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Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multi-State Contacts

J. Thomas Oldham*

I. Introduction

The activities of American corporations frequently contact numerous states. For example, a corporation may conduct business and have shareholders, employees, and creditors in many states. For this reason, more than one state could be said to have an interest in regulating the affairs of a corporation. It has generally been agreed, however, that certain corporate activities should be governed by one uniform set of rules, as opposed to multiple regulation by all interested states. Courts, therefore, have to select the law of one of the interested states to govern corporate "internal affairs," those activities that require one uniform set of rules. Because a corporation historically has been viewed in American law as the creation of the state of incorporation, and because a corporation would therefore be certain what law governed its internal affairs, American courts have normally applied the law of the state of incorporation to questions pertaining to corporate "internal affairs." This has been referred to as the "internal affairs doctrine." This doctrine was initially regarded as a limit upon a forum's jurisdiction; the only courts deemed to have jurisdiction over a corporation were the courts of the state of incorporation, the state in which the entity was created.2

The internal affairs doctrine is no longer regarded as a limit upon jurisdiction; it is now considered a choice of law rule. Some courts recently have exhibited a tendency to reject this doctrine even as a choice of law rule if the subject corporation has much more substantial contacts with the forum than with the state of incorporation or if the subject matter is one which logically permits the application of multiple regulatory schemes.3

The vast majority of courts, however, continue to apply the law of the state of incorporation to internal affairs, regardless of the level of contacts the corporation has with the forum or the state of incorporation, since it is

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1. The term state interest is generally used in this article to refer to the level of contacts between the state and the corporation. Apologies to Brainerd Currie.


3. See generally Oldham, supra note 2, at 93-98.

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considered vital that a corporation know in advance what law governs its internal affairs. No other corporate choice of law approach heretofore advanced provides the same degree of certainty to a corporation regarding what law will govern its internal affairs as does the internal affairs doctrine. The problem which results from this policy is that frequently corporations are governed by the law of a state with which the corporation has had minimal contacts. Corporations are able to avoid the corporate law of its commercial domicile by incorporating or reincorporating elsewhere.

A number of states have recently adopted statutes, such as "pseudo-foreign" corporation laws and tender offer rules, which purport to regulate various activities of foreign corporations that have significant contacts with the state. Many of these regulated activities could be considered questions pertaining to corporate internal affairs. This article will discuss the wisdom and constitutionality of these attempts by states to regulate various activities of foreign corporations, as well as potential problems which could result from such statutes. It will then be suggested that "pseudo-foreign" corporation laws offer a means by which certainty can be retained in corporate choice of law while allowing the commercial domicile to regulate the internal affairs of corporations in more instances.

II. HISTORY OF REGULATION OF CORPORATIONS WITH MULTI-STATE CONTACTS

During the eighteenth and nineteenth centuries, the corporate laws of many states were quite restrictive. For example, many such corporate laws limited the amount of assets a corporation could own. Many significant corporate transactions required the approval of all directors and shareholders. States then began to modify their statutes and make them less restrictive. (Such less restrictive corporate statutes have been termed "enabling" statutes or "pro-management" statutes, depending upon one's point of view.) Professor Hurst noted that at the beginning of the twentieth century our attitude toward economic regulation was laissez faire; a societal judgment was made that corporations should be unfettered in their attempt to spur economic growth. The depression in the 1930's, the abuses by corporate management after the second world war, and a prolonged period of prosperity have catalyzed another change in attitude toward corporate regulation. Many commentators now contend that state corporate laws should be made more

6. See Hurst, supra note 4, at xii.
restrictive.  

One obstacle to a state’s attempt to make its corporate law more restrictive has been the internal affairs doctrine. This doctrine has been applied in Anglo-American courts so that the internal affairs8 of a corporation are governed by the law of the state of incorporation, regardless of the contacts, if any, the corporation has with the state of incorporation.9 What has frequently occurred is that corporations have incorporated (or reincorporated) in jurisdictions with the least restrictive corporate law then in existence.10 A state is obviously, therefore, not encouraged to make its corporate law more

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8. Internal affairs have been defined as follows: “A corporation’s internal affairs are involved whenever the issue concerns the relations inter se of the corporation, its stockholders, directors, officers or agents.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 313, Comment a at 347 (1971). North State Copper & Gold Mining Co. v. Field, 64 Md. 151, 124, 20 A. 1039, 1040 (1885) suggested the following definition: “Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders’ meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation . . . .”

Examples of corporate internal affairs include the rules pertaining to when dividends may be declared, the duties and liabilities of officers and directors, the standards for indemnification of directors and officers, the proper procedure for electing directors, and the standards for the level of approval required for mergers and other types of reorganizations. The exact scope of what constitutes a question pertaining to an internal affair of a corporation is somewhat imprecise; a court wishing to apply local law to a question involving a foreign corporation may find that the issue does not pertain to the internal affairs of the corporation. See, e.g., Toklan Royalty Corp. v. Tiffany, 193 Okla. 120, 141 P.2d 571 (1943).


9. No distinction is generally made between a foreign corporation with substantial contacts with its state of incorporation and a foreign corporation which has almost all of its contacts with the forum. The law of the state of incorporation traditionally has been applied to all foreign corporations. See, e.g., Lancaster v. Amsterdam Improvement Co., 140 N.Y. 576, 35 N.E. 964 (1894); Demarest v. Grant, 128 N.Y. 205, 28 N.E. 645 (1891); Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N.E. 991 (1910); Cochran v. Shepler, 266 Pa. 226, 133 A. 232 (1926); see generally Latty, supra note 5, at 145-48.

10. Charles A. Beard made these findings regarding attempts by New Jersey to make its corporations code more restrictive:

Under the leadership of Woodrow Wilson, after he was challenged by Theodore Roosevelt to reform his own state, the legislature of New Jersey passed a series of laws doing away with corporate abuses and applying high standards to corporations. What was the result? The revenues of the state from taxes on corporations fell. Malefactors moved over into other states. In time the New Jersey legislature repealed its strict and prudent legislation, and went back, not quite, but almost to old ways . . . . Hearings on S. 10 before the Subcomm. of the Senate Comm. on the Judiciary, 75th Cong., 1st Sess., 326 (1937).

Similar frustration is reflected in this portion of the report of the Corporation Law Revision Commission of New Jersey:

It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from federal legislation and not from state corporation acts . . . . any attempt to provide such regulations in the
restrictive; domestic corporations may then reincorporate out of the state and new corporations will become incorporated in another state rather than being formed in the state. States will thereby lose charter fees and lose any power to regulate the internal affairs of such corporations. Most states have attempted to make their corporation laws approximately as enabling as the least restrictive state law then extant; if one state has adopted a new type of enabling provision or amended the corporation code in some way to make it less restrictive, other states commonly follow suit. This trend during the twentieth century toward decreasingly restrictive corporate law has been termed the "Gresham’s law" of corporate law.

California and New York have attempted to rectify the more extreme abuses of state corporate law shopping (and stem the “Greshman’s law” of corporation codes) by enacting laws which purport to regulate the internal affairs of technically foreign corporations whose “commercial domicile” or “social seat” is located in California or New York, respectively. These statutes address a significant problem in contemporary corporate choice of law—the regulation of a corporation with minimal contacts with the state of incorporation and a majority of its contacts with another state.

III. LAW GOVERNING CORPORATIONS WITH MULTI-STATE CONTACTS

A. General Choice of Law Rules

California and New York have adopted statutes which expressly require the application of certain sections of the law of the forum to the activities of foreign corporations which have a certain level of contacts with the state. Absent such a statute, courts generally apply the law of the state of incorporation to the internal affairs of a foreign corporation, even if the corporation had substantial contacts with the forum and minimal contacts with the state.

11. The importance of charter fees to states such as Delaware is discussed in Oldham, supra note 2, at 105 n.78.


13. Gresham’s law has been generalized to stand for any situation where the cheap drives out the valuable or the good. See Kaplan, Foreign Corporations and Local Corporate Policy, 21 VAND. L. REV. 433, 437 (1968); see generally Oldham, supra note 2, at 104-110. Another term used to describe this trend has been corporate “charter mongering.” See, e.g., Wall St. J., Jan. 10, 1977, at 14, col. 6 (remarks by Professor Neil Jacoby).

For a general discussion of examples of Gresham’s law of state corporations codes, see Cary, supra note 5; Schwartz, supra note 10. Examples of the increasingly “enabling” and pro-management profile of state corporate law can be seen both in the chronology of the enactment of state law provisions sanctioning broader indemnification rights of corporate insiders (see Oldham, supra note 2, at 108) and the enactment of state takeover laws. In both instances, a few states adopted such laws and then a number of other states quickly adopted similar provisions.


15. See CAL. CORP. CODE § 2115 (West 1977); N.Y. BUS. CORP. LAW §§ 1315-1320 (McKinney 1968).
of incorporation. If, however, the law of the state of incorporation conflicts with an important policy of the state, or if the foreign corporation conducts all or almost all of its business in the forum, a court might apply the law of the forum.

The internal affairs doctrine is a legacy of the "vested rights" approach to choice of law questions. This approach geographically conceptualizes the rights of parties resulting from a transaction or occurrence with multistate contacts. The rights of parties are said to "vest" in the place where they are "created"; the law of the vesting state must then be applied to govern those rights, regardless of where an action upon them is brought. Under the vested rights approach, the general nature of the action is first "characterized" (as a torts or contract action, for example). A choice of

17. See, e.g., Paper Products Co. v. Doggrell, 195 Tenn. 581, 261 S.W.2d 127, 129 (1953). Pursuant to the vested rights approach to the choice of law questions, a court might not apply the law of the state of incorporation if that law is deemed to violate a "fundamental policy" of the forum. See, e.g., Hausman v. Buckley, 299 F.2d 696 (2d Cir. 1962). See generally Nussbaum, Public Policy and Political Crisis in the Conflict of Laws, 49 YALE L.J. 1027, 1031 (1940); Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 981 (1956).
18. See, e.g., Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir. 1959) (applied Louisiana law to determine the duty of insiders of a Delaware corporation where the corporation transacted almost all of its business in Louisiana); Blazer v. Black, 196 F.2d 139 (10th Cir. 1952) (applied Kansas law to determine the duty owed by an officer of an Illinois corporation which did substantially all of its business in Kansas); International Ticket Scale Corp. v. United States, 165 F.2d 358 (2d Cir. 1948) (applied the law of New York to the question of legality of a dividend by a Delaware corporation); State v. Iowa S. Util. Co., 231 Iowa 784, 2 N.W.2d 372 (1942), aff'd sub nom. State v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948), cert. denied sub nom. Bechtel v. Thatcher, 337 U.S. 918 (1949) (applied Iowa law to govern the recapitalization of a Delaware corporation which did substantially all of its business in Iowa); German-American Coffee Co. v. Diehl, 216 N.Y. 57, 109 N.E. 875 (1915) (applied New York law to the legality of a dividend to be paid by a New Jersey corporation whose principal place of business was New York); McQuade v. Stoneham, 230 App. Div. 57, 242 N.Y.S.2d 153, 161 (1962) (applied the law of New York to the question of legality of a dividend to be paid by a New York corporation whose principal place of business was New York). These cases sometime refer to "equal treatment" legislation enacted by the various states as an additional reason for the application of forum law. Such equal treatment statutes generally provide that foreign and domestic corporations shall be treated equally and that foreign corporations shall bear the same burdens and responsibilities as domestic corporations. See, e.g., TEX. BUS. CORP. ACT ANN. § 8.02 (Vernon 1968). If taken literally, it could be argued that these provisions require foreign corporations to be governed by local corporation law. See Latty, Pseudo-Foreign Corporations, 65 YALE L.J. 137, 157 (1955).
19. See generally Coleman, Corporate Dividends and the Conflict of Laws, 63 HARV. L. REV. 433, 444 (1950); Kaplan, supra note 13, at 470-71. Such equal treatment statutes have rarely been construed by courts.

In some cases involving local creditors of foreign corporations, courts have held that certain creditor protection provisions contained in the local corporations code (such as the liability of shareholders for certain types of corporate debts) applied to all foreign corporations licensed to do business in the state. See, e.g., Joncas v. Krueger, 61 Wis.2d 529, 213 N.W.2d 1 (1973).

21. Characterization consists of classifying a matter within one of the established categories of cases. See A. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS (1940); Cook, "Characterization" in the Conflict of Laws, 51 YALE L.J. 191 (1941); Morse, Characterization: Shadow or Substance, 49 COLUM. L. REV. 1027 (1949).
law rule (connecting factor) has evolved for each general type of action; all
choice of law questions of the same type are treated similarly. Once the
action is characterized, the application of the appropriate connecting factor
leads to the state where the rights of the parties vest, and the laws of that
state govern substantive questions presented by the action. For example, all
tort questions are said to be governed by the law of the state where the al-
leged wrong occurred. Similarly, questions concerning the internal affairs of
a corporation have traditionally been decided by reference to the corporate
code of the state of incorporation, since the rights and duties regarding such
affairs were said to vest there.

Because the law selected pursuant to the vested rights approach fre-
quently is that of a state with little or no interest in regulating the parties or
transaction involved, recent choice of law decisions in many subject areas
have exhibited a growing dissatisfaction with the vested rights approach; a
number of courts now consider the various state policies underlying the laws
of the states with contacts with the matter\(^2\) or the contacts between the
parties involved and the various states.\(^3\) These governmental interest anal-
yses and Second Restatement approaches have generally not been applied to
questions pertaining to the internal affairs of corporations, however. Courts
have generally continued to apply the internal affairs doctrine.\(^4\) This is
because there is general agreement that a corporation must be certain what
corporate law governs its internal affairs.

The internal affairs doctrine provides this desired certainty. If the gov-
erning corporate law was determined on an ad hoc basis based upon which
state had the most significant contacts with the corporation or upon which
state's policy would be advanced by the application of its law in each situa-
tion, corporations would not be sure which law governed their behavior,
thereby severely burdening commerce. The question addressed by this arti-
cle is whether certainty in corporate choice of law could be maintained while
attempting to insure that the state with the most significant contacts with a
corporation could regulate it.

B. Statutory Choice of Law Rules

It was mentioned above that California and New York have adopted
certain choice of law rules regarding the application of local law to foreign
corporations with certain contacts with the state. California's law provides
that its law shall apply to such corporations "to the exclusion of the law of
the state of incorporation."\(^5\) In contrast, other states have statutorily en-
acted the internal affairs doctrine. For example, Delaware's corporations

\(^2\) This is referred to as governmental interest analysis. See, e.g., Mazza v. Mazza, 475
F.2d 385 (D.C. Cir. 1973); Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727 (1967); Horowitz, The

\(^3\) \textit{Restatement (Second) of Conflict of Laws} § 6, at 10 (1971).

\(^4\) Some courts have expressly or impliedly not followed the internal affairs doctrine in
some situations. See cases cited at note 18 supra. For a discussion of these cases, see Oldham,
\textit{supra} note 2, at 93-98.

code provides that its law shall govern the internal affairs of all Delaware corporations.26

Such statutes normally must be adhered to by local courts, unless the enforcement of such a statute would be unconstitutional.27 Of course, such choice of law statutes are not binding on foreign courts; they would apply normal conflict of laws rules.

IV. FEDERAL CORPORATION LAW

Although Congress has enacted securities laws which regulate the issuance and trading of securities and the dissemination of information by corporations, the internal affairs of American corporations are generally regulated by state corporate law.28 It has been suggested that, regarding large, truly national corporations, it seems somewhat absurd from a policy standpoint that such corporations would be governed by the corporate law of the state where the charter documents are filed rather than a federal corporation law.29 Such an argument is persuasive from a policy standpoint; however, there are competing considerations.

State corporate law has a rich body of precedent and most statutory sections of the corporate law of commercial states (such as Delaware, New York and California) have been construed in numerous court decisions; the meaning of such statutes is now relatively clear. A new federal corporation law would obviously be a composite of state corporate law. The statutory sections probably would not be enacted by Congress in a form identical to a state code section; it is likely that Congress would revise the section in some manner or combine two or more sections. The result would be, at least in the short run, that the meaning of such sections would be unclear. The obvious counter-argument is that in a short period of time (after such sections had been construed by courts) they too would then be clear in their meaning.

A more fundamental reason exists for not enacting a federal corporation law. It is submitted that there is no necessity for federal pre-emption of corporate law applicable to national corporations. Concern relating to state corporate law abuse generally focuses upon relatively few statutory sections.30 Such concerns could be addressed in a federal act which would ad-

26. DEL. CODE ANN. tit. 8, § 121(b) (1975).
30. See generally Cary, supra note 5. For example, reform proposals generally propose that corporate management (i) should be required to satisfy a higher standard of care and (ii) should not be indemnified by the corporation or company insurance in a larger number of instances. Other reforms proposed pertain to requiring more disclosure by large corporations and permitting a "public" representative to sit on the board of directors of large corporations. Ways to
dress only these primary concerns. State corporate law not in conflict with these sections could continue to apply to such national corporations. National corporations could continue to avail themselves of the relative certainty now existing in state corporate law, and federal policy could be furthered by the enactment of any statutes deemed to reflect an important federal policy.

