

1984

At the Crossroads of Corporate Takeover Legislation: *Missouri Public Service Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 22, 1983)

Daniel Freeman Kaplan
University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Daniel Freeman Kaplan, *At the Crossroads of Corporate Takeover Legislation: Missouri Public Service Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 22, 1983), 63 Neb. L. Rev. (1984)
Available at: <https://digitalcommons.unl.edu/nlr/vol63/iss2/5>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

At the Crossroads of Corporate Takeover Legislation

Missouri Public Service Co. v. Amen, No. CV 83-L-362
(D. Neb. June 22, 1983)

TABLE OF CONTENTS

I. Introduction	345
II. Background: Establishing the Need for Change	347
A. The Williams Act	347
B. State Legislation	351
III. Challenge and Response: Establishing the Room for Change	354
IV. Pointing the Way for Change	360
A. Obstruction: <i>Missouri Public Service Co. v. Amen</i> ..	360
B. Toward Constitutional Acceptability	369
V. Conclusion	372

I. INTRODUCTION

Increasingly aggressive competition in the business community and turbulence in the economy¹ have combined to unleash a fierce form of corporate Darwinism known as the takeover.² Fifteen years have passed since Congress promulgated the Williams Act,³

-
1. The rising popularity of the takeover attempt appears to be a product of several economic elements: the growth period of the 1960's increased corporate liquidity and readily available credit, while the recent inflationary times have increased incentives for attempting takeovers because of undervalued stock and augmented corporate desires for stable investments. *See generally* E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 65-66 (1973); Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733 (1979).
 2. A successful "takeover" results in a sale of the majority portion of outstanding shares in a public corporation to the takeover bidder. *See generally* E. ARANOW & H. EINHORN, *supra* note 1.
 3. Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454 (amending Securities Exchange Act of 1934, 15 U.S.C. §§78m-78n (1964)) (codified at 15 U.S.C. §78m (d)-(e), 78n (d)-(f) (1976)).

which regulates the transactions involved in corporate takeover attempts; Nebraska followed suit by passing a stricter regulatory scheme in the Corporate Takeover Act of 1977.⁴ With state takeover laws across the country coming under increasing judicial fire, Nebraska took emergency action in May of 1983 to change its statute, in hopes of bringing it under the umbrella of constitutional acceptability. In *Missouri Public Service Co. v. Amen*,⁵ however, the Federal District Court of Nebraska enjoined state officials⁶ from enforcing the new takeover act on the grounds that the state regulations were violative of the supremacy and commerce clauses of the Constitution.⁷

Missouri Public Service arrives at a critical juncture in the continuing national controversy surrounding state takeover legislation.⁸ The case comes at a point in which a legion of courts⁹ and commentators¹⁰ alike have overwhelmingly rejected these state schemes as being unconstitutional, based on the dual challenge echoed in *Missouri Public Service*. This stiff rebuff directed at state takeover legislation culminated when the United States Supreme Court invalidated an Illinois takeover act in *Edgar v. MITE Corp.*¹¹

Standing at a great crossroads, the decision in *Missouri Public Service* transcends a singular review of one takeover statute and plunges Nebraska into a referendum on the efficacy of state regulation in its entirety. The underlying issues of this case take on added significance because the Federal District Court of Nebraska rejected the unique new statute,¹² even after the legislature had excised many of the constitutionally objectionable provisions. Although the future of state regulation hangs in precarious balance, these negative voices need not sound the death knell for such legislation. Recent trends in judicial and legislative actions have opened up avenues for state regulatory efforts; available options

4. NEB. REV. STAT. §§ 21-2401 to -2417 (Supp. 1980) (repealed 1983).

5. No. CV 83-L-362 (D. Neb. June 22, 1983) (order granting preliminary injunction and temporary restraining order).

6. The state officials involved in this court order were Paul Amen, former Director of the Department of Banking and Finance, and Paul Douglas, Attorney General of Nebraska.

7. *Missouri Pub. Serv. Co. v. Amen*, No. CV 83-L-362, at 3 (D. Neb. June 22, 1983).

8. At this point, 37 states have enacted takeover regulations. See Tiger, *The Pennsylvania Takeover Disclosure Law: A Statute Waiting to Be Invalidated*, 25 VILL. L. REV. 458, 458 n.10 (1980).

9. See *infra* note 47.

10. See, e.g., Tiger, *supra* note 8, at 458. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

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

12. Nebraska Corporate Takeover Act, NEB. REV. STAT. §§ 21-2418 to -2430 (Cum. Supp. 1983).

are now particularly important for the many jurisdictions (including Nebraska) which have, in recent court struggles, rendered their takeover statutes impotent. This Article suggests that a judicial reorientation may attain a point of equilibrium at which a state, seeking to further shelter corporations from the trauma of takeover, may enact constitutionally sound legislation.

II. BACKGROUND: ESTABLISHING THE NEED FOR CHANGE

A. The Williams Act

In *Missouri Public Service Co. v. Amen*, Judge Warren K. Urbom found that the Nebraska Corporate Takeover Act was probably preempted by the federally enacted Williams Act.¹³ It is thus instructive to inquire into the origins and substantive highlights of this federal legislation.

Before Congress passed the Williams Act in 1968, cash tender offers¹⁴ enjoyed an unfettered existence at all regulatory levels of the government.¹⁵ The Williams Act represented the legislative re-

13. No. CV 83-L-362, at 3 (D. Neb. June 22, 1983). The district court stated that the "[p]laintiff has demonstrated a substantial likelihood of success on its claim that the Corporate Takeover Act is null and void on its face [because it is] . . . preempted by the Williams Act provisions of the Securities Exchange Act of 1934." The standards governing injunctive relief require a mere probability of success on the merits of the case. Other factors such as whether harm will be laid upon other parties if the relief is granted, and the effect of public interest, are also weighed in the balance. See *Baker v. Premis*, No. CV 82-L-459, slip op. (D. Neb. Aug. 30, 1982).
14. Tender offers are defined as public solicitations of the shareholders of a corporation to tender their shares in exchange for a specified cash amount above the current market price. See generally, *Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D. N.Y. 1979) (defining the elements of a tender offer); E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 1-34 (1977); J. FLOM, M. LIPTON & E. STEINBERGER, *TAKEOVERS AND TAKEOUTS—TENDER OFFERS AND GOING PRIVATE* (1976); Kramer, Budwick & Hope, *Tender Offers: Background and Definition*, in *TENDER OFFERS: MAKING AND MEETING THEM* (C. Kanter ed. 1979); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251-52 (1973); Note, *The Elusive Definition of a Tender Offer*, 7 J. CORP. L. 503 (1982).
15. Prior to the Williams Act, the law required only insiders to make disclosures in trading securities. Although proxy contests were also regulated under the Securities Exchange Acts, the federal government failed to specifically treat the issue of cash tender offers. See S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967); Sowards & Mofsky, *Corporate Take-over Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499 (1967). Regulation of tender offers did occur, but only from occasional litigation under Rule 10b-5. See *Moore v. Greatamerica Corp.*, 274 F. Supp. 490 (N.D. Ohio 1967) (enjoining the takeover bid under rationale that the offeror failed to meet disclosure requirements of Rule 10b-5); 6 L. LOSS, *SECURITIES REGULATION* 3, 655 (Supp. 1969). But cf.

sponse to the proliferating use¹⁶ of the tender offer, a device employed with increasing sophistication¹⁷ to gain control of a corporation resisting acquisition. The tender offer mechanism had, in the Supreme Court's words,¹⁸ "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws."¹⁹

In a hostile takeover attempt, the bidding corporation makes a tender offer directly to the shareholders of the "target" corporation,²⁰ in a *quid pro quo* for substantial control in that company. The ranks fall into place and the battle strategies are formulated almost without variation in the typical takeover scenario. The bidder's plan for corporate conquest entails a form of financial "blitzkrieg"²¹ in which a sweeping knockout coup takes the target's management by surprise. This initial blow comes in the form of public offers for phenomenal premiums over the prevailing market price,²² motivating shareholders to sell out large blocks of holdings within a period of days. By quickly negotiating the terms of control directly vis-a-vis the shareholders, the offeror bypasses the incumbent management of the resisting corporation, and thus circumvents protracted proxy contests, as well as the Maginot Line of defensive tools at the command of the target management.²³

Schoenbaum v. Firstbrook, 268 F. Supp. 385, 390 (S.D.N.Y. 1967) (holding that neither the shareholder nor the target management had standing to sue a tender offeror under Rule 10b-5), *aff'd in part and rev'd in part on other grounds* 405 F.2d 200 (2d Cir.), *aff'd in part and rev'd in part after reh' en banc* 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

