

## THE FUTURE OF HOSTILE TAKEOVERS: LEGISLATION AND PUBLIC OPINION

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Recent state takeover regulation has reinvigorated the debate over which level of government, state or federal, produces superior corporation laws. Management, which vigorously supports state legislation, has a conflict of interest concerning bids: successful takeovers can jeopardize its employment. Shareholders, however, are benefited by successful offers as they receive the bid premium, and they are benefited by the threat of offers, which keeps management on its toes. Most commentators, accordingly, consider state takeover laws to be troubling features in corporation codes because of the conflict of interest between managers and shareholders. The statutes make hostile takeovers more difficult, and any increase in a bidder's costs reduces the number of bids that will occur, which weakens the disciplining effect of the market for corporate control on managers. Consequently, as state legislatures have responded to management pleas to restrict hostile takeovers, there have been calls for federal legislation to preempt state takeover regulation. Partly due to lingering concern over the constitutionality of state takeover statutes, the supporters of restrictive legislation have, however, always worked on parallel fronts, advocating greater federal regulation of takeovers at the same time as they championed state takeover laws.

The focus of this Article is on the wisdom of promoting further federal action on takeovers. The Article begins by tracing the course of state takeover regulation, which frames the debate over federal action. It next reviews the theoretical foundation for federal intervention in takeovers. This is an analysis derived from externalities and jurisdictional spillovers and borne out by the politics of state takeover laws. It is complicated, however, by the persistence at the national level of collective action problems involving asymmetric organizational advantages of managers over shareholders. The core of the Article then follows, addressing the more important positive question, what will be the probable output of federal action? To answer this question, the Article examines the pattern of proposals

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introduced in Congress over the past twenty-five years that involve acquisitions. Previously-introduced bills can be informative about the contours of future legislation because a characteristic of successful policy initiation is the recombination and recycling of a limited number of preexisting policy alternatives. The Article also looks at the data on public opinion regarding takeovers for the same time frame. Public opinion is useful as an aid in understanding better the political calculus of legislators because it influences when a particular alternative moves up the policy agenda.

My findings, in a nutshell, are that the bills introduced in Congress have sought to increase the regulation of bidders. In addition, a plurality of the public has consistently expressed a negative attitude towards corporate acquisitions, and a majority consistently reports disinterest in, and lack of knowledge about, such transactions. Given this data, my prognosis is that any Congressional action is likely to mimic the states in the drive to restrict bidders, an outcome which undermines the theoretical case for federal legislation. Proponents of federal action to halt the regulatory trend in the states should therefore shift some of their effort to educating the public about the beneficial effects of an active market for corporate control. Without a more informed and sensitized public, preemption will in all likelihood take the form of a federal version of a state takeover statute.

## I. THE NORMATIVE CASE FOR FEDERAL LEGISLATION

### A. *The path of state regulation of takeovers.*

The first state takeover law was enacted in Virginia in 1968, at approximately the same time as the federal government moved to regulate bids with the Williams Act. Virginia's statute was a widely imitated corporate law innovation, as thirty-seven states adopted similar laws, with most enactments occurring between 1975 and 1980. The action by the states is strongly correlated with takeover activity: as an examination of Table 1 makes plain, the pioneering statutes and the burst of imitations occurred as the number of tender offers was sharply increasing.<sup>1</sup> The strength of this relation,

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1. The figures on tender offers in Table 1 are from Douglas V. Austin's database, as reproduced in Austin, Nigem & Bernard, *Tender Offer Update: 1987*, 22 MERGERS AND ACQUISITIONS 49, 49-50 (1987); Austin & Mandula, *Tender Offer Update 1986*, 21 MERGERS AND ACQUISITIONS 55, 55-56 (1986); Austin, *Tender Offer Update: 1978-1979*, 15 MERGERS AND ACQUISITIONS 13, 14, 18 (1980). I use Austin's data because it is the most comprehensive database for the variables of interest. Other published databases on acquisitions either have not been tabulated for the entire time period, or do not separately classify takeovers and whether or not an offer was contested. I did, however,

the responsiveness of legislators to acquisition activity, is supported by conventional statistical measures of association: the Pearson product moment correlation coefficient of .6613 between the number of statutes enacted per year and the number of tender offers is significant at less than .001.<sup>2</sup>

The Supreme Court temporarily derailed dual jurisdiction of tender offers in 1982 when it held, in *Edgar v. MITE*, Illinois' takeover statute unconstitutional.<sup>3</sup> The statute was found to burden impermissibly interstate commerce by going beyond the strictures of the Williams Act in delaying the consummation of bids, and by covering bids for firms that could be subject to regulation by other states as well. Because the Court did not state in *MITE* that the Illinois provision was preempted by the Williams Act, continued regulation of takeovers by the states was still a possibility. Accordingly, states immediately fashioned second generation takeover statutes to impede the activities of bidders once again. Given the constitutional failure of the initial takeover statutes that were patterned after blue sky regulation, the new laws were rooted in traditional areas of corporate governance, the regulation of business combinations and shareholder voting rights. Hence only one jurisdiction was implicated, that of the conventional choice of law rule, the state of incorporation. This formula proved to be successful. In 1987, the Supreme Court upheld Indiana's second generation stat-

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examine the correlations for all the variables discussed in the text with the acquisition series of two other databases: W.T. Grimm's count of announced mergers from 1963-1986 and of takeovers and contested offers from 1971-1986, which are published in its *Mergerstat Review* volumes; and *Mergers and Acquisitions* magazine's (M&A) count of acquisitions, which extends over the period of 1967-1986 and includes foreign corporations in the earlier years. State legislative activity was statistically significantly correlated with the M&A series (Pearson correlation of .4487), but with none of the Grimm data. However, the pattern of acquisitions in the Grimm data differs significantly from the pattern in other series such as the M&A data and the Federal Trade Commission database of large mergers, which ends in 1979. See Golbe & White, *Mergers and Acquisitions in the U.S. Economy: An Aggregate and Historical Overview*, MERGERS AND ACQUISITIONS 25, 27-36 (A. Auerbach ed. 1988). But the Austin series is significantly positively correlated with the Grimm takeover series (Pearson correlation of .6230), as well as with the M&A series (Pearson correlation of .4702).

2. The Pearson correlation assumes that the variables are normally distributed. Because conventional tests of normality (stem and leaf and box plots and the Shapiro-Wilk W statistic) of the statutes variable indicate that the normality assumption may be questioned, I also computed the Spearman rank correlation coefficient, which is a measure that does not require normality. The Spearman coefficient of .6590 is equally significant.

3. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). These first generation takeover statutes typically imposed notification and disclosure requirements more stringent than the Williams Act, and required, or permitted targets to request, a hearing by a state agency on the fairness of the bid.

Table 1. Legislative Activity and Tender Offers.

<u>Year</u>	<u>New State Statutes</u>	<u>Bills in Congress</u>	<u>Tender Offers</u>	<u>Contested Offers (% Total)</u>
1963	0	0	21	n.a.
1964	0	0	12	n.a.
1965	0	3	35	n.a.
1966	0	1	45	n.a.
1967	0	5	86	n.a.
1968*	1	1	62	n.a.
1969	2	8	49	n.a.
1970	0	3	15	n.a.
1971	1	1	6	n.a.
1972	0	3	29	13 (65%)
1973	1	2	80	35 (63%)
1974	2	10	68	43 (78%)
1975	5	23	71	19 (76%)
1976+	11	3	132	26 (30%)
1977	8	4	181	18 (30%)
1978	4	0	166	38 (28%)
1979	0	5	114	12 (13%)
1980	1	1	83	16 (21%)
1981	1	16	128	74 (62%)
1982**	1	10	96	32 (39%)
1983	2	6	77	26 (35%)
1984	7	29	142	33 (23%)
1985	10	41	121	43 (36%)
1986	5	4	183	42 (24%)
1987	12	35	n.a.	n.a.

\* Williams Act

+ Hart-Scott-Rodino Act

\*\* MITE decision

n.a. not available

ute in *CTS Corp. v. Dynamics Corp. of America*.<sup>4</sup> This led the new Chairman of the SEC, David Ruder, to lobby for congressional action. In testimony before a House Committee after the *CTS* decision, he advocated giving the SEC authority to preempt state regulation of takeovers.<sup>5</sup> He is not alone in this view: in a survey by the New York Society of Security Analysts of its members, a majority

4. *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

5. *Pending Legislation Regarding Contests for Corporate Control: Hearing Before Subcomm. on Telecommunications & Finance of the House Comm. on Energy & Commerce*, 100th Cong., 1st Sess. 69 (1987) (statement of David S. Ruder).

of respondents favored federal legislation on mergers and acquisitions over regulation by the states.<sup>6</sup>

Although more than twenty states enacted second generation statutes in the years between the *MITE* and *CTS* decisions, legislators and lobbyists were often reluctant to promote legislation for fear of constitutional infirmities.<sup>7</sup> The most frequently adopted version of a second generation statute was therefore one with limited regulatory scope.<sup>8</sup> After the *CTS* decision, however, the pace and scope of legislation changed: fourteen new statutes were adopted within approximately six months. More important, several of the new statutes strengthened less restrictive second generation statutes by using Indiana as a model, and many test *CTS*'s limits by mandating constraints on bidders that go further than the Indiana statute.<sup>9</sup>

The political history of second generation takeover statutes is similar across the states. The statutes are typically enacted rapidly, with virtually unanimous support and little public notice, let alone discussion.<sup>10</sup> They are frequently pushed through the legislature at the behest of a major local corporation that is the target of a hostile bid or apprehensive that it will become a target.<sup>11</sup> This phenome-

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6. New York Society of Security Analysts, "NYSSA Announces Results of Second Shareholder Rights Survey," News Release (May 9, 1988) (52% favor federal legislation; 27% favor state legislation; 21% no opinion). Between 250-270 of 5,000 members responded. (Telephone conversation with John McCabe, NYSSA President).

7. E.g., Dept. of Legislative Reference, *Staff Report to the General Assembly of Maryland on Corporations and Associations: Consideration of the Problem of Special Voting Requirements in Consolidations, Mergers, Takeovers, and Transfers of Assets*, Extraordinary Sess., 9, 65-72 (June 1983).

8. Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 114-15 (1987).