Another practical concern militates against any proposal for a federal corporation law. As the drafters of California's new general corporation law recently discovered, drafting a corporate code is a terrifically difficult and complex task. Rather than require congressmen and their staffs to become mired in the technicalities of corporate law drafting, it would seem preferable to focus their attention and energy upon the relatively small number of issues which are cause for public concern.

Although for a short period of time it appeared that the adoption of some sort of a federal corporation law was a political possibility, it now appears that there are few members of Congress who actively support such a proposal. For this reason, even a proposed federal minimum standards act is probably not a realistic proposal at the present time. Because of this, and because the Supreme Court has recently narrowly construed the federal securities law, it appears clear that in the near future corporate internal affairs matters will be governed by state corporation law.

It has also been suggested, however, that state court judges tend to be more pro-management than federal court judges. Cary, supra note 5. Creating a federal corporation law would result in disputes being adjudicated in federal court rather than state court.


33. For example, the 1972 Democratic Party platform proposed the establishment of a commission to study federal chartering of large corporations. See 30 Cong. Q. Weekly Rep. 1728 (1972). Although federal chartering has been proposed sporadically during this century (see, e.g., Brabner-Smith, Federal Incorporation of Business, 24 Va. L. Rev. 159 (1937); Snapp, National Incorporation, 5 Ill. L. Rev. 414 (1911)), the idea received a great deal of attention in the early 1970's. See generally R. Nader, supra note 7; Henning, supra note 5; Jennings, supra note 7; Note, Federal Chartering of Corporations: A Proposal, 61 Geo. L.J. 89 (1972).

34. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (a plaintiff in an action pursuant to section 10(b) of the Securities Exchange Act of 1934 must have "purchased" or "sold" a security); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (an action for damages under section 10(b) of the 1934 Securities Exchange Act must establish "scienter"—and intent to deceive, manipulate or defraud—on the part of the defendant); Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (a breach of fiduciary duty, absent any deception, misrepresentation or nondisclosure, does not establish a cause of action under section 10(b) of the Securities Exchange Act).
The "Gresham's law" effect which the internal affairs doctrine has had upon state corporation law has been outlined above. This pro-management drift in state corporate law has resulted because the law of the state of incorporation has generally been applied to a corporation's internal affairs, regardless of the contacts the corporation has with the various interested states. States have perceived that their corporate law should not be made too restrictive or the corporation would reincorporate elsewhere.

This "Gresham's law" effect could be reduced if states would adopt pseudo-foreign corporation statutes, which provide that important sections of the state corporate law would govern corporations whose commercial domicile was clearly in the state even though the charter documents were filed elsewhere. This would give states additional power to regulate corporations commercially domiciled there, thereby diminishing the need for a federal corporation law.

V. CONSTITUTIONAL LIMITS: STATE REGULATION OF CORPORATIONS WITH MULTI-STATE CONTACTS

No one contends that the corporate law of a state other than the state of incorporation should apply to a corporation whose principal contacts are with the state of incorporation (such a corporation will be referred to herein as a "domestic" corporation). The matter is less clear regarding corporations with less substantial contacts with the state of incorporation. For example, commentators frequently advocate that the law of the state of incorporation should not apply to a corporation which has approximately eighty percent or more of its contacts with a foreign state (such a corporation will be referred to herein as a "technically foreign" corporation). A number of commentators also advocate the application of foreign corporate law to a corporation with fifty to eighty percent of their contacts with a state other than the state of its incorporation (such a corporation will be referred to herein as an "arguably foreign" corporation). Corporations which do not have fifty percent of their contacts with any one state will be referred to herein as "national" corporations.

The application of the law other than the state of incorporation to technically foreign and arguably foreign corporations raises certain constitutional questions. One could argue that this would violate the due process clause or the full faith and credit clause, or that, because a corporation will not be certain what law governs its internal affairs, an impermissible burden

35. See Halloran & Hammer, supra note 27, at 1329; Horowitz, supra note 22, at 819-20; Leffar, Constitutional Limits on Free Choice of Law, 28 LAW & CONTEMP. PROB. 706, 715 n.45 (1963). The Restatement (Second) of the Conflict of Laws expresses no opinion regarding the law applicable to foreign corporations with substantially all of their contacts with another state. See Restatement (Second) of Conflict of Laws § 302, Comment g (1971).

Former Chief Justice Roger Traynor has stated that "courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet conditions and new moral values." Traynor, Law and Social Change in a Democratic Society, 1956 U. ILL. L.F. 230, 232. It is submitted that applying the internal affairs doctrine to technically foreign corporations in some situations is a rule which has "lost its touch with reality."

36. See generally Baraf, supra note 8.
on interstate commerce would result. These constitutional questions will be addressed below.

A. Due Process Clause

Early Supreme Court cases, discussing the limitations imposed by the Constitution upon choice of law decisions, suggested that the due process clause required the application of the vested rights choice of law approach. Later cases made it clear that it is constitutionally permissible under the due process clause for a state to apply the law of any state that has a reasonable connection with the matters in controversy. Recent Supreme Court cases hold that the due process clause only proscribes a state from applying its law to a matter in which it has no significant contacts.

37. U.S. CONST. amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."


In Richards v. United States, 369 U.S. 1, 15 (1962) the Supreme Court stated that: Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity. Similarly, Clay sanctioned the application of forum law, emphasizing that the forum had "ample contacts with the present transaction." 377 U.S. at 183.

In some instances the application of forum law has been deemed a violation of due process even though the state had a significant contact with the parties or the transaction involved. See John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924). In these cases, the contacts between the state and the transaction occurred late in the chronology of the transaction, and it has been considered unfair to the party resisting the application of the forum law to apply the forum law.

One commentator noted that these cases stand for the rule that, if the contact between the state and the transaction was "so late in the history of the transaction in dispute that to apply its law would result in a serious disregard of the justifiable expectations of one of the parties," due process forbids the application of forum law. See Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 IOWA L. REV. 449, 457 (1959) [hereinafter cited as Weintraub]. Similarly, Professor Kirgis contends that these cases stand for the rule that forum law may not be applied if it would be "manifestly unfair to the party resisting it." See Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 CORNELL L. REV. 94, 103 (1976) [hereinafter cited as Kirgis]. This due process limit upon state choice of law would not affect the regulation of corporations with multi-state contacts.

Professor Weintraub has suggested that these cases stand for the rule that:

it is a violation of due process for a forum having no substantial connection with the parties or the facts to affect the result . . . through the device of 'procedural' characterization if application of the forum rule will serve no significant local policy and if application of the foreign rule will not involve scrutiny of the intricacies of foreign procedure.

44 IOWA L. REV. at 490. This aspect of the due process limit upon state choice of law could affect multi-state regulation of corporations. Some courts attempt to circumvent the internal affairs doctrine by deeming an issue a matter of "procedure" or for some other reason not one pertaining to the internal affairs of a corporation. See Oldham, supra note 2, at 93-98. Often, the matter could not seriously be characterized as procedural and its characterization as such is
The Court's more flexible approach to choice of law decisions is reflected in *Watson v. Employers Liability Assurance Corp.*[^41] The plaintiff, a resident of the forum, brought an action against the insurer of the manufacturer of a product which had injured her. A clause in the insurance policy barred a direct action by the injured party against the insurance company. This clause was valid under Massachusetts law, the state where the insurance contract was executed, and the law of Illinois, the principal place of business of the manufacturer, but invalid under the law of the forum. The forum applied its law and held the clause to be invalid. The insurer argued that this violated due process. The Supreme Court deemed this choice of law determination constitutional since "more states than one may seize hold of local activities which are part of multi-state transactions and may regulate to protect interests of its own people."[^42] The Court noted that the forum had an interest in protecting its injured residents.

*Clay v. Sun Insurance Office, Ltd.*[^43] evidences a similar approach. In *Clay*, a forum resident brought suit against a foreign insurance company under a policy which the plaintiff had purchased when he resided in another state. A provision in the policy limited the period (after an insured loss) during which actions under the policy could be brought. This limitation was valid in the state where the contract was executed but invalid under the law of the forum. The forum applied its law. The Supreme Court held that this was constitutional, since the forum had "ample contacts with the transaction."[^44]

The discussion above shows that the application of the corporate law of the state of commercial domicile[^45] would not violate the due process clause, since the state of commercial domicile would have significant contacts with the corporation.

It is unclear what actually constitutes sufficient contacts to justify the application of the forum's law under the due process clause.[^46] Arguably for-

[^42]: Id. at 72.
[^44]: Id. at 183.
[^45]: The term "commercial domicile" will be used herein as a shorthand reference to the state with which a corporation has a majority of its contacts. It is not suggested that the concept of "domicile" is otherwise useful in discussing corporate choice of law. *See generally Restatement (Second) of Conflict of Laws* § 11, Comment 1 (1971).
[^46]: It apparently does not constitute a sufficient contact if one of the parties to an action is a nonresident domiciliary of the forum. *See Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

One thing which confuses due process analysis is the cavalier way in which courts interchangeably employ the terms "contact" and "state interest." These obviously are two different concepts—a contact refers to a connection with the transaction, while an interest refers to the fact that a state policy will be advanced by the application of its law to the transaction. Certain due process cases repeatedly refer to the fact that due process requires a state to have an interest in the application of its law. *See, e.g.*, *Aldens Inc. v. Packel*, 524 F.2d 38, 43 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Most cases and commentators agree, however, that the appropriate test for due process should be phrased in terms of "contacts" rather than an interest. *See generally* Weintraub, *supra* note 40, at 490.
eign and technically foreign corporations frequently have minimal contacts with the state of incorporation. The most significant contact may be an agent for service of process and a post office box. Such corporations may have no employees, do no business, and have no stockholders which reside in the state of incorporation; if so, it may be a violation of the due process clause to apply the law of the state of incorporation to such corporations.\footnote{47}

It has been suggested that the state tender offer laws may, to the extent that they purport to govern offers made by an out-of-state offeror to shareholders residing outside the state, violate due process.\footnote{48} The regulating state obviously has no contact between the out-of-state offer made to the non-resident shareholder. As a result of the contacts between the corporation and the state, however, the state might have sufficient contacts with the corporation to render constitutional its regulation of activities affecting the corporation which occur outside the state. Such a determination would be best made under the full faith and credit standard set forth below.\footnote{49} It would appear that, unless the extraterritorial application of state tender offer laws would be required by the full faith and credit standard, an attempt by a state to regulate tender offers made outside the state to non-resident shareholders of foreign corporations should be deemed to violate due process.

B. Full Faith and Credit Clause

The full faith and credit clause provides that a state must give full faith and credit to the “public Acts, Records and judicial Proceedings of every other State.”\footnote{50} Although the phrase “public Acts, Records and judicial Proceedings” has been construed to include statutes\footnote{51} as well as judicial decisions,\footnote{52} the Supreme Court has rarely held that full faith and credit requires the application of the law of one state in the courts of another, and the Court has become increasingly reluctant to so hold. Supreme Court cases have held choice of law determinations violative of full faith and credit in three subject areas: workmen’s compensation laws, shareholder assessments, and fraternal benefit insurance associations.\footnote{53}

\footnote{47} One reason for the requirement that a state have some contact with the matter in dispute is so that the parties are not unfairly surprised by the application of the law of a state with no connection with the transaction. Since it could hardly be said that the application of the law of the state of incorporation would result in unfair surprise, this suggests that a court would not deem this a violation of due process.


\footnote{49} See notes 101-19 and accompanying text infra.

\footnote{50} U.S. Const. art. IV, § 1: “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”


\footnote{52} See, e.g., Carroll v. Lanza, 349 U.S. 408 (1955).

\footnote{53} In addition to these three subject areas, the Supreme Court has sometimes held that it is a violation of the full faith and credit clause for a state to refuse to provide a forum for a suit based upon a foreign wrongful death statute. See First Nat’l Bank v. United Airlines, Inc., 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951).
1. Workmen's Compensation

The Supreme Court held that full faith and credit required the application of the workmen's compensation act of the state where the employment contract was entered into if the law of that state attempted to provide an exclusive remedy. The Court has since retreated from this approach and has more recently ruled, in a number of cases, that even if the employment contract was executed outside the forum, it is constitutionally permissible for the forum to apply its law if the forum had a substantial interest in the transaction.

Bradford Electric Light Co. v. Clapper, Pacific Employers Insurance Co. v. Industrial Accident Comm'n, and Carroll v. Lanza considered full faith and credit limitations upon choice of law in workmen's compensation cases. In Clapper, the employee normally worked and resided in Vermont. He was sent on a short assignment to New Hampshire where he was killed in an accident; the employee had no contacts with New Hampshire, other than his brief work assignment. Suit was brought in New Hampshire, and New Hampshire applied its law. The Supreme Court decided that this was a denial of full faith and credit to the law of Vermont.

In Pacific Employers, a resident of Massachusetts, who customarily worked in Massachusetts, was temporarily transferred to California. After being in California for a short time, the employee was injured. The employer was treated in California and incurred medical bills from California doctors. Suit was later brought in California regarding the injury and the California court applied California's workmen's compensation law and not the law of Massachusetts. The Supreme Court held that this application of California law did not violate the full faith and credit clause. Since the employee had been working in California a significant period of time, and since there were California creditors of the employee, California had a significant interest in applying its law.

Carroll involved an injury to an employee who normally resided and worked in Missouri. The employee was sent to Arkansas to do some work and was injured during the course of that work. Mr. Carroll was taken to a hospital in Missouri; presumably there were no medical creditors in Arkansas (other than possibly for ambulance service). Mr. Carroll had been actively involved in the Arkansas project for at least two months prior to the date of injury. Carroll later filed suit in Arkansas court regarding his injury and the court applied Arkansas law and not the workmen's compensa-

56. 286 U.S. 145 (1932).
59. The facts of this case are more fully set forth in Bradford Elec. Light Co. v. Clapper, 51 F.2d 992 (1st Cir. 1931).
60. See generally Kirgis, supra note 40, at 113.
tion law of Missouri. The Supreme Court determined that the application of Arkansas law did not violate the full faith and credit clause, since Arkansas had "a legitimate interest" in regulating the matter.\textsuperscript{62} The Court stated that "[t]he State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependants are among these, as . . . [\textit{Pacific Employers}] emphasizes."\textsuperscript{63}

Two commentators have made two different attempts to reconcile \textit{Clapper}, \textit{Pacific Employers} and \textit{Carroll}. Professor Weintraub suggests that \textit{Carroll} and \textit{Pacific Employers} substantially limited \textit{Clapper} and possibly overruled it sub silentio.\textsuperscript{64} Professor Kirgis argues that the cases are reconcilable. He contends that in \textit{Clapper} the state of injury had minimal interest in applying its law to compensate wrongful death victims, since the injured employee left no dependants and did not reside in the state.\textsuperscript{65} Kirgis claims that in \textit{Pacific Employers} and \textit{Carroll} the state of injury had a greater interest in the application of its law. In \textit{Pacific Employers}, the injured employee incurred medical bills and apparently resided in California, while Mr. Clapper did not reside in New Hampshire and apparently did not receive any medical care there.\textsuperscript{66} Similarly, Kirgis argues that in \textit{Carroll} the injured employee had resided in Arkansas and generally had more substantial contacts there than Mr. Clapper had with New Hampshire.\textsuperscript{67}

Regardless of whether \textit{Clapper} is viewed as being essentially overruled by \textit{Carroll} and \textit{Pacific Employers} or whether \textit{Clapper} is still considered to require that a forum must have some interest in regulating a transaction before it may apply its law to the transaction, no full faith and credit problem would result from the application of the law of the commercial domicile of a technically foreign or arguably foreign corporation to its internal affairs, since that state would clearly have such an interest.

2. Shareholder Assessments

Three Supreme Court cases involving shareholder assessments are more difficult to reconcile. \textit{Broderick v. Rosner}\textsuperscript{68} involved a bank which was incorporated in New York, and which had all of its business offices located in New York. A majority of its depositors, creditors, and stockholders probably were residents of New York; only 557 of the over 20,000 bank shareholders lived in New Jersey.\textsuperscript{69} New York law at that time permitted a corporation's shareholders to be subject to assessment. An administrative determination was

\textsuperscript{62} See 349 U.S. at 413.
\textsuperscript{63} Id.
\textsuperscript{64} See Weintraub, supra note 40, at 471-73. The Court in \textit{Carroll} stated that \textit{Pacific Employers} "departed from" (meaning that it severely limited) \textit{Clapper}.
\textsuperscript{65} See Kirgis, supra note 40, at 213. Professor Kirgis does not discuss the fact that Mr. Clapper was killed in New Hampshire and that certain expenses could have resulted therefrom, such as ambulance or mortician fees. See generally Currie, \textit{The Constitution and the Choice of Law: Governmental Interests and the Judicial Functions}, 26 U. CHI. L. REV. 9, 26-27 (1958).
\textsuperscript{66} See Kirgis, supra note 40, at 123.
\textsuperscript{67} Id. at 124.
\textsuperscript{68} 294 U.S. 629 (1935).
\textsuperscript{69} Id. at 638, 640.
made in New York that the corporation's shareholders were subject to assessment. New Jersey had enacted a law which barred suits based on foreign assessment statutes, and pursuant to that law, a New Jersey court refused to hear a suit based on the New York assessment determination. The Supreme Court held that full faith and credit required the New Jersey court to allow the suit.\(^{70}\)

\textit{Broderick} could be explained on the basis that in personam jurisdiction existed over the New Jersey resident in the New York proceeding due to the shareholder's relationship to the corporation (an implied consent notion), and that full faith and credit should be given to the New York administrative determination. It also could be argued that the case stands for the broad rule that full faith and credit requires the application of the law of the state of incorporation to questions pertaining to the internal affairs of a corporation (or at least shareholder assessments). A third interpretation is that this represents a situation in which New Jersey had a minimal interest in the application of its law and New York had an overwhelming interest in the application of its law. The language of the \textit{Broderick} decision is unclear which is the correct interpretation. The Court ruled that the matter was so "peculiarly within the regulatory power of . . . the State of incorporation . . . that no other State properly can be said to have any public policy thereon."\(^{71}\)

The full faith and credit clause might require, as some suggest,\(^{72}\) the application of the law of one state where it is clear that uniform national regulation of an issue is required. Accordingly, \textit{Broderick} could stand for the proposition that questions pertaining to shareholder assessments require uniform national regulation and, therefore, the application of the law of the state of incorporation.

