with the subject company and derive economic benefit from more efficient management of their investment after the takeover; it also may appeal to shareholders desiring liquidity and a quick profit. It may be argued that federal law and state law favor different interests in regulating tender offers. By preserving the secrecy and speed necessary for a successful tender offer, federal regulation may appear to favor those who want liquidity since the subject company is given little time to defend against the offer. State law, on the other hand, appears more favorable to those wanting to retain their investment, as seen by the emphasis placed on disclosing the corporate history of the offeror and by the opportunity given to the director to evaluate the benefits of the offer.

Even assuming that federal and state regulations favor different interests is not to say that federal regulation protects profit-seekers to the complete exclusion of those interested in investment. If tender offers effectuate the removal of entrenched, inefficient management, then the interests of those shareholders seeking wealth-maximization through their investment would receive equal benefits under federal legislation. It does not appear that state law accommodates these differing shareholder interests effectively. Although the offeror might raise the offering price to match the market rise during preoffer delay, any extra profit realized by the tendering shareholder could be obtained by the federal provision requiring price increases to be paid to all tendered shares. Moreover, to the extent that state law is more likely to permit inefficient management to defend successfully against an offer, it does not promote the interests of shareholders remaining with the company as well as federal legislation. If federal legislation can successfully accommodate both interests and do it more effectively than state law, then in terms of meeting the policy concerns, state legislation has no purpose.

Express congressional preemption or consent presents the most conclusive method of dealing with this dichotomous situation, at least in terms of settling the preemption issue. However, Congress is not likely to address the issue without strengthening the federal provisions. In the absence of any congressional initiative, the future of state takeover laws is thus left to the courts; or,

296. Sommer, Commentary—Takeover Statutes, 32 Bus. Law. 1483, 1486 (1977). Senator William Proxmire, Chairman of the Senate Committee on Banking, Housing and Urban Affairs, which oversees securities legislation, is strongly opposed to tender offers.
rather, it is left to other courts to build upon or disregard what
*Great Western* has begun. *Great Western* is not, perhaps, the best
possible case to test the validity of takeover statutes. At the in-
ception of the case, the Idaho Takeover Act had yet to be tested
administratively. No history of application of the Idaho Act to
prior tender offers existed to give the court a firm base for its deci-
sion. In addition, the court revealed little more than a framework
for further analysis. Yet, its ultimate conclusion of constitutional
invalidity appears sound.

Certainly, the issue of constitutionality of all takeover statutes
will not be laid to rest by this one district court opinion. On the
issue of preemption, the court discounted "pervasiveness" and
"dominance" arguments that would have invalidated all stat-
utes. Instead, it based preemption on a conflict in purposes
that turns solely upon the construction given the Idaho Act's pro-
visions as measured against the objectives of the Williams Act.
Under this theory, each state statute must be litigated separately.
Given the distinctions among provisions in state statutes, it is un-
certain what effect *Great Western* would have even as an analogy
for preemption. With regard to the commerce clause issue as
well, the district court's opinion was limited solely to the burden
of the Idaho Act upon interstate commerce. The decision there-
fore does not invalidate state takeover statutes as a class. The
narrow analysis of the court leaves the door open for other courts
to test independently the validity of other state statutes.

*Great Western* should not be dismissed as moot on appeal.
With the necessity for speed in a tender offer, it is unlikely any
offeror hopeful for success could withhold completing the acquisi-
tion until litigation ended. Thus, an appellate court could invoke
mootness as an avoidance technique. Yet suits over similar
takeover acts are likely to arise after *Great Western*, and the issue
of constitutionality under the commerce and supremacy clauses
cries out for review. Tender offers now face dual regulation in
over half the states. It was argued in 1970 that state takeover

and would probably object to any effort to preempt legislatively as the federal provisions
now stand. *Id.*

297. See text following note 132 *supra*.


299. E.g., Moore v. Ogilvie, 394 U.S. 814 (1969); see *Sosna v. Iowa*, 414 U.S. 393
(1975). See generally P. BATOR, P. MISHKIN, P. SHAPIRO, & H. WECHSLER, HART AND
WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 110-14 & 1977 Supple-
ment 13-23 (2d ed. 1972 & 1977 Supp.).

300. See note 64 *supra* and accompanying text.
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statutes should be given a trial as an “interesting and useful experiment in state securities and corporate law legislation.”

Nevertheless, as Justice Brandeis stated in *New State Ice Co. v. Liebmann*, experimentation is permissible only so long as it is “without risk to the rest of the country.”

