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Preemption and the Constitutionality of State Tender Offer Legislation

I. Introduction

State regulation of tender offers presents complex constitutional questions that have not yet been conclusively resolved.¹ Opponents of state regulation have attacked such legislation on the basis of two distinct theories, claiming that: (1) state regulation of tender offers is preempted by the Williams Act,² and (2) state regulation of tender offers violates the commerce clause of the Constitution.³ In *Great Western United v. Kidwell*, the Fifth Circuit cited both of these arguments in striking down Idaho's tender-offer regulations.⁴

The purpose of this Note is to focus on the claim that state tender offer regulation is preempted by the Williams Act. No wholesale analysis of the relevant features of every state takeover statute is undertaken. Rather, this note isolates patterns of analysis that have emerged from recent Supreme Court decisions and explains their significance to the specific issue of state tender offer regulation.

There are four cogent reasons for this inquiry. First, preemption has always been an unsettled area and despite the meticulous attention given to takeover statutes in the scholarly literature, relatively little work is directed at the preemption issues raised by the Williams Act. Significantly, little current work has considered the relationship between contemporary developments in preemption and the state power to regulate tender offers.⁵

Second, legislative intent is the key to preemption, and recent Supreme Court rulings have decisively defined the meaning of the Williams Act⁶ with regard to this issue.

Third, state regulation of tender offers is analytically related to the scope and impact of the federal securities laws which recently have been sharply curtailed by the Supreme Court.⁷

Fourth, the constitutionality of such regulation has important practical

1 In *Piper v. Chris-Craft, Indus., Inc.*, 430 U.S. 1 (1977) and *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), the Supreme Court analyzed various features of federal regulation of tender offers, but neither case involved preemption.

2 The Securities and Exchange Act of 1934, 15 U.S.C. § 78 (1976), as amended by the Williams Act of 1970, Pub. L. No. 90-439, §§ 13(e), 14(b), 14(d) and 14(e), 82 Stat. 454 provides for federal regulation of tender offers.

3 See, e.g., Langevoort, *State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. Q. 213 (1977) [hereinafter cited as Langevoort]; Wilner & Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976); Subcommittee on Proxy Solicitation and Tender Offers, Federal Regulation of Securities Committee, American Bar Association, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW 187 (1976). No analysis of the commerce clause issue is made in this Note.

4 *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (1978), *aff'g*, *Great W. United v. Kidwell*, 439 F. Supp. 420 (N.D. Tex. 1977). The Supreme Court has decided to hear the case. 47 U.S.L.W. 3450 (Jan. 9, 1979) (No. 78-759).

The questions of jurisdiction and standing involved in *Kidwell* are complicated and the Court may never reach the merits of the case.

5 For an independent analysis of the preemption issue, see Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979).

6 See 430 U.S. at 22-35 for the Supreme Court's account of the legislative history of the Williams Act.

7 See, e.g., *Green v. Santa Fe Indus.*, 430 U.S. 462 (1977).

consequences. State regulation of tender offers may greatly constrain the parties seeking to acquire target companies.⁸ Thus, such laws may act to slow down the entire process of a tender offer and thus lessen its chances of success. Some acquisitions may be entirely proscribed. Therefore, a decision as to the constitutionality of this type of legislation could have a direct bearing on the structure and distribution of corporate power in the United States. The result of the analysis in this Note is that state regulation of tender offers is not preempted by the Williams Act. If the constitutionality of state regulation of tender laws is to be challenged successfully, some other basis of attack is required. No attempt is made here to explore any alternative ways of attacking the constitutionality of state regulation of tender offers.⁹

II. Preemption

A. Conceptual Framework

Preemption analysis has presented recurring difficulties for the Supreme Court. Despite a virtual consensus on the theoretical standards employed to find preemption, conflict can be seen in the actual case holdings. Accordingly, the remarks of Mr. Justice Black remain appropriate for an understanding of preemption: "[no standard] provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal-clear distinctly marked formula."¹⁰

A further obstacle to the understanding of preemption is that a finding of preemption is often contingent upon a determination of legislative intent. Divining such intent is often difficult. Moreover, the competing constitutional values involved in a preemption case provide an additional layer of analytical complexity to the issues. Federalism demands that state legislation not be lightly overturned. Conversely, such regulation also must not frustrate the Supremacy Clause. Preemption, then, often involves a delicate balance of overall policy considerations. Notwithstanding these complicating factors, certain patterns of analysis typify the Supreme Court's approach to preemption, and a description of those patterns is essential for a proper understanding of the concept.¹¹

The first, and least difficult, pattern of preemption analysis rests upon an express Congressional intent to preempt. Provided that the intent to preempt is clear, and that the legislation is not otherwise improper, the Supremacy Clause mandates abrogation of the state regulation.¹²

8 See, e.g., Langevoort, *supra* note 3, at 238: "The primary effect of this state legislation lies in the added burdens it imposes on the offeror. Moreover, the waiting period and hearing provisions of the law place in the hands of hostile target management the most potent weapon in a tender offer fight: time."