The Supreme Court decided in \textit{Pinney v. Nelson}\(^ {73}\) and \textit{Thomas v. Matthiesen}\(^ {74}\) that a court may apply local law which sanctions assessment of shareholders of foreign corporations, although the law of the state of incorporation proscribes such an assessment. These cases both involved suits in California by California creditors against shareholders of foreign corporations, both of whose charters expressly authorized the corporation to do business in California. The Court reasoned that since the charters of both corporations expressly referred to the corporation doing business in California, the shareholders had somehow contracted to follow California corporate law.\(^ {75}\) Although the corporations were incorporated elsewhere and conducted a significant amount of business outside of California, this was not mentioned by the Court. It is unclear whether \textit{Pinney} and \textit{Thomas} are limited to situations in which a corporation expressly refers in its charter to doing business in states other than the state of incorporation.

It is difficult to reconcile \textit{Broderick} with \textit{Thomas} and \textit{Pinney}. Unless \textit{Broderick} was


\(^{71}\) 294 U.S. at 643 (quoting Converse v. Hamilton, 224 U.S. 243, 260 (1912)).

\(^{72}\) See generally Kirgis, \textit{supra} note 40, at 120; Weintraub, \textit{supra} note 40, at 455.

\(^{73}\) 183 U.S. 144 (1901).

\(^{74}\) 232 U.S. 221 (1914).

\(^{75}\) 183 U.S. at 151; 232 U.S. at 234-35.
erick inferentially overruled Thomas and Pinney, or unless Pinney and Thomas are limited to situations where the charter expressly authorizes corporate business outside the state of incorporation, it appears that Broderick must be limited to its facts. Professor Currie has suggested that Broderick resulted from New York's clear interest in the application of its law to protect creditors of New York banks, while New Jersey had no legitimate interest in the application of its law.\textsuperscript{76} Another commentator has argued that Broderick holds "that a state may not deny recovery on foreign facts when its own domestic law would award recovery on parallel facts occurring within its own borders."\textsuperscript{77} Professor Currie has asserted that Broderick's teaching is that if one state has a substantial interest in the application of its law and the forum has no legitimate interest in the application of its law, the full faith and credit clause requires the application of the former state's law.\textsuperscript{78} Professor Baraf, however, has maintained that the implication of Broderick, Thomas, and Pinney is that a state can regulate—consistently with full faith and credit—the internal affairs of a foreign corporation with which the state has a substantial connection.\textsuperscript{79}

The application of the law of a state other than the state of incorporation to a question pertaining to the internal affairs of an arguably foreign or technically foreign corporation would not violate the rule of Broderick, Thomas, and Pinney as set forth in the preceding paragraph. The law of that state could be applied to a foreign corporation with substantial contacts with the forum, since the forum would have a legitimate interest in the application of its law.

3. Fraternal Benefit Insurance Associations

Certain cases involving fraternal benefit insurance associations have held that the law of the state where an organization was formed must be applied to questions regarding the organization.\textsuperscript{80} One commentator has argued that these cases stand for the proposition that where uniform national regulation is needed, full faith and credit requires the application of the law of a certain state.\textsuperscript{81} The question which obviously arises is whether the rationale of these cases would extend to the internal affairs doctrine. While not clear, it is generally thought that the reasoning of these cases would not extend to the internal affairs doctrine.\textsuperscript{82} In any event, these cases

\textsuperscript{79} See Baraf, \textit{supra} note 8, at 245-47.
\textsuperscript{81} See Weintraub, \textit{supra} note 40, at 478-79.
\textsuperscript{82} Some commentators have attempted to distinguish full faith and credit requirements applicable to fraternal benefit societies from those applicable to corporations. Fraternal benefit society cases could have resulted from attempts by the Supreme Court to protect the solvency of
have been severely limited, if not overruled sub silentio, by subsequent decisions.83

Professor Kirgis has proposed the following formulation of the full faith and credit limitation upon choice of law by a forum: A forum shall be able to apply its law to a transaction or occurrence unless (a) another state has an interest in applying its law that is overwhelming in comparison with the interest of the forum, or (b) there is an overwhelming reason to decide all similar cases according to one legal system, and a state other than the forum clearly should be the "bellwether."84 This standard seems both workable and consistent with precedent. According to the first standard, a forum could apply its law to arguably foreign or technically foreign corporations, since another state would not have a greater interest in applying its law than the forum. The second standard proposed by Kirgis may apply to the regulation of corporations with multi-state contacts. A number of questions pertaining to corporate internal affairs probably require uniformity of regulation.85 Most commentators who adhere to this view assume that the law governing such questions should always be the law of the state of incorporation.86

Certain internal matters, however, do not seem to require uniform national regulation. States frequently regulate matters such as the ability of forum shareholders to review the shareholder list pertaining to foreign corporations or the type of reports and other information which must be given by a foreign corporation to shareholders residing in the state. In addition, New York enacted a statutory scheme in the early 1960s which provided that certain sections of the New York law would govern pseudo-foreign corpora-

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83. See Order of United Commercial Travelers of America v. Duncan, 221 F.2d 703 (6th Cir. 1955). See generally Baraf, supra note 8, at 244; Cheatham, Federal Control of Conflict of Laws, 6 Vand. L. Rev. 981, 596 (1953); Harper, The Supreme Court and the Conflict of Laws, 47 Colum. L. Rev. 883, 895-97 (1947); Kaplan, supra note 13, at 446; Reese & Kaufman, supra note 8, at 1131 n.53.

84. Kirgis, supra note 40, at 120.

85. See Coleman, Corporate Dividends and the Conflict of Laws, 63 Harv. L. Rev. 433, 466 (1950); Cowett, Reorganizations, Consolidations, Mergers and Related Corporate Events under the Blue Sky Laws, 13 Bus. Law. 760 (1958); Gibson & Freeman, A Decade of the Model Business Corporation Act in Virginia, 53 Va. L. Rev. 1396 (1967); Horowitz, The Commerce Clause As a Limitation on State Choice of Law Doctrine, 84 Harv. L. Rev. 806, 817-18 (1971); Kirgis, supra note 40, at 120; Reese & Kaufman, supra note 8.

86. See, e.g., Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 669 (1974). Other commentators, however, suggest that it might be possible to apply the law of the commercial domicile of a foreign corporation if it has few contacts with its state of incorporation and substantial contacts with one state. See Coleman, supra note 85, at 466; Horowitz, supra note 28, at 819-20; Kirgis, supra note 40, at 139-42; Reese & Kaufman, supra note 8, at 1143.
Among the areas regulated are the liability of directors, the enforcement of dissenters' rights, the indemnification of directors, and the merger of domestic and foreign corporations. This scheme does not seem to have generated any significant problems; no cases have been brought under the statute.

A number of commentators have argued that chaos would result if certain other internal affairs of corporations with multi-state contacts were governed by the laws of more than one state. Particularly troublesome are distributions to shareholders, the issuance of shares, the stockholders' voting rights, the minimum percentage of votes required to approve a reorganization, and the transactions in which dissenters' rights arise; a significant burden would be placed upon corporate activity if the standards for such actions were unclear. The states' corporate laws provide different standards for the same corporate acts.

For example, many state statutes provide that "distributions" (including dividends and share repurchases) may be paid out of "capital surplus"; other states provide that even if a company does not have capital surplus, it may make distributions out of the prior year's earnings. California has adopted an entirely different approach: a corporation is permitted to make distributions out of its retained earnings. In addition, distributions are allowed if minimum levels of assets-to-liabilities ratios (post-distribution) are met. It is entirely possible that a corporation could satisfy the Delaware-type standard and not satisfy the California standard.

Other more significant conflicts between state corporate laws could result. For example, the laws of many states, including Delaware, make cumulative voting for directors optional; it is only permitted if such a provision is included in the corporation's articles or bylaws. Contrastingly, under California and Illinois law cumulative voting is mandatory. (This requirement is one of those applicable to California pseudo-foreign corporations)

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87. See N.Y. BUS. CORP. LAW §§ 1315-1320 (McKinney Supp. 1979-80). New York pseudo-foreign corporations are subject to the following provisions of the New York corporations code: section 1315 (the release of a list of shareholders to a shareholder upon demand); section 1316 (voting trust records); section 719, except subsection (a)(3) thereof (liability of directors); section 720 (actions against a director or officer); section 1318 (information to shareholders); section 623 (dissenters' rights); section 626 (shareholder derivative actions); section 627 (security for expenses in a derivative action); sections 721-727 (indemnification of directors and officers); and section 907 (merger of domestic and foreign corporations).
88. See generally Baraf, supra note 8, at 229-32; Halloran & Hammer, supra note 27, at 1324-27.
89. See, e.g., R. LEFLAR, AMERICAN CONFLICTS LAW 241 (1968); Coleman, supra note 85, at 466; Reese & Kaufman, supra note 8.
93. A corporation obviously could have earnings in a year and satisfy the Delaware standard for a nimble dividend and not have retained earnings or an adequate assets-to-liabilities ratio. Of course, the opposite could also occur. See Halloran & Hammer, supra note 27, at 1308.
pursuant to section 2115.) Massachusetts proscribes cumulative voting. Consequently, it would be possible to have a Massachusetts corporation governed by section 2115 of the California Corporations Code and thereby have the California Code make a provision mandatory that is prohibited by the law of the state of incorporation. The more common situation will be that a Delaware or Nevada corporation will be governed by section 2115, and such corporations rarely provide for cumulative voting in the articles or bylaws. A corporation confronted with this conflict in governing law would probably seek a declaratory judgment prior to the shareholders' meeting, regarding the procedure for counting votes for directors.

Another important difference among state corporate codes is the standard set forth for the approval of mergers and other reorganizations. Certain state laws require the approval of two-thirds of the shareholders to any such corporate reorganization; other states merely require majority approval. In a reorganization, if it were unclear whether the corporation was governed by two-thirds or by majority approval, once again a declaratory judgment would probably be required to determine whether the reorganization had been appropriately ratified by the shareholders.

This discussion indicates that significant problems would arise if the ability of a corporation to make distributions to shareholders, to participate in reorganizations, and to vote cumulatively for directors were governed by the law of more than one state. The corporation might be required to satisfy the most restrictive statute. This can be done in certain instances. The problems, however, cannot be so glibly dismissed. If the law of one regulating state provides for straight voting for directors and the other regulating state requires cumulative voting, there is no "most restrictive statute." Similarly, it would be unclear whether a reorganization, which received an affirmative vote of fifty-five percent of the shareholders, would be approved if the law of one regulating state required a majority approval of shareholders and the law of another state required two-thirds approval. Perhaps the requirement of two-thirds approval could be considered the most restrictive

97. For example, Arden-Mayfair, Inc. was a Delaware corporation which satisfied the standard set forth in section 2115 of the California Corporations Code for California pseudo-foreign corporations. At that time, the board of Arden-Mayfair served staggered terms and directors were elected non-cumulatively. Louart Corporation, a major shareholder in Arden-Mayfair, sought to have all directors elected cumulatively at the annual shareholders meeting pursuant to section 2115. See generally Louart Corp. v. Arden-Mayfair, Inc., No. C 192091, minute order (Los Angeles County Super. Ct., June 30, 1977). In this action, the California court held section 2115, insofar as it requires cumulative voting and the annual election of directors, unconstitutional as applied to Arden-Mayfair. Findings of Fact and Conclusions of Law at 22-23 (on file with author) (filed with the court April 27, 1978). An action for declaratory judgment was filed in Delaware by Arden-Mayfair while the California action was progressing. See Palmer v. Arden-Mayfair, Inc. No. 5549, (Del. Ch. Newcastle County July 6 (1978), mem. opinion (on file with the author). In that case the Delaware court noted the California decision summarized above and ordered the annual meeting of Arden-Mayfair to be held under Delaware law.
100. See generally Halloran & Hammer, supra note 27.
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statute, but it appears that as a practical matter there would be a considerable amount of time spent determining which statute would govern and whether the reorganization could go forward. The potential for substantial stock price fluctuations and the inevitable securities act lawsuits which would ensue from such fluctuations would make a securities lawyer cringe at such uncertainty.

It was argued above that certain questions pertaining to the internal affairs of a corporation require uniform national regulation. If this is true, the next question which must be addressed is what the nature of this law should be. Perhaps the most logical result would be the adoption of a federal corporation law for truly national corporations. For a number of reasons, the enactment of a federal corporation law appears both unlikely and unwise. For national and domestic corporations, the law of the state of incorporation therefore should be applied to questions pertaining to the internal affairs. This should be required by full faith and credit. Certainty in choice of law would result from such a policy, and there would be no other state with an overwhelming interest in regulating such corporations.

In contrast, there is apparently no persuasive rationale for applying the law of the state of incorporation to technically foreign corporations or arguably foreign corporations. The state of commercial domicile has a more significant relationship and greater interest in regulating such corporations than the state of incorporation. The mention of such an idea always causes corporate lawyers to shriek in unison "but what about certainty in corporate choice of law?" There are a number of persuasive responses. It seems a bit absurd to sacrifice all policy concerns in the area of corporate choice of law on the alter of certainty. Moreover, in a number of cases such uncertainty could be rectified by reincorporating in the state of commercial domicile. As a practical matter, certainty does not currently exist regarding questions pertaining to the internal affairs of technically foreign corporations; some courts apply local law to such corporations. A statutory scheme which would clearly define the scope and timing procedures for the application of the law of the commercial domicile to the internal affairs of pseudo-foreign

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101. A number of commentators have suggested such a statute. Although certain commentators have suggested such a statute throughout the twentieth century, see Brabner-Smith, Federal Incorporation of Business, 24 VA. L. REV. 159 (1937); Grosscup, The Federal Corporation Problem and the Lawyer's Part in its Solution, 39 AM. L. REV. 835, 849-51 (1905); Reuschlein, Federalization—Design for Corporate Reform in a National Economy, 91 U. PA. L. REV. 91 (1942); Snapp, National Incorporation, 5 ILL. L. REV. 414 (1911), the idea seemed to be advanced by many individuals in the early 1970's. See generally Henning, Federal Corporate Chartering for Big Business: An Idea Whose Time Has Come?, 21 DE PAUL L. REV. 915 (1972); Jennings, supra note 7; Schwartz, supra note 7; Note, Federal Chartering of Corporations: A Proposal, 61 GEO. L.J. 89 (1972). See generally Oldham, Book Review, supra note 12. It was discussed above that such a federal corporation law would be unwise. See notes 28-34 and accompanying text, supra.

102. See, e.g., Kirgis, supra note 40, at 140-42; Oldham, supra note 2.

103. Brainerd Currie has noted that if certainty of result were the only concern relevant to choice of law, a good choice of law rule would be to apply the law of the interested state first in alphabetical order. See Currie, The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. CHI. L. REV. 258, 279 (1961).


105. See Oldham, supra note 2, at 93-98.
corporations would eventually result in at least equal (and probably greater) certainty in corporate choice of law for technically foreign and arguably foreign corporations and advance more sensible policies. (Of course, statutes such as some of the takeover laws of certain states which provide that the laws apply to any corporation whose “principal place of business” is in the state, or which has “substantial assets” in the state, without defining these terms, should obviously be avoided.) For example, the California scheme has incorporated filing procedures and specific rules regarding the time during which California law will govern pseudo-foreign corporations and the sections of California law which will govern them. Admittedly, some uncertainty has resulted regarding what law applies to such corporations, at least during the interim period while such statutory schemes become accepted. It is presently unclear whether courts of the state of incorporation will enforce pseudo-foreign corporation laws of another jurisdiction.

It should be noted that the application of the law of the state of incorporation to the internal affairs of a technically foreign corporation or an arguably foreign corporation may constitute a violation of the full faith and credit clause, since the state of commercial domicile has an overwhelming interest in regulating the corporation as compared to the state of incorporation. The enforceability of the California and New York pseudo-foreign corporation choice of law statutes currently depends, as a practical matter, upon the state in which suit is brought. If the action is brought in the

106. Such a scheme could increase the certainty of the law applicable to technically foreign corporations, since currently it is somewhat unclear whether the state of the commercial domicile would apply local law or the law of the state of incorporation to questions pertaining to the internal affairs of such a corporation. If full faith and credit requires the application of the pseudo-foreign corporation law of the commercial domicile of a pseudo-foreign corporation rather than the law of the state of incorporation, this would definitely increase certainty in corporate choice of law regarding pseudo-foreign corporations.