9. E.g., MO. ANN. STAT. § 351.407 (Vernon 1987); DEL CODE ANN., tit. 8, § 203 (1988).

10. Romano, *supra* note 8, at 138.

11. There are at least a dozen examples among second generation statutes: Connecticut for Aetna; Florida for Harcourt Brace Jovanovich (hostile bid by Robert Maxwell); Massachusetts for Gillette (hostile bid by Revlon Group); North Carolina for Burlington Industries (hostile bid by Dominion Textile and Asher Edelman); Kentucky for Ashland Oil (hostile bid by the Belzberg brothers); Pennsylvania for Scott Paper (hostile stockholder Brascan Ltd. trying to increase stake); Ohio for Goodyear Tire & Rubber (hostile bid by Sir Oliver Goldsmith); Ohio for Federated Department Stores (hostile bid by Campeau Corp., statute regulating foreign bidders); Arizona for Greyhound; Minnesota for Dayton Hudson (hostile bid by Dart Group); Wisconsin for G. Heileman Brewing Co. (hostile bid by Bond Holdings); Washington for Weyerhaeuser; Indiana for Arvin Industries (hostile bid by the Belzbergs), AMOCO also promoted bill; Illinois for an unidentified corporation, see McKenna & Bitner, *The "Fair Price Amendment" in the Illinois Business Corporation Act*, 67 CHICAGO BAR REC., 64, 74 n.59 (1986) ("one prominent Illinois Corporation" promoted statute); Maine for an unidentified corporation, see Maine Legislative Record—House, June 3, 1985, at 918 (remarks of Rep. Stevens, referring to the "corporation that was the instigator" of the bill); Washington for Boeing (facing possible hostile bid by T.Boone Pickens, statute for

non is consistent with the positive correlation between the enactment of state statutes and tender offer activity, for as the overall number of takeovers increases, the probability that any one state will be the home of a target, and hence discover the need for a takeover law, may increase. But this feature of the political process also suggests a weakness in looking at aggregate takeover activity to explain legislation: it is the relative size of a target that matters for legislative attention. Increases in the aggregate number of offers may not be correlated with the number of takeover bids for major corporations in various states. Moreover, in the 1980s, the total number of tender offers has declined but new financing techniques have permitted hostile takeovers of very large corporations.

The statutes are not, however, as some might intuit, promoted by a broad coalition of business, labor, and community leaders who fear that a firm's takeover will have a detrimental effect on the local economy. While some legislators may be concerned about such an effect, labor and community groups are not at the forefront in the attack on takeovers. In fact, the organization most actively involved in promoting the legislation besides corporate management and business groups, in nearly all states, is the local bar association. Although the bar has been involved in drafting legislation in some states, in others, such as Connecticut, it was deliberately bypassed by the statute's corporate sponsors, in order to ensure passage of the legislation without revision.<sup>12</sup> There is no doubt that the corporate bar's interest can differ from that of managers and shareholders.<sup>13</sup> For example, corporate lawyers profit from takeover litigation, and a statute that prevented all hostile takeovers would, presumably, also eliminate the lawsuits. A factor mitigating the incentive for maintaining some modicum of takeover activity is that a merged firm typically retains the acquiror's legal counsel. Because

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foreign resident corporation); Missouri for TWA (hostile bid by Carl Icahn, statute for foreign resident corporation). In addition, one proposed statute was not enacted in large part because it was being pushed by a target of a hostile bid at the time: New York for CBS (hostile bid by Ted Turner). See also Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters*, 1988 WIS. L. REV. 365.

12. Connecticut's second second-generation statute, a refinement of the Delaware-New York type statute, see *infra* text and accompanying note 16, was also pushed by management groups. When one legislator testifying at the public hearing voiced qualms over protecting managers without protecting workers, management became concerned that their proposal would be defeated and supported a modified bill which included the proviso that any corporation opting out of coverage of the statute must comply with a code to be drafted by an appointed commission consisting of legislators and representatives of labor and business. The code is anticipated to regulate plant closings and to provide guidelines for affirmative action and child care programs.

13. See generally Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

the acquiror and, correspondingly, its counsel are quite often out-of-state entities, the local bar's interest will be similar to that of incumbent management, in seeking to block takeovers. As we can conjecture plausible, diverse incentives for corporate lawyers independent of their clients' interests, we cannot identify *a priori* what motivates their behavior.

Perhaps the most important reaction to *CTS*, and the key to the resurgence of the federalism debate, is that Delaware, the leading incorporation state, enacted a second generation statute. To its credit, Delaware's legislative process was more open and deliberative than that of many other states. Shortly after the *CTS* decision, the Delaware Secretary of State requested the executive committee of the state corporate bar to study adoption of an Indiana-style takeover statute. The committee initially proposed a modified version of the Indiana statute, in which a critical difference was an opt-in rather than opt-out provision. The opt-in approach gives shareholders, rather than managers, control over the decision to restrict bids, thereby mitigating the conflict of interest created by a takeover statute. Following conventional procedure, the committee circulated the proposal to corporate practitioners in Delaware and other states. After consideration of the responses, several of which criticized the bill for being too favorable to bidders, the proposal was rejected.

The bar committee produced a second proposal several months later, which was a modified version of New York's second generation takeover statute that is more restrictive of bids than Indiana's. This time the committee did not advance an opt-in approach. Part of the impetus for the committee's second effort stemmed from the threat of some Delaware corporations to reincorporate in states that had second generation statutes if no bill was forthcoming.<sup>14</sup> Delaware feared, rightly or wrongly, that inaction would hurt its preeminence in the incorporation business.

After refinements incorporating solicited responses, the committee's second proposal was forwarded to the legislature over the opposition of some committee members. Several commissioners of the SEC, shareholder organizations and institutional investors, some of which had voiced objections to the bar committee, actively opposed the bill in the legislature. At the same time, corporations

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14. *Delaware May Staunch Leveraged Takeovers*, INVESTMENT DEALER'S DIGEST, Nov. 23, 1987, at 47; Sontag, "A Takeover Law Grows in Delaware," NAT'L L.J., Apr. 11, 1988, at 1.

also increased their lobbying efforts.<sup>15</sup> Although the Senate majority leader offered an amended bill which featured an opt-in regime, there was no support for that proposal and the bill passed intact, with virtually no dissents. The second generation takeover statute is apparently the first revision to the Delaware corporation code that was not unanimously endorsed by the corporate bar executive committee.

Delaware's second generation statute, like its first generation statute, is considerably less hostile to acquiring firms than the laws of other states. It provides bidders with greater flexibility to complete an unfriendly transaction.<sup>16</sup> This is explained, in large part, by the Delaware corporate bar's representation of a more diverse constituency, consisting of both targets and bidding firms, than is found in other states. For instance, large Delaware firms average more acquisitions over their lifetime than large firms incorporated in other states, and more firms that have undertaken a hostile acquisition are incorporated in Delaware than in any other state.<sup>17</sup> But because so many corporations are under Delaware's jurisdiction—approximately half of the Fortune 500 manufacturing firms and over forty percent of New York Stock Exchange listed firms—even a comparatively mild takeover statute is a matter of serious concern. The enactment of a Delaware takeover statute therefore provides momentum to the movement calling for federal preemption of state takeover laws.<sup>18</sup> Indeed, a California Senate commission on corporate governance recommended that the state legislature lobby for preemption to undo the effect of Delaware's statute.<sup>19</sup> The call for federal action is, however, still not one-sided. To the extent that the

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15. *Is Delaware About to Harpoon the Sharks?*, BUS. WK., Jan. 25, 1988, at 34 (Du Pont and Hercules Inc. executives phoning legislators); Sontag, *supra* note 14.

16. For example, the new statute's prohibition period on business combinations is three years rather than New York's five, and bidders who obtain 85% of the target's stock in a single transaction are exempt from its coverage. Delaware's threshold percentage that defines an interested shareholder is, however, lower than New York's, at 15% rather than 20%. Cf. DEL. CODE ANN. tit. 8, § 203 (enacted Feb. 2, 1988) with N.Y. BUS. CORP. LAW § 912 (McKinney 1986) (enacted in Extraordinary Sess., Dec. 10, 1985).

17. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L., ECON. AND ORG. 225, 263 (1985) (comparing number of acquisitions of Fortune 500 companies incorporated in Delaware and other states); see Romano, *supra* note 8, at 143 n.83 (discussing database for determining number of hostile bidders in each state).

18. As many commentators noted, the *CTS* decision would have only limited effect on the market for corporate control if Delaware did not join the regulatory bandwagon. See, e.g., Fischel, *From MITE to CTS: State Anti-takeover Statutes, The Williams Act, The Commerce Clause and Insider Trading*, 1987 SUP. CT. REV. 47; Romano, *State Takeover Laws: Constitutional But Dumb*, WALL ST. J., May 14, 1987, at 28, col. 4.

19. *California Legislature Asked to Back Federal Preemption of State Statutes*, CORPORATE COUNSEL WEEKLY (BNA), at 3 (Jan. 20, 1988).



Delaware statute, as some practitioners contend, will have at most only a minor impact on halting hostile takeovers, the demand for increased federal regulation of bids will not be abated by Delaware's action.<sup>20</sup>

*B. When is federal regulation preferable to state regulation?*

Economic theories of federalism provide the foundation for advocating that takeover regulation should be shifted to the jurisdiction of the national government. Analytically, the starting point is the theoretical justification of the state, that a principal function of government is to correct market failures. Markets fail to allocate resources efficiently when an activity produces externalities or when a commodity or service is a public good. An activity produces external economies or diseconomies—externalities—when it yields benefits or costs to individuals or firms other than the actor, and those third parties cannot be excluded from enjoying the benefits or bearing the costs. When this occurs, because actors only consider the benefits or costs that directly affect themselves, the socially optimal level of activity will not be undertaken.