9 Specifically, no analysis has been made of the commerce clause issue and state tender offer legislation. Although the field is not preempted for state attempts to regulate tender offers, a particular statute may violate the commerce clause.

10 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

11 Since these other factors are involved, it is extremely difficult to reconcile the cases involving preemption. For a more detailed analysis, see Note, *The Preemption Doctrine Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975) [hereinafter referred to as *Shifting Perspectives*]. Other patterns of analysis are possible. See, e.g., Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978). The ultimate justification of any framework for understanding preemption is how that framework reflects the decided cases. The patterns explored in this Note have all been employed by the Supreme Court in recent preemption cases. See, e.g., Ray v. Atlantic Richfield, 98 S.Ct. 988 (1978).

12 See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 247, 255 (1947).

The second, and more complex, pattern of preemption analysis rests on a determination that Congress, in enacting certain legislation, "occupied the field" and consequently left no aspect of the subject matter available for state regulation. For example, even though a state requirement for registration of aliens may not conflict with federal requirements, the need for national uniformity in this area preempts state legislation.¹³

The third, and more subtle, pattern of preemption analysis rests upon a determination that a conflict exists between the relevant federal and state legislation. This pattern may be subdivided into two types: direct conflict and indirect conflict. Direct conflict exists when it is impossible to satisfy both federal and state legislation; when, for example, federal legislation requires that which the state legislation forbids, or vice versa.¹⁴ Indirect conflict exists when although it might be possible to comply with federal and state legislation, the very act of compliance with state law frustrates the purpose of the federal legislation.¹⁵ The Williams Act is not explicitly preemptive; consequently, only the second and third patterns of analysis require exploration.

B. *Occupation of the Field*

A classic case for analyzing the concept of "occupation of the field" is *Hines v. Davidowitz*.¹⁶ In *Hines*, the Supreme Court considered whether the Alien Registration Act of 1940, which required federal registration of aliens, preempted a Pennsylvania statute with similar registration requirements. The Court held that the state regulation was preempted by the federal statute. Although the precise basis of the holding is unclear, the flexible standard used in *Hines* is significant. The test, Justice Black explained, was whether the state regulation "stands as an obstacle to the full purposes and objectives of Congress."¹⁷ In occupation of the field cases, a Congressional purpose to preempt is required. The import of *Hines* is the broad standard employed to find federal legislation preemptive. According to one commentator, the holding amounted to "a judicial assumption of competence to find preemption, notwithstanding the absence of clear Congressional intent to preempt."¹⁸

The *Hines* analysis was expanded in *Rice v. Santa Fe Elevator*,¹⁹ which involved an analysis of the relationship between federal and state regulation of warehouses. Although *Rice* ostensibly stands for the proposition that ". . . in a field which the states have traditionally occupied . . . we start with the assumption that the historic police powers of the state [are] not to be [ousted] by the Federal Act unless that was the clear and manifest purpose of Congress,"²⁰ it would be a radical mistake to conclude that the *Rice* Court imposed anything like an express intent requirement for a finding of preemption. Although intent

13 See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

14 See, e.g., *Free v. Bland*, 369 U.S. 663 (1962).

15 See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (involving local regulation of airline traffic).

16 312 U.S. 52 (1941).

17 *Id.* at 67. In conflict cases, a purpose of the legislation must be frustrated if preemption is to be found. See text accompanying note 34 *infra*.

18 *Shifting Perspectives*, *supra* note 11, at 631.

19 331 U.S. 218 (1947).

20 *Id.* at 230.

was the alleged key to a finding of preemption, the standards employed for judging intent were expansive and indeterminate. According to the Court, intent to occupy the field can be found by: (1) pervasive regulation, (2) a dominant federal interest or (3) the importance of unhampered operation of the federal legislation.²¹ These indicia provided the basis for an expansive reading of preemption.

The Supreme Court's willingness to find preemption reached its height in *Pennsylvania v. Nelson*,²² in which the Court invalidated a state sedition law on the ground that the field was occupied. Chief Justice Warren employed a three-pronged test to find preemption: (1) the pervasiveness of the federal regulatory scheme, (2) the need for national uniformity and (3) the *danger* of conflict between state and federal law.²³ It seemed that *Nelson* had reaffirmed the proposition that Congressional intent is a condition precedent to a finding of preemption. Since *Nelson* employs a *potential* conflict standard, however, such intent can be easily inferred.

