future corporate internal affairs matters will be governed by state corporation law.

The "Gresham's law" effect which the internal affairs doctrine has had upon state corporation law has been outlined above. The primary cause of this pro-management drift in state corporate law has been the fact that the law of the state of incorporation has generally been applied to a corporation's internal affairs, regardless of the contacts the corporation has with the various interested states. A state has perceived that its corporation law could not be made too restrictive or the corporation would reincorporate elsewhere and thereby no longer be governed by the state's corporate law, regardless of its contacts with the corporation.

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

V. PSEUDO-FOREIGN CORPORATION LAWS

A. New York

New York Law generally provides that certain provisions of the New York corporation law apply to a foreign corporation when more than one-half of the total of its business income for the preceding three fiscal years was allocable to New York.216 Certain problems stem from a statute (such as the New York provision) which provides that it shall govern a corporation immediately if it satisfies a certain test relating to the income derived from the state. For example, the New York law governs a foreign corporation beginning the first day of the fiscal year if for the prior three fiscal years it has had more than one-half of the total of its business income allocable to New York. The problem with this formulation is that audited financial statements are frequently not available until about 90 days after the end of the fiscal year. For this reason, it could be unclear for 90 days whether the corporation would be governed by the New York law. Similarly, it would be unclear for 90 days whether the corporation ceased to be governed by New York law; it would

appear that this uncertainty would not be resolved until the audited financial information was available. Even Dr. Pangloss would not deem this the best of all possible worlds.

Another type of problem which would stem from the New York-type of regulatory scheme is that it only considers one contact (business income) between New York and the foreign corporation and it only requires that the corporation derive more than 50% of its business income from New York to satisfy the statutory test.\textsuperscript{217} There is some possibility that such a corporation could have more than 50% of its shareholders, assets or employees in another jurisdiction; it is not clear that the New York law will only apply to corporations whose primary contact is with New York. It would appear advisable for such state schemes to require the consideration of a number of factors in order to determine whether the forum law should govern the foreign corporation. A state would then be more certain that it would have the primary interest in regulating the corporation.

The New York law does not clearly provide the manner in which it regulates newly formed corporations. The law simply states that it will govern those corporations deriving more than 50% of their income from New York during the last three years. It is unclear whether such newly formed corporations would not be governed by New York law for three years until they had such financial information, or whether the New York law would apply sooner if the corporation derived more than 50% of its revenues from New York.

**B. California**

California law requires any foreign corporation transacting intrastate business in California and any “foreign parent” corporation to file an officers’ certificate with the California Secretary of State.\textsuperscript{218} This officers’ certificate sets forth both the percentage of the company’s “outstanding voting securities” held by shareholders residing in California and the percentage of the company’s sales made in California, property located in California and salary paid to employees in California. The certificate must be filed within three months and fifteen days after the close of the company’s fiscal year.\textsuperscript{219} If the officers’ certificate shows that over 50% of the corporation’s “out-

\textsuperscript{217} The bill as originally submitted to the New York Legislature required either that 67% of the corporation’s revenue be generated from New York or that 67% of the shareholders reside in New York. See Baraf, supra note 7, at 233.

\textsuperscript{218} See CAL. CORP. CODE § 2108 (West 1977).

\textsuperscript{219} Id.
standing voting securities" are held by shareholders residing in California and the average of the corporation's payroll, property and sales "factors" allocable to California exceed 50%, certain sections of California law shall apply to the corporation during its next fiscal year, beginning the first day of the next fiscal year.\(^{220}\)

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

C. Model Provision

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

A number of commentators agree that such pseudo-foreign corporation laws should apply to corporations with more than 70-80% of its contacts with one state.\(^{221}\) The question remains whether such statutes should apply to corporations having a lower level of contacts with the state. The argument that such corporations should

\(^{220}\) Cal. Corp. Code §2115(a) (West Supp. 1980). Section 2115(c) exempts from the scope of §2115 corporations whose shares are listed on the American or New York Stock Exchanges and corporations that are subsidiaries of corporations not subject to §2115. The provision is unclear, however, regarding the timing of this exemption. For example, it is unclear whether §2115 would govern a corporation during its next fiscal year if, after it had filed the §2103 officers' certificate which showed that the corporation met the 2115(a) tests (but before the beginning of the next fiscal year), the corporation either listed its shares on the American or New York Stock Exchange or became a wholly-owned subsidiary of a corporation not governed by 2115.