Public goods are closely related to externalities. They are characterized by nonrivalry and nonexcludability in consumption: one individual's consumption of such a good does not reduce the amount of the good available to others, and it is impossible or extremely expensive to exclude any individual from consuming or using the good. These attributes again create problems for production of the optimal level of the good by a market mechanism: sellers cannot exact a price from users since individuals cannot be excluded from the public good's use, and even if individuals can be excluded (an impure public good), any market pricing system would be inefficient since the marginal cost of an additional consumer of a public good is zero. Correcting the market failure for public goods and externalities by government action, however, presents similar informational

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20. Some maintain that only private defensive tactics, and in particular, poison pills, protect target companies; others contend that *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), has effectively eliminated hostile takeovers by subjecting Delaware targets to auctions supervised by courts, as the high bid in the auction will be approved by the board. This contention does not imply that the number of initial bids will be unaffected by the statute; rather, the argument is that given the existence of a bid, the need to conduct an auction trumps the statute's ability to stop a hostile bid. Corroborating the view of the inadequacy of the statute is the National Association of Manufacturers' continued lobbying of Congress for a bill amending the Williams Act to increase both the waiting period for a tender offer's completion and the disclosure requirements on purchasers of blocks of stock as to their intentions and financing sources.

problems: the users of public goods, like the beneficiaries of an external economy, have no incentive to reveal their true preference for the good if the revelation will be used to determine their share of a coerced pricing (taxes) system, just as they have no incentive to voluntarily pay for the use of the public good or the external economy.

A public good may be a local public good: the consumption of such a public good is limited to those in a particular geographic region. The consumers of a local public good can exercise choice over its quality and type by choosing their location. If there are enough jurisdictions and moving is costless, citizens can vote with their feet and choose the community whose package of public goods they prefer, thereby simulating a competitive market for the production of those goods.<sup>21</sup>

The economic theory of federalism focuses on the extent of the externality, or the localness of the public good, to identify which level of government, if any, is the appropriate one to intervene in a market. A government should have control over an activity whose externalities fall completely within its borders, for then the costs and benefits will accrue solely to the citizens to which that government is accountable and the allocation of resources will be efficient.<sup>22</sup> When the costs and benefits spill over jurisdictional boundaries, allocational inefficiencies can arise. For example, a government's regulation may not induce enough of an activity by failing to count benefits accruing to citizens of other states in addition to its own citizenry. It might also induce too much of an externality-producing activity when the activity benefits its citizens and citizens in other states bear the costs. In a spillover situation, a higher level government will contain all benefited and harmed citizens within its borders and will therefore be the more appropriate authority.

Corporation codes governing the relation between shareholders and managers share many of the characteristics of local public goods.<sup>23</sup> The reduction in operating costs one corporation receives

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21. This is the well-known theory of local public goods developed by Charles Tiebout. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); For a formal and critical treatment of Tiebout's thesis, see A. ATKINSON & J. STIGLITZ, LECTURES ON PUBLIC ECONOMICS 519 (1980) (defining local goods as those goods specific and particular to a geographical location).

22. For a good textbook introduction to the subject, see R. BOADWAY & D. WILDASIN, PUBLIC SECTOR ECONOMICS 497-518 (2d ed. 1984). For an excellent application of this analytical approach to commerce clause questions, see Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983).

23. Frank Easterbrook first applied Tiebout's insight to corporate law to argue for state competition in corporate charters. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23, 28, 33-35 (1983). Although excludability is possible because corporations must file with a state for legal recognition, for which the state

from a particular governance provision does not diminish the cost savings any other firm obtains from the law. There are many jurisdictions from which to choose—besides all the states and the District of Columbia, each state typically offers a menu of corporation codes appealing to different types of firms, the most common distinction being between closely-held and publicly-traded firms, and the codes' enabling structure permits a corporation to tailor further its charter to its own taste.<sup>24</sup> Mobility costs are low—a firm need move no physical assets to change its incorporation state. Finally, jurisdictional spillovers to third parties from the manager-shareholder contract are unlikely. Where they do occur they can be dealt with more effectively by other regulatory regimes, such as environmental protection and antitrust statutes, at both the state and federal level.

Like all public goods, the provision of corporation codes entails free rider problems. The cost of lobbying for a specific law is likely to exceed the benefit to an individual corporation, though not the aggregate benefit of all firms. The free rider problem, however, appears to be less important for takeover statutes, as we typically find one firm more than willing to incur the lobbying expense. For in the takeover context, the target's management has its livelihood at stake. The heightened differential calculus for managers considering hostile takeovers in contrast to other issues of corporation law highlights another aspect of the collective action problem, evidenced by the politics of state takeover laws: the benefits of takeover statutes are concentrated on local citizens—managers and, arguably, locally-employed workers of targets, and local businesses and charities with relations to targets—but the costs are dispersed among shareholders and bidding firms who typically do not reside in the legislating state.<sup>25</sup>

At a higher level government, this failure to count all costs and benefits should not occur because all parties are included within the

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charges a fee, this does not eliminate the free rider problem because once incorporated a firm cannot be excluded from enjoying the benefits of subsequent code reforms and judicial decisions interpreting code provisions.

24. This effectively increases the number of jurisdictions beyond a fixed fifty-one.

25. For development of the externality argument with respect to takeover statutes, see J. G. Sidak & S. Woodward, *Corporate Takeovers, the Commerce Clause, and the Efficient Anonymity of Shareholders* (manuscript 1988); see also Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96 (1987) (discussion of Supreme Court's allowance of state regulation).

jurisdiction.<sup>26</sup> But Delaware is also able to internalize many of the costs and benefits: not only are a larger number of hostile acquirors incorporated in Delaware than any other state,<sup>27</sup> but also, few Delaware corporations are physically present in the state. The very large number of potential targets in Delaware makes it more worthwhile for nonresident bidders and shareholders to lobby in Delaware than other states, as would be equally true of a national forum. Although they do not vote in the jurisdiction, their attorneys do.<sup>28</sup> Unlike the national government, however, Delaware is subject to competition for revenues from other states whose calculations favor enacting takeover statutes. There is thus an externality, albeit of a different sort, affecting Delaware politics that would not be present at the national level, where income from corporate franchise taxes would be an insignificant factor. In this context of stark shareholder-manager conflict, state competition may not be for the better.<sup>29</sup>

Yet it would be a mistake to infer automatically that national regulation would be an improvement. One source of the political market failure regarding takeover legislation, the organizational difference between managers and shareholders, is relatively constant across government level. Managers are easier to coordinate across firms than shareholders whether the forum is Congress or a state legislature. Managers already interact through trade associations and positions on boards, and they clearly stand to realize substantial benefits—job protection—from takeover legislation. And, as noted, when a major firm is the target of a hostile bid, its managers, who

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26. This discussion puts to one side the question whether the interest of anyone other than shareholders should count. For views on this matter, see Romano, *Metapolitics and Corporate Law Reform*, 36 *STAN. L. REV.* 923 (1984).

27. A potential asymmetry in legislative influence may offset the importance of bidder presence: while bidders may lobby against a takeover statute, the threat of migration because of an unsatisfactory outcome is more credible for a target than an acquiring firm. The text emphasizes absolute and not relative numbers of acquirors in the state as affecting takeover legislation for two reasons. First, the more bidders present in absolute number, the more likely it is that someone will reach a legislator's ear. Second, empirical research indicates that the absolute number of hostile acquirors and the ratio of the number of hostile bidders to the number of acquirors in the state are statistically significantly negative predictors of a state's adoption of a second generation takeover statute but the percentage of hostile acquirors of total domestic corporations is not. Romano, *supra* note 8, at 140. The number of hostile bidders incorporated in Delaware is 7.5% of the total number of New York Stock Exchange firms incorporated in Delaware, which is the highest percentage so calculated for any state.

28. For example, T. Boone Pickens' counsel, one of the most prominent members of the Delaware bar, opposed the new takeover statute.

29. With respect to corporation code provisions in which the serious conflict of interest presented by takeovers is absent, the theory and evidence supporting state chartering is compelling. See Romano, *supra* note 17; Romano, *The State Competition Debate in Corporate Law*, 8 *CARDOZO L. REV.* 709 (1987).

are far fewer in number than its shareholders, are benefitted by a takeover statute by more than the lobbying cost, and thus have individual incentives to bear the cost of furnishing the collective good—the statute—to all group members—all managers.<sup>30</sup>

Just as the benefits of takeover regulation at the national level are still concentrated, the costs are still diffuse, for shareholders are dispersed across the states and most investors' holdings are so small that the free rider problem is severe. Large shareholders, especially institutional investors, have more of an incentive to lobby but they lack some of the organizational advantages available to managers. Business organizations, such as trade associations, typically provide valuable information to their member firms, which induces individual participation, and have served as the mechanism for management's lobbying for takeover statutes.<sup>31</sup> Collective action by shareholders is harder to sustain because they have less need for a centralized organization to share information. It is well established that the markets in which the stocks of concern (stock of companies subject to hostile takeovers) are traded—the national stock exchanges—are efficient, such that stock prices include all publicly available information. There is, accordingly, no benefit for one investor—especially an institution competing for clients—to share its private information with all other investors in an umbrella shareholder organization. Without political entrepreneurs or the group's production of private goods for its individual members, such as shared information, collective action is unlikely to succeed.<sup>32</sup>

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30. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 24 (1971) (identifying this condition of asymmetric costs and benefits across group members for individual provision of collective good).

31. See, e.g., *id.* at 144-47; R. HARDIN, *COLLECTIVE ACTION* 101 (1982). Mancur Olson contends that successful national organizations like the Chamber of Commerce will have a federated structure: the local affiliates are small groups for which the collective action problem is lessened as the members interact on several levels and the sanctions enforcing participation are therefore greater, as are the rewards in terms of the provision of selective incentives. Of course, it is local affiliates (the state chambers) that lobby for state takeover statutes.

32. E.g., R. HARDIN, *supra* note 31; M. OLSON, *supra* note 30. Certain shareholder organizations have just begun to emerge, as discussed *infra* at text and accompanying notes 117-19, in response to the problems presented by takeovers, in which information on voting against management defensive tactics is shared. These organizations were formed by prototypical political entrepreneurs—a prominent state politician, Jesse Unruh, Treasurer of California, who managed the state employees' pension funds; and T. Boone Pickens, a hostile bidder. As a major player in the takeover market, Pickens has a substantial interest in legislation, which could very well meet Mancur Olson's condition. See M. OLSON *supra* note 30 (conditions for an individual's furnishing of a collective good).