Hines, *Rice* and *Nelson* still provide a proper framework for analyzing preemption in occupation of the field cases. An extreme reluctance to find preemption, however, has been typical of recent cases. In *Goldstein v. California*,²⁴ for example, the Court refused to find that federal copyright legislation preempted state regulation of the field.

In *Goldstein*, the Court found that record piracy was not—and could not have been—within contemplation of the federal copyright act of 1909.²⁵ Accordingly, it held that Congressional silence left the field unoccupied and thus some state regulation was permissible.²⁶ The reluctance of the Court to infer preemption, where it certainly could have justified such an inference under the *Hines* line of cases, is indicative of a contraction of the preemption doctrine.²⁷

In *New York State Department of Social Service v. Dublino*,²⁸ moreover, the new reticence to find preemption was continued. In *Dublino*, state regulation of certain welfare programs was upheld even though the state requirements were more stringent than were the requirements imposed by federal law. The Court rejected the claim that the federal regulations, by virtue of their pervasiveness, preempted state legislation. Speaking for the Court, Justice Powell declared that if Congress intends to preempt it should "manifest its intention clearly . . . Exercise of Federal Supremacy is not lightly to be presumed."²⁹ In the wake of *Goldstein*, *Dublino* is a significant case and marks a clear break with the expansive reading of standards for finding intent in *Hines*, *Rice* and *Nelson*. If the Court will neither presume nor infer intent to preempt, then it seems that some approximation of a specific intent requirement for finding pre-

21 *Id.*

22 350 U.S. 497 (1956).

23 *Id.* at 502-05 (emphasis added).

24 412 U.S. 546 (1973).

25 *Id.* at 568.

26 *Id.* at 571.

27 In *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964), the Court found preemption notwithstanding Congressional silence. The Court distinguished *Goldstein* from *Sears*. 412 U.S. at 569.

28 413 U.S. 405 (1973).

29 *Id.* at 413 (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

emption has emerged in occupation of the field cases.

Recent cases have followed the *Goldstein-Dublino* pattern. In *Philadelphia v. New Jersey*,³⁰ for example, no "clear and manifest purpose" to preempt the entire field of waste management was shown and therefore the field was not occupied.³¹ In *Exxon v. Governor of Maryland*,³² a state pricing statute was held not preempted by federal antitrust laws despite the pervasiveness of the goals of antitrust legislation. The Court asserted that it is "generally reluctant to infer preemption."³³

There is no question that the occupation of the field cases are difficult to synthesize; nonetheless, a clear and consistent pattern has recently emerged from the Court for analyzing such preemption cases: absent a clear and unequivocal expression of Congressional intent to occupy the field, the Court will not find preemption. Consequently, the viability of the *Hines* line of cases, in which the Court expressed a willingness to *infer* intent, is dubious.

C. Conflict

"Conflict" is a more readily applied concept than "occupation of the field," and the analysis given by the Court has been fairly consistent. Cases of direct conflict, which do not involve interpretation of the ambiguous "intent to preempt" standard, present no substantial analytical difficulty. The Supremacy Clause clearly mandates that state regulation must fail if it directly conflicts with valid federal legislation.

Caution must be taken, however, in dealing with "indirect conflict." The Supreme Court in *Hines* offered an analysis of such conflict. State and federal regulation conflict when the state regulation stands as "an obstacle to the full purpose and objectives of Congress."³⁴ At first reading, this rule gives an extremely broad reading to "conflict," a reading that threatens to interpret "conflict" so broadly as to collapse "conflict" into "occupation of the field" in analyzing preemption.

Any such expansive reading of "conflict," however, is mistaken and must be read in terms of a series of limiting interpretations. First, consider the analysis of conflict in *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*.³⁵ In *Ware*, a conflict arose when an employee of Merrill, Lynch forfeited his pension benefits upon leaving his job. Under California law, the forfeiture was invalid. The New York State Exchange Rule enacted pursuant to the Securities and Exchange Act of 1934 (1934 Act),³⁶ however, permitted the forfeiture. Despite the conflict between the state and federal legislation, the Court did not find preemption. Since the Congressional purpose in passing the 1934 Act was primarily investor protection,³⁷ issues concerning conditions of employment in the securities industry

30 98 S.Ct. 2531 (1978).

31 *Id.* at 2534 n.4.

32 98 S.Ct. 2207 (1978).

33 *Id.* at 2217.

34 312 U.S. at 67.

35 414 U.S. 117 (1973).