16. See *The Great Takeover Binge*, BUS. WK., Nov. 14, 1977, at 176; *After Wave of Mergers, Analysts Debate Pauses*, N.Y. TIMES, May 31, 1982, at D1, col. 1 ("The latest surge in merger activity 'has only two quantitative equals in United States industrial history.'").
17. See Boehm, *supra* note 1, at 735-36.
18. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).
19. *Id.* at 22. The Piper Court apparently was speaking of such contests for corporate control as the proxy fight or the merger attempt. See *supra* note 15.
20. The target corporation's securities are the subject of a tender offer in a takeover attempt. For elaboration, see E. ARANOW & H. EINHORN, *supra* note 1, at 1-9.
21. These rapidly forced tender offer transactions are also called "Saturday Night Specials." See Bartell, *The Wisconsin Takeover Statute*, 32 BUS. LAW. 1465, 1466 (1977); Comment, *Securities Regulation: The Validity of North Carolina's Tender Offer Disclosure Act*, WAKE FOREST L. REV. 267, 269 n.12 (1982).
22. These premiums often represent as much as sixty percent of the prevailing market price. The tender offer involved in the *Missouri Public Service* dispute was \$14.00 per share or \$3.00 per share above the then current price of the target company. Brascan Holdings, Inc. made tender offers representing a premium of up to 79.4 percent over commonly traded prices in its attempt to take over F. W. Woolworth Co. See *Brascan Ltd. v. Lassiter*, FED. SEC. L. REP. (CCH) ¶ 98,247, at 91,624 (E.D. La. May 3, 1979).
23. Once in control, the bidding corporation may replace the incumbent management of the target company. For an in-depth discussion of target manage-

The target company's defense strategy, on the other hand, is directed toward delay,²⁴ during which the target management may resort to a vast array of defensive maneuvers. Incumbent managers have employed a grab bag of tactics, including: enticing friendly offers from white knights;²⁵ entering into transactions which would render subsequent acquisition violative of antitrust laws;²⁶ and offering competitive bids in their own right to defeat outside domination.²⁷

The stakes²⁸ and emotions²⁹ run high as the target management

ment's defensive strategies, see Block & Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44 (1983); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

24. See *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 9 (S.D. Ind. 1978) ("The single most effective weapon a target company may utilize to defeat a tender offer is delay."). See also Securities Exchange Act Rel. No. 15230, FED. SEC. L. REP. (CCH) ¶ 81,748, at 80,985 (Oct. 13, 1978).
25. This actually did occur in Missouri Public Service Co.'s struggle to acquire The Gas Service Co. Gas Service invited Kansas City Power & Light as a white knight bidder (e.g. an offeror who is supported by the target's incumbent management) to deliver a knockout offer against Missouri Public Service. For other examples, see the invitation of Stokely-Van Camp, Inc. to Quaker Oats Co. to make a friendly offer in order to defeat Pillsbury Co.'s hostile takeover attempt, *Quaker Oats Bid for Stokely Tops Pillsbury's Offer*, Wall St. J., July 18, 1983, at 3, col. 1; and the attempted takeover of Pullman, Inc., where Wheelabrator-Fry, Inc., as a white knight, raised J. Ray McDermott's initial bid for Pullman from \$28 per share to \$51.50 per share in 1980, Wall St. J., Aug. 22, 1980, at 2, col. 2.
26. For example, the management of Marshall Field & Co. defeated Carter Hawley Hale's tender offer by negotiating the acquisition of a store located in a Houston shopping mall where the offeror already had a store. This acquisition prevented the takeover by irritating potential antitrust problems inherent in the offer. *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168 (N.D. Ill. 1980), *aff'd*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). See generally Millstein, *Antitrust Aspects of Takeovers and Mergers: The Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 32 BUS. LAW. 1517 (1977).
27. See, e.g., *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980) (Chicago Rivet & Machine Co. defeated the takeover attempt of MITE Corp. through a purchase of shares by the target management).
28. The money involved in most takeover offers runs into seven and eight-digit figures. For example, Crane Co.'s hostile offer for Harsco Corporation's stock involved \$60.8 million. *Crane Co. v. Lam*, 509 F. Supp. 782, 783 (E.D. Pa. 1981). Pillsbury Co.'s hostile tender offer for Stokely-Van Camp Inc. involved \$173 million, Wall St. J., July 18, 1983, at 3, col. 1. Texaco Inc.'s friendly takeover bid for Getty Oil recently broke all records by reaching \$9.89 billion. Wall St. J., Jan. 9, 1984, at 1, col. 6.

Merely attempting a takeover may involve phenomenal costs. For example, see *Dart Industries, Inc. v. Conrad*, 462 F. Supp. 1, 8 (S.D. Ind. 1978) ("To date, plaintiffs have incurred out-of-pocket expenses of over \$1 million as a result of fees owed to its investment advisors, legal fees, and advertising and printing costs."); *Hi-Shear Indus., Inc. v. Campbell*, FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,032 (D.S.C. Dec. 4, 1980) ("In the instant case, plaintiff [the bid-

fighters for what it perceives to be the best interests of its security holders (which is also directly linked to the management's own professional future), and the offeror fights for an attractive investment. Hostile takeover battles often degenerate into a mudslinging brawl. It became evident that, without adequate control, such a sanguinary struggle could injure the target shareholders as the battle is dragged into the "courts, on Wall Street, and through the media."³⁰ The potential for bypassing many of the investor-protecting reforms instituted in the Securities Exchange Act of 1933 and 1934³¹ warranted attention as the takeover fever hit in the 1960's.

Prompted by the fear that seductive premiums and the pressurized environment enveloping tender offers would lure shareholders away from making informed investment decisions, Congress promulgated statutory regulations intended to educate the target's security holders, and give fair warning of the magnitude and context of the contemplated transaction.³² Without filling this regulatory "gap"³³ in securities law, proponents of the bill argued, the investor could get swallowed up in the tempest of the tender offer and be left with inadequate information to decide whether to tender his stock at the offered price, or assume the risks³⁴ attendant in retaining his stock after the takeover metamorphosis.

The disclosure provisions of the Williams Act are embodied in amendments to sections 13(d) and 14(d) of the 1934 Securities Ex-

der] must make significant interest payments for each day in which the offer is extended . . .").

29. For an interesting view of the fears, pressures, and sensationalism surrounding takeover attempts, see Johnson & Teresko, *Frustration and Fear: The Human Side of Takeover Attempt*, *INDUSTRY WK.* Nov. 24, 1975, at 25.
30. *Martin Marietta Corp. v. Bendix Corp.*, 547 F. Supp. 533, 534 (D. Md. 1982).
31. 15 U.S.C. §§ 77a-78kk (1976).
32. SENATE COMM. ON BANKING AND CURRENCY, *FULL DISCLOSURE OF EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS*, S. REP. NO. 550, 90th Cong., 1st Sess. 2-4 (1967).
33. *Id.* at 4; H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813.
34. Some Congressmen worried about the prospect of "corporate raiders" attempting to "loot" the target companies in the tender offer process. See *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 46 (1967) (statement of Sen. Thomas H. Kuchel); 111 CONG. REC. 28,257-58 (1967) (remarks of Sen. Harrison A. Williams). Before the Williams Act tempered the abuses of the takeover mechanism, some tender offerors liquidated the target's stock upon acquisition, and used the proceeds for the offeror's benefit. See *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947) (offeror purchased a controlling interest in the target company in order to liquidate it and take advantage of appreciated leaf tobacco possessed by the target).

change Act.³⁵ These provisions require the offeror³⁶ to file with the Securities Exchange Commission (SEC), *inter alia*: the tender offeror's identity and background; the total sum of funds behind the takeover bid and the source of those funds; the offeror's present holdings in the target corporation; and any plans to liquidate, merge, or make any other fundamental alterations in the target's corporate structure once the offeror takes control.³⁷

In addition to initiating these disclosure requirements, the Williams Act also provided substantive protections for shareholders in tender offer situations. Aimed at stabilizing the volatile first days of the tender offer process,³⁸ the legislation requires uniformly priced offers,³⁹ sales on a pro rata basis,⁴⁰ a minimum shareholder withdrawal period,⁴¹ and adherence to a broad anti-fraud provision.⁴²

B. State Legislation

The restrictions contained in the Williams Act not only failed to extinguish the takeover fever, but the phenomenon plunged forward, unchecked.⁴³ Critics of the Act felt it was ineffectual in corraling the voracious conglomerate appetite for takeover investments, and clamored for additional regulation that would increase the chances for a more informed investor evaluation of hostile takeover offers. A flurry of state legislation followed⁴⁴ as localities awakened to the perceived need to draw the reins tighter on the runaway takeover boom of the 1970's.⁴⁵

A considerable body of case law has grown out of the challenges to state tender offer regulation. Since the birth of these statutes, at

35. Williams Act §§ 13(d), 14(d), 15 U.S.C. § 78m(d) (1976).

36. The offeror may be a natural person, company, government, instrumentality of government, or partnership. 15 U.S.C. §§ 78c(a)(9), 78n(d)(2) (1976).

37. 15 U.S.C. § 78m(d) (1976).

38. One commentator has explained that before the advent of the Williams Act, "stockholders were being stampeded to accept questionable or inadequate offers because there was often insufficient time to obtain a higher offer." Arsht, *The Delaware Takeover Statute—Special Problems for Directors*, 32 BUS. LAW. 1461, 1461 (1977).

39. Williams Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1976).

40. *Id.* § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1976).

41. *Id.* § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1976).

42. *Id.* 15 U.S.C. § 78n(e) (1976).

43. For example, the "merger mania sweeping the oil industry a few years ago" has culminated in Texaco Inc.'s latest offer to purchase most of Getty Oil's 79.1 million outstanding shares. Wall St. J., Jan. 9, 1984, at 1, col. 6. See also *supra* note 16.