In addition, there is another important asymmetry affecting the taking of collective action in the takeover context: individuals are more likely to coordinate their actions to avoid public "bads" than to obtain public goods.<sup>33</sup> This is because most people are risk averse—they care more about preventing losses than achieving gains, of equal dollar magnitude.<sup>34</sup> In the takeover context, this asymmetry favors the lobbying effort of managers over shareholders, as managers may be harmed by takeovers while target shareholders profit. Moreover, management typically stands to lose more than even large shareholders stand to gain, which exacerbates the collective action problem. Accordingly, an analytical case can be made for national regulation of corporations in the takeover context, but it is considerably more problematic than at first glance.

## II. THE PROBABLE OUTPUT OF FEDERAL ACTION

### A. *Efforts at federal legislation, 1963-1987.*

#### 1. Content of congressional proposals.

An externality analysis of takeover laws suggests that congressional proposals could conceivably differ significantly from the states' protectionism. The data indicate otherwise. From 1963-1987, over 200 bills regulating corporate takeovers, excluding bills directed exclusively at acquisitions of banks, were introduced in Congress.<sup>35</sup> Table 2 breaks down the bills by subject matter. While

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33. R. HARDIN, *supra* note 31, at 82-83, 120-21.

34. Russell Hardin terms this phenomenon "hysteresis." *Id.* at 82-83.

35. This tally was obtained by reviewing all entries in the subject index of the Commerce Clearing House's *Congressional Index* for the 88th through 100th Congresses, which span the 25 years from 1963 to 1987. The 25-year span was chosen so as to precede amply the first major legislation on takeovers, the Williams Act enacted in 1968, and to end immediately prior to the *CTS* decision. Bills involving banks were excluded because it would be difficult to unpack the interaction between efforts at changing the banking regime established by the Glass-Steagall Act and state-federal relations from regulating takeovers. In the earliest Congresses, for which Table 1 lists no activity, there were a few bills concerning acquisitions of federally insured banks. *E.g.*, H.R. 12307, 88th Cong., 2d Sess. (1964) (providing for notice of change in control of insured banks). Bills directed at foreign stock or asset acquisitions have been included, even though these bills may be motivated by xenophobic sentiment unrelated to efforts at regulating takeovers, because they are most often introduced to stop a hostile takeover in progress. *See infra* notes 70-71 and accompanying text.

The tally is in all likelihood inexact. Some bills that do not refer explicitly to acquisitions may have been offered as a response to a hostile bid. For example, some revisions in the corporate tax code that are not explicitly connected with the tax treatment of mergers were inspired by hostile takeovers. For example, the bill, *To Change the Tax Treatment of Partial Liquidations and of Certain Distributions of Appreciated Property*, S. 2687, 97th Cong., 2d Sess. (1982), which does not explicitly refer to takeovers in the provisions changing the tax treatment of the specified corporate distributions was

Table 2. Types of Bills.

Year	Gen TO	Air	Carr	Comm	Oil	Tax	For Inv
1963	—	—	—	—	—	—	—
1964	—	—	—	—	—	—	—
1965	3	—	—	—	—	—	—
1966	1	—	—	—	—	—	—
1967	5	—	—	—	—	—	—
1968	1	—	—	—	—	—	—
1969	1	3	4	—	—	—	—
1970	1	2	—	—	—	—	—
1971	—	—	—	—	1	—	—
1972	—	2	—	—	1	—	—
1973	—	—	—	2	—	—	—
1974	—	—	—	—	—	—	10
1975	3	—	—	—	1	1	18
1976	3	—	—	—	—	—	—
1977	1	—	—	—	—	—	3
1978	—	—	—	—	—	—	—
1979	1	—	—	—	2	—	2
1980	1	—	—	—	—	—	—
1981	3	—	—	—	4	1	8
1982	1	—	—	—	—	9	—
1983	1	—	—	—	1	2	2
1984	14	1	—	2	8	3	1
1985	22	3	—	2	5	9	—
1986	—	4	—	—	—	—	—
1987	24	3	—	—	—	3	5

Key:

- Gen TO = regulation of tender offers in general  
 Air = regulation of acquisitions of airlines  
 Carr = regulation of acquisitions of carriers  
 Comm = regulation of communications industry acquisitions  
 Oil = regulation of petroleum industry acquisitions  
 Tax = taxation of acquisitions  
 For Inv = regulation of investments/acquisitions by foreigners

“designed to remove the more blatant provisions of current law which encourage takeover activity” which had recently been used in two major acquisitions, U.S. Steel’s acquisition of Marathon Oil thwarting Mobil Oil’s hostile bid, and Mobil’s acquisition of an Esmark subsidiary. *Tax Treatment of Corporate Mergers and Acquisitions, and of Certain Distributions of Appreciated Property, and Job Training Credit Proposal, Hearing before Sen. Finance Comm., 97th Cong., 1st Sess., 54 (1982)* (statement of Sen. Danforth). Although I could identify these particular tax proposals, there are undoubtedly other bills, motivated by takeovers, without an informative legislative history. There may also be noise in the collection method working in the opposite direction: some bills that have been included,

most bills (86) involved the regulation of tender offers or mergers in general, either by amending the Securities Exchange Act or the Clayton Act, a large number (49) focus on restricting acquisitive activity in specified industries only—energy, transportation and communications—industries which are already regulated by Congress. Another large cluster of bills (49) is concerned with the regulation of stock and asset acquisitions by foreigners.<sup>36</sup> The final major category of bills (28) provides disincentives to takeovers by increasing the tax on such transactions.

The most striking characteristic of the takeover-related bills is that, like state statutes, the vast majority aim at making acquisitions more difficult. The principal approaches to restrict bids are: (1) To delay the consummation of a bid (which gives management the opportunity to implement a defensive strategy to defeat a bid);<sup>37</sup> (2) to increase the costs of an acquisition, particularly for hostile bidders (which reduces the profitability of engaging in hostile takeovers and thereby decreases the number of offers that will be made);<sup>38</sup> and (3) more directly, to ban takeovers.<sup>39</sup> Some recent bills have imitated the states by including a federal Indiana-type statute provision, and a few have specifically protected state regulation from preemption.<sup>40</sup>

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such as bills restricting acquisitions by petroleum companies, may be motivated by anti-trust concerns and unrelated to a legislative effort to restrict hostile takeovers.

36. This category includes bills directed at foreign investment in general. Bills regulating foreign investments in petroleum companies were counted as oil industry rather than foreign investment bills.

37. These take the form of extending the Hart-Scott-Rodino Act's waiting period for tender offers; extending the Williams Act's waiting period for tender offers; requiring federal agency approval of acquisitions in specified industries; and requiring community impact statements and federal agency review if an acquisition will result in layoffs.

38. These include closing the Williams Act's 10-day window during which a bidder can purchase additional shares before filing the required 13-d statement for 5% ownership; increasing bidder disclosure obligations; requiring all stock purchases over a low threshold amount to be by tender offer; prohibiting noncash tender offers; and prohibiting federally insured banks from holding junk bonds or financing takeovers.

39. In addition to bills proposing bans on all hostile takeovers, some bills propose banning only hostile takeovers financed by junk bonds. There are also bills proposing bans limited to all acquisitions in particular industries or all acquisitions by foreign investors.

40. Bills with an Indiana-type provision are H.R. 2996 and H.R. 2016, 100th Cong., 1st Sess. (1987); S. 706, S. 1582 and S. 1882, 99th Cong., 1st Sess. (1985); H.R. 1480, 99th Cong., 1st Sess. (1985); H.R. 5914, 98th Cong., 2d Sess. (1984). Bills with a provision preserving regulation by states are: S. 1323 and S. 1324, 100th Cong., 1st Sess. (1987); S. 706 and S. 1582, 99th Cong., 1st Sess. (1985). In addition, one bill, S. 1695, 99th Cong., 1st Sess. (1985), would reverse the SEC's effort to overrule a Delaware Supreme Court decision permitting the defensive tactic of a discriminatory self-tender, *Unocal v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985), in the All-Holders Release, Rel. No. 33-6653, *reprinted in* Fed. Sec. L. Rep. (CCH) 1186 (Jul. 16, 1986).



In addition to the substantive tilt against bidders, unlike virtually all of the state second generation statutes, all of the congressional bills restricting bids establish mandatory regimes. Firms can neither opt-out of nor opt-in to these regulatory schemes. Only proposals limiting management's defensive tactics or copying the Indiana statute incorporate opt-out features. In short, shareholders would fare no better, and in all likelihood far worse given the absence of an opt-out provision, under the vast majority of congressional proposals.

In the 1980s when the number of congressional bills sharply increased, a set of new ideas, emphasizing regulation of contested bids only, surfaced in the mix of policy alternatives. As enumerated in Table 3, throughout the 1980s there are, for the first time, bills

Table 3. Recent Trends in Bill Contents.

<u>Year</u>	<u>HB</u>	<u>DT</u>	<u>GM</u>	<u>GM&amp;DT</u>	<u>DT&amp;BR</u>	<u>GM&amp;BR</u>	<u>GM&amp;DT&amp;BR</u>	<u>Total</u>
1981	1	—	—	—	—	—	—	1
1982	1	—	—	—	—	—	—	1
1983	—	—	—	1	—	—	—	1
1984	4	2	1	2	2	2	—	13
1985	16	1	1	1	1	7	2	29
1986	—	—	—	—	—	—	—	0
1987	8	2	—	—	1	6	5	22
<u>Total</u>	30	5	2	4	4	15	7	67

Key:

- HB = regulation of only hostile takeovers; management-approved acquisitions excluded
- DT = regulation of defensive tactics
- GM = regulation of greenmail
- BR = regulation of takeovers (bidders affected)

Note: Regulation of greenmail, defensive tactics, and/or hostile bids does not appear in bills introduced 1963-1980. The bills in those years are of the bidder regulation (BR) variety.

expressly regulating only hostile acquisitions (30), that is, bills with provisions exempting bids approved by incumbent managers. This may be a lag effect, for the number of contested offers appears to have declined in the 1980s, but some very large firms were the targets of hostile bids in these years and the classification system for contested offers of the database used in Table 3 has varied over the years.<sup>41</sup> In addition, in the 1980s, for the first time there are proposals directed at regulating defensive tactics by managers. Most of

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41. See *infra* note 52 and accompanying text.

the proposals regulating defensive tactics, however, are coupled with proposals increasing the regulation of bidders: eleven bills regulate both defensive tactics and bidder activity while only five bills restrict exclusively defensive tactics.<sup>42</sup> Such packaging creates the impression that a "level playing field" for takeovers is being maintained, although one side—incumbent management—may in fact be helped out far more than the other side. For example, firm opting-out is allowed for restrictions on incumbent management's defensive tactics but not for the additional restrictions placed on bidders.