\(^{221}\) See generally Halloran & Hammer, supra note 24, at 1329; Kaplan, supra note 11; Kirgis, supra note 30, at 139-42.
not be governed by such statutes would be that they are more truly national corporations, since they have significant contacts with many states. This does not seem persuasive, however. If a state pseudo-foreign corporate law would consider a number of different contacts between the state and the corporation and the level of the contacts between the corporation and the state averaged more than 50%, it would appear quite unlikely that any other state would have a greater interest in regulating the affairs of the corporation.\textsuperscript{222} For this reason it seems more rational to apply the law of the commercial domicile rather than the law of the chartering state to such a corporation.

It has been mentioned that the New York pseudo-foreign provision only considers the percentage of the company's revenues generated in the state. While this is a relevant factor, more types of contacts should be considered before a corporation is deemed pseudo-foreign. California's jurisdictional provision is a better example of a consideration of a number of relevant contacts. The California provision requires that (i) a majority of the company's shareholders reside in the state and (ii) the average of the company's payroll, sales and property “factors” exceed fifty percent before a foreign corporation is deemed commercially domiciled in California. It seems highly doubtful that a corporation that satisfies the standard could realistically be deemed commercially domiciled in any other state.

Both the California and New York statutory schemes exempt corporations with securities listed on the American or New York

\textsuperscript{222} California law provides that any reorganization of a foreign or domestic corporation must be qualified with the California Commissioner of Corporations if more than 25% of the corporation's shareholders reside in California. See generally Cal. Corp. Code \textsuperscript{25103} (West Supp. 1980). In order to qualify such a transaction, the Commissioner must find that the terms of the transaction are fair, just and equitable. Pursuant to this provision, California purports to regulate offers made to all shareholders of a foreign corporation if 25% of those shareholders reside in California.

This is an example of the troubling interface which exists between state blue sky regulation and the internal affairs doctrine. While there is a general consensus that a state should not generally regulate the “internal affairs” of a foreign corporation (unless the corporation is a pseudo-foreign corporation), there is general agreement that states should have the power to regulate “securities transactions,” at least insofar as they pertain to resident shareholders. In this example, however, California does not merely purport to regulate offers made to California shareholders but attempts to regulate the total transaction. Such an attempt to regulate the transaction, coupled with the California practice of reviewing the fairness of the terms of the transaction, makes this “blue sky” regulation resemble an attempt to regulate the internal affairs of foreign corporations.

One treatise argues that this California policy does not amount to an attempt to regulate the internal affairs of pseudo-foreign corporations and is merely an exercise of California blue sky jurisdiction. See generally 1 Marsh & Volk, Practice Under the California Securities Laws 7-28, \textsuperscript{7.06} (1979). The commentators note that the specified minimum level of contacts which require qualification in California is somewhat arbitrary. Id.

It is submitted that the minimum level of contacts required by this California policy is much too low. As a general rule, a state should not attempt to exercise primary jurisdiction over a reorganization involving a foreign corporation unless the
Stock Exchanges. 223 One argument advanced in support of this exemption is that such corporations are truly national companies. This seems to be a total make-weight argument; under American law the internal affairs of all corporations, even "truly national corporations," are governed by the corporate law of at least one state. The law of some state must be applied to such corporations. Any other considerations notwithstanding, it would appear more sensible to apply the law of the state of commercial domicile to such a corporation rather than the law of the state of incorporation.

The consideration which militates against this conclusion is the fact that at the present time the rule that full faith and credit requires the application of the law of the state of commercial domicile has not yet fully developed. Until such a rule evolves, even if the state of commercial domicile has adopted a pseudo-foreign corporation provision, it will be unclear whether pseudo-foreign corporations are governed by the law of the state of incorporation or the law of the commercial domicile. Such uncertainty will place a burden on interstate commerce, and the burden generally would be greatest regarding large national companies with securities traded on national securities exchanges. 224 For this reason, it would be wise to maintain the listed securities exemption, at least, until the time, if ever, the proposed full faith and credit requirements discussed above are accepted.

corporation at least has 50% of its contacts (as somehow determined) with the regulating state.