44. Virginia actually enacted its tender offer statute about four months before Congress passed the Williams Act, VA. CODE §§ 13.1-528 to -541 (1978 & Supp. 1982).

45. See *supra* note 8.

least fifteen courts have determined⁴⁶ that these state regulatory schemes are preempted by the Williams Act or excessively burden interstate commerce in violation of the commerce clause.⁴⁷ Other courts have cast serious doubts upon the constitutional acceptability of state takeover laws, although the cases did not turn on that issue.⁴⁸ Only a handful of statutes have survived initial challenge,⁴⁹ and even some of these laws have met their demise in subsequent challenges.⁵⁰

In retrospect, it appears that most of the corporate takeover statutes did, in fact, fail the constitutional test of preemption.⁵¹ Although this initial drive for takeover legislation on the state level outwardly purported to adopt the federal goal of investor protection,⁵² the input of local corporate management, as a lobbying en-

46. Tender offer litigation arises in a number of procedural contexts, including requests for preliminary injunctions and temporary restraining orders, and disposition on the merits.

47. *Telvest v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Va.); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Mo.); *Kennecott Corp. v. Smith*, 637 F.2d 181 (3d Cir. 1980) (N.J.); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980) (Ill.); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978) (venue in district court was improper) (Idaho), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Missouri Pub. Serv. Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 22, 1983) (Neb.); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982) (Md.); *Canadian Pac. Enters. (U.S.), Inc. v. Krouse*, 506 F. Supp. 1192 (S.D. Ohio 1981) (Ohio); *Crane Co. v. Lam*, 509 F. Supp. 782 (E.D. Pa. 1981) (Pa.); *Natomas Co. v. Bryan*, 512 F. Supp. 191 (D. Nev. 1981) (Nev.); *Joseph E. Seagram & Sons, Inc. v. Marley, Fed. Sec. L. REP. (CCH) ¶ 98,246* (W.D. Okla. July 17, 1981) (Okla.); *Hi-Shear Indus., Inc. v. Campbell*, 1980 FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. Dec. 4, 1980) (S.C.); *Dart Indus., Inc. v. Conrad*, 426 F. Supp. 1 (S.D. Ind. 1978) (Ind.); *Brascan Ltd. v. Lassiter*, FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. May 3, 1979) (La.); *Kelly v. Beta-X Corp.*, 103 Mich. App. 51, 302 N.W.2d 596 (1981) (Mich.); *Eure v. Grand Metropolitan Ltd.*, FED. SEC. L. REP. (CCH) ¶ 97,694 (N.C. Super. Ct. Apr. 18, 1980) (N.C.).

48. *See, e.g.*, *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 474 F. Supp. 1341 (E.D. Mo. 1979); *UV Indus., Inc. v. Posner*, 466 F. Supp. 1251 (D. Me. 1979); *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466 F. Supp. 1114 (D. Mass. 1978); *GM Sub Corp. v. Liggett Group, Inc.*, 415 A.2d 473 (Del. 1980); *UV Indus., Inc. v. Sharon Steel Corp.*, BLUE SKY L. REP. (CCH) ¶ 71,4166 (N.Y. Sup. Ct. 1979).

49. *See, e.g.*, *Strode v. Esmark, Inc.*, FED. SEC. L. REP. (CCH) ¶ 97,538 (Ky. Cir. Ct. May 13, 1980); *Wylain, Inc. v. TRE Corp.*, 412 A.2d 338 (Del. Ch. 1980).

50. *See, e.g.*, *Sharon Steel Corp. v. Whaland*, 121 N.H. 607, 433 A.2d 1250 (1981), *vacated*, 458 U.S. 1101 (June 28, 1982) (case remanded to the New Hampshire Supreme Court "for further consideration in light of *Edgar v. MITE Corp.*").

51. Traditional preemption analysis has its roots in the supremacy clause, which prohibits state laws that are inconsistent with a valid congressional enactment. *See* U.S. CONST. art. VI, cl. 2. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 342-44 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

52. It was declared, for example, that the purpose of the Ohio takeover statute

tity, belied such a benign complexion.⁵³ In their strides toward pro-management parochialism, the states enacted provisions which sought only to shelter local industry by inhibiting the tender offer vehicle.⁵⁴ This disrupted the dual federal goal of protecting investors, while still preserving a carefully constructed balance in the web of conflicting interests between the takeover bidder and the incumbent management.⁵⁵

State legislation displayed its protectionist bias in provisions delaying the tender offer process. This feature of delay became manifest in several mechanisms, the most blatant of which was the precommencement waiting period.⁵⁶ Provisions for administrative hearings,⁵⁷ enabling the state government to suspend tender offers for an open-ended duration, also came under fire.⁵⁸ More subtle methods of inhibiting the hostile tender offer, such as exempting from regulation tender offers that won the approval of the target corporation's management,⁵⁹ were woven into the state regulatory fabric.

Many courts also found that the extraterritorial reach of takeover statutes ran afoul of commerce clause restrictions on state legislation.⁶⁰ Jurisdiction was typically based on some tenuous minimum contact with the regulating state, e.g., the location of substantial assets or principal place of business⁶¹ within state borders, or a charter of incorporation in the state.⁶² Quite frequently the long reach of these regulations extended to sister states, or even foreign nations. Given the fact that many target companies are publicly held, this almost ensured a geographic scattering of the target's shareholders and, thus, preserved the extraterritorial

was to "protect shareholders of Ohio and Ohio-based corporations by requiring . . . fair, full, and effective disclosure to shareholders in regard to takeover bids." 1969-1970 Ohio Laws 352 (1969) (statute codified at OHIO REV. CODE ANN. §1707.04 (Page 1978)).

53. See Wall St. J., Nov. 19, 1975, at 1, col. 6 (discussing the impact of local industrialists in sponsoring the Ohio and Idaho statutes).

54. See *Corporate Takeovers: Hearings Before the Senate Comm. on Banking, Housing, & Urban Affairs*, 94th Cong., 2d Sess. 94 (1976) (statement of SEC Commissioner Loomis); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974).

55. See *infra* Part III (discussion of constitutional standards).

56. See, e.g., HAWAII REV. STAT. § 417E-3(f) (Supp. 1976) (imposing a mandatory sixty-day waiting period before the tender offer became effective).

57. See, e.g., CONN. GEN. STAT. § 36-360 (1981).

58. See, e.g., *Hi-Shear Indus., Inc. v. Campbell*, FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031 (D.S.C. Dec. 4, 1980).

59. See, e.g., COLO. REV. STAT. § 11-51.5-104(3) (Supp. 1975); IDAHO CODE § 30-1501(5)(e) (1980).

60. See, e.g., *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981).

61. See, e.g., N.Y. BUS. CORP. LAW § 1061(a) (McKinney Supp. 1976).

62. See, e.g., S.D. COMP. LAWS ANN. § 47-32-3 (1983).

character of the laws.⁶³

By the 1980's, state takeover legislation was clearly on a collision course with the Constitution. The seeds of change had been firmly planted.

III. CHALLENGE AND RESPONSE: ESTABLISHING THE ROOM FOR CHANGE

Underlying the preemption and commerce clause challenges to existing state legislation is the broader issue of whether the states may regulate the field of corporate takeovers at all. In the face of other hostile court decisions, *Missouri Public Service Co. v. Amen*, in effect, may destroy the theoretical feasibility of any state regulation of tender offers.⁶⁴ However, an analysis of fundamental constitutional concepts dealing with the commerce clause and preemption clearly indicates that the law has not foreclosed the idea of state regulation *in toto*; some form of state takeover statute, with the proper legislative posture, may indeed meet with constitutional approval.

On June 23, 1982, the United States Supreme Court finally addressed the controversy surrounding state takeover regulations in *Edgar v. MITE Corp.*⁶⁵ On appeal from the Seventh Circuit,⁶⁶ the Court's invalidation of the Illinois Business Takeover Act⁶⁷ constitutes an integral part in the jigsaw puzzle of state takeover legislation.

In January of 1979, the MITE Corporation, a Delaware corporation with its principal place of business in Connecticut, made a tender offer of \$28.00 per share for all outstanding shares of Chicago Rivet & Machine Company, an Illinois-based and locally held corporation. The bait in the offer was a premium of \$4.00 per share above market price.⁶⁸ MITE complied with the federal disclosure requirements prescribed in the Williams Act, but filed suit to enjoin Illinois officials from enforcing the state takeover act on the grounds that it violated the supremacy and commerce clauses of the federal Constitution.

MITE's constitutional challenges persuaded the Federal District Court of Illinois to enjoin the Secretary of State from enforcing

63. For example, in *Hi-Shear Indus., Inc. v. Campbell*, FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,032 (D.S.C. Dec. 4, 1980), the court estimated that 99.1 percent of the publicly held target's shareholders lived beyond the boundaries of the state which invoked its takeover statute.

64. See *infra* Section IV(A).

65. 457 U.S. 624 (1982).

66. *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

67. ILL. REV. STAT. ch. 121-1/2, §§ 137.51-.70 (1980).

68. *Edgar v. MITE Corp.*, 457 U.S. 624, 628 (1982).

ing the takeover act against the bidding corporation.⁶⁹ The Illinois Secretary of State appealed the district court's injunction, but the Illinois Act again met with defeat at the Seventh Circuit.⁷⁰ The Supreme Court heard the Illinois Secretary of State's final appeal, affirming the Seventh Circuit's rejection of the state takeover statute.