Another significant characteristic of takeover-related bills is that similar strategies and permutations of these strategies are repeatedly introduced, corroborating earlier research on the congressional decision agenda. In a comprehensive study of policy initiation, John Kingdon found that successful law reform in the national arena involves the recombination of old elements rather than the invention of completely new proposals.<sup>43</sup> When Congress has acted to regulate takeovers in any major way, the recombinant aspect of legal change stressed by Kingdon has been a prominent feature. Senator Williams introduced the first proposal regulating cash tender offers and requiring disclosure of ownership of stock blocks in 1965,<sup>44</sup> although it was not until 1968 when a modified version, originating in his 1967 bill, was enacted. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, which requires premerger notification and waiting periods for certain acquisitions, including cash tender offers, had first been proposed 20 years earlier.<sup>45</sup> It had also

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42. Table 3 tabulates proposals restricting greenmail separately because while they might appear to be limiting defensive tactics, they may also be considered an anti-takeover measure, as a means to deter bidders from acting in the first place by reducing their potential return. See generally Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13 (1985). Greenmail bans are frequently proposed by management as charter amendments, along with other shark repellent amendments, conduct which strongly suggests that this is a form of self-paternalism that management expects will aid it against prospective raiders. Even here, proposals directed against greenmail are more likely to be tied to other efforts at regulating bidders than to stand alone, for a ratio of 22 to six (including in the "stand alone" count of six, four bills that regulate only other defensive tactics along with greenmail).

43. J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 131 (1984). Kingdon's database consisted of 247 interviews, conducted over four years, of persons both inside and outside of government, and 23 case studies of policy initiation and noninitiation, in the areas of health and transportation policy. *Id.* at 5.

44. S. 2731, 89th Cong., 1st Sess. (1965). Unlike the Williams Act, this bill imposed a prepurchase and waiting period requirement on 10% stock purchases as well as on cash tender offers.

45. H.R. 9424, 84th Cong., 2d Sess. (1956).

been periodically introduced in succeeding Congresses.<sup>46</sup> The new elements found in bills of the 1980s have now been repeatedly introduced over several Congresses, and they continue the trend of restricting bidders.<sup>47</sup> An educated prediction, accordingly, is that any future federal action on takeovers will regulate bidders still further.

## 2. The federal political process.

The similarity in prospective legislative output between Congress and the states suggests that, notwithstanding the externality analysis, the inputs of the politics at the federal level may not be that different from the states. This is consistent with the earlier suggestion that there would be a collective action problem for shareholders across all levels of government. To investigate further the input side of the federal legislative function, Table 1 compares the annual number of takeover-related bills with time series data related to the economic and political environment: the level of takeover activity and of state legislation. It seems plausible that when takeover activity heats up, national legislators, just like state legislators, are pressed to act by constituents and the number of bills introduced rises. While a more accurate variable for measuring an association between congressional action and takeover activity would be the dollar value of offers rather than the absolute number of offers, as we would expect larger targets to attract the attention of more legislators across more states, such a data series is not available.<sup>48</sup> Table

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46. *E.g.*, H.R. 2143, 85th Cong., 1st Sess. (1957); H.R. 7780, 89th Cong., 1st Sess. (1963). As the successful sponsor Rep. Rodino put it, noting the lengthy history, "premerger notification is an idea whose time has clearly come." *Merger Oversight and H.R. 13131, Providing Premerger Notification and Stay Requirements: Hearings before the Monopolies and Commercial Law Subcomm. of the House Judiciary Comm., 94th Cong., 2d Sess. 1* (Mar. 10, 1976) (statement of Rep. Rodino).

47. Even the new elements are not completely different from proposals in the 1970s; rather, they more precisely delimit which types of offers are to be restricted, in an attempt to make takeover regulation more feasible. For example, limiting restrictions to hostile bids financed by junk bonds improves the regulation's political acceptability, because it will not affect as much economic activity as a proposal restricting all bids. See J. KINGDON, *supra* note 43, at 138 (important criteria for a proposal to reach priority on the decision agenda are low cost, technical feasibility, and value acceptability).

48. Presumably, the correlation between bills and such a series would be stronger, as casual empiricism indicates that the time period in which legislative activity accelerated—the 1980s—is also the period in which the dollar value of bids dramatically increased, given the number of extremely large targets, while the number of bids did not. Although there is no complete publicly available time series of the value of takeovers (or contested offers), Austin began reporting a total dollar value of tender offers in 1978, M&A began reporting the average value of its merger series in 1979, and Grimm began reporting the average value of its announced merger series in 1968. The M&A and Grimm value series do not include all mergers, but only those for which prices

1 tabulates instead the number of tender offers and contested tender offers.

Despite the use of the theoretically less desirable measure, there is still a statistically significant positive correlation between the number of tender offers and the number of bills. The Spearman correlation of .4190 between the number of bills and the number of offers is significant, although the Pearson correlation of .3016 is not.<sup>49</sup> The correlation between bills and offers suggests that the reaction of national legislators is not dramatically different from that of state legislators: when takeover activity increases, legislators increase their efforts at enacting takeover-related legislation. Bearing this hypothesis out, the number of bills introduced in Congress per year is even more strongly correlated with the number of state takeover statutes enacted per year. The Pearson correlation of .6553 and the Spearman correlation of .5180 between the number of bills and the number of statutes are both significant at the 1 percent level.

There is, however, no statistically significant correlation between the number of contested offers and legislative activity by either level of government.<sup>50</sup> An important reason for the absence of significance, in my opinion, involves database limitations. In some years over ten percent of the offers could not be classified for lack of information, and another ten percent were excluded from consideration because the bid was withdrawn, although management resistance could have caused the withdrawal.<sup>51</sup> Moreover, there are problems in the coding of takeovers. In recent years, the database

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were available, which tend to be the larger transactions. The Pearson correlation of .5924 between bills and the Grimm value series was significant but the Pearson correlations between bills and the M&A value series of .5442 and between bills and the Austin value series of .4455 were not. It should be noted that the number of offers is highly correlated with both the Grimm and M&A value series (Pearson correlation of .8397 with the M&A value series; Pearson correlation of .5188 with the Grimm value series), but not with the Austin value series (Pearson correlation of .2419). The Austin value series is, however, highly correlated with the number of contested offers (Pearson correlation of .8869).

49. Again, both measures are reported because the diagnostic plots and W-statistic for the bills variable indicate that the assumption of normality is questionable.

50. Neither correlation coefficient between the number of bills and the number of contested offers (Spearman correlation of .3408; Pearson correlation of .3112) nor the proportion of contested offers (Spearman correlation of .2664; Pearson correlation of .1283) were significant. This is also true for the states: none of the correlation coefficients between state enactments per year and contested offers or percent contested offers were significant.

51. *E.g.*, Austin, *supra* note 1, at 17 (of 222 offers in 1978-1979, 47 were eliminated from the contested-uncontested offer database: 26 could not be classified and 21 bids had been withdrawn, some because of a successful counter-offer by another bidder).

classifies as contested only offers management opposes from start to finish; if management eventually capitulates, an offer is reclassified as uncontested, although this has not always been the classification procedure.<sup>52</sup> As a result, some auctions, in which the target opposes an initial bidder and is acquired by another suitor, may be classified as uncontested offers. These difficulties indicate that measurement error is far more serious in the contested offers data than the tender offers data, which would make the detection of a statistically significant association between contested offers and the number of bills (or state statutes) more difficult.

One explanation for the weaker correlation between congressional bills and offers compared to that between state statutes and offers is that Congress could be expected to be slower to respond to takeover activity than state legislatures, which, we have seen, respond very quickly, compensating when necessary for their part-time status by calling emergency sessions to consider takeover bills. Obtaining information about a problem, or coordinating and mobilizing support for a solution would be more time-consuming in Congress than in a state legislature: the number of federal legislators is larger than that of the largest state legislature; there is far greater diversity in members' interests; and there are more objects of legislation.<sup>53</sup> More important, apart from the very largest corporations, the survival of any one particular company will be more important to one or two states, where it has major facilities, than to the nation. Consequently, because any one corporation's takeover is important to only a handful of Senators and Representatives, it would take the cumulation of many corporate takeovers to persuade enough members of Congress of a need for action. Moreover, because target management is likely both to be sensitive to its relative importance, and to interact more frequently with local than national legislators, it in all likelihood invests greater time and effort in obtaining state rather than federal legislation. Such behavior would contribute to a congressional lag. Indeed, such a strategy could have a feedback effect: increasing success at the state level can reduce further the effort expended at the national level.

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52. Austin, Nigem & Bernard, *supra* note 1, at 51. In earlier years, offers were classified as contested as long as management was opposed to the offer at some point in time, even if management ultimately accepted the bid. Austin & Mandula, *supra* note 1, at 56.

53. For some suggestions concerning why congressional logrolling has not mitigated at least some of these problems and produced more legislation see *infra* text and notes 82-86.