107. See Kirgis, supra note 40, at 141-42. Many civil law countries do not follow the rule that the law of the place of incorporation governs a corporation’s internal affairs. See generally Latty, supra note 2, at 167 n.134. In these countries the law either of the “social seat” (sieg social) or the principal place of business (centre d’exploitation) applies to such questions. See generally 2 E. RABEL, THE CONFLICT OF LAWS 33-35 (2d ed. 1960); Vagts, The Multinational Enterprise, A New Challenge for Transnational Law, 83 HARV. L. REV. 740 (1970); Note, The Nationality of International Corporations Under Civil Law and Treaty, 74 HARV. L. REV. 1429 (1961). Latty notes that this choice of law rule evolved as a result of England’s relatively lax corporation laws in the Nineteenth Century. Businesses apparently were chartered in England and then conducted business in France and other parts of Europe. See Latty, supra note 2, at 166 n.130.

A corporation’s social seat is generally said to be the place of its “central administration.” The determination of a corporation’s social seat normally depends upon where its executive offices are located and where shareholders and directors meetings are held. See Hadri, The Choice of National Law Applicable to the Multi-National Enterprise and The Nationality of Such Enterprises, 1974 DUKE L.J. 1, 7. Although in some instances a corporation’s social seat is unclear (see Latty, supra note 2, at 168), the civil law choice of law rule for corporations has generally been a workable approach. See generally 2 E. RABEL, THE CONFLICT OF LAWS (2d ed. 1960); Latty, supra note 2, at 166-72; Vagts, supra note 107.


109. It was noted above that in the litigation relating to the election of directors of Arden-Mayfair, Inc., even though Arden-Mayfair satisfied the standard for a California pseudo-foreign corporation set forth in California’s code, a Delaware court held that the Arden-Mayfair annual meeting of shareholders should be held pursuant to Delaware law.

110. See Kirgis, supra note 40, at 142 n.87; Oldham, supra note 2, at 119.

111. See Oldham, supra note 2, at 123-30.
state of incorporation, the forum will probably apply its law and not the pseudo-foreign corporation statute; if suit is brought in the state of commercial domicile, the forum will probably apply its pseudo-foreign corporation law, unless it is deemed unconstitutional. This obvious forum-shopping problem (and the related burden on commerce) could be greatly ameliorated, and certainty in corporate choice of law regarding pseudo-foreign corporations could be greatly advanced, by establishing the following rule: if a corporation has minimal contacts with its state of incorporation and has substantial contacts with a state that has adopted a pseudo-foreign corporation law (thereby showing its interest in applying its law to such corporation), and the foreign corporation satisfies the test for jurisdiction incorporated in the pseudo-foreign corporation law, full faith and credit should require the application of the law of the commercial domicile rather than the state of incorporation.

The uncertainty which would remain would be whether the corporation had “significant contacts” with the state of incorporation. Given this uncertainty, the rule should provide that if the state of commercial domicile has enacted a law which attempts to assure that only corporations whose commercial domicile is within that state are governed by that law, full faith and credit should require the application of such a law to the exclusion of the law of the state of incorporation, regardless of the contacts between the corporation and the state of incorporation.

It has been noted that different forums use substantially different tests to establish whether they have a substantial interest in regulating foreign corporations. For example, the various state tender offer laws consider the number of shareholders and the number of employees which reside in the state, the location of the corporation’s principal executive offices, the amount of assets in the state, and the amount of revenues the corporation derived from the state, among others. The New York statutory scheme pertaining to the internal affairs of foreign corporations considers the percentage of revenues the corporation derived from New York. The California statute considers the number of shareholders, employees, revenues, and assets located or generated in California.

It is certainly possible that a tender offer could be governed by the tender offer laws of two or more states. For example, when Great Western tendered for the shares of Sunshine Mining Company, it was initially considered possible that the tender offer would simultaneously be regulated by

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112. California’s statutory scheme would arguably fall within this group of statutes, since it considers a number of factors in connection with the determination and requires that the average of these contacts exceeds 50% and that 50% of the shareholders reside in California.

To the extent that the various state tender offer laws purport to govern a foreign corporation with “substantial assets” in the state or which has its “executive office” or “principal place of business” within the state, such laws are obviously undesirable. These terms are vague and do not ensure that the state will have the dominant interest in regulating the corporation.

113. See generally E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control 207 (1977) [hereinafter cited as Tender Offers].


three state takeover laws. It should be emphasized, however, as to questions pertaining to state regulation of affairs of foreign corporations which required uniform national regulation, full faith and credit was only required to be given to those state laws which made a reasonable attempt to limit their application to only those corporations that had more than fifty percent of their contacts with the state. No state tender offer law approaches this standard. For this reason, state tender offer laws, insofar as they attempt to extraterritorially regulate tender offers made pertaining to foreign corporations, should be deemed to violate due process, and the application of such laws would not be required by the full faith and credit clause. The tender offer law of the state of incorporation, if there is such a law, should be given full faith and credit by all states.

The California scheme regulating certain internal affairs of pseudo-foreign corporations requires that fifty percent of the corporation's shareholders reside in California and that the average of the corporation's property, payroll, and sales located in or derived from California exceed fifty percent. This standard makes a reasonable attempt to limit the application of the statute to those corporations in which California has the predominant interest in regulating. Although different standards are conceivable, as long as the state standard included more than one contact between the corporation and the state, and required that the contacts with the states exceed fifty percent, it would appear highly unlikely that a corporation would satisfy the jurisdictional requirements of more than one such statute.

A related question which arises is what law should apply to a technically foreign or arguably foreign corporation whose commercial domicile has not adopted a statute such as California. Then, certainty in choice of law becomes a concern. Possibly at some point it will become the accepted rule that, regardless of whether the state of commercial domicile has adopted a pseudo-foreign corporation statute, the law of the commercial domicile applies to a pseudo-foreign corporation. (Such a rule would not evolve without

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117. It could be argued that only the sections of the state tender offer law which require uniform national regulation should be given full faith and credit rather than the whole tender offer law. This may be true in principle, but as a practical matter it would probably create a great deal of uncertainty as to which provisions must be given full faith and credit. For this reason, the whole tender offer law of the state of incorporation should be given full faith and credit by all other states. This general rule regarding giving full faith and credit to the tender offer law of the state of incorporation is subject to the pseudo-foreign corporation exception discussed herein.
119. Accord, Halloran & Hammer, supra note 27, at 1324-27. It may be advisable for the statute to consider both the percentage of shareholders residing in the state as well as certain business contacts (such as assets in the state, principal executive offices in the state, or revenue derived from the state) between the corporation and the state. If the statute covers both types of contacts, it would be even less likely that a company could satisfy more than one of such laws.

An interesting example of the fringe area of pseudo-foreign corporations is Great W. United Corp. v. Kidwell, 439 F. Supp. 420 (N.D. Tex. 1977), aff'd, 577 F.2d 1256 (5th Cir. 1978), rev'd on venue grounds, Leroy v. Great W. United Corp., 99 S. Ct. 2710 (1979). Sunshine, the target company, was a Washington corporation with no significant contacts with Washington. Its principal executive offices and more than 50% of its assets were located in Idaho, and it conducted a significant amount of business in New York. Sunshine's main subsidiary was a Delaware corporation which conducted a great deal of its business in Maryland.
the states adopting pseudo-foreign corporation statutes.) If this occurs, such a rule could be applied and the corporation, if clearly a "tramp" pseudo-foreign corporation, would be certain what law would govern its internal affairs. Until such a rule evolves, however, technically foreign and arguably foreign corporations should be governed by the law of their respective states of incorporation; any other result would leave the corporation unsure which law governed its internal affairs. Even assuming such a new choice of law rule would develop, the problem would still exist as to what constituted a pseudo-foreign corporation; until a workable definition evolves or until the state of commercial domicile would adopt a pseudo-foreign corporation statute, the corporation would be unsure which law governed its internal affairs.

C. Commerce Clause

Arguably, certain state regulations of corporate affairs violate the Constitution's commerce clause. It has been suggested that pseudo-foreign corporation laws and tender offer laws place an impermissible burden upon interstate commerce.

1. General Rules

It is somewhat difficult to predict whether courts will conclude that pseudo-foreign corporation laws or tender offer laws impose impermissible burdens on interstate commerce. Few appellate courts have confronted these questions, and the guidelines for what constitutes an impermissible burden are vague and depend upon a number of considerations. The extent of the restriction on state power imposed by the commerce clause has frequently been stated by the Supreme Court in a manner that begs the question and provides little guidance. For example, the Court has often concluded that the burden imposed upon commerce by a state statute is "direct" or "indirect," depending upon whether the statute is to be upheld or deemed unconstitutional.

Nevertheless, it is possible to set forth some general rules. If the state statute is deemed to discriminate against interstate commerce, or to favor local business vis-a-vis out of state business, such statutes are almost always ruled unconstitutional. Courts generally uphold regulation if the subject

120. U.S. CONST. art. I, § 8, cl. 3.
121. See Halloran & Hammer, supra note 27.
122. See Tender Offers, supra note 113, at 225.
matter is deemed one "of local concern" which Congress has not regu-
126. The trick, of course, is discerning when a matter is of local concern. The Court has sometimes been quite generous in its willingness to find the matter one of local concern; the regulation of the interstate marketing of the California raisin crop\textsuperscript{127} and pollution control of ships traveling upon the Great Lakes have been deemed local in nature.\textsuperscript{128}

Recent decisions have stated that the validity of state statutes under the commerce clause will generally be determined by balancing the burden upon commerce against the local benefit derived therefrom.\textsuperscript{129} Professor Dowling has argued that a state regulation will only be deemed an imper-
missible burden when that burden exceeds its local benefits.\textsuperscript{130} In the famous case of \textit{Pike v. Bruce Church, Inc.},\textsuperscript{131} the Supreme Court set forth the standard of review of state statutes under the commerce clause in this man-
ner:

Where the statute regulates even-handedly to effectuate a leg-
132. \textit{Id.} at 142 (citation omitted). This test has been considered the appropriate standard for commerce clause review of state statutes in a number of cases, including \textit{Great Western United.}
internal affairs of pseudo-foreign corporations should be governed by the pseudo-foreign corporation law of the commercial domicile (if such a law exists), rather than the law of the state of incorporation, minimal burdens on interstate commerce would then result from pseudo-foreign corporation laws.

A current example of the type of burden imposed by pseudo-foreign corporation laws is reflected in the Arden-Mayfair litigation. Arden-Mayfair was a Delaware corporation that satisfied the California pseudo-foreign corporation tests. It was unclear whether Delaware or California law governed certain internal affairs of the corporation, including the method for the election of its directors. Suits were initiated in both California and Delaware to resolve, among other things, whether votes for directors should be cumulated.\textsuperscript{133} The California court concluded that the California provision, as applied to Arden-Mayfair and the method of its election of directors, placed an impermissible burden on interstate commerce and was therefore unconstitutional. The court ordered that the election of Arden-Mayfair's directors be held pursuant to Delaware law.\textsuperscript{134} By the time the Delaware court reviewed the matter, the California decision had been rendered; the Delaware court merely reiterated the California holding.\textsuperscript{135}

\textit{Arden-Mayfair} represents the extreme example of the types of burdens currently imposed upon interstate commerce by the pseudo-foreign corporation laws. California required a transaction be carried out in one way, while Delaware required the transaction be carried out in a significantly different manner. It was impossible to comply with both; the directors either had to be elected cumulatively or by straight voting.

Of course, other types of conflicts could result.\textsuperscript{136} In addition to \textit{Arden-Mayfair}'s cumulative voting dilemma, corporate reorganizations (and dissenters' rights relating thereto), corporate distributions and repurchases of a corporation's shares, and the legality of the indemnification of corporate officers or directors all could be sources of conflict between the state of incorporation and pseudo-foreign corporation law.

\section*{B. State Tender Offer Laws}

State takeover laws\textsuperscript{137} impose burdens on interstate commerce in addition to those resulting from the pseudo-foreign corporation laws. Added to the problem of uncertainty as to which state law is applicable to the transaction, state takeover laws place a number of unique burdens on commerce. Many takeover laws provide for more extensive disclosure than required under the Williams Act. A significant number of state laws grant with-

\begin{itemize}
\item \textsuperscript{134} Minute Order in Louart Corp. v. Arden-Mayfair, Inc., No. C-192091 (Los Angeles County Superior Court July 6, 1979). The order is dated June 30, 1977.
\item \textsuperscript{135} See Palmer v. Arden-Mayfair, Inc., No. 5549 (Del. Ch., Newcastle County 1978).
\item \textsuperscript{136} See notes 91-101 supra and accompanying text.
\item \textsuperscript{137} See notes 218-43 infra and accompanying text for an extensive discussion of state takeover laws.
\end{itemize}
drawal rights to a target company's shareholders for a period exceeding that provided in the Williams Act, thereby making it less clear to the bidder, until a later date, how many shares are definitely tendered. State law pro rata repurchase requirements sometimes extend beyond the period set forth in the Williams Act, forcing the bidder to buy more shares to satisfy both the Williams Act pro rata repurchase requirements and the requirements of the various state laws.

Moreover, between the notice of intention to make a tender offer and the date the tender offer commences, the market for target company's securities will be highly unstable and might require the cessation of trading for that stock. If the stock exchange or the Securities and Exchange Commission (SEC) suspends trading of the target company's stock, this obviously would dry up the market for these shares during that period. If trading is not suspended, however, there is normally a very active market for shares for which a tender offer is to be made.

State takeover laws seem to encourage bidders to use the "bear hug" tender offer approach: the bidder first makes a takeover proposal to the target company's management. If target management does not approve the offer (thereby foreclosing taking advantage of the "friendly offer" exemption contained in most state takeover laws), the bidder would then make a tender offer at a lower price to the shareholders. Similarly, since state takeover laws tend to facilitate the entry of a third-party bidder, the initial tender offer may be lower than what otherwise would have been made, in anticipation of further bidding.

By far the most significant burden of the state takeover laws, however, results from the delay created by most laws. State takeover laws generally prolong tender offers, since many state takeover laws require a waiting period between the required filing of a notice of intention to make a tender offer and the date upon which the offer commences. Thus, the offer remains open longer than required under federal law. In addition, a number of state takeover laws provide that, upon request from target management, the state securities commission must hold a hearing regarding the adequacy of disclosure in the tender offer document and the fairness of the terms of the offer.

138. Both the district court and the circuit court in the Great Western United case seemed concerned about this possibility. The New York Stock Exchange also believes this to be a possibility. See SEC. REG. & L. REP. (BNA) No. 1, at A-12 (June 1969).


140. The district court in Great Western United voiced this concern. 439 F. Supp. at 438.

141. This point was made by the circuit court in Great Western United. See 577 F.2d at 1283.

142. For example, one study found that, prior to the widespread enactment of state takeover laws, more than 2/3 of all tender offers were completed 22 days after the announcement of the tender offer. See Ebeid, Tender Offers: Characteristics Affecting Their Success, MERGERS & ACQUISITIONS 24 (1976). Because of the waiting period and mandatory hold-open period set forth in most state takeover laws, the average tender offer now takes much longer to complete.
The tender may not commence until such hearings have occurred.\footnote{143}{See notes 227-31 infra and accompanying text for a discussion of the provisions regarding such hearings and waiting periods.}

One result of the delay is that the offeror’s expenses are increased.\footnote{144}{See generally Bromberg, Tender Offers: Safeguards and Strengths—An Interest Analysis, 21 CASE W. RES. L. REV. 613, 651 (1970).} Frequently, tender offers are financed and the bidder must pay a daily commitment fee for the financing; the longer the tender offer remains open, the greater the financing fee. Further, the bidder’s expenses are increased by having to deal with the various state securities commissions and having to appear at any required hearings.

Aside from the economic hardship on the offeror, the waiting period also gives target management time to communicate its position to target shareholders and generally engage in defensive tactics. A variety of defensive tactics may be attempted by the target company: issuing additional shares to friendly shareholders, attempting to enter into a merger with a third party, or wooing another buyer.\footnote{145}{See generally Fleischer, Defensive Tactics in Tender Offers, 9 REV. SEC. REG. 853 (1976); Reuben & Elden, How to be a Target Company, 23 N.Y.L.S. L. REV. 423 (1978); Schmults & Kelly, Cash Takeover Bids—Defense Tactics, 23 BUS. LAW. 115 (1968). See, e.g., Bell Industries Plans Anti-Takeover Moves: Shareholders to Vote, Wall St. J., Oct. 19, 1979, at 45, col. 4.}

On October 18, 1979 Dominion Bridge indicated its desire to tender for the shares of Warner & Swasey Co. Warner & Swasey's management resisted the proposed tender offer. The Ohio Division of Securities did not approve the adequacy of Dominion Bridge's disclosure document until more than two months had elapsed. During that time, a “white knight” third-party bidder, Bendix Corp., was located. Warner-Swasy Takeover Fight's Stakes Increased, Wall St. J., Dec. 17, 1979, at 5, col. 1.