As one court aptly put it: "*Edgar* is not exactly a model of judicial unanimity."⁷¹ In the text of the case, there are a total of six opinions with seven correspondingly splintered viewpoints. Only six members of the Court addressed the merits of the case,⁷² as Justices Brennan, Marshall, and Rehnquist, dissenting separately, found the appeal to be moot.⁷³ The fragmented breakdown of the Court may be summarized as follows: with respect to the preemption issue, three members of the Court (led by Justice White) believed that the Illinois Act conflicted with the purposes of the Williams Act, and was, therefore, operationally preempted under the supremacy clause; Justice O'Connor did not address this point, and Justices Powell and Stevens expressed the contrary position—that the Illinois law was not federally preempted. Five of the six Justices addressing the merits of the case further held that, under the *Pike v. Bruce Church, Inc.* standard, the Illinois Business Takeover Act imposed undue burdens on interstate commerce; Justice Blackmun remained silent on this point.

The White plurality opinion first turned to the issue of preemption. Citing the expression of Congressional intent embodied in the Securities Exchange Act of 1934, Justice White reasoned that "Congress did not explicitly prohibit states from regulating takeovers; it left the determination [of] whether the Illinois statute conflicts with the Williams Act to the courts."⁷⁴ Considering the

69. *MITE Corp. v. Dixon*, No. 79 C 200 (N.D. Ill. Feb. 9, 1979).

70. *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980).

71. *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 526 (D. Md. 1982).

72. Chief Justice Burger and Justices White, Blackmun, O'Connor, Stevens, and Powell discussed the merits of the case.

73. The dissenting Justices felt that the case was rendered moot by MITE's withdrawal of the tender offer. For a similar interpretation, see *Tyco Laboratories, Inc. v. Connelly*, 473 F. Supp. 1157 (D. Mass. 1979) (challenge to the constitutionality of the Massachusetts Act rendered moot by the plaintiff's post-trial disclaimer of interest in making a takeover bid).

74. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982). Not only is there no federal expression intimating Congress' intent to occupy the field of tender offer regulation, but, to the contrary, the Securities Exchange Act of 1934 expressly reserves room for consistent state securities legislation. Section 28(a) of that Act states, "[n]othing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a) (1976). The *Edgar* plurality joined even the most hostile cases in

line of cases which hold that a direct conflict with the federal statute will invalidate the state regulation "where compliance with both federal and state regulations is a physical impossibility,"⁷⁵ the three-man plurality found that it would not be impossible to comply with both the provisions of the Williams Act and the more burdensome requirements of the Illinois law.⁷⁶

Having determined that state takeover legislation did not explicitly or directly contradict the Williams Act, Justice White focused his attention on whether the state legislation was nonetheless preempted because of an operational conflict with the purposes and objectives of the federal legislation.⁷⁷ The plurality found that the basic intent of Congress was to protect investors,⁷⁸ but emphasized that:

[I]t is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice.⁷⁹

White then went on to examine three provisions of the Illinois Act that upset the balance struck by Congress between the bidder, target management, and target shareholders. One of those provisions was the requirement that the tender offeror notify the Secretary of State and target company of its intent to make a takeover bid and the material terms thereof twenty days before the offer becomes effective.⁸⁰ White found that this prefiling notice provision not only furnished incumbent management with the powerful

rejecting the notion that the Williams Act expressly preempts state efforts. See, e.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1129 (8th Cir. 1982); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 182 (1979) (Section 28(a) "was plainly intended to protect, rather than to limit, state authority.").

75. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1962)).

76. The Illinois Act required a precommencement notice to be made 20 business days before the tender offer became effective, ILL. REV. STAT. ch. 121-1/2, §§ 137.54.B, 137.54.E (Supp. 1980), and therefore would be in conflict with Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1981). See *infra* notes 119-20 and accompanying text. However, the events of this litigation took place prior to the effective date of Rule 14d-2(b), and the Rule operates prospectively only. 44 Fed. Reg. 70326 (1979).

77. If the state law frustrates the purposes or policies underlying federal legislation, the head of preemption will rise. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (setting forth the preemption test of whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

78. *Edgar v. MITE Corp.*, 457 U.S. 624, 633 (1982).

79. *Id.* at 633, 634.

80. ILL. REV. STAT. ch. 121-1/2, §§ 137.54.B, 137.54.E (Supp. 1980).

tool of delay,⁸¹ but also found that it acted "to the detriment of stockholders who will not have an offer before them during this period."⁸²

The second troublesome provision in the Illinois Act was the allowance for an administrative hearing that would suspend the contemplated transaction.⁸³ This provision was particularly skewed toward the target management's ends, as it set no deadline for the completion of such hearings and required a hearing at the request of target shareholders.⁸⁴ White found such unrestrained potential for derailing legitimate takeover attempts to be contrary to the philosophy of the Williams Act.⁸⁵

The plurality finally held that the provision in the Illinois Act authorizing the Secretary of State to pass judgment on the substantive fairness of the tender offer⁸⁶ was preempted. Justice White reasoned that this authorization interfered with the market-oriented federal goal of an informed decision made by the investor, not by the government.⁸⁷

Several members of the Court emphatically defended the concept of state regulation from the preemption attack. Justice Stevens expressed a strong concern for leaving the door open wide for state legislation. Stevens was not persuaded that "Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to

81. *Edgar v. MITE Corp.*, 457 U.S. 624, 635 (1982).

82. *Id.*

83. ILL. REV. STAT. ch. 121-1/2, § 137.51.A-52.B (Supp. 1980).

84. *Edgar v. MITE Corp.*, 457 U.S. 624, 637 (1982) ("Since incumbent management in many cases will control [large holdings of stock] . . . this provision allows management to delay the commencement of an offer by insisting on a hearing.").

85. Courts have long pointed to language in the legislative history of the Williams Act evincing the goal of neutrality: "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S. 510 is designed solely to require full and fair disclosure for the benefit of investors." 113 CONG. REC. 24664 (1967) (remarks of Sen. Williams).

86. ILL. REV. STAT. ch. 121-1/2, § 137.57.E (Supp. 1980).

87. *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982) ("Both the House and Senate Reports observed that the [Williams] Act was 'designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision.'" (Citations omitted.)). Other courts argue that heavy reliance on the state to oversee the tender offer process eviscerates the market approach to investor protection. *See, e.g., Hi-Shear Indus., Inc. v. Campbell*, FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,031 (D.S.C. Dec. 4, 1980) ("The benevolent bureaucracy approach is in conflict with the market approach and frustrates the express Congressional intent that the *shareholders* make *their* decision.") (emphasis in original).

provide special protection for incumbent management.”⁸⁸ Justice Powell echoed Stevens’ concern for leaving room for some form of state act.⁸⁹

In shifting the focus to the commerce clause issue, the enlarged plurality distinguished state takeover legislation from acceptable state blue sky laws by stressing that blue sky laws merely regulate intrastate securities transactions:⁹⁰ “MITE’s offer to Chicago Rivet’s shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines.”⁹¹

The only majority position⁹² of the Court emerged in the second half of Justice White’s commerce clause analysis, wherein the opinion applied the heralded *Pike v. Bruce Church, Inc.* test.⁹³ Weighing the benefits and burdens in the third prong of the *Pike* test, the Court pointed out that the Illinois Act’s extraterritorial nature placed a “substantial” burden on interstate commerce. If the tender offer attempt was blocked, so argued the Court, shareholders would be deprived of the opportunity to obtain premiums over the prevailing market price. This lost opportunity would, in turn, hinder efficient allocation of economic resources and reduce

88. *Edgar v. MITE Corp.*, 457 U.S. 624, 655 (1982) (Stevens, J., concurring in part and in the judgment).

89. *Id.* at 646, 647 (Powell, J., concurring in part). Powell explained, “I agree with Justice Stevens that the Williams Act’s neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include but often are broader than those of incumbent management.”

90. The underlying purpose of blue sky legislation is local investor protection from fraud by supplementing the federal securities regulations embodied in the 1933 and 1934 Acts. See L. LOSS & E. COWETT, BLUE SKY LAWS 17-42 (1958). In *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917), the Supreme Court rejected a commerce clause challenge since blue sky laws “apply to dispositions of securities *within* the State.”

91. *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982). Only twenty-seven percent of Chicago Rivet’s shareholders resided in Illinois; thus, the tender offer would by necessity involve a complex network of interstate commerce.

92. Justice White was joined in Section V(B) of his opinion by Chief Justice Burger and Justices Powell, Stevens and O’Connor.

93. The Supreme Court has employed varying approaches to define the scope of permissible state regulation under the commerce clause. Compare *South Carolina Highway Dep’t. v. Barnwell Bros.*, 303 U.S. 177, 184-85 (1938) (state interest in safety justified the burden on interstate commerce), with *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) (state interest in safety outweighed by need to maintain federal uniformity).