The intuition concerning a slower congressional reaction is supported both by anecdotes and statistical data. Although many state legislatures have been mobilized to enact protective takeover statutes immediately upon the appearance of a hostile bid, congressional hearings on bills responding to hostile attempts often take place after the bid's outcome has been decided.<sup>54</sup> In addition, there is a statistically significant positive correlation between the number of congressional bills and lagged variables for the number of tender offers and contested offers.<sup>55</sup> While there is also a significant positive correlation between the number of state statutes and lagged tender offers, but not between state statutes and lagged contested offers,<sup>56</sup> the correlation between state laws and contemporaneous tender offers is much stronger. This bolsters the conclusion that Congress is slower to react than state legislators. Further evidence of a lag in congressional reaction can be found in the awareness of members of Congress of a timeliness problem, as indicated by the inclusion of retroactive provisions in bills to ensure particular bids will be covered, or reopened, should the bidder successfully com-

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54. Sen. Arlen Specter of Pennsylvania introduced legislation to stop T. Boone Pickens' takeover of Gulf Oil of Pennsylvania, S. 2447 and S. 2448, 98th Cong., 2d Sess. (1984), and at the time of the hearings Gulf had agreed to merge with a White Knight. See *Tender Offer Practices and Corporate Director Responsibilities: Hearing on S. 2448 and S. 2797 before Sen. Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 2d Sess., 6 (1984) (statement of Sen. Specter). Rep. William Coyne of Pennsylvania reintroduced a bill requiring community impact statements, H.R. 960, 99th Cong., 1st Sess. (1985), after the Gulf-SOCAL merger conclusion of T. Boone Pickens' takeover attempt, which was the subject of his testimony at a hearing on efforts at restricting takeovers. *Tax Aspects of Acquisitions and Mergers, Hearings before Oversight Subcomm. and Select Revenue Measures Subcomm. of House Ways and Means Comm.*, 99th Cong., 1st Sess., 819 (1985) (statement of Rep. Coyne). The takeover-related corporate tax proposals mentioned in the text and accompanying note 35, *supra* were debated and enacted after the completion of the acquisitions that inspired them. Congressional hearings have been convened in the midst of a hostile bid, *see infra* note 62 (citing hearings), but none of those hearings produced any contemporaneous legislation.

55. Both the Pearson correlation of .3862 between bills and offers lagged by one-year and the Spearman correlation of .3720 are significant. The Spearman correlation of .5125 between bills and contested offers lagged by one-year is significant, although the Pearson correlation of .2498 is not.

56. The Pearson and Spearman correlations between the number of new state laws and the number of tender offers lagged by one year are, respectively, .5190 and .5743. Both correlations are significant at less than 5%. The Pearson correlation between state laws and contested offers lagged by one-year is negative and insignificant; the Spearman correlation is positive and insignificant. I have no good explanation for why Congress would be more sensitive to the level of contested offers than the states, that is, for why the number of statutes is not correlated with the contemporaneous or lagged number of contested offers while the number of bills is correlated with the lagged contested offers series.

plete its offer before enactment, provisions that are rarely used in bills proposing state takeover laws.<sup>57</sup>

Congressional activity also appears to be related to the constitutional status of state regulation. In the years between *MITE* and *CTS* when the constitutionality of state statutes was in doubt, the number of congressional bills soars. Several bills, as noted earlier, explicitly include a provision preserving the right of states to regulate takeovers. The proposed relation can be tested by examining the difference between the mean number of bills introduced in the two different time periods to determine whether they come from the same population. The difference in means (twenty-one bills in 1982-1987 compared to five in 1963-1981) is significant at the five percent level. Of course, this difference is also related to changes in underlying economic factors affecting acquisitive transactions across the two time periods.<sup>58</sup> The difference in means between the number of tender offers before and after *MITE* (124 offers in 1982-1987 compared to seventy-three offers in 1963-1981) is also significant at five percent. It is impossible to isolate the magnitude of the effect on the increased number of offers of the underlying uncertainty over the constitutionality of state regulation, for the two variables are, in all likelihood interrelated: acquirors may increase their activity when states' ability to regulate is in doubt. Congressional behavior is correspondingly most reasonably described as a function of both the constitutional status of state regulation and the level of takeover activity.

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57. See, e.g., H.R. 5452 and H.R. 5135, 98th Cong., 2d Sess. (1984) (introduced Apr. 12 and Mar. 14, respectively, but made retroactive to Jan. 1 to cover divestiture of refineries from Texaco-Getty merger); *To Amend the Federal Aviation Act of 1958, Hearings on S. 1373 before the Sen. Commerce Comm.*, 91st Cong., 1st Sess., 97-98 (1969) (statement of Howard C. Westwood, Counsel to Western Air Lines) (proposed statute retroactive to bill introduction date, March 7, to be applicable to Western Air Lines' hostile acquirer, Kirk Kerkorian, because he had not exercised control in the form of voting his shares as of March 7). There is an interesting parallel to this strategy in Delaware's second generation takeover statute which further supports the contention that Delaware and the national government have similar political processes for the production of corporate laws. While most other states' second generation takeover statutes are either effective immediately upon enactment or prospectively, Delaware's is not. Recognizing the more deliberative process that would be undertaken, the Delaware bill included a retroactive provision, to a date prior to its legislative introduction, which protected Boeing, a prime advocate of the legislation, against a potential takeover by T. Boone Pickens.

58. For example, business conditions in the 1980s were favorable to acquisitions, quite apart from the uncertain status of state regulation: there was a booming stock market and a new definition of market share under the federal merger guidelines that expanded the number of possible corporate marriages. Dept. of Justice, Antitrust Div., *Merger Guidelines*, 47 Fed. Reg. 28, 493 (1982).

Table 4. Regressions of Bill Introductions, 1963-1987.

1. Bills =	1.7934	- 0.0245 Offers	+ 0.0497 Offerslag	+
	(.461)	(-.370)	(.883)	
	+ 2.23 Statutes	- 1.5251 Statuteslag	+	
	(2.882)*	(-1.614)		
	+ 8.8792 MiteDummy			
	(1.924)			
	F = 3.775*		DW = 2.633	
	R <sup>2</sup> = .5261		R <sup>2</sup> (adjusted) = .3868	
2. Bills =	4.5947	- 0.0419 Offers	+ 1.6132 Statutes	+
	(1.447)	(-.970)	(2.369)*	
	+ 10.5301 MiteDummy			
	(2.343)*			
	F = 5.556*		DW = 2.213	
	R <sup>2</sup> = .4546		R <sup>2</sup> (adjusted) = .3728	

(t-statistics in parentheses)

\* significant at less than 5 percent

Accordingly, I estimated a multiple regression model that treats the number of bills introduced in Congress as a function of takeover activity, state regulatory activity, and the constitutional status of state action. Two estimated equations and related statistics are reported in Table 4; one includes lagged variables for the number of one includes lagged variables for the number of offers and state statutes enacted per year to reflect the slower reaction of Congress and the other does not. The explanatory variables included in both equations are the number of offers, the number of statutes and a dummy variable for the constitutionality issue, that distinguishes between years before and after the *MITE* decision.<sup>59</sup> The regression

59. The contested offers variable was not included because its shorter time series would too substantially reduce the number of observations. No adjustments were made to the ordinary least squares estimation method because the problem of autocorrelation that often occurs with time-series data does not appear to be a factor: the Durbin-Watson (D-W) statistic of 2.633, reported in Table 4, indicates that there is no positive serial correlation present but is indeterminate concerning negative serial correlation. The D-W statistic of 2.213 in the regression model excluding the lagged variables indicates no serial correlation, positive or negative. Moreover, although the bills variable does not appear to be normally distributed, normal distribution tests for the regression residuals could not be rejected. Because the number of state laws, while exogenous to Congress, is really an endogenous variable, I also estimated several two-stage least squares models, which take the simultaneity of the variables into account. In the first stage the number of state statutes was regressed on a combination of the number of offers, lagged offers and the *MITE* dummy. The residuals were then used to



results are similar. As indicated by the  $R^2$  statistics, both regressions explain close to forty percent of the variation in the number of bills. The hypothesis that the independent variables taken together have no effect on the number of bills can be rejected, given the statistical significance of both regressions' F-statistics. In fact, a joint hypothesis test in the full model (equation 1) that the coefficients of both lagged variables are equal to zero, that is, that they have no explanatory power, could not be rejected ( $F = 1.4086$ ). This suggests that the simpler model (equation 2) is preferable. The only explanatory variable that is statistically significant is the number of state statutes; but when the lagged variables are omitted, the dummy variable for *MITE* is also statistically significantly positive. Although the insignificance of the number of offers as an explanatory variable might be a function of its positive association with the number of statutes, tests for multicollinearity were not significant.<sup>60</sup> The significant positive sign of the coefficient on the number of statutes supports the view that the political process affecting Congress and the states is similar: when the number of new state takeover laws rises so does the number of bills introduced in Congress.

The most important evidence of the common political process for congressional bill introductions and state enactments is that the principal factor motivating political action at the state level—the presence of a large-sized target firm in the state<sup>61</sup>—also appears to be the primary impetus for congressional interest in regulating takeovers. The years of hotly-contested battles involving major corporations—the 1980s battles over Phillips Petroleum (1985), Gulf Oil (1984), TWA (1985), and Marathon Oil (1981)—are years of high congressional bill activity. Many of the battles, as well as earlier contests, were the subject of congressional hearings, often held

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estimate bills, with various combinations of statutes lagged and the *MITE* dummy when it was not used in the first stage. Each equation overall was significant (the F-statistic ranged from 4.881 to 9.341) although the  $R^2$  and adjusted  $R^2$  values were less than .33 and none of the explanatory variables were individually significant in explaining the number of bills, nor in explaining state statutes in the first stage regression. This technique is still crude, however, because the number of offers should not be treated as exogenous. I did not estimate a three-stage process that would treat offers as endogenous because of the lack of an appropriate instrumental variable for the number of offers.

60. The preferred test for multicollinearity—the singular-value decomposition test—did not evince collinearity, although the simplest tests indicate collinearity—offers, lagged offers and lagged statutes, when separately regressed on all other explanatory variables, had relatively high  $R^2$  values ( $R^2$  greater than .6). See D. BELSLEY, E. KUH & R. WELSCH, *REGRESSION DIAGNOSTICS* 85-113 (1980). Multicollinearity is not a factor, under either set of tests, in the regression model that excludes the lagged variables.

61. See *supra* note 11 and accompanying text.

without any consideration of a bill.<sup>62</sup> Furthermore, these and other takeovers of large corporations explicitly motivated Senators and Representatives from the state where the target was located to promote legislation. Besides spurring the introduction of legislation, takeovers of local firms prompt members of Congress to testify in support of other members' bills and to continue to introduce, cosponsor and testify in support of takeover regulation in subsequent sessions after the outcome of their local problem has been resolved.<sup>63</sup> This evidence lessens the significance of the lack of explanatory power of the number of offers in the regressions for the number of bills and of the weak correlation between those two variables: to the extent that a subcategory of takeover bids attract congressional attention, the total number of takeovers is irrelevant.