36 The Stock Exchange rules were enacted pursuant to § 6 of the Securities and Exchange Act of 1934.

37 414 U.S. at 130. For a further discussion of these points, see text accompanying notes 61-68 *infra*.

are only peripherally related to the purpose of the federal legislation, and the state regulation was allowed to stand.³⁸ The Court determined that such legislation should be preempted "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."³⁹

Accordingly, the *Hines* conflict standard, as interpreted in *Ware*, cannot be employed in a wholesale way to justify a finding of preemption on conflict grounds.

Second, in *Florida Lime & Avocado Growers, Inc. v. Paul*,⁴⁰ the Supreme Court held that there must be *actual* conflict between the state and federal regulation. The conflict need not be express or overt, but it must be real. Mere potential conflict is insufficient to justify preemption. Third, a methodological principle has emerged for interpreting conflict: a court should attempt to reconcile state and federal regulation wherever possible. This amounts to a presumption against a finding of conflict that justifies preemption; only when the conflict is irreconcilable⁴¹ should there be a finding of preemption.

None of these glosses on the concept of "conflict" are infallible indicators of preemption. Rather, they function as inhibitions against any expansive interpretation of "conflict" that would justify the wholesale preemption of state regulation. Three recent Supreme Court rulings illustrate this principle.

In *City of Burbank v. Lockheed Air Terminal, Inc.*,⁴² a city ordinance restricting the takeoff and landing of aircraft was held to conflict with the Federal Aeronautics Act. In reaching its conclusion, the Court noted that the purpose of the federal act is "to ensure the safety of aircraft and the efficient utilization of airspace."⁴³ Since the city ordinance limited the flexibility of the FAA in controlling air traffic (and hence directly affected both the safety and efficient use of the airspace), the Court held that the ordinance conflicted with the federal regulation. Thus preemption was found.⁴⁴

In *Jones v. Rath Packing*,⁴⁵ the Court invalidated state regulation of packaged flour sold within the state. Justice Marshall found that the express purpose of the Federal Fair Packaging and Labeling Act was to promote value comparisons among similar products.⁴⁶ In order to comply with the stricter state standards, national manufacturers would overpack, and thus defeat the express purpose of the federal statute. Accordingly, the state regulation was preempted.

In *Ray v. Atlantic Richfield*,⁴⁷ the same pattern recurred. In *Ray*, the State imposed tanker design requirements stricter than those imposed by federal law.

38 *Id.* at 135.

39 *Id.* at 127 (citing *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)).

40 373 U.S. 132, 142-43 (1963).

41 414 U.S. at 127. Justice Blackmun takes this principle as well established. He claimed: "This approach is supported by decisions extending back to the turn of the century. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *International Assn. of Machinists v. Gonzales*, 356 U.S. 617 (1958); *Union Brokerage Co. v. Jenson*, 322 U.S. 202 (1944); *Savage v. Jones*, 225 U.S. 501 (1912)."

42 411 U.S. 624 (1973).

43 *Id.* at 627.

44 *Id.* at 639.

45 430 U.S. 519 (1977).

46 *Id.* at 543.

47 98 S.Ct. 988 (1978).

The Court, nevertheless, decided that Congress had expressly intended to establish uniform construction standards for vessels throughout the nation. The state legislation imposing stricter requirements directly conflicted with express Congressional intent and was therefore invalidated.⁴⁸

An analysis of recent conflict cases reveals no mechanical test to predict the Court's result. A fairly stable pattern of analysis, however, has emerged in conflict cases: state regulation will be struck down if it directly conflicts with the express purpose of federal legislation. Without such a conflict, however, the state regulation should not be disturbed.

III. The Williams Act

A. *The Issue*

Does the Williams Act preempt state regulation of tender offers? The question can be analyzed in terms of (1) the occupation of the field analysis and (2) the conflict analysis.

B. *The Occupation of the Field Analysis*

Is federal regulation of tender offers sufficiently comprehensive to justify the claim that the field is occupied to the exclusion of concurrent state legislation? In terms of the analysis given in Part II of this Note, a clear intention on the part of Congress to preempt is a prerequisite to a finding of preemption. The Williams Act does not contain an express intent to preempt and therefore is not preemptive of state regulation.

Further, the Williams Act amends the 1934 Securities Exchange Act, which contains a savings clause: "Nothing in this chapter shall affect the jurisdiction of the securities commissioner (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."⁴⁹ Such a clause, although not dispositive of the preemption issue, raises an inference that Congress intended to supplement rather than to preempt state regulation.⁵⁰

A counterargument might be made that the savings clause in the 1934 Act applies only to "blue sky" regulation existing at the time of the 1934 Act. Since tender offers, as they now exist, were unknown at the time of passage of the Act, state regulation of tender offers might be considered outside the scope of the savings clause.⁵¹ There are a number of difficulties with this counterargument.