The *Pike v. Bruce Church, Inc.* decision concentrated the main interacting forces into a formulation that composes the oft-quoted test: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” 397 U.S. 137, 142 (1970).

the target management's incentive to perform well.⁹⁴

The majority seemed to endorse the limited purpose of the Illinois Act in protecting resident security holders by regulating the internal affairs of companies incorporated within the state. This "legitimate state objective," however, was outweighed in the *Pike* balance by the burden on interstate commerce. The Court further weighted the balance against the local interest by pointing out the global application⁹⁵ of the Illinois Act to any corporation, located either within or outside of the state, for which ten percent of the outstanding shares are held by Illinois residents.⁹⁶

In his separate concurrence, Justice Powell approved of White's analysis through the *Pike* balancing standard, because that portion of the opinion "leaves some room for state regulation of tender offers."⁹⁷

As important as *Edgar* is in clarifying the field of takeover legislation through its expressed substantive findings, it is more significant for its implications. The true import of the case rests in its directions for the future. Only three of the Supreme Court Justices found that the particular takeover act was preempted, and even they did not foreclose the possibility that some type of takeover legislation would pass constitutional muster. Even though a majority found that the takeover act violated the commerce clause, the focus of the Court's opinion was on the impact of those provisions peculiar to the Illinois statute. *Edgar* signaled the demise of the first wave of state legislation, but left the door open for a sec-

94. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). For an in-depth argument in accord with White's statements to the effect that stifling tender offers ultimately decreases shareholder welfare, see Easterbrook & Fischel, *supra* note 23. *But cf.* Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right To Resist Tender Offers*, 3 CORP. L. REV. 107 (1980).

95. *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) ("While protecting local investors is plainly a legitimate state objective, the state has no legitimate interest in protecting non-resident shareholders.").

96. ILL. REV. STAT. ch. 121-1/2, § 137.52-10 (Supp. 1980).

97. *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982) (Powell, J., concurring in part). Powell went on to state:

"This period in our history is marked by conglomerate corporate formations essentially unrestricted by the antitrust laws. Often the offeror possesses resources, in terms of professional personnel experienced in takeovers as well as of capital, that vastly exceed those of the takeover target. This disparity in resources may seriously disadvantage a relatively small or regional target corporation. Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State."

Id. (footnotes omitted).

ond generation of state efforts to meet with constitutional approval.⁹⁸

IV. POINTING THE WAY FOR CHANGE

A. Obstruction: *Missouri Public Service Co. v. Amen*

In light of the foregoing, the decision in *Missouri Public Service Co. v. Amen* takes on special significance. It does not involve a mere run-of-the-mill takeover act meeting its rightful demise; rather, the federal district court in *Missouri Public Service* found itself standing at the crossroads of takeover legislation. The Supreme Court had just announced its standard for reviewing state tender offer regulations in *Edgar*, and the Nebraska Unicameral had responded by constructing what was hoped to be one of the first constitutionally sound takeover statutes in the United States, the 1983 Corporate Takeover Act⁹⁹ (LB 599). The import of *Missouri Public Service* as a test case took a quantum leap, for to invalidate the new statute is to abandon the idea of state takeover laws in any form.

On June 13, 1983, Missouri Public Service ("Mopub"), a Missouri power supplier, publicly announced its intention to make a cash tender offer at \$14.00 per share¹⁰⁰ for ultimate control of two-thirds of the common stock of The Gas Service Co., a natural gas distributor incorporated in Delaware with its principal place of business in Missouri.¹⁰¹ As this offer triggered both the Williams Act and the Nebraska Corporate Takeover Act, Mopub responded by filing the requisite information with the SEC,¹⁰² but failed to comply with the disclosure provisions of the Nebraska law. Mopub then brought suit in the Federal District Court of Nebraska seek-

98. Several commentators have recently reached the same conclusion. See, e.g., Note, *Corporate Battles for Control—Edgar v. MITE and the Constitutionality of State Takeover Legislation—The Continuing Saga*, 26 How. L.J. 1425, 1473 (1983) ("The [Supreme] Court's first substantive foray into the tender offer thickets leaves considerable room for state regulation of tender offers."). But cf. Comment, *Tender Offers—Edgar v. MITE Corp. and State Tender Offer Regulation*, 9 J. CORP. L. 95, 112 (1983) ("The [Edgar] decision stands as a serious, perhaps fatal blow to state regulation of tender offers."); Note, *A Failed Experiment: State Takeover Regulation After Edgar v. MITE Corp.*, 1983 U. ILL. L.F. 457, 476 ("[O]nly a severely decimated statute can remain after close constitutional scrutiny.").

99. Nebraska Corporate Takeover Act, NEB. REV. STAT. §§ 21-2418, -2430 (Cum. Supp. 1983).

100. This sum provided a premium of \$3.00 per share to the shareholders over the prevailing market price, representing a total net premium of \$9 million. See Wall St. J., June 13, 1983, at 2, col. 3.

101. *Id.*

102. *Missouri Pub. Serv. Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 22, 1983) at 2. Mopub filed a Schedule 14D-1 with the SEC pursuant to §14(d)(1) of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(e) (1967).

ing declaratory and injunctive relief against the enforcement of the state takeover law on the grounds that it violated the supremacy and commerce clauses of the Constitution.

Two factors in *Missouri Public Service* indicate that all tender offer regulations, regardless of their form, are unconstitutional. First, even though no court has ever held that the federal law possessed such a pervasive and dominant character,¹⁰³ Mopub contended that the Williams Act represented a "comprehensive . . . congressional scheme which regulates the *entire field* of cash tender offers. No aspect of this type of securities transaction was ignored by Congress and no part of it was left to state regulation."¹⁰⁴ The plaintiff corporation also relied heavily on two Opinion Letters issued by the office of the Nebraska Attorney General, predicting that courts would find that the Williams Act "had entirely occupied the field" of tender offer regulation.¹⁰⁵ Once again taking an absolute position, Mopub, in its commerce clause analysis, argued that state regulation of interstate tender offers was, *per se*, an undue burden on interstate commerce.¹⁰⁶

The second factor indicating a rejection of all types of state takeover legislation is that the court discarded the entire Nebraska

103. Implicit congressional intent to preempt parallel state law may become manifest if the federal expression is so pervasive that it leaves no room for concurrent state action, *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1978), or if the federal interest so dominates a field that logic mandates exclusion of state laws in the same area. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Federal tender offer regulation embodied in the Williams Act is a minimum disclosure statute that does not comprehensively regulate all aspects of the tender offer. S. REP. No. 550, 90th Cong., 1st Sess., 2-4 (1967). The efficacy of the Act is not tied to exclusive federal jurisdiction.

The federal interest in takeover regulation or in securities regulation as a whole does not display a preeminence requisite to finding an intent to dominate the field. The interest is not of the same degree, for example, as the paramount position of the federal government recognized in foreign affairs or national security, both areas in which the Supreme Court has found concurrent state legislation to be implicitly repugnant. *See, e.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497, 504-07 (1956). State security laws, however, have long enjoyed a spirit of cooperation with federal security laws establishing "a second line of protection" for securities investors. SECURITIES AND EXCHANGE COMMISSION, SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. No. 95, 88th Cong., 1st Sess., pt. 4, at 734 (1963).

104. Brief for Plaintiff at 5-6, *Missouri Pub. Serv. Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 13, 1983).

105. *See id.* at 9-10 ("While the [Supreme] [C]ourt did not specifically so hold, a logical extension of the . . . [*Edgar v. MITE Corp.*] holding might be that the Williams Act had entirely occupied the field, and that *any* additional requirements by a state would operate to the advantage of incumbent management, in violation of the Williams Act. That may be an extreme interpretation, but it is possible") (quoting Op. No. 88, Neb. Atty. Gen. (April 25, 1983)).

106. *See* Brief for Plaintiff at 11-16, *Missouri Pub. Serv. Co. v. Amen*, No. CV 83-L-362 (D. Neb. June 22, 1983).

Act, despite the fact that the most constitutionally objectionable provisions had been deleted by the actions taken in LB 599.

In May of 1983, the Nebraska Unicameral found itself in a difficult predicament; it was under the heavy lobbying influence of local corporate management to protect resident investors and company managers from the turmoil of takeover attempts,¹⁰⁷ but it also recognized that its then current legislation had failed constitutional scrutiny upon fifteen or twenty occasions.¹⁰⁸ The legislature declared a state of emergency¹⁰⁹ during which the old Corporate Takeover Act of 1977¹¹⁰ was replaced with the overhauled version in LB 599.¹¹¹

Substantial thought went into this constitutionally streamlined bill, as Nebraska legislators attempted to avoid all the old mistakes contained in the former legislation. First, LB 599 added a short expression of legislative intent. The bill declared its purpose to be that of protecting investors by policing disclosure of information that would help investors evaluate tender offers.¹¹² This explicitly put the Act in line with the intent of the Williams Act and increased its likelihood of passing preemption analysis.¹¹³

107. Sen. Loran Schmidt, one of the sponsors of LB 599, explained to the State Department of Banking and Finance that "[t]here are several companies that have contacted me who are concerned. . . ." *Nebraska Corporate Takeover Act: Hearing on LB 599 Before the Nebraska Department of Banking and Finance*, 87th Leg., 3d Sess., at 86 (Neb. Feb. 22, 1983). At the same hearing, Martin Colladay, Vice President of Public Affairs from Conagra, Inc. (an Omaha-based corporation), spoke on behalf of LB 599. Colladay distributed a pamphlet put out by the Omaha Chamber of Commerce which supported the legislation. *See id.* at 88.