Examples of congressional activity motivated by local takeover battles are legion. Senators and Representatives from Oklahoma introduced legislation banning hostile takeovers of energy companies and punitively taxing greenmail payments as a consequence of T. Boone Pickens' attempt to take over Phillips Petroleum, headquartered in Bartlesville, Oklahoma, that ended in a greenmail payment

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62. E.g., *FCC Network Acquisition Approval Act of 1985: Hearing before the Sen. Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985) (CBS takeover, S. 1312); *Hearing before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 1st Sess. (1985) (TWA takeover); *Hearing before House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981) (Mobil-Marathon takeover); *Hearing on H.R. 4930 before Subcomm. on Fossil and Synthetic Fuels of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981); *Proposed Purchase of Marathon Oil Co. by Mobil Oil Co.: Joint Hearings before the Sen. Comm. on Commerce, Science, and Transportation and the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981); *Effects of Proposed Canadian Pacific Acquisition of Hobart Corp.: Hearing before the Sen. Judiciary Comm.*, 97th Cong., 1st Sess. (1981); *Proposed Tender Offer to the Copperweld Corp. by Societe Imetal: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) (hearings held in Pennsylvania and Ohio, sites of Copperweld plants) [hereinafter cited as *Hearing on Copperweld Takeover*]; *Market Performance and Competition in the Petroleum Industry: Hearings before the Special Subcomm. on Integrated Oil Operations of the Sen. Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. (1974) (Burmah Oil acquisition of Signal Oil); *Standard Oil Co. of Indiana-Occidental Petroleum Corp. Merger: Hearing before the Special Subcomm. on Integrated Oil Operations of the Sen. Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. (1974); *Hearing To Amend the Federal Aviation Act of 1958*, *supra* note 57 (controlling stock block purchases of Western Airlines by Kirk Kerkorian and of Pan American by Resorts International).

63. E.g., *Tax Aspects of Acquisitions and Mergers: Hearings before the Oversight and Select Revenue Measures Subcomm. of the House Ways and Means Comm.*, 99th Cong., 1st Sess. 595 (1985) (statement of Rep. Bonker of Wash. in support of H.R. 1100 banning junk bonds and greenmail, referring to then active hostile takeover attempt by Sir Oliver Goldsmith of major Washington employer, Crown Zellerbach). Senators Boren, Nickles and Metzenbaum, and Representatives Brooks and Seiberling, among others, have continued to sponsor and testify in favor of takeover-related bills ever since their initial efforts instigated by local contests. It should be noted, however, that some of their states, such as Ohio, have also continued to be the home of targets of hostile bids.

to Pickens.<sup>64</sup> Pickens' attempt to take over Gulf Oil, headquartered in Pittsburgh, Pennsylvania, inspired several takeover-related bills by members of the Pennsylvania delegations of the House and Senate as well.<sup>65</sup> Similarly, Mobil Oil's battle for Marathon Oil, the primary employer in Findlay, Ohio, was the source of numerous bills from Senators and Representatives of Ohio.<sup>66</sup> Members of the Kansas delegations in the Senate and House introduced, cosponsored and testified in favor of several proposals to restrict energy company mergers and acquisitions, in an effort to prevent the Texaco takeover of Getty, whose success required the divestiture of a major refining plant in El Dorado, Kansas.<sup>67</sup> Other members sponsored legislation restricting gas pipeline acquisitions because of a takeover of a major Kansas pipeline by an investment bank.<sup>68</sup> The Senators from Missouri introduced legislation restricting hostile airline acquisitions as a result of Carl Icahn's attempt to take over TWA, a major employer in Missouri.<sup>69</sup> Representative Jack Brooks of Texas intro-

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64. S. 473, 476 and 420, 99th Cong., 1st Sess. (1985) (Sens. Boren and Nickles of Okla.); H.R. 1003 and 1100, *id.* (Reps. Jones, Edwards, English and McCurdy of Okla.); H.R. 998, *id.* (Rep. Edwards). See *Corporate Mergers and Acquisitions in General, Hearing before the Sen. Judiciary Comm.*, 99th Cong., 1st Sess., 34 (1985) (statement of Sen. Nickles that the Senate bills were in response to the Phillips Petroleum takeover bid).

65. *E.g.*, H.R. 5374, 98th Cong., 2d Sess. (1984) (Rep. Coyne), see Coyne testimony, *supra* note 54 concerning origin of bill; S. 2447 and 2448, 98th Cong., 2d Sess. (1984) (Sen. Specter), see STAFF OF SENATE FINANCE COMM. 98TH CONG., 2D SESS., FEDERAL INCOME TAX CONSIDERATIONS IN OIL AND GAS COMPANY MERGERS AND ACQUISITIONS, 4 (Comm. Print 1984) (statement of Sen. Specter on origin of bills).

66. *E.g.*, S. 1926 and 1927, 97th Cong., 1st Sess. (1981) (Sen. Metzbaum of Ohio); H.R. 4930 and 5274, *id.* (Rep. Brown of Ohio); H.R. 4409, *id.* (Rep. Seiberling of Ohio). Other congressional delegation members testified at the Mobil-Marathon acquisition hearings cited *supra* in note 62.

67. S. 2589, 98th Cong., 2d Sess. (1984) (Sen. Kassebaum of Kan.); *Oil Industry Mergers: Hearings before the Subcomm. on Fossil and Synthetic Fuels and the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 12 (1984) (statement of Rep. Whittaker of Kan. in support of H.R. 5452). H.R. 5452 and H.R. 5153, 98th Cong., 2d Sess. (1984) (Rep. Florio of N.J.) were introduced with a similar purpose: the Texaco-Getty merger was going to result in closing a New Jersey refinery.

68. H.R. 4095, 98th Cong., 1st Sess. (1983) (Reps. Slattery and Glickman of Kan.); see *Gas Pipeline Mergers: Hearing before the Subcomm. on Fossil and Synthetic Fuels, House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 7 (1984) (statement of Rep. Glickman).

69. S. 1218, 99th Cong., 1st Sess. (1985) (Sens. Danforth and Eagleton of Mo.); S. 1267, *id.* (Sen. Eagleton); see *International Air Transportation Protection Act of 1985: Hearing on S. 1218 before the Aviation Subcomm. of the Sen. Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 1 (1985) (statement of Sen. Danforth that Icahn takeover of TWA was reason for bill). TWA's hub is the St. Louis Airport. TWA has a history of congressional protectors. Rep. Bosco of California introduced legislation to prohibit an airline operating under Chapter XI of the federal bankruptcy law from acquiring another airline in response to Texas Air Corporation's proposed acquisition of TWA, although his object may have been more to punish Texas Air than to help TWA. H.R. 2870, 99th Cong., 1st Sess. (1985). When he was a state legislator in California in

duced legislation to enforce uniform margin requirements against foreign investors when he was "alerted to the inequity in the stock purchase margin requirements by the experience of the Zale Corp., a Texas-based corporation with offices throughout Texas . . . that was threatened with a takeover by a Canadian company. . . ."70 Canadian Dome Petroleum's takeover of Conoco inspired similar bills by Senators and Representatives of the affected states.<sup>71</sup> The entire North Carolina delegation in the House sponsored a bill to ban hostile takeovers by foreign persons either financed by debt or made for cash if the bidder did not have all the cash in possession, to thwart the hostile takeover of a major North Carolina company, Burlington Industries, by a Canadian firm, Dominion Textile.<sup>72</sup> At the same time the North Carolina legislature passed three statutes for Burlington.<sup>73</sup>

Further support of the connection between specific hostile bids and congressional bill sponsorship is provided by a study of Senate bills introduced in 1984-1987 by Kenneth Lehn and James Jones. They found a statistically significant positive relation between the probability of a Senator introducing a bill regulating takeovers and the presence of the target of a hostile bid in his or her state.<sup>74</sup> Their finding strongly corroborates the anecdotal evidence indicating that the politics operating at the national and state levels are quite similar. In addition, the anecdotal evidence provides the direct institutional link with which to interpret Lehn and Jones' aggregate result: management of targets, invoking the specter of local employment devastation, contact their Senators and Representatives for assist-

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1981, Rep. Bosco had sponsored state legislation to aid Continental Airlines in its effort to fight off a takeover by Texas Air, then called Texas International. Texas Air apparently promised legislators that it would not move Continental's headquarters from California to Texas nor fire many employees and Bosco's bill was not adopted. Two years later, Texas Air moved the headquarters. *Government Policies on the Transfer of Operating Rights Granted by the Federal Government, Particularly Certificates of Public Convenience and Necessity and Airport Slots: Hearings before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 99th Cong., 1st Sess. 367-68 (1985) (statement of Rep. Bosco).*

70. *Acquisition of U.S. Companies by Foreign Nationals: Hearings on H.R. 1294 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 10 (1981) (statement of Rep. Brooks).*

71. S. 1429 and S. 1436, 97th Cong., 1st Sess. (Sen. Kassebaum of Kan.); *Extension of Margin Requirements to Foreign Investors, Hearings on S. 1429 and S. 1436 before the Subcomm. on Securities of the Sen. Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 3-4 (1981) (statement of Sen. Nickles of Okla. supporting bills).*

72. H.R. 2514, 100th Cong., 1st Sess. (1987).

73. *North Carolina Legislature Responds to Attempted Takeover of Burlington*, Sec. Reg. & Law Rep. (BNA) 829 (June 5, 1987).

74. K. Lehn and J.W. Jones, *The Legislative Politics of Hostile Corporate Takeovers* (manuscript 1987).

ance. But as in the politics of state statutes, labor unions have not been extremely active in the congressional politics. As tabulated in Table 5, in seventy-seven congressional hearings on takeover bills

Table 5. Witnesses at Takeover Hearings.

<u>Witness</u>	<u>No. Hearings (%)*</u>
Federal Govt. +	62 (81)
Target Management	46 (60)
Academic	37 (48)
Member of Congress	32 (42)
State or Local Govt.	23 (30)
Union Member	19 (25)
Acquiror/Raider	15 (20)
Investment Bank	15 (20)
Stock Exchange	4 (5)
Shareholder Org.	2 (3)

\* Of 77 hearings on takeover-related legislation or particular bids held from 1963 to 1987, the number with at least one witness of specified type.