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

It has been argued that the distinction between companies with shares listed on the American and New York stock exchanges and other companies with traded shares is a distinction which is in violation of the equal protection clause. This argument should not be successful, since there is a rational basis for the distinction. It could reasonably be concluded that the application of pseudo-foreign corporation laws to companies with shares listed on the American and New York exchanges would cause a greater burden on interstate commerce than that resulting from the application of the laws to the other companies. Because of this, and because courts have been increasingly reluctant to strike down economic statutes on the basis of protection [see City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); see generally Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A. L. Rev. 716, 720-25 (1969)], this distinction could probably withstand a constitutional attack.
D. Recommendations

It is submitted that states should adopt pseudo-foreign corporation statutes such as the model provision suggested above. If many would enact such statutes, it would be less clear that a corporation could evade the corporate law of its commercial domicile merely by incorporating elsewhere. Such a result would enable states to regulate corporations in the manner deemed optimal rather than in the manner deemed necessary not to induce corporations to re-incorporate elsewhere. The exemption for corporations with shares listed on the American and New York stock exchanges would exempt some corporations, but states would gain the power to regulate most corporations commercially domiciled within the state.

It was mentioned above that it is unclear whether states other than the commercial domicile will apply pseudo-foreign corporation laws rather than the law of the state of incorporation to questions pertaining to the internal affairs of pseudo-foreign corporations. This obviously means that, at least until the notion of pseudo-foreign corporation laws becomes accepted, some uncertainty will exist in corporate choice of law regarding the law applicable to a pseudo-foreign corporation. There will be some difficulty in forcing a pseudo-foreign corporation law. It was suggested above that one way of ameliorating this uncertainty would be to determine that full faith and credit would require the application of reasonable pseudo-foreign corporation laws to questions pertaining to the internal affairs of such corporations. Alternatively, this result could be achieved if states would incorporate a choice of law provision in their corporate codes which would state that the internal affairs of all domestic corporations would be governed by the state corporations code, unless the corporation satisfied the jurisdictional test of a reasonable pseudo-foreign corporations code of another state. It is not anticipated that pro-management states such as Delaware would be inclined to adopt this type of choice of law provision, however.

VI. State Tender Offer Laws

More than two-thirds of all the states have enacted takeover statutes in some form. 225 These statutes contain some combination of the following types of provisions: (i) a requirement that certain types of information be disclosed to target company shareholders, (ii) a specified waiting period between the time a notice of intention is

filed with a state regulatory agency and the date upon which the offer can become effective, (iii) specified minimum or maximum periods during which the offer may remain effective, (iv) withdrawal rights which must be given to tendering shareholders of target companies, (v) standards for state regulatory review of the completeness of the disclosure documents and the fairness of the transaction, (vi) the requirement that all target company shareholders receive the highest price offered for the shares, and (vii) the requirement that if more shares are tendered during a certain specified period than the offeror desires to purchase, the offeror must purchase the shares on a pro rata basis rather than on the basis of the first tendered, first purchased.226

Various standards are set forth in the state takeover laws regarding what type of contacts the target company must have with the state in order to have the tender offer governed by the state takeover law. Most statutes provide that if the target company is incorporated in the state, the tender offer will be governed by the local takeover law.227 Some statutes require a domestic corporation to have some other contact with the state, such as doing business within its borders,228 before the local takeover law applies to a tender offer for its shares.229 Other state laws purport to govern tender offers for shares of a foreign corporation if the corporation has its principal place of business in the state, shareholders in the state,220 a certain number of employees in the state, its principal executive offices in the state,231 substantial assets in the state, or does business in the state.232

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226 See generally id.; Tender Offers for Corporate Control, supra note 38, at 207-17.

For example, New York and Ohio law provide that the corporation must have its principal place of business and substantial assets in the state before the law
One aspect of the state takeover laws which has caused a significant amount of controversy is the fact that they are extraterritorial. The statutes purport to govern offers made to shareholders regardless where domiciled if the tender offer falls within the jurisdictional limits of the statute.\textsuperscript{233} The scope of such statutes is obviously more expansive than normal state blue sky laws, which are limited to offers made to shareholders who reside in the state.

A number of state statutes also create a procedure pursuant to which the adequacy of the disclosure or the fairness of the offer or both may be reviewed by the state securities commission\textsuperscript{234} either upon request by target company management\textsuperscript{235} or at the discretion of the state securities commission.\textsuperscript{236} Since the tender may not occur until all such hearings are completed, the hearings obviously delay a tender offer. The Williams Act has no comparable provision.