⁴⁸ *Id.* at 997.

⁴⁹ 15 U.S.C. § 78bb(a) (1976).

⁵⁰ See Note, *Pre-Emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 212-15 (1959), for an analysis of how courts have disregarded such savings clauses. In recent years, however, the intent not to preempt expressed by such clauses has been a vital factor in a finding of preemption. See text accompanying notes 10 to 48 *supra*. Unfortunately, in *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1275 n.39, the savings clause argument is dismissed with no analysis of the relationship between such clauses and Congressional intent to preempt.

⁵¹ This claim is advanced in 577 F.2d at 1275 (citing *Langevoort*, *supra* note 3, at 247). There is a difficulty with *Langevoort's* analysis that bears noting. On the one hand, since blue sky regulation has explicitly been held to be constitutional, see *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), *Langevoort* argues that state tender offer statutes are "more closely analogous to" general corporation law than blue sky law. *Langevoort*, *supra* note 3, at 242. When *Langevoort* attacks the savings clause analysis, however, he does *not* analyze the question of whether Congress intended to preempt general state corporation law. If tender offer legislation is more

First, even if the savings clause were inapplicable to tender offers, such inapplicability would not justify the inference that Congress *intended* to preempt, and it is the finding of such intent that is the key to preemption.⁵² As stated above, the Williams Act contains no such expression of intent.

Second, nothing in the scope of the savings clause depends on the time element. A savings clause may be intended to have retrospective *and* prospective effect. No decision or analysis of the legislative history of the 1934 Act has ever suggested that the savings clause was meant to be only retrospective. Concurrent regulation of all aspects of securities seems to have been clearly contemplated by Congress.

Third, the policy factors against a finding of preemption—federalism, for example—have nothing to do with a time restriction on the scope of a savings clause. If, for example, federalism provides policy reasons for not finding preemption, then those policy factors are not advanced by reading the savings clause retrospectively. The relevant policy factors are time-independent, and, hence, little or nothing in the way of advancing those policy factors is gained by a restrictive interpretation of the scope of the savings clause.

Fourth, tender offers are closely analogous to proxy solicitations, and there is little question that the role once played by proxy solicitation in terms of gaining corporate control is now played by the tender offer.⁵³ Because a tender offer is the successor concept to proxy solicitation, there is strong reason to read the savings clause prospectively: regulation of proxy solicitation has historically been a matter of state regulation.

Hence, no plausible reason exists for finding the Williams Act preemptive of state regulation of tender offers. In the first place, Congress expressed no intent to preempt state regulation, and in addition, it seems clear that the Williams Act should not be excluded from the scope of the savings clause of the 1934 Act.

C. *The Conflict Analysis*

The previous analysis suggests that states may regulate tender offers provided that there is no conflict with the purpose of the federal regulation.

As has been stated above, there are two types of conflicts: direct and indirect.⁵⁴ Although individual differences make generalization about individual

closely analogous to general state corporation law, then no question of preemption should ever arise, because tender offers would belong to a part of corporate law that historically has been a matter of state regulation. Hence, tender offers are well within the scope of the savings clause.

⁵² See text accompanying notes 10 to 48 *supra*.

⁵³ For a discussion of this analogy, see Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. L. REV. 722, 744-45 (1970). In *Kidwell* the analogy was explicitly rejected. 577 F.2d at 1280 n.53 (citing Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1154 (1974)). Although the *Kidwell* court recognized the similarities between proxy solicitations and tender offers, the court argued that there were important differences between them. In particular, in a proxy contest the shareholder tenders only his vote; the other aspects of his relationship with the corporation remain. In a tender offer, however, the relationship is severed. This is an entirely inadequate distinction. First, the offeror may not offer to buy all the shares; rather, he may accept tenders on a *pro rata* basis. Second, the offeree may reject all or part of the offer. In each of these circumstances, a relationship between the offeror and the shareholder still exists. This relationship has other important consequences for understanding the preemption issue. See text accompanying note 70 *infra*.

⁵⁴ See text accompanying note 14 *supra*.

state tender offer statutes difficult, direct conflict is not the usual problem.⁵⁵ Typically, the state regulations are more comprehensive than the federal requirements, and satisfying the conditions imposed on the tender offer by the Williams Act is a mere threshold condition for satisfying the state requirements. Hence, "direct" conflict does not often occur.⁵⁶

However, preemption may still be justified on the basis of an "indirect" conflict. To justify such a result, it must be shown that the state tender offer regulation under attack frustrates the purpose of the Williams Act. Therefore, the legislative history of the federal statute must be examined.