108. *Id.* at 90 (remarks of Barry Lake, former legal counsel for the Nebraska Department of Banking and Finance: "Within the last five years our department has probably been sued about 15 or 20 times" by takeover bidders enjoining enforcement of the 1977 Nebraska Corporate Takeover Act.).

109. *See* Nebraska Corporate Takeover Act § 16, 1983 Neb. Laws 1334, 1339.

110. NEB. REV. STAT. §§ 21-2401 to -2417 (1977) (repealed 1983).

111. The 1977 Act was repealed in The Nebraska Corporate Takeover Act § 15, 1983 Neb. Laws 1334, 1339.

112. NEB. REV. STAT. § 21-2419 (Cum. Supp. 1983) ("The purpose of this act is to provide protection to offerees by requiring that an offeror make full, fair, and effective disclosure of all material facts necessary for the making of an informed decision about a takeover bid.").

113. *Compare* KY. REV. STAT. § 292.560-630 (Baldwin 1981), where the Kentucky Legislature unabashedly stated the purpose of its tender offer regulation as "[a]n Act relating to the prevention of take-over bids through the purchase of corporate securities." 1976 Ky. Acts 534 (statute codified at KY. REV. STAT. § 292.560-630 (Baldwin 1981)).

It should be noted that the old Nebraska statute was silent as to legislative intent. However, portions of the legislative history indicate a slight recurring undercurrent of protectionism in the motives behind the 1983 Nebraska Corporate Takeover Act. *See Nebraska Corporate Takeover Act: Hearing on LB 599 Before the Nebraska Department of Banking and Finance* at 88 (February

LB 599 also redefined the term "takeover bid" in radically different terms by deleting the friendly offer exemption¹¹⁴ of the 1977 version.¹¹⁵ Courts have rightly charged that the mere stamp of management's approval does not aid the shareholders in making a more intelligent investment decision.¹¹⁶ A "friendly" tender offer only transfers the decision from the hands of investors into the hands of a paternalistic management, thus frustrating the federal objective of protecting investors while preserving the forces of the market environment.¹¹⁷ Not only does the elimination of the friendly offer exemption help the Nebraska Act withstand the preemption analysis, but it also settles some commerce clause concerns. The exemption saturated the 1977 Act with a protectionist hue, making the legislation resemble an attempt to inhibit hostile takeovers, rather than an attempt to evenhandedly regulate.

The most important change in the new regulations was the wholesale withdrawal of any form of built-in statutory delay. In the 1977 law, a precommencement waiting period of twenty days after public announcement was mandatory before any bid would be recognized as effective.¹¹⁸ In 1980, the SEC promulgated Rule 14d-2(b),¹¹⁹ which juxtaposed the federal and state provisions so as to put them in direct conflict;¹²⁰ under the federal regulations, the tender offer's validity is triggered immediately upon announcement, while state statutes contained similar delay provisions as were contained in the old Nebraska Act.¹²¹ Thus Rule 14d-2(b) set state takeover legislation on a collision course with the federal reg-

22, 1983) (Martin Colladay remarked: "This makes Nebraska a more attractive locale for new businesses and decreases the possibility of relocation and/or liquidation of successful Nebraska businesses.").

114. Nebraska Corporate Takeover Act, NEB. REV. STAT. § 21-2420(1) (Cum. Supp. 1983), deletes the exemption from its definition of a "takeover bid."

115. NEB. REV. STAT. § 21-2401 (1977) (repealed 1983).

116. See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1278 (5th Cir. 1978) (referring to IDAHO CODE § 30-1501(5)(e) (1980 & Supp. 1980)).

117. One commentator contended "it may be more important to shareholders of a target company that full and fair disclosure be made in the case of a 'friendly' tender offer than in the case of an 'unfriendly' offer because in the former situation, deals may have been struck between management and the offeror of which the shareholders are unaware." Tiger, *supra* note 8, at 471 n.96.

118. NEB. REV. STAT. § 21-2402 (1977) (repealed 1983).

119. SEC Exchange Act Rel. No. 16384, 1979-1980 FED. SEC. L. REP. (CCH) ¶ 82,373.

120. The SEC explained its action as follows:

While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes *presently in effect* [emphasis supplied] frustrate the operation and purposes of the Williams Act and that . . . Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act.

Id. at 82,584.

121. For examples of precommencement waiting period provisions, see DEL. CODE

ulations, ultimately leaving a dramatic imprint upon subsequent case law.¹²² LB 599 eliminates the potential for delay by recognizing offers as being effective upon the filing of certain disclosures "as soon as practicable on the day of the first public announcement of the takeover bid."¹²³

Mopub further argued that the disclosure provisions of the Nebraska Act of 1983 are more extensive than those found in the Williams Act¹²⁴ and, therefore, urged that "in the area of financial disclosure it can be true that 'less is more.' Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosure."¹²⁵ The more rigorous disclosure provisions have also been charged with tipping the legislative scales toward incumbent management by facilitating the obstruction of bids with defective filings.¹²⁶

On the other hand, various courts have correctly defended additional state disclosure requirements as being consistent with, and supplemental to, the informative disclosure provisions of the Williams Act.¹²⁷ Nebraska defused the dilemma by letting the bidder off the hook with relatively minor disclosure hardships.¹²⁸ These disclosure requirements are similar to the anti-fraud segment of the act,¹²⁹ as they supplement the goal of the federal Williams Act to protect investors. Similar provisions in other challenged statutes have rarely been attacked by any court. Even those jurisdictions invalidating the local takeover act have been careful to save the anti-fraud provisions.¹³⁰

ANN. tit. 8, § 203(a)(1) (Supp. 1980); KY. REV. STAT. ANN. § 292.570(1) (Baldwin Cum. Supp. 1980).

122. Nearly all courts have recognized the irreconcilable conflict between Rule 14d-2(b) and state precommencement waiting periods. *See, e.g.*, Natomas Co. v. Bryan, 512 F. Supp. 191, 193 (D. Nev. 1981); Eure v. Grand Metropolitan Ltd., FED. SEC. L. REP. (CCH) ¶ 97,694, at 98,648 (N.C. Super. Ct. 1980).

123. Nebraska Corporate Takeover Act, NEB. REV. STAT. § 21-2421 (Cum. Supp. 1983).

124. Mopub isolated the more extensive provisions. *See* Brief for Plaintiff at Appendix A, Missouri Pub. Serv. Co. v. Amen, No. CV 83-L-362 (D. Neb. June 22, 1983).

125. *Id.* at 14-15 (quoting *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1280 (5th Cir. 1978)).

126. *See* Brudney, *A Note on Chilling Tender Solicitations*, 21 *RUTGERS L. REV.* 609, 624 (1967) ("The very process of providing additional information operates—and is intended to operate—to increase the cost and to diminish the chances of success of the outside bidders . . .").

127. *See, e.g.*, *Strode v. Esmark, Inc.*, FED. SEC. L. REP. (CCH) ¶ 97,538, at 97,807 (May 13, 1980).

128. Nebraska Corporate Takeover Act, NEB. REV. STAT. § 21-2423 (Cum. Supp. 1983).

129. *Id.*; NEB. REV. STAT. § 21-2424 (Cum. Supp. 1983).

130. *See, e.g.*, *Kennecott v. Smith*, 507 F. Supp. 1207, 1225 (D. N.J. 1981) ("The only sections which may survive after removing the [takeover] act's vital organs

Moreover, in an attempt to balance the policing effort, the 1983 act has instituted a novel idea of symmetrical regulation. Section 21-2425 of the Nebraska Takeover Act requires the target corporation's management to file copies of its own pieces of propaganda sent to shareholders.¹³¹ The anti-fraud provision in section 21-2424 also applies equally to the target's management as well as the offeror. These provisions should quiet some of the criticism concerning inhibition of takeover attempts, as they may actually tend to aid bidders.

The whole complexion of the 1983 administrative enforcement provisions differs substantially from the 1977 version. The old scheme afforded the State Department of Banking and Finance almost absolute authority in pulling the strings of a takeover bid, especially with regard to plenary powers to delay.¹³² The Department possessed the power to "summarily delay the effective date of the offer" if it deemed the filing of information insufficient.¹³³ With such a provision, it is no wonder that the tender offer became known as the tender trap.¹³⁴ Delay was a built-in feature of the old statute, as a hearing automatically suspended the offer into a state of limbo until the Department gave its stamp of approval.¹³⁵

The 1983 regulatory scheme has reduced the spectre of administrative intervention in the takeover bid process so as to achieve an equilibrium which still provides investors with a forum for relief, while muting the blatantly delay-oriented provisions of the old act. The legislation authorizes the State Department of Banking and Finance to conduct an investigation "as it deems necessary" concerning the offeror's compliance with the statute's disclosure requirements.¹³⁶ In addition to these investigatory powers, the Department may exercise authority to enjoin offers to or

are the anti-fraud provisions . . . "); *Kelly v. Beta-X Corp.*, 103 Mich. App. 51, 59, 302 N.W.2d 596, 599-600 (1981).