One study found that of the contested cash tender offers and exchange offers studied that were made from 1972 through 1975, 78% were either completely or partially successful. Austin, Tender Offer Statistics: New Strategies Are Paying Off, MERGERS & ACQUISITIONS 11-14 (1975) [hereinafter cited as Austin, Tender Offer Statistics]. A later study conducted by the same writer found that the probability of success in connection with a contested tender offer decreased significantly during 1976 and 1977. It was found that of the 18 contested tender offers made in 1977 that were studied, only 10 were completely or partially successful; 45% were unsuccessful. Similarly, of the 26 contested tender offers made in 1976 that were studied, only 13 were completely or partially successful; 50% were unsuccessful. See generally Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, N.Y.L.J., June 12, 1978, at 25, col. 3 [hereinafter cited as Austin, Study Reveals Friends in Tactics, Premium Success Rates in Offers.]

Professor Austin contends that these figures suggest that, because of the state takeover laws and the increasing use of defensive tactics by target management, it is becoming increasingly difficult to make a successful tender offer. Another article interprets this information differently. See generally Comment, The Constitutionality of State Takeover Statutes: A Response to Great Western, 53 N.Y.U. L. Rev. 872 n.2 (1979) [hereinafter cited as NYU Comment]. This article notes that, of the contested tender offers made during 1976 and 1977 deemed “unsuccessful” by Professor Austin, a third-party bidder frequently gained control of the target company. It is stated that of the 18 tender offers made in 1977 that were studied by Austin, in 16 (88%) of these either the initial bidder or a third-party bidder was partially or completely successful. Similarly, of the 26 tender offers made in 1976 that were studied by Austin, the initial bidder or a third-party bidder was completely or partially successful in 80% of the offers. (These findings
A separate problem is created by the rights of the state securities commissions to hold hearings regarding the adequacy of the disclosure and the fairness of the transaction. These hearings may either be held upon motion by the commission itself or upon request by target management. A request for a hearing by target management is a defensive tactic often used to postpone a tender offer. The tender offer will be held at bay until the securities commission is satisfied that the disclosure is adequate and the terms are fair. In addition, if the state securities commission does not approve the degree of disclosure or the terms of the transaction, the tender may be enjoined by the securities commission.

A significant result of the delays imposed by the state takeover laws is that the initial bidder is less likely to be successful. In a growing number of cases, the initial bidder is defeated by a "white knight" third-party bidder. It is unsettled whether target management is more successful in retaining control in contested offers because of the state laws.

State takeover laws, in their current form, may dampen the interest of
Arbitrageurs play a very important role in a tender offer. Arbitrageurs buy shares of a target company on the open market after a tender is announced, with the hope of receiving the full tender premium for the shares within a short period after the arbitrage purchase. If it appears that the state securities commission will not allow the tender to commence, or even if the commission significantly delays the tender, arbitrageurs may be less interested in participating.

When state takeover laws were initially enacted, commentators predicted that tender offers would no longer be effective vehicles for acquiring control of companies. Although these predictions were less than prescient, the data discussed above do suggest that the probability of an initial bidder in a contested tender offer gaining control of the target company has decreased in the last few years. This could be attributed to the opportunity of target management to use defensive tactics as a result of the enactment of takeover statutes by many states and the more frequent appearance of a "white knight" third-party bidder.

In addition to decreasing the likelihood that initial bidders will be successful in a contested tender offer, state takeover laws probably have a "chilling effect" upon tenders. A number of effects of state takeover laws probably discourage tenders. First, it seems less likely that the initial bidder will be successful, and second, the delayed and prolonged tender makes it less likely that the shares will sell at bargain prices. Finally, the bidder's expenses are increased. It does not appear, however, that state takeover laws have significantly reduced the number of tenders made.

During the period from 1970 through 1974, a relatively small number of tender offers were made. During this period, only a handful of state takeover laws were in effect. During 1975 through 1979, the annual number of

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<th>Year</th>
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<td>(Oct '68-Sept '69)</td>
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<td>1970</td>
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Most of the principal, commercial states adopted tender offer laws during 1975 and thereafter. During this period, the number of tender offers made has significantly increased. See
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tender offers has generally increased.\textsuperscript{156} During the period from 1975 through 1977, tender offer laws became effective in twenty-seven additional states.\textsuperscript{157} Although it is impossible to tell how many tender offers were discouraged by these laws, it does not appear that the enactment of such laws during 1975-1977 by almost all the major, commercial states (California, according to form, being the lone rebel) has dramatically affected the number of tender offers made.

3. Local Benefits

A. Pseudo-Foreign Corporation Laws.

The internal affairs doctrine permits corporations to avoid regulation by the law of the state of commercial domicile by incorporating or reincorporating elsewhere.\textsuperscript{158} With pseudo-foreign corporation laws, states can retain regulatory control over corporations commercially domiciled there, if the state so desires. This is not an insignificant benefit. The state of commercial domicile obviously has an interest in the financial stability of corporations domiciled there, both to protect resident shareholders and creditors of the corporation. Further, such a state would have an interest in promulgating the standard of care which should be exercised by directors and officers of corporations and standards for indemnification of officers and directors of commercially domiciled corporations.

Perhaps most important, states have an interest in protecting resident shareholders from fraudulent or unfair practices. For example, the recent drop in stock prices has made more companies consider the advisability of attempting to "go private." Different states have taken different approaches to regulating procedures for going private. Many states have done nothing (generally relying upon the fiduciary duties of controlling shareholders and management to other shareholders), while other states, such as California, have adopted more restrictive protective legislation.\textsuperscript{159} Indeed, states have

\textsuperscript{generally Mishkin and Nathan, Tender Offers Continue to Surge, N.Y.L.J., Dec. 19, 1977, at 30, col. 1.}

Professor Douglas Austin of the University of Toledo is preparing information regarding tender offers made during 1978 and 1979. He is compiling this information during the winter of 1979 and it will be published in 1980. (Correspondence on file with author.)

Professor Austin has stated that from 1970 through 1975 an aggregate of 269 tender offers were made. See Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, supra note 146, at 25. This difference between his figures and the figures supplied by the Securities and Exchange Commission could result from the fact that the SEC figures are compiled on the basis of its fiscal year (from October 1 through September 30), while Professor Austin's information is presumably compiled on a calendar year basis.

\textsuperscript{156. See Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, supra note 146. See also information supplied by Ruth Appleton, supra note 155.}

\textsuperscript{157. During this period takeover laws became effective in Indiana, Delaware, Connecticut, New York, Massachusetts, Pennsylvania, Michigan, Illinois, Texas, and New Jersey, among others.}

\textsuperscript{158. See notes 8-10 supra and accompanying text.}

\textsuperscript{159. California Corporations Code § 1101 provides that in connection with any merger other than a short-form merger, the common shares of a disappearing corporation may be converted only into common shares of the surviving corporation unless all shareholders of the disappearing corporation approve another plan. Similarly, in connection with a sale of assets transaction, if the buyer controls the seller, the terms of the sale must be approved by at least
an interest in protecting shareholder rights in connection with any corporate reorganization, if a large percentage of its shareholders reside in the state.

The benefit derived from pseudo-foreign corporation laws, therefore, is that the state of commercial domicile retains the right to regulate the internal affairs of corporations commercially domiciled there, to the extent, if any, that the state desires to do so to protect shareholders and creditors residing there.

B. Benefits Derived from State Takeover Laws.

Given that the primary effect of state takeover laws is to delay the commencement of a tender offer and to prolong the tender offer once it has commenced, the bidder rarely acquires the target company shares for the price originally bid. A third party frequently enters the fray and competes with the original bidder for the shares of the target company. Therefore, one effect of state takeover laws seems to be that bidders are not able to get the bargain they had been able to obtain under the quicker "Saturday night special" tender offer permitted under the Williams Act. (Alternatively, one could argue that bidders now bid a lower initial price in anticipation of the bidding to follow.)

90% of the seller's outstanding shares, unless the shareholders of the seller receive common shares of the buyer in connection with the sale. CAL. CORP. CODE § 1001(d) (West 1977).

See, e.g., Flom, supra note 154.


An example of such a bidding war in which target shareholders received a large premium for their shares was the contest between United Technologies and J. Ray McDermott for control of Babcock & Wilcox Company. At the time the tender was announced, the market price of the shares was $35. United Technologies originally bid $42 for the shares. McDermott was eventually successful with an offer of $65 per share. See Metz, Babcock and Wilcox: A Battle That Shook Wall Street, N.Y. Times, Sept. 21, 1979, at 57, col. 1.

Similarly, Dominion Bridge and Bendix battled for control of Warner & Swasey. When Dominion Bridge initially announced its proposed offer of $57 per share, Warner & Swasey's stock was trading for $36%. The final successful bid by Bendix was $83 per share.


Professor Austin's studies suggest that tender offer premiums are currently not significantly higher than premiums received by target shareholders a decade ago. He notes that during the period from 1968 through 1972, a "majority" of the premiums contained in tender offers amounted to less than 50% of the market price of the shares two weeks prior to the tender offer. See Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, supra note 146. Although the premiums received by shareholders during 1972 through 1975 increased somewhat, during the 1976-1977 period 71.6% of the tender offers studied offered target shareholders premiums of less than 50% of the market price of the shares. These figures do not distinguish between contested and uncontested tender offers, however. It could be true that premiums currently received by shareholders in uncontested tender offers are not significantly higher than those received a decade ago, but that shareholders now receive greater premiums in a contested offer or when two bidders are fighting for control of a target company.

A.F. Ehrbar disagrees with the findings of Professor Austin and contends that tender offer premiums were then averaging more than 60% over market price, and in contested tender offers the premiums were greater. Ehrbar notes that the premium target shareholders have historically received in tender offers is approximately 25%. 
Another related local benefit stemming from state takeover laws is the additional time given shareholders to decide whether to tender their shares. This results both from the waiting period (during which a tender has been announced but has not commenced) and from the longer hold-open period required, coupled with the increased withdrawal rights and pro rata takeup protection given target company shareholders. Since the recent SEC proposals regarding tender offer regulation would lengthen the required hold-open period and would extend withdrawal rights and pro rata takeup protection beyond that currently provided in the Williams Act, this suggests that these measures are now seen as a more desirable regulatory scheme.\(^6\)

4. Less Restrictive Alternatives

A. Pseudo-Foreign Corporation Laws.

It does not appear that there is an alternative to pseudo-foreign corporation laws which would be less burdensome on interstate commerce while still affirming a state’s right to regulate commercially domiciled corporations. The foreign corporation could be required to have seventy to ninety percent of its contacts with the state before the pseudo-foreign corporation law would apply. This change would result in such laws applying to fewer corporations and to corporations with generally fewer national contacts; while placing less of a burden on interstate commerce, this would also substantially erode a state’s ability to regulate commercially domiciled corporations.

B. State Takeover Laws.

In sum, the principal benefit accruing from state takeover laws seems to be a prolongation of tender offers, resulting from the required waiting period, the expanded withdrawals rights, the pro rata takeup provisions, and the extended mandatory hold-open period. One significant burden upon commerce is that tender offers now must be announced in advance of the tender rather than concurrently with the commencement of the tender, as the Williams Act permitted. The waiting period provisions permit target management to engage in defensive tactics and give third parties additional notice of the tender, affording them time to consider whether they also wish to bid for the target shares.

It appears that whatever benefit is derived from the waiting period is outweighed by the resulting burden upon commerce. The advantages of the waiting period could essentially be retained by prolonging the hold-open period and lengthening pro rata purchase rights and withdrawal rights. Under such a regulatory scheme, shareholders would still have a significant period of time to consider whether they wish to tender their shares and management would not have an opportunity to engage in defensive tactics prior to the commencement of a tender. For these reasons, it seems that state law

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waiting period provisions should be deemed an impermissible burden upon interstate commerce.

A similar conclusion should be reached regarding the provisions of state laws which provide for hearings by the state securities commission. These hearings probably do benefit shareholders by attempting to insure full and accurate disclosure. Target management uses these hearings, however, as a significant defensive tool. Many state statutes provide that hearings must be held upon request by target management. Since the tender may not commence until all hearings have been completed, target management almost always requests hearings, often in more than one state. Consequently, the commencement of tender offers could be delayed for months, thereby substantially increasing the costs to the bidder and making it more likely that a third-party bidder will enter the scene. Because these hearing procedures substantially delay the commencement of a tender offer after its announcement, and because the essential benefits of the state laws would continue without such provisions, they should be deemed impermissible burdens upon interstate commerce. The primary benefit of state takeover laws—the prolongation of the period during which shareholders may decide whether to tender their shares—may be retained without providing for hearings by the state securities commissions.

164. For example, United Technologies Corporation initially announced on April 5, 1977, its intention to tender for the shares of Babcock & Wilcox at a price of $42 a share, with the tender to commence as soon as all state law requirements had been satisfied. Babcock & Wilcox then requested hearings under the takeover laws of four different states. Because of these maneuvers by target management, United Technologies was not able to have the tender commence until August 4, 1977; the initial tender price was then $48. A third-party bidder appeared on the scene and was successful. See generally Brown, supra note 162, at 844-45.

Another example of the burdens imposed by the state law hearing requirements can be seen in the attempted tender offer by Thrall Car Manufacturing Company for the shares of Youngstown Steel Door Company. On May 24, 1976, Thrall Car announced its intention to tender for Youngstown Steel shares at a price of $14 a share. The management of Youngstown Steel requested a hearing pursuant to the state takeover law. These hearings were held from June 25 through July 16, 1976. The commission issued its order on August 2, 1976. When one reads this order, it appears that the Ohio Securities Commission was attempting to insure that state takeover laws would be deemed unconstitutional. The division found the disclosure document inadequate in many ways. Among other things, the division wanted Thrall Car to disclose a great amount of information regarding the business of Youngstown Steel. This information seemingly could only have been obtained from Youngstown Steel management, who did not appear amenable to such cooperation, to say the least. More importantly, the division found both the price offered target shareholders too low and the hold-open period of the offer too short. As if this was not enough to frustrate Thrall Car, the division announced that any amended offer and the accompanying disclosure document would first be forwarded to Youngstown Steel management for their comments, and then the offer and disclosure document would be again reviewed by the commission. A third-party bidder appeared that was supported by Youngstown Steel management; this third-party bidder was able to avail itself of the "friendly offer" exemption of the Ohio takeover law. The bidder was therefore able to tender successfully for the shares of Youngstown Steel while Thrall Car could not make a tender offer, since it had not complied with the state statute. See Tender Offers, supra note 113, at 223-25.

A recent case considered the constitutionality of the Ohio takeover law. The court found that the Ohio law did not impose an impermissible burden on interstate commerce, that the Ohio law did not conflict with the federal law, and that the Williams Act did not intend to preempt the field of regulation of tender offers. AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979).
5. Balancing the Benefits and Burdens

A. *Pseudo-Foreign Corporation Laws.*

It was argued above that pseudo-foreign corporation laws could advance significant state policies, but their enforcement could also result in substantial burdens upon interstate commerce. The commerce clause balance in some circumstances will not be an easy one.

The burdens upon interstate commerce resulting from pseudo-foreign corporation laws hopefully will ebb as the pseudo-foreign corporation exception to the internal affairs doctrine becomes more established, which should occur if a number of states adopt pseudo-foreign corporation laws. Most civil law countries apply the law of the country in which the corporation's "social seat" is located to internal affairs questions; no significant burden on commerce appears to result. The burdens upon interstate commerce imposed by such laws, therefore, seem largely to be a transitory phenomenon.

State regulations which are aimed at restraining fraudulent or unfair trade practices seem more likely to survive commerce clause review than those oriented toward increasing the profitability of local business. Pseudo-foreign corporation laws seem clearly to be of the former type.

Because the commercial burden hopefully will gradually diminish, and because these laws do not represent an attempt by a state to favor local business vis-a-vis out of state enterprise, these laws should be allowed to survive commerce clause challenge. Of course, if the burden is substantial, it may be necessary to deem such laws unconstitutional as applied in certain situations.

B. *State Takeover Laws.*

As noted, both the waiting period provisions of state takeover laws and the provisions allowing hearings by state securities commissions should be held impermissible burdens upon interstate commerce, since the benefits of state takeover laws could be retained while these significant burdens upon interstate commerce could be eliminated. The question remains, however, whether state takeover laws without these provisions should be deemed impermissible burdens upon interstate commerce.

A number of judges and commentators have noted that state takeover laws were essentially special interest legislation designed to protect management of local target companies; however, this should not be considered determinative. Although the Supreme Court has sometimes focused upon an improper legislative purpose or motive in connection with the enactment of legislation as a justification for deeming the statute unconstitutional, in

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165. See note 107 supra.
most instances the Supreme Court does not deem legislative purposes significant.168 The commerce clause determination should be based upon the effect of these laws and not on an attempt to generalize the motivations of the legislatures of more than two-thirds of the states.

The extent of the burden imposed upon interstate commerce by state takeover laws would depend upon whether state takeover laws would be deemed analogous to internal affairs questions and thus be governed by only the law of one state.169 If this view would be accepted, only one state takeover law would apply to any takeover. If not accepted, it is quite possible that two or more state takeover laws could regulate a tender. Additional hindrances upon interstate commerce would result from the conflicting requirements.