It is also common for state takeover laws to require that notice of a tender offer be filed with the state a certain number of days before the tender offer.\textsuperscript{237} The Williams Act has no such requirement.\textsuperscript{238}

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\textsuperscript{238} The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (and the rules promulgated by the Federal Trade Commission regarding this act) provide that the Federal Trade Commission must be notified thirty days prior to the date of certain types of acquisitions (fifteen days prior to the consummation of governed
The state takeover statutes provide certain exemptions from the statutory scheme. One exemption frequently contained in the laws is the “friendly offer” exemption. 239 This exemption from the tender offer laws normally applies if the board of directors of the target company approves the offer. Some states exempt from the coverage of its state tender offer law companies with securities not registered pursuant to Section 12 of the 1934 Act. 240 A few states exempt tender offers made pursuant to a registration statement filed with the SEC. 241

One of the more obvious drawbacks of the state tender offer laws is the imprecise manner in which the jurisdictional limits of the laws are set forth. In many instances it obviously will be unclear whether a corporation’s “principal place of business” will be in the state or whether it would be deemed to have “substantial assets” in the state. For example, it is unclear whether the latter term requires the corporation to merely have a substantial amount of assets in the state (whatever that means) or a substantial portion (more than 10%, 25% or 50%?) in the state. 242 The problem which could result from cash tender offers. See generally 15 U.S.C. §18(a) (1976); M. Litton & E. Steinberger, supra note 169, at 333-97. The rules for determining what types of cash tender offers are governed by the Hart-Scott-Rodino Act are somewhat complicated, but the Act generally governs a tender offer pursuant to which (i) the bidder acquires at least 15% of the shares of the target company or the aggregate value of the shares purchased exceeds $15 million, and (ii) the bidder has total assets or annual net sales of at least $100 million and the target company is engaged in manufacturing and has annual net sales or total assets of at least $10 million, or the bidder has total assets or annual net sales of at least $100 million and the target company has total assets or annual net sales of at least $10 million and the target company has total assets or annual net sales of at least $100 million. See id. at 348-49; Axinn, Fogg & Stoll, Contest for Corporate Control Under the New Law of Preacquisition Notification, 24 N.Y. L. SCH. L. REV. 857 (1979).

The rules promulgated by the Federal Trade Commission exempt tender offers pursuant to which the bidder will acquire 15% of the target company's shares, but the acquired shares will not have an aggregate value exceeding $15 million and the bidder will not acquire 50% of the voting shares of a target company with annual net sales or total assets of at least $10 million. See generally M. Litton & E. Steinberger, supra note 169, at 349-50.

The waiting period prescribed by the Hart-Scott-Rodino Act is really a period during which the cash tender offer may not be consummated. The tender offer may commence during this period, but shares tendered may not be purchased until the expiration of the fifteen-day period. See generally id. at 333, 334, 341, 345-62. For this reason the fifteen-day waiting period created by the antitrust laws is not a “waiting period” in the same sense as the state takeover law waiting periods.

239 See, e.g., ALASKA STAT. §45.57.110(2)(E) (Supp. 1979); see generally Tender Offers for Corporate Control, supra note 38, at 209; Langevoort, supra note 116, at 225; State Takeover Statutes: An Unconstitutional Approach?, supra note 227, at 404.

240 See, e.g., COLO. REV. STAT. §11-15.5-102(5)(c) (Supp. 1978); NEV. REV. STAT. §78.377(2) (e) (1973).

241 See, e.g., CONN. GEN. STAT. ANN. §36-457(a)(3) (West Supp. 1980); NEV. REV. STAT. §78.377(2) (b) (1973).

242 The Indiana takeover law only applies to foreign corporations that have a “substantial portion” of their assets in Indiana. See Ind. Code Ann. §23-2-3.1-1(f) (Burns Cum. Supp. 1979). In the tender offer by United Technologies for shares of Otis Elevator, the Indiana Securities Division concluded that the fact that
these vaguely drafted jurisdictional limits of the state takeover provisions is that a tender offer could be governed by two or more statutes.\textsuperscript{243}

The state tender offer laws currently have various conflicting requirements. For example, the laws of some states prohibit a tender offer from remaining effective more than 35 days.\textsuperscript{244} The laws of other states, however, require a tender offer to remain effective for more than 35 days.\textsuperscript{245} Most states (and the Williams Act) permit a tender offer to be made for less than all of the shares of a target company; Hawaii requires that a tender offer be made for all shares.\textsuperscript{246}

The state laws also provide different rules regarding the period dur-

Otis had $32 million worth of assets in Indiana (9% of its total assets) did not constitute a "substantial portion" of its assets. See Vaughan, State Tender Offer Regulation, 9 Rev. Sec. Res. 969, 970 n.15 (1976).