Given the massive proliferation of takeover acts in recent years, perhaps it is time to test and reach a resolution on the “useful experiment.”

IV. CONCLUSION

Given the importance of the issues to the regulation of securities nationwide, an appeal to the Supreme Court is almost assured. Assuming the case is not dismissed for mootness or for lack of personal jurisdiction, the Court has three options: affirm, reverse, or interpret the statute restrictively so as to avoid the constitutional questions. It is possible for the Court to attempt to impute a sufficiently narrow construction to the Idaho Act to find it constitutional. The vehicle may be section 30-1506(1), which heretofore has been deemed to confer an extraterritorial overreach on the Act in derogation of the commerce clause. The provision states that “[n]o offeror may make a takeover offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.” By emphasizing the word “all,” one might read the first clause as merely forbidding the offeror, once the offer is made in Idaho, from extending it to less than all the stockholders residing within the state borders. Although such an interpretation stretches the literal language, it has the benefit of sidestepping the constitutional danger of extraterritoriality and brings the Act more in line with the purpose of blue sky laws to protect state citizens. While this alternative construction might avoid invali-


303. *Id.* at 311. See 1 L. Loss, *Securities Regulation* 104–05 (2d ed. 1961), in which the author states, “[The price of the experimentation . . . should not be too high. . . . Whatever . . . protection [separate legislation may] afford should not be achieved at any unnecessary cost to legitimate business.”

304. Should the court not dismiss the case for mootness, it still might not meet the merits if it overturns the case for lack of personal jurisdiction. As noted at the outset, this jurisdictional issue in *Great Western* creates as much or more controversy as the merits. See note 15 *supra*.

dation under the commerce clause, it is questionable what effect it would have on the preemption issue. Arguably, the abrogation of one provision does not lessen the potential conflict between federal and state regulation. The Act would continue to delay the offer and exempt both subject company management from disclosure and consented offers from regulation in conflict with the Williams Act.

If the Supreme Court overturns the decisions of the appellate court, two-tier regulation will become virtually universal. Even if the decision is limited to upholding the Idaho Act alone, attacks on other state statutes would hold little hope for success since the Idaho Act ranks among the most stringent takeover statues. On the other hand, if the lower court's ruling is upheld, state takeover acts would have a limited future.

It should be recognized, however, that invalidation by the courts of one or of all state takeover statutes cannot remove all possibility of a viable form of state regulation of tender offers. Congress holds the option of expressly consenting to state regulation. Furthermore, absent a judicial determination of preemption on "pervasiveness" or "dominance" grounds, states such as Idaho might amend their statutes to remove those excesses that conflict with the Williams Act and unduly burden interstate commerce. The Idaho Act, unlike statutes of states such as Ohio and Virginia, contains no severability clause by which a statute may still stand although portions are declared unconstitutional. Thus, Idaho faces the task of rebuilding its takeover statute. To bring the Act more in harmony with federal regulation and the commerce clause, the following amendments are suggested.

First, state disclosure requirements should be extended to cover subject company management. Rule 14(d) of the Williams Act requires minimum disclosure whenever management makes a recommendation. If the articulated purpose is to provide full disclosure to investors, disclosure by management would seem as important as disclosure by the offeror.

Second, the exemption for noncontested offers should be removed. The need of shareholders for full disclosure upon which to base their decision does not vary with the approval of subject company management.

306. See text accompanying notes 193–96 supra.
307. A major proponent of the Ohio Takeover Act suggested amendments to that state's statute similar to those offered here. Shipman, supra note 301, at 762–69.
Third, the state should discard preoffer approval and hearing provisions. If the proper purpose is to allow sufficient time for investors to pass on the acceptability of the offer, a postoffer period—such as the fifteen day period in federal regulations—should adequately protect shareholders. As a result, the state avoids delaying and frustrating tender offers and disrupting the market. This would be a means of protecting shareholders that is less burdensome on interstate commerce. At the very least the state ought to remove the power of subject company management to require a hearing without cause. Instead of the director passing on the acceptability of the offer, the state might consider providing for injunctive relief to permit adjudication of questionable offers.

The state might also consider redefining section 30-1506(1) along the lines indicated above to remove allusions to extraterritorial application of the Act and alleviate some of the burden on interstate commerce. In this fashion, the legitimate state interests involved in tender offers could be vindicated through a system of regulation that is both two-tiered and consistent with the Constitution.

JANICE E. CROSS