Assuming that a tender offer is not an internal affairs matter, tender offers could be regulated in the same manner that securities transactions are generally regulated by blue sky laws. Accordingly, state takeover laws would not be extraterritorial and would only govern offers made to resident shareholders. Such an approach would be an improvement upon the current extraterritorial laws which base jurisdiction upon any substantial (sometimes even a minimal) contact with the state. It is submitted that such an analysis, however, fails to consider the distinction between a tender offer and a normal offering of securities. In a normal public offering of securities, securities are being offered by the company to the general public. If for some reason a state blue sky law is deemed too restrictive or the offer would not qualify in that state, no significant problem results; offers are made only in the states where the applicable blue sky laws are satisfied. As a result, the only burden upon interstate commerce is that the shares may not be offered to residents of states with restrictive laws.

In contrast, a tender offer is made to a specific group of people—existing shareholders. In addition, it is a complex transaction with a number of important substantive terms and rights (such as the hold-open period, withdrawal rights, and pro rata repurchase rights) provided to the target shareholder. The regulation of a tender offer by all states in which target shareholders reside would obviously result in different shareholders being treated differently (e.g., the tender would remain open in some states longer than in others). Most importantly, if a state enacted a restrictive takeover law, or if only a few shareholders resided in the state, a bidder might choose to ignore such states and merely bid for shares in states where a larger number of shareholders reside or which have less restrictive takeover laws.170 The undesirable result is that certain shareholders are not able to take ad-

169. See notes 244-51 infra and accompanying text.
170. Arkansas purports to regulate all tender offers made regarding target companies with more than 35 Arkansas shareholders. Offerors have attempted to avoid compliance with the Arkansas statute by excluding Arkansas residents from the offer. See generally 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 244-45 (1978). Such a tactic would appear to violate the terms of the New York Stock Exchange Company Manual. Id. at 225.
vantage of the full premium offered in the tender offer.\textsuperscript{171} Because of these factors, it seems more desirable to have one extraterritorial tender offer law govern a tender offer rather than different state takeover laws.

Regulating tender offers made to shareholders residing outside the state does not result in any local benefit to the regulating state. This in no way differs from the extraterritoriality of state regulation of corporate internal affairs; such regulation almost always has some extraterritorial effects, but has never been considered impermissible for that reason. It will be argued below that a tender offer should be considered an internal affairs matter, hence justifying the extraterritoriality of the tender offer laws.

If the waiting period provisions and the provisions permitting hearings by state securities commissions are deleted from state takeover laws, the burden upon interstate commerce would diminish. The following significant burdens remain: disclosure requirements exceeding those of federal law, different hold-open periods, pro rata repurchase, and withdrawal rights.

The additional state disclosure requirements do not seem to create a constitutional problem.\textsuperscript{172} State blue sky laws frequently impose disclosure requirements in addition to those required by the SEC, and it is accepted that state blue sky laws are constitutional. No disclosures required by state law are prohibited by federal law.

The longer hold-open period (coupled with prolonged withdrawal rights) of state statutes, however, would burden interstate commerce. These provisions give target shareholders more time to decide whether to tender their shares, and consequently give a third-party bidder additional time to decide whether to bid for the shares. Although such provisions have not significantly reduced the number of tender offers, such provisions clearly could have a "chilling effect" upon tender offers.

Apparently, the SEC has concluded that it would be wise to lengthen the hold-open period and withdrawal rights prescribed under the Williams Act.\textsuperscript{173} These proposals would extend withdrawal rights until the expiration of fifteen business days from the commencement of the offer (proposed rule 14d-7) and they would require a tender offer to remain open at least thirty business days from the commencement of an offer (proposed rule 14e-1). This suggests that the SEC has concluded that the benefits accruing to target shareholders from such extensions would exceed any burdens upon commerce which would result. It is submitted that state hold-open periods and withdrawal rights which are longer than those prescribed under the Williams Act should be deemed constitutional, unless the period is clearly excessive.

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\textsuperscript{171} Unless trading of the shares of the target company would be suspended, shareholders would be able to sell shares on the open market. The market price in such instances, however, often is significantly less than the tender price.

\textsuperscript{172} \textit{Accord}, Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1281-87 (5th Cir. 1978).

\textsuperscript{173} Under federal law, a Schedule 14D-1 must be filed in connection with a tender offer. 17 C.F.R. § 240. 14d-100. Various states have different disclosure requirements. See \textit{generally} Gould & Jacobs, The Practical Effects of State Tender Offer Legislation, 23 N.Y.L.S. L. REV. 399, 410 (1978).

Lengthened pro rata repurchase rights also place a burden upon the tender offer. To satisfy the pro rata repurchase rights of both the Williams Act and state law, the bidder would need to buy more shares than required. In light of the benefits which accrue to shareholders from giving them a significant period of time to decide whether to tender their shares, however, such prolonged pro rata repurchase rights should be deemed constitutional.

State regulation of securities transactions and corporate internal affairs has generally not been considered an impermissible burden upon commerce. State takeover laws (without a waiting period and without provisions for an administrative hearing) should satisfy a commerce clause review.174

D. Preemption

A question exists whether state regulation of tender offers has been preempted by the Williams Act.175 A state statute normally is preempted if the federal law (or the legislative history of that law) clearly reflects the intention of Congress that state regulation of the subject matter should not be allowed.176 Even if the federal law does not expressly preempt state regulation, sometimes an intention to preempt will be inferred if (i) the federal

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174. Accord, AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979); City Investing Co. v. Simcox, 476 F. Supp. 112 (S.D. Ind. 1979). Quite another question is presented by a city and not a state enacting a takeover law. Such a law was enacted by Urbana, New York. See Tender Offers, supra note 113, at 254 n.103. It is extremely doubtful that such a law would be constitutional.

Certain state takeover laws have unusual provisions which appear to impermissibly burden interstate commerce. For example, Hawaii's law requires that a bidder offer to purchase 100% of the target shares (see HAWAII REV. STAT. § 417E-2(3) (1976); a bidder may not specify that it will only bid for a certain lower percentage of the shares. This significantly burdens interstate commerce, since tender offers frequently are made for less than 100% of the shares; the cost of buying all or nearly all of the outstanding shares may be prohibitive. The benefit is that all shareholders wishing to tender may obtain the premium for all shares tendered, rather than the pro rata take-up which would normally occur. The burden on interstate commerce resulting from such a provision clearly seems to exceed its benefits.

Kansas has enacted a provision which provides that if a person acquires 2% of a company's stock without disclosing an intention to "influence control of the target company" or without making the appropriate filing with the state securities commission, a tender offer may not be made for one year. KAN. STAT. ANN. § 17-1277(b) (1975). For similar statutes, see GA. CODE § 22-1904 (1977); OHIO REV. CODE ANN. § 1707.041(b)(2) (Anderson 1978). It is unclear what local benefit is derived from these provisions, other than making sure that target management is notified at an early date of an intended tender offer. The burdens imposed by the provision are significant; if a person has purchased shares at some point when it did not have an intention to make a tender offer or for whatever other reason the provision was not satisfied, a tender offer cannot be made until the expiration of the one-year period. (In one instance, the Ohio Securities Commissioner concluded that the Ohio provision only applied if the purchaser had an intention to seek control of the target company at the time the purchaser bought the shares. 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS 251 (1978).) In addition, the provision represents an additional means of alerting target management of an intended tender offer. Since the benefits are minimal and the burden significant, such a provision should not withstand a commerce clause review. (It should be noted that the SEC's proposed rule 14e-2 contains a somewhat similar requirement regarding disclosure of an intention to make a tender offer.)

After this article was prepared, the SEC adopted amendments to its tender offer rules. See note 193, infra. If it is determined that such rules are enforceable, these new rules would significantly alter the commerce clause balance set forth herein.

175. The doctrine of preemption is derived from the supremacy clause, U.S. CONST. art. VI, cl. 2.

regulation of the subject matter is so pervasive that it leaves no room for state supplementation;\(^\text{177}\) (ii) the federal interest in the subject matter is so dominant that the states must be precluded from enacting laws on that subject;\(^\text{178}\) or (iii) the need for uniform national regulation is so great that state regulation cannot be tolerated.\(^\text{179}\) Even if an intent to preempt state regulation is not expressly evident and cannot be inferred, a state law still may be preempted if it directly conflicts with the substantive requirements of the federal law and it is impossible to comply with both laws\(^\text{180}\) or if the state law undermines the purposes and objectives of the federal law.\(^\text{181}\)

The three types of preemption outlined above have been referred to as express, implicit, and operational preemption.

1. Express Preemption

The Williams Act contains no language from which one could conclude that Congress intended to preempt the field of regulation of tender offers. Indeed, the Williams Act was codified in the Securities Act of 1934, which Act contains a savings clause allowing states to enact similar laws provided they do not conflict with federal law.\(^\text{182}\)

2. Implicit Preemption

There has been some debate regarding whether the Williams Act constitutes a sufficiently comprehensive or pervasive federal scheme so that an intent to preempt could be inferred.\(^\text{183}\) An important consideration is that state and federal governments traditionally have concurrently regulated securities transactions.\(^\text{184}\) In addition, Virginia had adopted its takeover law before Congress enacted the Williams Act, and the continuing effectiveness of this state law was not addressed in the Williams Act. Of course, a number of states have subsequently adopted state takeover laws. The Williams Act has been amended during this period and no mention has been made of an intention to preempt. Similarly, the proposed new federal securities law ex-

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182. See 15 U.S.C. § 78bb(a) (1976). This savings clause should not be given a great deal of weight, however, since it was enacted decades before the enactment of the Williams Act or state takeover laws.

183. See Note, supra note 108.

184. For example, it has been said that "under the [federal] securities laws state regulation may co-exist with that offered under the federal securities law . . . ." SEC v. National Sec., Inc., 393 U.S. 453, 461 (1969).
pressly permits state regulation of tenders if the corporation has a certain level of contacts with the state.\textsuperscript{185} Accordingly, it seems that state takeover legislation should not be deemed impliedly preempted by the Williams Act.

The Supreme Court cases in which the federal interest in the subject matter has been so dominant that the states have been barred from enforcing their laws have generally been limited to foreign affairs and national security.\textsuperscript{186} Therefore, it does not appear that the federal interest in regulating tender offers is so dominant that state regulation of the field must be precluded.

On the other hand, one may view uniform national regulation of the securities area as necessary.\textsuperscript{187} This argument, however, has not been well received in the United States; state regulation of securities transactions has generally been deemed constitutional.\textsuperscript{188}

A related point is that tender offer regulation could be treated as an internal affairs matter and not as an "issuance of securities." State regulation of corporate internal affairs has generally been constitutionally sanctioned.\textsuperscript{189}

There is a more basic reason why uniform national regulation of tender offers is not necessary. Valuable information has been learned from the state regulation: prolonging the tender offer period (while giving target shareholders certain prophylactic rights during that period) benefits target shareholders and does not appear to put a significant burden upon interstate commerce. Because much has and will be learned from state tender offer regulation, state tender offer regulation should be preempted only to the extent that it conflicts with or undermines the objectives of the federal law.

3. Operational Preemption

Of course, a state law is preempted if it conflicts with the federal law and it is impossible to comply with both.\textsuperscript{190} State takeover laws frequently

\textsuperscript{185} Under the proposed new federal securities law, states could regulate tenders if 50% of the corporation's shareholders lived in the state and the corporation's principal place of business was there. See Bartell, Federal-State Relations Under the Federal Securities Code, 32 VAND. L. REV. 457, 480 (1979).


\textsuperscript{187} See, e.g., 1 L. LOSS, SECURITIES REGULATION 102 (2d ed. 1961).

\textsuperscript{188} See, e.g., Hall v. Geiger-Jones Co., 242 U.S. 539 (1917). Of course, it could be argued that the regulation of tender offers is somehow different from the regulation of other types of securities transactions and that states should not be able to regulate them.

\textsuperscript{189} See, e.g., Santa Fe Indus. v. Green, 430 U.S. 462 (1977).

\textsuperscript{190} See, e.g., Goldstein v. California, 412 U.S. 546, 554 (1973); Free v. Bland, 369 U.S. 663 (1962). In addition to an actual and resolvable conflict, the Supreme Court has sometimes suggested that the possibility of states enacting legislation conflicting with federal legislation is sufficient to deem state law preempted. See generally Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973); accord, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960). The holdings of the Atlantic Richfield and Burbank cases, however, were principally based upon the fact that a pervasive federal scheme was in effect and preemption was thus required.

Even if a state statute has conflicted with the federal statute and the conflict was not resolv-
set forth substantive provisions that are different from those set forth in the Williams Act. For example, the pro rata repurchase rights, withdrawal rights, hold-open periods, disclosure requirements, and waiting periods in the various state takeover laws frequently vary from those in the Williams Act. It is possible, however, to comply with both the state and federal provisions if more shares are tendered than desired, the pro rata repurchase requirements of the Williams Act can be satisfied as to target company shareholders who tender within the first ten days; then, another computation could be made under the applicable state law as to shares tendered after the tenth day but within the period during which target company shareholders are given pro rata repurchase rights under state law. The bidder would need to buy more target shares than desired, but both state and federal requirements would be satisfied.

The Supreme Court has ruled that the state law will only be preempted if it undermines the purposes of the federal law. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 134-40 (1973).

191. For a general discussion of the state takeover laws and the Williams Act, see notes 218-51 infra and accompanying text.

192. See notes 218-43 infra and accompanying text.

193. It should be noted, however, that certain rules proposed by the Securities and Exchange Commission could result in an irreconcilable conflict between state and federal rules. Proposed rule 14e-1, 44 FED. REG. (1979) (to be codified in 17 C.F.R. § 240) provides, among other things, that tender offers must remain open for at least 30 business days. See Securities Exchange Act Release No. 15,548, supra note 163. Under proposed rule 14e-1, it could be impossible to satisfy this requirement as well as the requirements of some state takeover laws that tender offers remain open no longer than 35 days.

Some commentators argue that state law deviations from federally mandated pro rata repurchase obligations and withdrawal rights should be preempted. See Tender Offers, supra note 113, at 226-29.

After this article was prepared, the SEC adopted amendments to its tender offer rules. The new rules provide that shareholders of a target company should be able to withdraw tendered shares until 15 business days have elapsed from the commencement of the offer. New rule 14e-1 now requires that a tender offer must remain open for a minimum of 20 business days. A bidder is permitted, under rule 14d-8, to extend the pro rata repurchase period beyond the 10-day period set forth in the Williams Act.

The most significant new provision is rule 14-d-2(b). This requires a bidder, within five days after the material terms of a proposed tender have been publically announced, to (i) file a schedule 14D-1 with the SEC and (ii) transmit to the shareholders of the target company a disclosure document which contains a summary of the material terms of the offer. The Release states that "Rule 14d-2 is intended to prevent public announcements by a bidder of the material terms of its tender offer in advance of the offer's final commencement." See SEC. REG. & L. REP. (BNA), No. 531, at E-5 (Dec. 15, 1979). This directly conflicts with state takeover laws which require waiting periods between the announcement and commencement of tender offers.

This provision also states that an offer generally will be deemed to commence the date upon which the material terms of a proposed offer are made public. This is substantially different from when an offer may be deemed to have commenced under state law, thereby making it more difficult to comply with both federal and state pro rata repurchase requirements and withdrawal rights.

In addition, the SEC has taken the position that setting forth the material terms of a proposed tender offer in a document filed with a state securities commission constitutes a public announcement of the tender offer. SEC brief in H.B. Holdings v. Rosario Resources Corp. (S.D.N.Y.) No. 80 Civ. 0201 (CLB) (Jan. 14, 1980).

If it is determined that these rules adopted by the SEC (and the state law waiting period and administrative hearing provisions) are enforceable, it may be impossible to comply with both the state and federal provisions, thereby significantly changing the preemption discussion set forth herein. The Ohio Division of Securities has challenged the authority of the SEC to adopt these new rules in Ohio v. SEC, CA 2-80-111 (S.D. Ohio, filed Feb. 15, 1980).

Similarly, if state law granted shareholders withdrawal rights for a longer period than that set forth in the Williams Act, the bidder would merely honor the state's longer withdrawal right period to satisfy both the state and federal law requirements. This could, however, undermine the federally created right of the bidder which provides that tenders become irrevocable the eighth day after the tender commences.195 Nevertheless, the longer withdrawal rights provided by state law seem to be designed to afford unsophisticated shareholders additional time to decide whether to tender shares. Thus, this provision is intended to protect target shareholders and it supports—rather than undermines—the purpose of the Williams Act. Since the state withdrawal rights advance the general purpose of the Williams Act, and since it is possible to comply with both federal and state withdrawal rights, the state provisions should not be preempted.

The Supreme Court has been solicitous of the state interest in regulating securities transactions. In Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware,196 the Court upheld a state statute which conflicted with the requirements of the New York Stock Exchange Rules (which were promulgated pursuant to the 1934 Securities Exchange Act).197 The Court decided that it was unnecessary to hold the state law preempted to advance the policy of the 1934 Act.198 Because currently there is no irreconcilable conflict between state and federal takeover laws, and because states historically have been given the right to regulate securities transactions concurrently with the federal securities laws, it is submitted that state takeover laws should not be preempted by federal law.