The law also provides that it only governs foreign corporations whose principal place of business is in Ohio and who have substantial assets in Ohio. See Ohio Rev. Code Ann. § 1707.041(A)(1) (Page Supp. 1979-1980). Société Imetal made a tender offer for the shares of Copperweld, a non-Ohio corporation. Copperweld's executive offices apparently were in Pennsylvania; it apparently had no assets in Ohio and was not qualified to do business there. See Wilner & Landy, supra note 116, at 12. Two subsidiaries were Ohio corporations, while five other subsidiaries were foreign. See id. at 12-13. Copperweld's management contended that, since its two Ohio subsidiaries conducted a significant amount of its business in Ohio, the principal place of business of the parent should be deemed Ohio and the parent should be deemed to have substantial assets in Ohio. The Ohio Attorney General concluded that the local takeover statute governed Copperweld. See id. at 13. This obviously represents a rather broad interpretation of what constitutes "substantial assets." The Attorney General believed that if a company has "substantial assets" in Ohio, its principal place of business is in Ohio. See Wilner & Landy, supra note 116, at 5; State Takeover Statutes: An Unconstitutional Approach?, supra note 227, at 403 n.76.

\textsuperscript{129} It was noted above that it was initially believed that the tender offer by Great Western United for Sunshine Mining would be simultaneously governed by three takeover statutes. See A Response to Great Western, supra note 99, at 888 n.125. When Grand Metropolitan, Ltd. proposed to make a tender offer for the Liggett Group, four states asserted jurisdiction. See "Liggett Says Grand Metropolitan's Offer is Temporarily Barred by Order of Court," Wall St. J., Apr. 22, 1980, at 8, col. 3 (Western Ed.); "British Concern Starts Bid to Buy Liggett Group," Wall St. J., Apr. 21, 1980, at 2, col. 2 (Western Ed.).


\textsuperscript{245} Mass. Ann. Laws, ch. 110C, § 7 (Michie/Law Co-op Supp. 1980); Mich. Comp. Laws Ann. § 451.905(2) (Supp. 1979). Both require the tender offer to be held open sixty days. The Michigan law also provides that if the proposed purchase price is increased (which frequently happens) at any time during the offer, this is considered a new offer and it must remain open for sixty days after the date the increased price was offered.

The Williams Act has been construed to require an offer to remain open for ten days. The New York Stock Exchange Company Manual provides that tender offers "should" remain open for a minimum of ten days. See M. Litron & E. Steindl, supra note 169, at 226. The American Stock Exchange Company Guide provides that a tender offer must remain open for a minimum of fourteen days. See id. at 227. The various state tender offer laws require tender offers to remain open for a minimum of between ten to sixty days. See generally 2 TENDER OFFERS HANDBOOK (Georgeson & Company, J. Robinson ed. 1976).

ing which shareholders may withdraw tendered shares. The various state statutes also set forth different rules for the periods during which the offeror must purchase tendered shares on a pro rata basis if the tender is over subscribed; it would obviously be impossible to satisfy two different types of pro rata repurchase standards, without purchasing more shares than desired. In addition, one state regulatory authority may find a tender offer unfair and either disapprove or postpone the tender offer while another state regulatory authority may approve the tender offer.

The different requirements of the state securities law set forth above suggest that it would be highly burdensome to have one tender offer regulated by more than one of such laws. The administrative hearing requirements of the various statutes also could place a significant burden upon tender offers. In the current extraterritorial form of state tender offer laws, a tender offer cannot be made in any state until all administrative hearing requirements have been satisfied in all states alleging jurisdiction. The potential for delay inherent in such a regulatory scheme could be quite burdensome. In addition, it could be difficult to arrive upon terms that all state securities commissions would deem “fair and equitable.” It is unclear, at the present time how difficult it will be to obtain the approval of state securities commissions regarding the fairness of the offer.