In the 1960's, the use of tender offers as a means of acquiring corporate control grew substantially. Such tender offers, however, were not covered by the Securities Exchange Act of 1934. Thus, in addition to other advantages of the tender offer, the gap in the scope of the 1934 Act afforded a method of acquiring control without complying with the cumbersome proxy regulation provisions of the 1934 Act.

Congress passed the Williams Act in response to this gap in federal securities regulation. Essentially, the philosophy embodied in the reform corresponded to that of the 1934 Act itself: disclosure to investors. No attempt was made to judge the fairness or worth of a tender offer. Rather, the requirements of the Williams Act are disclosure requirements imposed on the tender offeror.

In particular, the offeror is required to give certain information to both the target company and the Securities and Exchange Commission (SEC) within 10 days after acquiring 5% of the stock of the target. Further, section 14(d) of the 1934 Act requires that the offeror file any solicitation materials employed in the offer with the SEC and the target. Moreover, in recognition of the functional equivalence of the tender offer and the proxy solicitation, section 14(f) of the Act requires an offeror who intends to replace a majority of the board of directors without a meeting of shareholders to provide disclosures similar to those required in a proxy solicitation to be sent to the shareholders of the target corporation.

On its face, the Williams Act seems to have no preemptive force at all. Rather, the legislation merely imposes certain minimal disclosure requirements with which an offeror must comply. This narrow Congressional purpose seemingly could not be frustrated by state requirements of further disclosure.

Notwithstanding these claims, the argument for preemption is as follows: clearly, the imposition of additional disclosure requirements increases the difficulty involved in completing a tender offer. Therefore, such state regulation may operate in favor of an incumbent management that opposes the tender

⁵⁵ See Langevoort, *supra* note 3, for a discussion of some of the differences among the various statutes.

⁵⁶ If direct conflict can be shown, of course, then under the Supremacy Clause, the Williams Act would have some preemptive effect. A mistake to avoid in the conflict analysis, however, is to interpret more stringent requirements as conflicting requirements. This mistake is made by Wilner & Landy, *supra* note 3, at 30-31. They offer the example of a Nevada statute (NEV. REV. STAT. § 78.3772(3) (1973)) which requires that the offeror prorate tenders for the life of the offer. The Williams Act does not require this, and, therefore, it is possible to comply with the Williams Act and be in violation of state law. *Id.* This is clearly not a case of conflicting requirements because literal compliance with both federal and state regulations is possible. Any compliance with the Nevada statute entails compliance with the Williams Act, and this is generally true about more stringent state requirements.

offer.⁵⁷ In adopting the Williams Act, however, Congress expressly adopted a policy of neutrality between management and the offeror.⁵⁸ Hence, an express purpose of the Williams Act—the creation of a neutral environment between management and the offeror—is frustrated by the state regulation of tender offers. Thus, the Williams Act preempts the conflicting state legislation.

The key presupposition of the argument is the role “neutrality” plays in the Williams Act. The proponent of the preemption finding has two basic arguments for the claim that a goal of the Williams Act is neutrality between the offeror and management. First, in the legislative history of the Williams Act, it is clear that Congress intended “to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.”⁵⁹ Therefore, a state may neither advance nor inhibit tender offers with other legislation. Second, the original version of the Williams Act contained strong pro-management provisions which were eliminated from the Act and replaced with more “neutral” language.⁶⁰

Such an expansive interpretation of the Williams Act’s intended “neutrality,” however, was decisively discredited by the Supreme Court in *Piper v. Chris Craft*.⁶¹ *Piper* involved the question of whether a defeated tender offeror had standing to sue management of the target corporation for violations of the Williams Act.

The plaintiff, joined by the SEC, had argued that Congress intended to protect offerors as part of a pervasive scheme for regulating tender offers, and that in enacting the legislation Congress had adopted a policy of neutrality as the proper legislative stance toward tender offers.⁶²

Chief Justice Burger, author of the opinion, rejected this claim and explained that the “neutrality” of the Act was solely designed to protect investors⁶³ and not to set a general policy toward targets or offerors in actual takeover attempts.

He stated:

Congress was indeed committed to a policy of neutrality in contests for control, but its policy of even-handedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in the section of the Senate Report entitled, “Protection of Investors.” Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the “pawn[s] in a form of industrial warfare.” The Senate Report expressed the purpose as “placing investors on an equal footing with the takeover bidder,” Senate Report, at 4, without favoring either the tender offeror or existing

57 This is the basis of a finding of preemption in *Kidwell*. See 577 F.2d at 1278 (citing *Langevoort*, *supra* note 3, at 238; *Wachtell*, *Special Tender Offer Litigation Tactics*, 32 *Bus. Law.* 1433, 1437-42 (1976); and *Wilner & Landy*, *supra* note 3, at 9).