The most difficult preemption question is whether the state laws are preempted by the federal law because they frustrate the objectives of the Williams Act. The analysis is confounded because these objectives are less than clear. One purpose of the Williams Act clearly is to protect shareholders of the target company.199 A question that remains is whether the Williams Act is designed to balance the equities between target management and the tender offeror. Certain statements found in the legislative history suggest that such a balance was attempted. On the basis of this legislative history, the circuit court in Great Western held that a purpose of the Williams Act was to establish such a balance between target management and the tender offeror, and that the state laws undermine this balance and therefore should be preempted.200

197. Id. at 139-40.
200. 577 F.2d at 1279-80.

Senator Williams noted, regarding the Williams Act, that "we have taken extreme care to
Other commentators have argued that no such balance was struck. Proponents of this view note that the “Williams bill” as initially introduced by Senator Williams was decidedly pro-target management and gradually was amended to the form enacted as the Williams Act. Moreover, a number of people who testified regarding the bill stated that its sole purpose was to protect investors in target companies.\footnote{See generally Note, supra note 108. As to the degree to which the Williams Bill was amended before its enactment, compare S. 2731, 89th Cong., 1st Sess. (1965) with S. 510, 90th Cong., 1st Sess. (1967).} Similarly, the Supreme Court found that the Williams Act reflects a “policy of neutrality in a contest for control,” but this policy “does not go . . . to the purpose of the legislation . . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.”\footnote{Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 29 (1977).}

It seems, therefore, that the purpose of the Williams Act is unclear. This should not affect the determination whether state takeover laws are operationally preempted by the Williams Act, however. If state waiting period and administrative hearing provisions were stricken from state takeover laws, these laws would not significantly undermine any balance struck by the Williams Act between the interests of target management and tender offerors. No notice of a tender offer would be required. Target management would no longer be able to engage in defensive tactics prior to the commencement of a tender offer. To satisfy state law it may be necessary to disclose more information, to hold the offer open longer, or to give somewhat different withdrawal rights to shareholders and pro rata repurchase protection than provided under the Williams Act. Such variances do not seem to significantly erode any objectives of the Williams Act.\footnote{Great Western found that the degree of disclosure required under Idaho law undermined the utility of federally mandated disclosure and was thereby preempted. 577 F.2d at 1281.} For this reason, if the provisions of state law requiring a waiting period and permitting state administrative hearings are deleted, state takeover laws should not be deemed operationally preempted by the Williams Act because they undermine the Act’s purposes.

Arguably, state takeover laws could be operationally preempted since the state takeover laws take a “fiduciary approach” to tender offers while the Williams Act reflects a “market approach.”\footnote{Id. at 1276-80; 1 M. Lipton & E. Steinberger, TAKEOVERS AND FREEZEOUTS 233-34 (1978).} The essence of this argument seems to be that state law gives target management power to block a tender offer, while federal law leaves the decision with the shareholders. The former belief stems from the fact that many state laws exempt tender offers

\footnote{\textit{Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids}, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).}
approved by target management. Absent such approval by target management, state takeover requirements must be followed in most cases.

This “fiduciary approach—market approach” distinction seems to over-estimate the club given target management under state laws. Target management is successful in retaining control in less than a majority of contested tender offers.\(^{205}\) Admittedly, target management is given some power under state takeover laws.\(^{206}\) If the waiting period and administrative hearing provisions are deemed impermissible burdens upon commerce, however, the power of target management would be reduced, thereby reducing the significance of the “friendly offer” exemption.

Since in a contested tender offer target company shareholders still have the opportunity to tender their shares, and since the power of target management would be reduced if the waiting period and administrative hearing provisions are deleted, state takeover laws in such form would not significantly undermine any objective of, or any market approach reflected in, the Williams Act and thus should not be deemed operationally preempted by the Williams Act.

If there is no irreconcilable conflict between state and federal law, the question of preemption is a policy decision.\(^{207}\) As a result of state takeover laws, the longer hold-open periods (with longer pro rata repurchase and withdrawal rights) benefit target shareholders and probably do not substantially impede takeovers. Because such valuable knowledge can result from the experimentation in state takeover regulation, such experimentation should be allowed to continue.

The preceding discussion concludes that the application of the pseudo-foreign corporation law of the commercial domicile of a pseudo-foreign corporation to its internal affairs does not violate the due process clause, the full faith and credit clause, or, in general, place an impermissible burden upon interstate commerce. Indeed, full faith and credit should be deemed to require the application of such pseudo-foreign corporation laws. Different types of such pseudo-foreign corporation laws will be considered below.

VI. PSEUDO-FOREIGN CORPORATION LAWS

A. New York

New York law generally provides that certain provisions of the New York corporation law\(^ {208}\) apply to foreign corporations that derive more than one-half their total business income for the preceding three fiscal years from

\(^{205}\) See note 146 supra.

\(^{206}\) The probability of success of an uncontested tender offer appears to be much higher than that of a contested one. Of the contested tender offers studied by Professor Austin during the period from 1972 through 1977, approximately 93% of these offers were either partially or completely successful. During the same period, only approximately 70% of contested tender offers were partially or completely successful. See Austin, Study Reveals Trends in Tactics, Premiums, Success Rates in Offers, supra note 146. Professor Austin does not note what percentage of the “unsuccessful” contested tender offers represent instances in which a third party gained control of the company.

\(^{207}\) See Hirsch, supra note 179, at 542-49.

\(^{208}\) See note 87 supra.
New York.\textsuperscript{209} Certain problems arise from a statute which provides that it governs a corporation immediately if a certain test relating to the income derived from the state is satisfied. For example, the New York law governs a foreign corporation beginning the first day of the fiscal year if, for the prior three fiscal years, it has had more than one-half of its total business income allocable to New York. The trouble with this formulation is that audited financial statements often are not available until about ninety days after the end of the fiscal year; it could be unclear for ninety days whether the corporation would be governed by the New York law. Similarly, it would be unclear for ninety days whether the corporation ceased to be governed by New York law; this uncertainty would not be resolved until the audited financial information was available.

Another problem with New York's regulatory scheme is that it only considers one contact (business income) and it only requires that the corporation derive more than fifty percent of its business income from New York to satisfy the statutory test.\textsuperscript{210} A corporation could have more than fifty percent of its shareholders, assets, and employees in another jurisdiction; it is not clear that the New York law will only apply to corporations whose primary contact is with New York. It would appear advisable for such state schemes to require the consideration of a number of factors. A state then would be on firmer ground that it is indeed the one with the primary interest in regulating the corporation.

Aside from the above, the New York statute does not clearly provide the manner in which it regulates newly formed corporations. The law simply states that it will govern those corporations which during the last three years derived more than fifty percent of their income from New York. The question is whether such newly formed corporations would be governed by the state of incorporation for three years until they had such financial information, or whether the New York law would apply sooner.

B. California

California law requires any foreign corporation transacting intrastate business in California and any "foreign parent" corporation to file an officers' certificate with the California Secretary of State.\textsuperscript{211} This officers' certificate sets forth the percentage of the company's shareholders that reside in California, the percentage of the company's sales made in California, the property located in California, and the salaries paid to employees in California. The certificate must be filed within 105 days after the close of the company's fiscal year. If the officers' certificate indicates that over fifty percent of the corporation's shareholders reside in California and that the average of the corporation's payroll, property, and sales "factors" allocable to California exceed fifty percent, certain sections of California law apply to the corpo-

\begin{itemize}
\item \textsuperscript{209} N.Y. BUS. CORP. LAW §§ 1315-1320 (McKinney 1963 & Supp. 1979).
\item \textsuperscript{210} The bill as originally submitted to the New York legislature required either that 67\% of the corporation's revenue be generated from New York or that 67\% of the shareholders resided in New York. See Baraf, supra note 8, at 233.
\item \textsuperscript{211} CAL. CORP. CODE § 2108 (West 1977 & Supp. 1978).
\end{itemize}
ration, beginning the first day of the next fiscal year.212

The California provision avoids certain of the problems of the New York provision discussed above. For example, it has a more workable timetable for application. After the financial information has been computed and the officers' certificate prepared, the corporation normally will have approximately eight months to plan its corporate activities while being aware that certain California provisions will govern its activities during the upcoming fiscal year. Conversely, the corporation will normally have eight months' notice that the law will no longer apply. In addition, the California provision considers a number of different types of contacts between the corporation and California; this tends to insure that California will have the predominate interest in regulating the company.

C. Model Provision

A certain time lag between the end of the fiscal year and the time at which a pseudo-foreign corporation law would apply is necessary so that a corporation can prepare its audited financial information and determine its contacts with the state. A certain amount of additional lag time is necessary so that a corporation may plan its corporate activities. A minimum of six months lag time seems required, and the one year provided by the California statute seems reasonable, since it coincides with a new fiscal year.

A number of commentators agree that such pseudo-foreign corporation laws should apply to corporations with more than seventy to eighty percent of its contacts with one state.213 The question remains whether such statutes should apply to corporations with a lower level of state contacts. One could argue that since such corporations have significant contacts with other states they are more national in character and should not be governed. This does not seem persuasive, however. If the pseudo-foreign corporation law considers a number of different contacts and the magnitude of the contacts between the corporation and the state averaged more than fifty percent, it seems quite unlikely that any other state would have a greater interest in regulating the affairs of the corporation.214 It therefore seems more rational

212. Id. at § 2115. Section 2115(e) exempts from the scope of § 2115 corporations whose shares are listed on the American or New York stock exchanges and corporations that are subsidiaries of corporations not subject to § 2115. The exemption is unclear, however, regarding the timing of this exemption. For example, would § 2115 govern a corporation during its next fiscal year if, after it had filed the § 2108 officers' certificate which showed that the corporation met the § 2115 tests (but before the beginning of the next fiscal year), the corporation either listed its shares on the American or New York stock exchange or became a wholly-owned subsidiary of a corporation not governed by § 2115.

213. Halloran & Hammer, supra note 27, at 1329. See generally Kirgis, supra note 40, at 139-42.

214. California law provides that any reorganization of a foreign or domestic corporation must be qualified with the California Commissioner of Corporations if more than 25% of the corporation's shareholders reside in California. CAL. CORP. CODE § 25103 (West 1977). To qualify a transaction with the California Commissioner, the Commissioner must find that the terms of the transaction are fair, just, and equitable. Accordingly, California purports to regulate offers made to all shareholders of a foreign corporation if 25% of those shareholders reside in California.

This is an example of the troubling interface which exists between state blue sky regulation and the internal affairs doctrine. While there is a general consensus that a state should not
to apply the law of the commercial domicile rather than the law of the state of incorporation.

As noted above, the New York pseudo-foreign provision only considers the percentage of the company's revenues generated in the state. While this is a relevant factor, more types of contacts should be considered before a corporation is deemed pseudo-foreign. California's jurisdictional provision is a better example of a consideration of a number of relevant contacts. It seems highly doubtful that a corporation that satisfies California's standard could realistically be deemed commercially domiciled in any other state. The pseudo-foreign corporation law should provide that the sections of the state's corporation law which reflect important state policies will apply to pseudo-foreign corporations. These sections should obviously be set forth in the pseudo-foreign corporation law.

Both the California and New York statutory schemes exempt corporations with securities listed on the American or New York stock exchanges. One argument advanced in support of this exemption is that these corporations are truly national companies. This seems to be a make-weight argument; under American law, the internal affairs of all corporations, even truly national corporations, are governed by the corporate law of some state. Any other considerations notwithstanding, it would appear more sensible to apply the law of the state of commercial domicile to national corporations rather than the law of the state of incorporation.

The consideration which militates against this conclusion is that, currently, full faith and credit does not seem to require the application of the law of the state of commercial domicile. Until such a rule evolves, even if the state of commercial domicile has adopted a pseudo-foreign corporation provision, it will be unclear whether pseudo-foreign corporations are governed by the law of the state of incorporation or the law of the commercial domicile. Such uncertainty will place a burden on interstate commerce, and the burden generally would be greatest regarding large national companies with securities traded on national securities exchanges. Hence, it would generally regulate the internal affairs of a foreign corporation (unless the corporation is a pseudo-foreign corporation), there is general agreement that states should have the power to regulate securities transactions, at least insofar as they pertain to resident shareholders. In this example, however, California does not merely purport to regulate offers made to California shareholders but attempts to regulate the total transaction. Such an attempt to regulate the total transaction, coupled with the California practice of reviewing the fairness of the terms of the transaction, makes this blue sky regulation resemble an attempt to regulate the internal affairs of foreign corporations.

One treatise argues that this California policy does not amount to an attempt to regulate the internal affairs of pseudo-foreign corporations and is merely an exercise of California blue sky jurisdiction. See generally 1 MARSH & VOLK, PRACTICE UNDER THE CALIFORNIA SECURITIES LAWS § 7.06 (1979). The commentators note that the specified minimum level of contacts which require qualification in California is somewhat arbitrary.

It seems that the minimum level of contacts required by this California policy is much too low. As a general rule, a state should not attempt to exercise primary jurisdiction over a reorganization involving a foreign corporation unless the corporation has at least 50% of its contacts (as somehow determined) with the regulating state.


216. The distinction between companies with shares listed on the American or New York stock exchanges and those that are not.
be wise to maintain such an exemption for such companies with listed securities, at least until such time, if ever, the proposed full faith and credit requirements discussed above are accepted.

D. Recommendations

States should adopt pseudo-foreign corporation statutes such as the model provision suggested above. If many states would enact such statutes, a corporation could not easily evade the corporate law of its commercial domicile merely by incorporating elsewhere. The upshot would be that states could regulate corporations in the manner deemed optimal rather than the manner deemed necessary to induce corporations to incorporate in the state.

Since it is unclear whether states other than the commercial domicile will apply pseudo-foreign corporation laws to questions pertaining to the internal affairs of pseudo-foreign corporations until the notion of pseudo-foreign corporation laws becomes accepted, some uncertainty will exist in corporate choice of law regarding the law applicable to a pseudo-foreign corporation. One way of ameliorating this uncertainty would be to determine that full faith and credit would require the application of reasonable pseudo-foreign corporation laws to questions pertaining to the internal affairs of such corporations. Alternatively, states could include a choice of law provision in their corporate codes stating that the internal affairs of all domestic corporations would be governed by the state corporations code, unless the corporation satisfied the jurisdictional test of a reasonable pseudo-foreign corporations code of another state. It is not anticipated that pro-management states (e.g., Delaware) would be inclined to adopt this type of choice of law provision, however.

stock exchanges and companies with shares traded on other exchanges or traded over-the-counter is obviously somewhat arbitrary. It has been argued that the exemption from pseudo-foreign corporation laws should be extended to such companies. For example, the initial California draft of § 2115 did exempt such companies. Including such companies under the umbrella of this exemption, however, would significantly increase the number of companies exempted from the statutory scheme. It seems, therefore, that the line drawn between companies with shares listed on the New York and American stock exchanges and other companies is a reasonable distinction and should be continued. Of course, the uncertainty regarding an internal affairs transaction of a company with shares listed on the American and New York stock exchanges could cause a greater burden on commerce than uncertainty in internal affairs matters of other companies.

The distinction between companies with shares listed on the American and New York stock exchanges and other companies with traded shares is one which also could be in violation of the equal protection clause. This argument should fail, however, since there is a rational basis for the distinction. Because it could reasonably be concluded that applying pseudo-foreign corporation laws to companies with shares listed on the American and New York exchanges would cause a greater burden on interstate commerce than applying the laws to other companies, and because courts have been increasingly reluctant to strike down economic statutes on the basis of equal protection (see New Orleans v. Dukes, 427 U.S. 297, 303 (1976); see generally Karst, "Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A. L. REV. 716, 720-25 (1969)), this distinction probably could withstand constitutional attack.

217. See generally Oldham, supra note 2, at 123-31.
VII. State Tender Offer Laws: Multi-State Regulation of a Corporate Activity

More than two-thirds of all the states have enacted takeover statutes in some form.218 These statutes contain some combination of the following provisions: (i) certain information be disclosed to target company shareholders; (ii) a specified waiting period between the time a notice of intention is filed with a state regulatory agency and the date upon which the offer can become effective; (iii) specified minimum or maximum periods during which the offer may remain effective; (iv) withdrawal rights which must be given to tendering shareholders of target companies; (v) standards for state regulatory review of the completeness of the disclosure documents and the fairness of the transaction; (vi) the requirement that all target company shareholders receive the highest price offered for the shares; and (vii) the requirement that if more shares are tendered during a certain specified period than the offeror desires to purchase, the offeror must purchase the shares on a pro rata basis rather than on a first tendered, first purchased basis.219

Various standards are set forth in the state takeover laws regarding what type of contacts the target company must have with the state to have the tender offer governed by the state takeover law. Most statutes provide that if the target company is incorporated in the state, the tender offer will be governed by the state takeover law;220 some statutes require a domestic corporation to have some additional contact with the state, such as doing business in the state,221 before the state takeover law applies to a tender offer for its shares.222 Other state laws govern tender offers for shares of a foreign corporation if the foreign corporation has its principal place of business, shareholders,223 a certain number of employees, its principal executive offices,224 substantial assets, or does business in the state.225

218. See generally 2 TENDER OFFERS HANDBOOK (J. Robinson ed. 1976).
222. E.g., IDAHO CODE § 30-1501(6) (Supp. 1979) (substantial assets in state); MINN. STAT. § 80B.01(9) (West Supp. 1979) (substantial portion of assets in state); WIS. STAT. § 552.01(6) (West Sp. Pam. 1979) (substantial assets in state).
223. See ARK. STAT. ANN. § 67-1264(5)(c), (6) (Bobbs-Merrill Supp. 1979) (35 shareholders in state); 3 BLUE SKY L. REP. (CCH) ¶ 35,671 (1979) (Tex. Blue Sky Reg. 065.15.00.200(f)).