248. These rules generally provide that if the number of shares tendered exceeds the number of shares desired by the bidder, shares tendered during a certain period must be purchased by the offeror on a pro rata basis rather than pursuant to a first tendered, first purchased procedure. For example, the Williams Act provides that shares tendered during the first ten days of a tender offer are entitled to pro rata repurchase protection. See 15 U.S.C. §78n(d) (6) (1976). Some states follow this rule while many others do not. For example, a number of states provide that the pro rata repurchase protection applies to shares tendered at any time during the tender offer. See, e.g., Alaska Stat. §45.57.010(3) (Supp. 1979); Conn. Gen. Stat. Ann. §36-463(c) (West Supp. 1980); Ind. Code Ann. §23-2-3.1-5(b) (Burns Cum. Supp. 1979); Nev. Rev. Stat. §78.3772(2) (1973); N.J. Stat. Ann. §49:5-9(b) (West Supp. 1979); Va. Code §13.1-530(c) (1975). Others provide for pro rata repurchase during a longer period than that specified in the Williams Act. See, e.g., Del. Code Ann. tit. 8, §203(a) (3) (Supp. 1978) (twenty days).

249. APL Corporation recently proposed to make an exchange offer for the shares of Pabst Brewing Company. The Wisconsin Securities Commissioner rigorously reviewed the terms of the offer. The offer was never made; a significant
The state administrative hearing requirements also could create various timing problems for the offeror. For example, the laws of certain states provide that a tender offer must be made during a certain period after the filing of a notice of intention to make a tender offer.\(^{250}\) The initiation of a state administrative hearing could easily make it impossible to satisfy such a time requirement.

A number of commentators have discussed whether a tender offer constitutes a matter pertaining to the “internal affairs” of a corporation.\(^{251}\) This obviously depends upon how the issue is characterized. The “internal affairs” of a corporation are normally defined as matters pertaining to the relationship among the corporation, its directors, officers and shareholders. Such “internal affairs” matters are contrasted with relationships between the corporation and third parties. The “internal affairs” of a corporation have traditionally been regulated by the law of the state of incorporation, while other matters are governed by normal choice of law rules.

A sale of a corporation’s securities is normally not considered an “internal affairs” question. However, if a tender offer is characterized as a sale of control to an existing shareholder,\(^{252}\) this would appear to be an “internal affairs” matter, both since it is a sale of control and because the purchaser already has a relationship with the corporation. If a tender offer is characterized as just a large securities transaction, it would seem to resemble the type of transaction which has traditionally been governed by state blue sky law and not by the state of incorporation. Certain commentators argue that a tender offer constitutes an “internal affairs” matter,\(^{253}\) while others

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251. Compare Langevoort, supra note 116, at 220; Shipman, supra note 202, at 741-45; and A Response to Great Western, supra note 99, at 931-34, with Wilner & Landy, supra note 116, at 16-17, and Commerce Clause Limitations, supra note 116, at 1155.
252. A tender offeror frequently purchases approximately 5% of the shares of the target company before a tender offer is made. After 5% of the target’s shares are owned, a Schedule 13D must be filed with the SEC and the offeror’s interest in the target becomes public.
253. See Langevoort, supra note 116, at 220; Shipman, supra note 722-23; A Response to Great Western, supra note 99, at 931. Proponents of this view note that a tender offer is the functional equivalent of a proxy fight, unquestionably an internal affairs matter.
contend that it is not. The debate over this issue seems to be generating much heat but little light. The primary issue is not whether this constitutes a matter pertaining to the "internal affairs" of a corporation but merely whether a tender offer is an issue which requires uniform national regulation by the law of one state, or whether concurrent regulation by the various interested states is a workable approach. If it is determined that a tender offer can be governed by a number of state takeover laws, no more need be decided; the various interested states could regulate a tender offer. If it is decided that tender offers require uniform national regulation, the next matter to be decided is what law should be applied to such tender offers.

It has been contended by a few commentators that the extraterritorial aspects of state takeover laws should be deleted and that jurisdiction of state takeover laws should be limited to offers made to residents of the forum. This would obviously result in one tender offer being regulated by a number of various blue sky laws. It was set forth above that the laws as currently enacted contain many different and sometimes expressly contradictory requirements. Disclosure requirements would vary from state to state. More frequently, states would apply different substantive rules to a tender offer involving shareholders residing in more than one state. A significant burden would therefore result from the regulation of tender offers by all states in which target company shareholders reside.