58 577 F.2d at 1277 (citing S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967)).

59 *Id.*

60 See *Langevoort*, *supra* note 3, at 218.

61 430 U.S. 1 (1977).

62 *Id.* at 29.

63 *Id.* at 35.

management. This express policy of neutrality scarcely suggests an intent to confer highly important, new rights upon the class of participants whose activities prompted the legislation in the first instance.⁶⁴

In reaching its conclusion, the Court placed heavy emphasis on: (1) the express purpose of the legislation; (2) the remarks of the sponsor in introducing the bill on the Senate floor and (3) the testimony of the chairman of the SEC.⁶⁵ Based on these factors the Chief Justice concluded that "the legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer."⁶⁶

Therefore, state tender offer statutes do not necessarily "conflict" with the purpose of the Williams Act even if they do generally favor management. Such state regulation will not be preempted unless it compromises the basic Congressional goal of "investor protection" via disclosure of information.⁶⁷

The Williams Act, then, is concerned solely with investor protection. Only the mechanics of disclosure are designed to be neutral between management and the offeror. The policy of neutrality is merely a means toward the ultimate goal of the Act and is not an independent purpose of the legislation. Hence, the reading of neutrality required to support a claim of preemption under the conflict pattern of analysis is inconsistent with the analysis of neutrality given in *Piper* and with the legislative history of the Williams Act.⁶⁸

IV. Policy Considerations

In addition to the factors discussed above, three policy reasons can be advanced to support the conclusion that the Williams Act is not preemptive. These policy considerations are based upon: (1) the nature of the tender offer as a device for gaining corporate control, (2) the historical role of state regulation of securities, and (3) recent developments in federal securities regulation.

First, tender offers, in nature, design and effect, are devices to gain control of a corporate entity. Hence, the tender offer is the functional equivalent of the proxy solicitation and is explicitly recognized as an alternative to the proxy contest as a method of gaining control.⁶⁹ Because of this relationship, the disclosure requirements imposed by the Williams Act are similar to the information re-

64 *Id.* at 29-30.

65 *Id.* at 26-27.

66 *Id.* at 35.

67 *Id.* at 29. Further, it should be noted that the Supreme Court explicitly rejected the change of the promanagement version of the legislation as an expression of Congressional purpose to provide a neutral environment for tender offers. *Id.* at 30-31.

68 A second reason given for finding conflict with the purpose of the Williams Act is the claim made by the *Kidwell* court that the philosophy behind the Securities Act of 1934 is a "disclosure" philosophy based on an explicit rejection of more substantive requirements going to the fairness of the transaction. *See* 577 F.2d at 1279. State regulation based on the concept of investor protection (and hence going beyond mere disclosure) is said to conflict with the philosophy of disclosure embodied in the 1934 Act. *Id.*

These claims, even if true, do not support a finding of preemption since they could be used to justify preemption of any state securities regulation stricter than federal law. Indeed, such a position would require wholesale preemption of state "blue sky" laws which would "conflict" with the 1934 Act by adding requirements beyond its disclosure mandates.

Such a wide-ranging account of conflict is far too broad to fit any of the patterns of conflict analyzed in Part II of this note that do justify preemption. Hence, wholesale use of the "disclosure" argument to justify a finding of conflict is as unprecedented as it is unwarranted.

69 *See generally* Shipman, *supra* note 53.

quirements in proxy solicitations.

Proxy solicitation, however, and the relationship between management and shareholder that it governs, is a classic "internal corporate affair" transaction subject to state regulation. A finding of preemption, therefore, would present a dilemma. Since proxy solicitation and its successor concept of "tender offer" are so closely related, there is no way to provide a conceptual basis for differentiating between tender offers and proxy solicitation with respect to the preemption issue. Either an *ad hoc* distinction relevant to preemption must be drawn between a tender offer and proxy solicitation, or proxy solicitation also must fall to the preemption analysis due to the functional equivalence of the two concepts. The first result is unjustifiable. The second result redefines the entire relationship between "blue sky" regulation and federal regulation of securities, and Congress intended no such result.