For example, New York and Ohio law provides that the corporation must have its principal place of business and substantial assets in the state before the law applies, while Indiana and New Jersey law provides that it applies to a corporation that has substantial assets in the state or has its principal place of business there. The significance of this distinction is unclear.

One of the most aggressive of the state laws is the Utah takeover law, which applies to any
One aspect of the state takeover laws which has caused a significant amount of controversy is the fact that these laws are extraterritorial. The statutes purport to govern offers made to shareholders, regardless of domicile, if the tender offer falls within the jurisdictional limits of the statute.\textsuperscript{226} The scope of such statutes is obviously more sweeping than normal state blue sky laws, which are limited to offers made to shareholders who reside in the state.

A number of state statutes also create a procedure whereby adequacy of the disclosure or the fairness of the offer may be reviewed by the state securities commission,\textsuperscript{227} either upon request of target company management\textsuperscript{228} or at the discretion of the state securities commission.\textsuperscript{229} The Williams Act has no comparable provision.

It is also common for state laws to require that a notice of a tender offer be filed with the state a certain number of days before the tender offer commences.\textsuperscript{230} The Williams Act has no such requirement.\textsuperscript{231}

The state takeover statutes provide certain exemptions; one frequently

\textsuperscript{226} See generally Tender Offers, supra note 113, at 153.
\textsuperscript{227} Id. at 217-20; see Comment, supra note 220, at 406. Certain states require a finding that there is "fair, full, and effective disclosure" (see, e.g., \textsc{Ohio Rev. Code Ann.} \S 1707.041(B)(1)(c) (Page 1978), while others require a finding that the terms of the offer are "fair and equitable" (see, e.g., \textsc{Hawaii Rev. Stat.} \S 417E-3(g) (1976); \textsc{Ind. Code Ann.} \S 23-2-3-2(f) (Burns Supp. 1979); \textsc{Minn. Stat. Ann.} \S 803.03(5) (West Supp. 1979); \textsc{N.J. Stat. Ann.} \S 49:5-4(a)(2) (West Supp. 1979-80); \textsc{Wis. Stat. Ann.} \S 552.05(5) (West Sp. Pam. 1979).
\textsuperscript{228} See, e.g., \textsc{Conn. Gen. Stat.} \S 36-460 (West Supp. 1978); \textsc{La. Rev. Stat.} \S 51:1501(E) (West Supp. 1978); \textsc{S.D. Comp. Laws Ann.} \S 47-32-23 (Supp. 1979).
\textsuperscript{229} See, e.g., \textsc{Hawaii Rev. Stat.} \S 417E-3(f) (1976).
\textsuperscript{230} See, e.g., \textsc{Mass. Gen. Laws Ann.} ch. 110C, \S 2 (West Supp. 1979) (30 days); \textsc{Ohio Rev. Code Ann.} \S 1707.041(B)(1) (1978) (20 days); \textsc{Va. Code} \S 13.1-531(a) (Supp. 1978) (20 days); see generally Comment, supra note 220, at 405.
\textsuperscript{231} The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (and the rules promulgated by the Federal Trade Commission regarding this Act) provide that the Federal Trade Commission must be notified 30 days prior to the date of certain types of acquisitions (15 days prior to the consummation of governed cash tender offers). See generally 15 U.S.C. \S 18(a) (1976); 1 M. \textsc{Lipton} & E. \textsc{Steinberger}, \textsc{Takeovers and Freezeouts} 333-97 (1978). The rules for determining what types of cash tender offers are governed by the Hart-Scott-Rodino Act are somewhat complicated, but the Act generally governs a tender offer if (i) the bidder acquires at least 15% of the shares of the target company or the aggregate value of the shares purchased exceeds $15 million, and (ii) the bidder has total assets or annual net sales of at least $100 million and the target company is engaged in manufacturing and has annual net sales or total assets of at least $10 million, or the bidder has total assets or annual net sales of at least $10 million, or the bidder has total assets or annual net sales of at least $10 million and the target company has total assets or annual net sales of at least $10 million and the target company has total assets or annual net sales of at least $10 million. Id. at 348-49.

The rules promulgated by the Federal Trade Commission exempt tender offers in which the bidder acquires 15% of the target company's shares, but the acquired shares will not have an aggregate value exceeding $15 million and the bidder will not acquire 50% of the voting shares of a target company with annual net sales or total assets of at least $10 million. Id. at 349-50.

This waiting period prescribed by the Hart-Scott-Rodino Act is really a period during which the cash tender offer may not be consummated. The tender offer may commence during this period, but shares tendered may not be purchased until the expiration of the 15-day period. Id. at 333, 334, 341, 345-62. For this reason, the 15-day waiting period created by the antitrust laws is not a "waiting period" in the same sense as the state takeover law waiting periods.
contained in the laws is the friendly offer exemption. Such an exemption normally provides that if the target company's board of directors approves the offer, the tender offer law will not apply. Some states exempt companies with securities not registered pursuant to section 12 of the 1934 Act. A few states exempt tender offers made pursuant to a registration statement filed with the SEC.

One of the more obvious drawbacks of the state tender offer laws is the imprecise jurisdictional limits. It will be unclear where a corporation's principal place of business is or whether it has substantial assets in a state. Specifically, it is unclear whether the latter requires the corporation to have a substantial amount of assets in the state or a substantial portion (more than ten percent, twenty-five percent or fifty percent) in the state. The problem which could result from these vague jurisdictional limits is that a tender offer could be governed by two or more statutes.

The state tender offer laws currently have a number of conflicting requirements. For example, the laws of some states prohibit a tender offer from remaining effective more than thirty-five days, while other states require a tender offer to remain effective for more than thirty-five days. Most states

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232. See, e.g., ALASKA STAT. § 45.57.010(3) (Supp. 1979); see generally Tender Offers, supra note 113, at 209; Comment, supra note 220, at 405.
235. The Indiana takeover law only applies to foreign corporations that have a substantial portion of their assets in Indiana. IND. CODE ANN. § 23-2-3.1-1(j) (Burns Supp. 1979). In the tender offer by United Technologies for shares of Otis Elevator, the Indiana Securities Division concluded that the fact that Otis had $32,000,000 worth of assets in Indiana (9% of its total assets) did not constitute a substantial portion of its assets. Vaughan, State Tender Offer Regulation, 9 REV. SEC. REG. 969, 970 n.15 (1976).

The Ohio law provides that it only governs foreign corporations whose principal place of business is in Ohio and which have substantial assets in Ohio. OHIO REV. CODE ANN. § 1707.04.1(A)(1) (1978). Societe Imetal made a tender offer for the shares of Cooperweld, a non-Ohio corporation. Cooperweld's executive offices apparently were in Pennsylvania; it apparently had no assets in Ohio and was not qualified to do business there. Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality, 45 FORDHAM L. REV. 1, 12 (1976) [hereinafter cited as Wilner & Landy]. Two subsidiaries were Ohio corporations, while five other subsidiaries were foreign. Id. at 12-13. Cooperweld's management contended that, since its two Ohio subsidiaries conducted a significant amount of its business in Ohio, the principal place of business of the parent should be deemed Ohio and the parent should be deemed to have substantial assets in Ohio. The Ohio Attorney General concluded that the Ohio takeover statute governed Cooperweld. Id. at 13. This obviously represents a rather broad interpretation of what constitutes substantial assets. The Attorney General believed that if a company has substantial assets in Ohio, its principal place of business is in Ohio. Id. at 5; see Comment, supra note 220, at 403 n.76.
236. It was initially believed that the tender offer by Great Western United for Sunshine Mining would be simultaneously governed by three takeover statutes. See Note, supra note 108, at 888 n.125.
238. MASS. GEN. LAWS ANN. ch. 110C, § 7 (West Supp. 1979); MICH. COMP. LAWS § 451.905(2) (Supp. 1979). Both require the tender offer to be held open 60 days. The Michigan law also provides that if the proposed purchase price is increased (which frequently happens) at any time during the offer, this is considered a new offer and the offer must remain open for 60 days after the date the increased price was offered.

The Williams Act has been construed to require an offer to remain open for 10 days. The New York Stock Exchange Company Manual provides that tender offers "should" remain open.
(and the Williams Act) permit a tender offer to be made for less than all of the shares of a target company; Hawaii requires that a tender offer be made for all shares.\footnote{239} Moreover, different rules exist regarding the period during which shareholders may withdraw tendered shares,\footnote{240} and the periods during which the offeror must purchase tendered shares on a pro rata basis if the tender is oversubscribed.\footnote{241} It would be manifestly impossible to satisfy two different types of pro rata repurchase standards, without purchasing more shares than desired. Finally, one state regulatory authority may find a tender offer unfair and either disapprove or postpone the tender offer, while another state regulatory authority may approve the tender offer.

The different state requirements suggest that it would be highly burdensome to have one tender offer regulated by more than one law. The administrative hearing requirements of the various statutes also could place a significant burden upon tender offers. In the current extraterritorial form of state tender offer laws, a tender offer cannot be made in any state until all administrative hearing requirements have been satisfied in all states alleging jurisdiction. In addition, it could be difficult to agree on terms that all state securities commissions would deem fair and equitable.\footnote{242}

These administrative hearings also could create timing problems for the


\footnote{241} These rules generally provide that if the number of shares tendered exceeds the number of shares desired by the bidder, shares tendered during a certain period must be purchased by the offeror on a pro rata basis rather than pursuant to a first tendered, first purchased procedure. For example, the Williams Act provides that shares tendered during the first ten days of a tender offer are entitled to pro rata repurchase protection. 15 U.S.C. § 78n(d)(6) (1976). Some states follow this rule while many others do not. For example, a number of states provide that the pro rata repurchase protection applies to shares tendered at any time during the tender offer. \textit{See, e.g.}, N.J. Stat. Ann. § 49:5-9(b) (Supp. 1979-80); Va. Code § 13.1-530(c) (Supp. 1978). Others provide for pro rata repurchase during a longer period than that specified in the Williams Act. \textit{E.g.}, Del. Code Ann. tit. 8, § 203(a)(3) (Supp. 1978) (twenty days).

\footnote{242} APL Corporation recently proposed to make an exchange offer for the shares of Pabst Brewing Company. The Wisconsin Securities Commissioner rigorously reviewed the terms of the offer. The offer was never made; a significant factor in this decision to abandon the offer was the burden placed upon the offer by the Wisconsin Securities Commission. \textit{1 M. Lipton & E. Steinberger, Takeovers and Freezeouts} 255 (1978); \textit{Pabst Buys Stake Held by Suitor APL, Takeover Feud Ends}, Wall St. J., Oct. 23, 1979, at 19, col. 1 (western edition). Another proposed tender offer that never commenced because of burdens placed upon the offer by the involvement of the state's securities commission was the proposed offer for the shares of Universal Leaf Tobacco Company by Congoleum Corporation. After the proposed tender offer had not been approved by the Virginia Securities Commission eight months after the intention to tender was
offeror. For example, the laws of certain states provide that a tender offer must be made during a certain period after the filing of a notice of intention to make a tender offer.\textsuperscript{243} The initiation of a state administrative hearing could easily make it impossible to satisfy such a time requirement.

A number of commentators have discussed whether a tender offer constitutes a matter pertaining to the internal affairs of a corporation.\textsuperscript{244} This obviously depends upon how the issue is characterized. The internal affairs of a corporation are normally defined as matters pertaining to the relationships among its directors, officers, and shareholders. Internal affairs are contrasted with relationships between the corporation and third parties.

A sale of a corporation's securities is generally not considered an internal affairs question. If a tender offer is characterized as a sale of control to an existing shareholder,\textsuperscript{245} however, this seems to be an internal affairs matter, since it is a sale of control and the purchaser already has a relationship with the corporation. If a tender offer is characterized as just a large securities transaction, a tender offer seems to resemble the type of transaction which has traditionally been governed by state blue sky law and not by the state of incorporation. Certain commentators argue that a tender offer constitutes an internal affairs matter;\textsuperscript{246} others contend that it is not.\textsuperscript{247} This debate seems to be generating much heat, but little light. The primary issue is not whether this constitutes a matter pertaining to the internal affairs of a corporation, but whether tender offers require uniform national regulation by the law of one state, or whether concurrent regulation by the various interested states is a workable approach. If it is determined that a tender offer can be governed by a number of state takeover laws, no more need be decided; the various interested states could regulate a tender offer.\textsuperscript{248} If it is decided that tender offers require uniform national regulation, then the issue is what law should be applied to such tender offers.

The extraterritorial aspects of state takeover laws could be deleted and jurisdiction of state takeover laws could be limited to offers made to residents of the forum.\textsuperscript{249} This would obviously result in one tender offer being regulated by a number of various blue sky laws. As mentioned, the laws as announced, Congoleum decided not to pursue the tender offer. Congoleum Drops Universal Leaf Bid, Richmond Times Dispatch, June 10, 1977, at A-11, col. 1.

\textsuperscript{243} See, e.g., DEL. CODE ANN. tit. 8, § 203(a)(1) (1978).


\textsuperscript{245} A tender offeror frequently purchases approximately five percent of the shares of the target company before a tender offer is made. After five percent of the target's shares are owned, a Schedule 13D must be filed with the SEC and the offeror's interest in the target becomes public.

\textsuperscript{246} See Shipman, supra note 244, at 722-23; Note, supra note 108, at 931. Proponents of this view note that a tender offer is the functional equivalent of a proxy fight, unquestionably an internal affairs matter.

\textsuperscript{247} See Wilner & Landy, supra note 235, at 16.

\textsuperscript{248} Of course, it would still have to be decided whether such laws should be extraterritorial.

\textsuperscript{249} See generally Note, Commerce Clause Limitation Upon State Regulation of Tender Offers, 47 S. CAL. L. REV. 1123, 1153 (1974).
rently enacted contain many different and sometimes glaringly contradictory requirements. Disclosure requirements would vary from state to state. More importantly, states would apply different substantive rules to a tender offer involving shareholders residing in more than one state. Therefore, a significant burden would result from the regulation of tender offers by all states in which target company shareholders reside.

It has also been suggested that if multi-state regulation of tender offers would be permitted (without extraterritorial application of the state laws), offerors would not make offers in states with few shareholders or restrictive statutes. Target company shareholders would inevitably receive different prices for their shares. Such a tender offer regulatory procedure would probably be chaotic and significantly hinder interstate commerce.

The alternative would be one tender offer law governing the tender offer. This would be a more manageable way to regulate a tender offer. The law governing such a tender offer could be selected in the same manner as other internal affairs choice of law determinations discussed above. The tender offer law to be applied would be the tender offer law, if any, of the state of incorporation, unless the target company were a pseudo-foreign corporation and the state of commercial domicile had enacted a takeover law which governed pseudo-foreign corporations so that the statute would only extend to corporations whose commercial domicile was in the forum.

VIII. CONCLUSION

The application of the internal affairs doctrine has had a "Gresham's law" effect upon state corporation codes. This has resulted because the doctrine has been rigidly applied even regarding those corporations that had little or no contact with the state of incorporation and had a majority of its contacts with another state. The enactment of pseudo-foreign corporation laws, plus statutory choice of law provisions which expressly recognize the psuedo-foreign corporation limit to the internal affairs doctrine, such as those discussed in the article could stem this pro-management tide of state corporation laws. A corporation could no longer evade the corporate law of its commercial domicile merely by incorporating elsewhere. States would be able to regulate corporations in the manner considered optimal, rather than in the manner considered necessary to induce domestic corporations not to incorporate or reincorporate elsewhere.

If this scheme would curb the pro-management trend in state corporate law, this would allow states to continue to be responsible for regulating the internal affairs of corporations. If the pro-management trend in state corporate law continues, it seems inevitable that increasing pressure will be placed upon Congress to regulate certain internal affairs matters, and possibly even preempt state corporate law.

The application of the internal affairs doctrine frequently results in the

250. See Note, supra note 108, at 933.

251. None of the present tender offer statutes which attempt to govern tender offers for the shares of certain foreign corporations is so limited.
corporation being regulated by a state with little or no interest in governing its affairs. The scheme advanced in this article would result in corporations being regulated by the commercial domicile (the state with the most interest in regulating the corporation), while retaining certainty in corporate choice of law.

Tender offers and certain other corporate internal affairs require uniform national regulation. Therefore, full faith and credit should generally require the application of the law of the state of incorporation to such questions. An exception to this rule seems reasonable if the corporation has a majority of its contacts with another state, and if that state has adopted a pseudo-foreign corporation statute regulating that issue. Then, full faith and credit should be required to be given to the pseudo-foreign corporation law of that state rather than the law of the state of incorporation. If the state of commercial domicile has not adopted such a law, full faith and credit should require the application of the law of the state of incorporation, even if the corporation is a tramp or technically foreign corporation. Multi-state regulation of other issues which are susceptible to multiple state regulation should be permitted as long as the regulating state has sufficient contacts with the corporation to satisfy due process requirements.

Such a standard is obviously not as simple as the internal affairs doctrine. It would, however, provide certainty in corporate choice of law and permit the state with clearly the predominate interest in regulating a corporation to do so. Multi-state regulation of issues which require uniform national regulation would be avoided.