131. NEB. REV. STAT. § 21-2425 (Cum. Supp. 1983) requires that "[n]o solicitation or recommendation to the stockholders of a target company to accept or reject a takeover bid shall be made unless . . . the person making such solicitation or recommendation has filed copies . . . with the department [of Banking and Finance]."

132. See NEB. REV. STAT. § 21-2402 (Supp. 1979) (repealed in 1983).

133. *Id.*

134. See Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

135. NEB. REV. STAT. § 21-2406 (1977) (repealed in 1983) ("If it [the Nebraska Department of Banking and Finance] finds that the takeover bid provides for full and fair disclosure to offerees of all material information concerning the offer, it shall by order declare the offer effective.").

136. Nebraska Corporate Takeover Act, NEB. REV. STAT. § 21-2428(1) (Cum. Supp. 1983).

purchases from Nebraska residents "in the event that any person is violating or about to violate any provision of this act."¹³⁷ The 1983 statute thus authorizes administrative involvement only to the extent needed to police compliance, and avoids giving the state carte blanche to summarily block the tender offer.

When determining the scope of administrative review, most courts exhibit two competing biases: on the one hand, courts suspect the worst in target management's motives for resisting takeover bids;¹³⁸ on the other hand, these same courts cling to a faith in pure market forces.¹³⁹ The extreme distrust of the legislative efforts to regulate takeovers in a controlled market approach is unwarranted. Dissatisfied with the rigidity of the market approach, the SEC has assimilated some of the fiduciary oriented tenets of state legislation into the Williams Act.¹⁴⁰ The conceptual underpinnings of the market approach do not go far to shelter investors from the turbulence of the real market, as aggressive and sophisticated practices of arbitrageurs, and the complex dangers of a large securities transaction, could conspire to dupe the most informed analysts of Wall Street.¹⁴¹ The suspicion of incumbent management's motives is also overplayed, as the members of management are bound by the traditional fiduciary duties of corporate managers¹⁴² and the threat of suit from disgruntled shareholders.¹⁴³

137. *Id.* at § 21-2428(2). See also IND. CODE ANN. § 23-2-3-8(b) (Burns Supp. 1976) (Indiana injunction provision).

138. This cynicism may not be totally without reason. See *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168 (N.D. Ill. 1980) (shareholder's suit against target management for defeating a tender offer with a premium exceeding 100 percent of the price). See also Easterbrook & Fischel, *supra* note 23.

139. For example, the court in *Kennecott Corp. v. Smith*, 637 F.2d 181, 188 (3d Cir. 1980), placed its faith in the free flow of information provided in the "unfettered" market setting.

140. The SEC has even advocated independent board review of takeovers to determine whether they are appropriate or not. *Conglomerate Mergers—The Effects on Small Businesses and Local Communities: Hearings Before the Subcomm. on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Comm. on Small Business*, 96th Cong., 2d Sess. 255, 287-88 (1980) (testimony of Harold M. Williams, Chairman, SEC). Also, the new Schedule 14D-1 (adopted in 1977) required more detailed disclosures than in previous filings.

141. With the increasing sums of money involved and the emergence of sophisticated and active arbitrage forces working with offerors in these complex transactions, the pure market approach may have some shortcomings. See Comment, *Should Tender Offer Arbitrage Be Regulated?*, 1978 DUKE L.J. 1000 (1978).

142. See generally Gelfond & Sebastian, *Reevaluating the Duties of Target Management in a Hostile Tender Offer*, 60 B.U.L. REV. 403 (1980); Lynch & Steinberg, *The Legitimacy of Defensive Tactics in Tender Offers*, 64 CORNELL L. REV. 901 (1979); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule*, 58 N.Y.U. L. REV. 621 (1983).

This does not mean, however, that states may place shackles on the market to attain any goal that advances the interests of the investor. The state should intervene only to make up for some of the limitations inherent in the market approach so as not to tip the scale of neutrality in either direction. Section 21-2428 of the Nebraska Act appears to have done a masterful job in balancing these interests. It provides a mechanism for reviewing compliance with disclosure requirements, without adjudicating the substantive fairness of the tender offer itself.¹⁴⁴ The procedural safeguards in the injunction procedure,¹⁴⁵ coupled with the advantage of providing investors with a remedy before the tender offer is completed, complement the market approach to investor protection.

The alterations effected in the 1983 Act also erased the portions of the old statute which were objectionable to the commerce clause. Very little connection between the regulating state and the target corporation was required to trigger the application of the 1977 tender offer regulations. The only prerequisite to application was that the target company be a corporation "whose securities are to be the subject of a takeover bid."¹⁴⁶ The looseness of this nexus between the corporation and the state has been attacked elsewhere as not supporting a legitimate local interest sufficient to satisfy the *Pike* test.¹⁴⁷

Those courts which have attacked tender offer regulations' constitutionality under the commerce clause have rightly indicated that a local interest is served only if the state regulates the internal workings of a local corporation, or if it is protecting local shareholders. Stated conversely, a state has no legitimate local interest in regulating the affairs of foreign corporations or protecting non-resident shareholders.¹⁴⁸ Most states have attempted to tighten

143. Target management has an affirmative duty to oppose a tender offer it believes is contrary to the corporation's best interests. See *Lewis v. McGraw*, 619 F.2d 192 (2d Cir. 1980), *cert. denied*, 449 U.S. 951 (1980); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978). See also Block & Miller, *supra* note 23, at 66-67; Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979).

144. Compare Nebraska Corporate Takeover Act, NEB. REV. STAT. § 21-2428 (Cum. Supp. 1983) (administrative review), with NEB. REV. STAT. § 21-2406 (1977) (repealed in 1983).

145. See *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1033 (1st Cir. 1982) ("The traditional equitable prerequisites to injunctive relief are required. Thus, injunctions may not be granted simply by showing a violation of the Act: there must also be irreparable harm, and the injunction must be tailored to fit the circumstances of the particular case.").

146. NEB. REV. STAT. § 21-2401(4) (1977) (repealed 1983).

147. See *supra* notes 60-62 and accompanying text.

148. See, e.g., *Crane Co. v. Lam*, 509 F. Supp. 782, 789 (E.D. Pa. 1981) ("The Court agrees that the protection of investors is a legitimate state interest, but only to the extent those investors reside in Pennsylvania.").

the nexus between the state and the target corporation by enacting additional requirements that the company be chartered under the state's laws¹⁴⁹ or, alternatively, that the state's laws regulate only corporations with some established business presence within the state.¹⁵⁰ These measures insure the local character of the statutory interest.

Nebraska has attempted to neutralize commerce clause criticism in a twofold approach. First, the legislature has redefined the term "target corporation" to include only those companies whose equity securities are subject to the contemplated bidding *and* which have thirty-five or more shareholders in Nebraska.¹⁵¹ Although the bill's sponsors acknowledged that there was nothing "magic" about the number thirty-five,¹⁵² the provision did demonstrate a minimum level of local interest that the statute must serve.

The thirty-five shareholder requirement did not, however, shed the extraterritorial implications of the statute. In an effort to eradicate the extraterritoriality problem, Nebraska adopted a novel provision which restricts the authority to block offers under the Act to those instances involving resident shareholders. The statute clearly states that "any injunction issued under sections 21-2418 to 21-2430 [the Nebraska Corporate Takeover Act] may only enjoin offers to or purchases from Nebraska residents pursuant to a takeover bid."¹⁵³ Thus the state legislature sidestepped the debate as to whether tender offer legislation should be characterized as securities regulation, or as state corporation law, and placed this statute in the vein of blue sky securities law. Although the potential for application to interstate transactions does yet exist, LB 599 requires protection only of resident investors. Thus LB 599 fits well within the ambit of the constitutionally accepted blue sky laws.¹⁵⁴

149. *See, e.g.*, MD. CORPS. & ASS'NS CODE ANN. § 11-902(n)(2)(iv), (i) (1-2) (Supp. 1980). As amended by 1981 Md. Laws ch. 776, the target corporation must be organized in Maryland, be doing business in the state, and have at least thirty-five shareholders in the state.

150. *See, e.g.*, IND. CODE ANN. § 23-2-3.1-1(j) (Burns Supp. 1981) (as amended by Pub. L. No. 215 (1981)).

151. NEB. REV. STAT. § 21-2420 (Cum. Supp. 1983).

152. *Nebraska Corporate Takeover Act: Hearing on LB 599 Before the Nebraska Department of Banking and Finance*, 87th Leg., 3d Sess., at 88 (Neb. Feb. 22, 1983) (remarks of Senator Newell and Martin Colladay).