Second, historical reasons justify a finding that the Williams Act is not preemptive. Consideration of the typical tender offer situation is illustrative. If an offeror makes a bid, he is in a prospective control relationship with the corporation. Hence, he is well within the possibility of the creation of a continuing relationship with at least some of the shareholders. The offeror may, for example, only offer to purchase the minimum number of shares required for him to attain control. On the other hand, some shareholders may reject the offer entirely. In either of these situations, the following issues arise:

- (1) Is there a fiduciary relationship between the offeror and the shareholders?
- (2) If so, to which group of shareholders is a fiduciary duty owed?
- (3) What is the nature and degree of the fiduciary relationship?
- (4) What remedies lie for a breach of the fiduciary duty?

The intelligibility of these questions presupposes the applicability of the concept of fiduciary duty to tender offers. It could be argued, however, that the entire concept of the fiduciary relationship is misused if applied in the context of a tender offer, or at least that the concept should be employed in an entirely minimal way.⁷⁰

Resolution of such issues has traditionally been left to state law. Indeed, a wide variety of treatments exist for such relationships.⁷¹ The Williams Act is silent on the issues historically analyzed under state law, and a finding of preemption in the face of this silence and in the absence of a federally created alternative remedy is unwarranted. The Williams Act simply is not sufficiently comprehensive to be preemptive of this varied and complex area of the law.

Third, recent developments in federal securities litigation militate against a finding of preemption. After years of expanding the scope of the federal securities

⁷⁰ See, e.g., the controversy concerning *Singer v. Magnavox*, 380 A.2d 969 (Del. 1977). The case and much of the critical literature are discussed in Note, *Going Private—Is It Over? Eliminating Minority Interests After Singer v. Magnavox*, 54 NOTRE DAME LAW. 149 (1978) [hereinafter referred to as *Going Private*]. Notwithstanding the controversy over *Singer*, the *Singer* fairness standard was extended to a tender offer situation in *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1978).

⁷¹ See *Going Private*, *supra* note 70, at 161-62.

laws, the Supreme Court has made a dramatic turnabout.⁷² In *Santa Fe v. Green*,⁷³ the Court clearly stated that there is not to be a federal common law of securities. This pronouncement has significant impact on the preemption issue. In *Green*, minority shareholders sought a remedy under SEC rule 10b-5 for breach of fiduciary duty by the majority shareholder. The Second Circuit held that the minority shareholders had a cause of action under rule 10b-5, but the Supreme Court reversed.⁷⁴ The Court held that no remedy for breach of fiduciary duty exists under rule 10b-5. In reaching its conclusion, the Court stated that the fundamental purpose of the 1934 Act is to provide for disclosure, and that the fairness of a transaction is only a "tangential" concern of the statute.⁷⁵ Thus, the Court held that a remedy for breach of fiduciary duty is a matter for state law.⁷⁶

The holding in *Green* suggests significant limits to the scope of the 1934 Securities and Exchange Act. Although it is based on a squeeze-out merger situation, the holding is an interpretation of statutory language that is also applicable to the Williams Act, an amendment to the 1934 Act. Thus, in light of *Green*, there is no federal remedy for a breach of fiduciary duty concerning a tender offer.⁷⁷ If the fairness of a transaction is only a "tangential" concern of the 1934 Act, then any legal remedy is a matter for state law.⁷⁸

A finding that the Williams Act is preemptive would create a vacuum with respect to a claim of a breach of fiduciary duty concerning tender offers. There is no available federal remedy, and a finding of preemption would eliminate any state remedy. This result, when viewed in light of the historical role of state legislation in creating or denying claims of action with respect to fiduciary duties owed to shareholders, weighs heavily against a finding of preemption.

V. Conclusion

If such state tender offer legislation is to be prohibited, it should be on the basis of a comprehensive Congressional scheme for the wholesale regulation of tender offers. For such a scheme to be preemptive, an unequivocal expression of Congressional intent to preempt is the proper predicate for such a finding. Clearly, preemption is not the proper basis for a holding that state tender offer legislation is unconstitutional.

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⁷² See, e.g., *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

⁷³ 430 U.S. at 479.

⁷⁴ *Id.* at 475.

⁷⁵ *Id.* at 478.

⁷⁶ *Id.* at 479.

⁷⁷ This analysis of *Green* is supported by *Berman v. Gerber Prod.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978) (citing *Altman v. Knight*, 431 F. Supp. 309, 314 (S.D.N.Y. 1977) which held that no action for breach of fiduciary duty would lie under the antifraud provisions of the 1934 Act, including alleged breaches of fiduciary duties during a tender offer).

⁷⁸ In light of the important contraction of scope *Green* places on the 1934 Act, *Langevoort's* claim "that . . . state responsibility for the governance of corporations has been effectively assumed by the federal law" is extremely dubious. See *Langevoort*, *supra* note 3, at 252-53.