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

The alternative would be one state's law governing the tender offer. This would be a more manageable way to regulate a tender offer. The law governing such a tender offer could be selected in the same manner as other "internal affairs" choice of law determinations discussed above. The tender offer law to be applied would be the law, if any, of the state of incorporation, unless the target company was a pseudo-foreign corporation and the state of commercial domicile

254. See Wilner & Landy, supra note 116, at 16; Commerce Clause Limitations, supra note 116, at 1155.

255. See generally Commerce Clause Limitations, supra note 116; Security Law and the Constitution, supra note 38.

256. See A Response to Great Western, supra note 99, at 933.
had enacted a takeover law which governed pseudo-foreign corporations so that the statute would only extend to corporations whose commercial domicile was in the forum.257

VII. Conclusion

It was discussed above that the “internal affairs” doctrine has had a “Gresham’s law” effect upon state corporation codes. This has resulted because the doctrine has been rigidly applied even regarding those corporations that had little or no contact with the state of incorporation and had a majority of its contacts with another state. It is submitted that the enactment of pseudo-foreign corporation laws, plus statutory choice of law provisions which expressly recognize the pseudo-foreign corporation limit to the internal affairs doctrine, such as those discussed in the article could stem this pro-management tide of state corporation laws and give states the power to regulate corporations that clearly are commercially domiciled in the state. Most corporations could no longer evade the corporate law of their commercial domicile merely by incorporating elsewhere. States would be able to regulate corporations in the manner considered optimal, rather than in the manner considered necessary to induce domestic corporations not to incorporate or re-incorporate elsewhere.

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

The application of the “internal affairs” doctrine frequently results in the corporation being regulated by a state with little or no interest in governing its affairs. The scheme advanced in this article would result in corporations being regulated in most instances by the state of commercial domicile, the state with the most interest in regulating the corporation, while retaining certainty in corporate choice of law.

Tender offers and certain other corporate “internal affairs” require uniform national regulation. Therefore, full faith and credit should generally require the application of the law of the state of incorporation to such questions. An exception to this rule seems reasonable if the corporation has a majority of its contacts with

257. None of the present tender offer statutes which attempt to govern tender offers for the shares of certain foreign corporations are so limited.
another state, and if that state has adopted a pseudo-foreign corporation statute regulating that issue. Then, full faith and credit should be required to be given to the pseudo-foreign corporation law of that state rather than the law of the state of incorporation. If the state of commercial domicile has not adopted such a law, full faith and credit should require the application of the law of the state of incorporation, even if the corporation is a "tramp" or technically-foreign corporation. Multistate regulation of other issues which are susceptible to multiple state regulation should be permitted as long as the regulating state has sufficient contacts with the corporation to satisfy due process requirements.

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

[After this article was prepared, the SEC adopted amendments to its tender offer rules. The new rules require that a tender offer remain open at least twenty business days. A shareholder is given the right to withdraw tendered shares during the first fifteen business days of the offer and during the ten-day period following the announcement of a competing offer.\textsuperscript{258} The rule which most directly impacts the subject matter of this article is Rule 14d-2. This rule provides that, once certain specified material terms of a proposed tender offer are made public, within five days thereafter a disclosure document must be disseminated to all shareholders of the target company regarding the tender. Under this rule, if the required disclosure document is filed by the tendering party with the appropriate state securities commission or commissions, such a filing would constitute a public announcement of the material terms of the tender offer. Rule 14d-2 therefore expressly conflicts with the state law waiting period and administrative hearing provisions. If the authority to make such a rule is within the power of the SEC,\textsuperscript{259} and if state law disclosure requirements, waiting period provisions and administrative hearing provisions are not amended, this new rule would change the commerce clause and preemption discussions set forth above pertaining to multistate regulation.]


\textsuperscript{259} Ohio has challenged the authority of the SEC to adopt these rules. Ohio v. SEC, C.A. 2-80-111 (S.D. Ohio filed February 15, 1980).
to state law waiting period and administrative hearing provisions. The conflict between this new rule and such state law provisions add additional force to the argument that these provisions of state law should be deemed unconstitutional.

Certain states have already responded to the new SEC rules by attempting to minimize the conflict between state and federal rules.260 States have either pared the disclosure which must be made by a tendering party to the state securities commission (so that the disclosure would not set forth all of the material terms of the tender sufficient to trigger the federal requirement of disclosure to target shareholders) or the state securities commission has permitted the tender to commence before the approval of the state securities commission has been obtained, if the tendering party agrees that the tender will not be consummated prior to obtaining the approval of the state securities commission.]