153. NEB. REV. STAT. § 21-2428(2) (Cum. Supp. 1983).

154. A notable issue in determining the overall legitimacy of interests served in state takeover statutes is whether such statutes protect investors as a form of state securities regulation, or as a traditional form of state corporate law. If state takeover legislation is a form of securities regulation, it may fail the test for constitutionality applied to other state securities regulations, namely blue

B. Toward Constitutional Acceptability

It is instructive to look at how several recent cases have analyzed state takeover laws which have been reshaped with an eye toward gaining constitutional acceptance. Some of these cases have distilled and separated out the component provisions of the acts in an effort to adapt to the jurisprudential evolution unfolding in tender offer legislation. For example, in *Joseph E. Seagram & Sons, Inc. v. Marley*,¹⁵⁵ the Oklahoma District Court granted a preliminary injunction barring enforcement of the Oklahoma takeover statute.¹⁵⁶ In doing so, the court noted the surgical changes that the Oklahoma legislature had made on the statute "in an effort to 'harmonize' the Oklahoma Act with provisions of federal law."¹⁵⁷ In this "harmonizing" effort, a pre-filing notification requirement was eliminated in order to make compliance with the new Rule 14d-2(b) possible.¹⁵⁸ Even so, the court found that another provision conflicted with the supremacy and commerce clauses.¹⁵⁹ The significance of the case lies in the court's willingness to break down its examination of the statute and to look at the takeover law in question as something more than a monolithic entity.¹⁶⁰

sky laws. Since the original commerce clause challenge of blue sky laws in 1917, state securities regulations have been upheld on the narrow precept that they protected *resident* investors, and thus did not have the extraterritorial quality inherent in most takeover statutes. See *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Merrick v. N.W. Italsey & Co.*, 242 U.S. 568 (1917).

If, however, takeover legislation is categorized in the traditional mold of state corporate regulation, the application of full faith and credit from jurisdiction to jurisdiction, combined with the states' strong and historic interest in regulating upheavals in the inner corporate structure, may act to carry the legislation to the satisfaction of legitimacy requirements. See Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433 (1968), for an in-depth look at the state's right to regulate extraterritorial events that have impact on local corporate activity.

155. FED. SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. July 17, 1981).

156. Oklahoma Multinational Corporation Take-Over Bid Act, 71 OKLA. STAT. ANN. tit. 71 §§ 414-421 (Supp. 1980).

157. *Joseph E. Seagram & Sons, Inc. v. Marley*, FED. SEC. L. REP. (CCH) ¶ 98,246, at 91,618 (N.D. Okla. July 17, 1981).

158. *Id.* at 91,618-19.

159. The court still found an administrative hearing provision to be repugnant to the purposes of the Williams Act, *id.* at 91,619.

160. Other recent cases have compared the statute under scrutiny to the Illinois act struck down in *Edgar v. MITE Corp.* See *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128 (8th Cir. 1982) ("Our examination reveals that there are no significant distinctions between the Illinois and Missouri Takeover Acts; therefore, the issues . . . are controlled by the majority decision in *Edgar v. MITE Corp.*"); *Mesa Petroleum Co. v. Cities Service Co.*, FED. SEC. L. REP. (CCH) ¶ 99,064, at 95,048 (W.D. Okla. Dec. 21, 1982) ("The Illinois Act and the Oklahoma Act are not materially different.").

Also, in *Bendix Corp. v. Martin Marietta Corp.*,¹⁶¹ the Federal District Court in Maryland granted a preliminary injunction to restrain the enforcement of the Maryland Corporate Take-Over Law.¹⁶² The court took this action even though it noted that the statute was amended in 1980 to give the Maryland Securities Commissioner the power to exempt transactions from particular provisions of the takeover act "to the extent the Commissioner deems such action necessary or appropriate to make their applications reasonably consistent" with federal legislation.¹⁶³ The court found that the Commissioner's relaxation of the act's disclosure requirements, while leaving unaltered the pre-filing notification provision, was not sufficient to make the statute constitutionally sound.¹⁶⁴

The clearest indication of judicial acquiescence to the legislative changes taking place in corporate takeover regulations appeared in *Agency Rent-A-Car, Inc. v. Connolly*.¹⁶⁵ In this recent case, Agency Rent-A-Car, Inc. (hereinafter referred to as Agency) challenged the State's power to block Agency's tender offer for a controlling number of shares in Spencer Companies. The state of Massachusetts invoked its takeover statute after Agency failed to disclose, contemporaneously with its offer announcement, its intent to gain control. On appeal, the First Circuit became the first court to affirm the legitimacy of a state takeover act since the *Edgar* decision.

The Massachusetts Act has been pruned down to a basic antifraud/disclosure statute that appears to be perfectly compatible with the Williams Act.¹⁶⁶ Recognizing this compatibility between the state and federal statutes, the First Circuit dismissed the charges of preemption. The court discussed Supreme Court cases and the underlying purposes of the Williams Act in an attempt to dispel the possibility of operational preemption, and concluded: "While the importance of neutrality—neither encouraging nor discouraging tender offers, by not favoring either the target's management or the bidder—was recognized, this was viewed by the [Supreme] Court essentially only as a means to the end of investor protection."¹⁶⁷ Focusing on Powell's and Stevens' concur-

161. 547 F. Supp. 522 (D. Md. 1982).

162. MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -11-908 (Supp. 1980).

163. *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 524 (1982) (quoting MD. CORPS. & ASS'NS CODE ANN. § 11-902(d) (Supp. 1980)).

164. *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 532 (1982).

165. 686 F.2d 1029 (1st Cir. 1982).

166. See MASS. GEN. LAWS ANN. ch. 110C (West Supp. 1981) (amended by 1981 Mass. Acts ch. 508). This Act contains no precommencement waiting period or prefiling notification and contains an unrestrictive hearing procedure.

167. *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1033 (1st Cir. 1982). The First Circuit was discussing *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977).

rences in *Edgar*, the First Circuit insisted that the policy of neutrality evinced by Congress in the Williams Act did not amount to a prohibition against affording at least some protection for incumbent management.¹⁶⁸

The core importance in *Agency Rent-A-Car* emerged in the First Circuit's following words:

It is vital at the outset to distinguish this case from others involving tender offer regulation preemption issues. In *Edgar v. MITE Corp.*, the Court held that the Illinois take-over statute was unconstitutional under the Commerce Clause. Justice White, joined by Chief Justice Burger and Justice Blackmun, expressed his view that the state statute was also preempted by the Williams Act. Even were this the view of a majority of the Court, it would not require that the Massachusetts law be struck down. The provisions of the Illinois act that Justice White focused on all presented far more egregious conflicts with the Williams Act than is apparent here.¹⁶⁹

The *Agency Rent-A-Car* court thus displayed a needed flexibility in evaluating a particular takeover statute on its individual merits, rather than rigidly branding the law as unconstitutional without further thought. The First Circuit recognized that differences do exist between various state takeover laws; moreover, the court heeded these differences as warranting different constitutional treatment.

Agency further challenged the provision in the Massachusetts Act imposing automatic delays for violations of the concededly valid disclosure provisions. Agency argued that this provision was preempted because it went further than was necessary to protect investors, thereby tipping the scales too far in favor of target management.¹⁷⁰ In a lucid preemption analysis, the First Circuit laced a long line of cases together to demonstrate that Congress had not expressed an intent to occupy the entire field of tender offer regu-

In that case, an unsuccessful takeover bidder (Chris-Craft) brought suit under the Williams Act for damages resulting from alleged fraudulent actions taken by the management of the target company in resisting the takeover attempt. The tender offeror contended that Congress, by navigating a new course of neutrality, had in fact attempted to steer away from defensive maneuvers that aided management of the target corporation in impeding the takeover attempt. The Supreme Court discarded this contention, as Chief Justice Burger responded emphatically that "[t]he legislative history . . . shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies . . ." *Id.* at 29. Burger went on to say that "Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness 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." *Id.*

168. *Id.* at 1034.

169. *Id.* at 1035-36.

170. *Id.* at 1036.

lation. Even though the court acknowledged that the Massachusetts law did allow the state to delay the tender offer in the event of a violation of the statute, such delay was not found to be inimical to the purposes of the federal Williams Act. The court agilely dodged the preemption problem in the statute's provision for delay by distinguishing between delays emanating from sanctions, and delays automatically resulting from compliance with state takeover laws.¹⁷¹

The First Circuit finally remanded the case to the district court level in order to apply the factual background to the more problematic commerce clause issue.¹⁷² The court was careful to note that "[w]hile *Edgar* indicates that the constitutionality of the Massachusetts statute presents very serious and substantial questions, . . . [the benefits and burdens of the statute] are not necessarily identical to the benefits and burdens of the Illinois statute at issue in *Edgar*."¹⁷³

V. CONCLUSION

The Nebraska Corporate Takeover Act was carefully rebuilt to meet the constitutional standards etched out in *Edgar v. MITE Corp.* When confronted with such an innovative legislative effort, the courts must resist the reflex to invalidate the law without taking into account its new structure. Holding that the Williams Act occupies the entire field of tender offer regulation, and that no path of reconciliation with the spirit of the commerce clause may be forged, should be recognized as an aberration from the standing law. This should be remedied as soon as possible. Adherence to the *Missouri Public Service* rationale could spell the demise for worthy state regulation; whereas, following a more flexible approach leaves room for takeover legislation to continue its evolution toward constitutional acceptability.

Daniel Freeman Kaplan '84

171. *Id.* at 1037-39. "[T]he disclosure requirements . . . and the deterrent effect of . . . [the] one-year ban [on further bids, imposed as a penalty for violating the disclosure requirements,] operate in general toward the same end as the federal statute: protection of investors . . ." *Id.* at 1039.

172. The Massachusetts Act contained no provision similar to that of NEB. REV. STAT. § 21-2428(2) (Cum. Supp. 1983). See *supra* note 153 and accompanying text.

173. *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1040 (1st Cir. 1982).