+ Executive branch/agency official or employee.

or particular hostile bids held during 1963-1987, while forty-six had at least one target manager as a witness, only nineteen had a union representative or member as a witness.<sup>75</sup> Table 5 also highlights the prevalence of the collective action problem for investors as a source of the one-sidedness in congressional proposals: shareholders are the one group affected by takeovers that is nearly always absent from the witness roster, having participated in only two hearings. It is, of course, possible that other witnesses, such as raiders (present at 15 hearings), academics (37), investment banks (15), or government agencies (62), are advocates, at least in part, of shareholders' interests.

### 3. Behavioral explanations.

Despite all this congressional activity, hearings and takeover-related bills rarely result in legislation. This is consistent with research findings that the subjects of congressional hearings and

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75. The only unions that appear to be active in this context are airline unions, which testified at the hearings called on Carl Icahn's bid for TWA, *supra* notes 62 and 69, and have been lobbying to have revived and strengthened job protection provisions, as were imposed on airline mergers, friendly or hostile, in the days of regulation. See *Airline Mergers and Acquisitions: The Question of Labor Protection: Hearing before Aviation Subcomm. of the Sen. Commerce, Science, and Transportation Comm.*, 99th Cong., 1st Sess. (1985).

reports do not rank very high as priority agenda items.<sup>76</sup> One might therefore wonder why members of Congress engage so frequently in activity which appears altogether futile, and why target managers even bother with the federal route? From the congressional members' perspective, holding hearings and introducing bills on takeovers are equivalent to participating in roll call votes, performing casework, and making home appearances and speeches. These activities are forms of congressional "advertising, credit-claiming, and position-taking," which are important for reelection because they identify the incumbent with particularized benefits to constituents and popular messages associated with little issue content or controversy.<sup>77</sup> It is thus not surprising that, as Table 5 shows, many hearings have Senators and Representatives among the witnesses. Also consistent with this credit-claiming explanation of congressional activity is the bipartisan politics. As in state legislatures, in Congress state congressional delegations virtually unanimously support an individual member's takeover-related proposal.

The congressional politics on takeovers shares features with a particular form of constituent service that has been termed the "fire alarm" approach to executive branch oversight. In this approach, Congress does not sniff out fires itself but instead responds to constituents' pulling of the fire alarm box.<sup>78</sup> By calling or participating in a hearing on a takeover, members of Congress can receive credit for responding to a constituent's problem, while the constituent has borne the cost of informing the member. But despite the structural similarity, the member's efforts typically do not eliminate the cause of the constituent's complaint in this context. The low rate of actual legislation makes the benefit to managers from lobbying, and, by implication, the actual credit a member of Congress can receive, difficult to identify. However, the expenditures involved in seeking federal action are negligible. Managers may simply believe it worth

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76. J. KINGDON, *supra* note 43, at 231-32.

77. D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 49-73 (1974). An excellent example is the hearing on Societe Imetal's hostile takeover of Copperweld held in Pennsylvania during the battle, at which five congressmen were present: "It was only last Thursday that any of us in Congress realized the seriousness of Imetal to take over Copperweld. Since that time Congressman Dent, Congressman Gaydos and the subcommittee have been extremely swift and deliberate in their actions. I want also to thank Congressmen Murtha and Carney for taking this important step. . . . on Friday last I contacted the chairman of the Federal Trade Commission and the Antitrust Division of the Justice Department, demanding an investigation and saying, as I do believe, that this measure would violate the antitrust statutes and would minimize competition." *Hearing on Copperweld Takeover*, *supra* note 62, at 7 (statement of Rep. Heinz).

78. See McCubbins & Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 2 AMER. J. POL. SCI. 165 (1984).

while to cover all bases, given the large potential loss they face from a successful hostile takeover, and when the constitutionality of state laws became more uncertain after *MITE* it was all the more important to engage in such activity. It also appears that a congressional hearing has benefits besides the production of legislation: it may delay the outcome of a bid, which is a tactic that sometimes enables management to thwart a hostile offer.<sup>79</sup> In addition, even if the credit received is scant, the cost to the member of Congress of service (introducing a bill or holding a hearing) is small, while the cost of inaction is potentially large (loss of support of not only the constituent firm but also of the rest of the local business community).

This analysis is not meant to suggest that congressional efforts at takeover legislation are uniformly perceived as futile or insincere gestures. Members of Congress do not necessarily intend all of their takeover-related action to be symbolic, and, of course, federal takeover legislation has periodically been enacted. One proxy of intention is the form the proposed legislation takes, given the many options for regulation in the takeover area. For while a Senator or Representative's support for a particular bill undoubtedly entails a decision concerning a preferred regulatory strategy, the different forms of regulation come under the jurisdiction of different committees. Consequently, the legislator can adapt the regulatory approach to maximize his or her institutional influence by drafting a bill that will be forwarded to a committee on which he or she serves.

There is some empirical support for this speculation. Slightly under two-thirds (sixty-two percent) of takeover-related bills were introduced by individuals who were members of the committee to which the bill was referred; of the remainder, thirteen percent were sponsored by individuals who, in the same session, introduced at least one other takeover-related bill that went to a committee on which they served.<sup>80</sup> While we might expect the preferences of

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79. *E.g.*, *Hearing on Copperweld Takeover*, *supra* note 62, at 25 (statement of Phillip H. Smith, President and Chairman of Copperweld) (thanking Congressmen present and stating "if it hadn't been for you and the prompt response we got from you this company would have been taken over yesterday which was the run-out date for the first tender offer").

80. Seven bills were referred to two committees; in five of these cases, the sponsor was a member of one of the committees. In a random sample of bill introductions, in both houses in 1965, 1975 and 1985, 52% of the bills introduced were referred to a committee of which the sponsor was a member. In this sample, 12 bills were referred to two committees; of these, seven were introduced by a member of one of the relevant committees. The ratio of bills for which the sponsor was a member of the committee of jurisdiction to those for which the sponsor was not a member is 1.61 for the takeover bills and 1.10 for the random sample of bills. To see whether this difference is statistically significant, I computed the chi-square statistic for the contingency table of

committee members to differ from those of the whole house, the content of takeover-related bills does not vary with the sponsor's membership. Moreover, the takeover bills of committee chairmen, which presumably have a greater likelihood of passage given the institutional organization of Congress,<sup>81</sup> do not differ in kind from those directed to the committee that are introduced by committee members and nonmembers.

The data do raise a potentially puzzling question: why, particularly given the venerable congressional institution of logrolling, and the increasing pressure for federal action in the 1980s after *MITE*, was no general takeover legislation enacted?<sup>82</sup> To frame the question more broadly, the persistence of policy alternatives on the decision agenda raises the question when does an idea become one "whose time has come?" To state the obvious, there is no theory powerful enough to predict political change. Cognizant of this caveat, researchers of congressional decision-making have nonetheless identified as important variables in the timing of reform: (1) changes in presidential administration; (2) changes in the composition of Congress; and (3) shifts in national mood.<sup>83</sup>

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sponsor committee membership and bills. Its value of 3.78 just fails to be significant at the 5% level (the tabulated chi-square is 3.84). This means that by conventional statistical standards we cannot dismiss the possibility that the difference in rate of sponsorship by a committee member across the groups of bills is a matter of chance. However, we do expect that members of Congress are more likely to introduce bills that go to committees on which they sit, as the choice of committee is not random. See e.g., Rohde & Shepsle, *Democratic Committee Assignments in the House of Representatives: Strategic Aspects of a Social Choice Process*, 67 AMER. POL. SCI. REV. 889 (1973).

81. See Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J. L., ECON., & ORG. 33 (1986); Weingast & Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988).

82. We must be careful to acknowledge, however, that an important takeover statute was actually adopted during this time period—the tax reform act of 1986 ended a longstanding corporate tax provision that allowed appreciated properties to be distributed to shareholders without being subjected to the corporate level tax, and had been used profitably in hostile takeovers. Moreover, the principal loophole blunting the effect of the 1986 Act, exemption for so-called "mirror liquidation" transactions, was closed in the Omnibus Budget Reconciliation Act of 1987. While the reform will probably have a significant effect on all acquisitions, friendly and hostile, and may have a perverse, unintended effect of restricting management's ability to respond to a hostile bid by remaining independent, most practitioners and commentators view a general regulatory statute, along the lines of the Williams Act, as the more critical reform issue.

83. J. KINGDON, *supra* note 43, at 176. Examples of changes in government actors producing legislation that had been in the policy hopper for some time are airline deregulation, promoted by the newly-elected Carter Administration, and Great Society programs, such as Medicare and Medicaid, adopted after Lyndon Johnson's election which increased the number of liberal democrats in the House. *Id.* at 161, 175.



The principal reason why the substantial constituent pressure in the 1980s for federal action on takeovers did not produce major legislation is, in my estimation, that one of the most important players, the Reagan administration, was opposed to it.<sup>84</sup> The SEC Chairman throughout the period, John Shad, was a vigorous proponent of the Administration's position in favor of a deregulated market. Agency heads are quite important in successful policy initiation,<sup>85</sup> and the takeover field has been no exception. The Williams Act was vigorously supported by then SEC Chairman Manuel Cohen, just as the Carter Administration's Justice Department enthusiastically supported the Hart-Scott-Rodino Act. This fact no doubt goes some way in explaining the popularity of federal government personnel as witnesses in the takeover-related hearings, for without agency support, congressional policy objectives can be undermined by their inadequate or unenthusiastic implementation.

With the relevant regulatory agency and the President opposed, production of a takeover statute would clearly have been viewed by most members of Congress as a losing proposition, making efforts at logrolling unlikely to be pursued. A new administration may, correspondingly, present a window of opportunity for those advocating further legislative action on hostile takeovers. For instance, the Democratic presidential candidate, Michael Dukakis, apparently wants to "control the merger and acquisition binge."<sup>86</sup> In addition, Nicholas Brady, a trusted advisor of the Republican candidate, George Bush, has advocated increased regulation of takeovers,<sup>87</sup> and the new SEC Chairman David Ruder is much more favorably disposed to regulation than Chairman Shad.<sup>88</sup> However, there are important institutional features of the Presidency that temper predicted change in policy from the 1988 election: unlike members of Congress, the President is elected by and represents all citizens and is thereby considered to be more removed from pork barrel politics.<sup>89</sup> The Reagan Administration's opposition to takeover regulation could be an instance of the operation of this institutional factor.

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84. E.g., COUNCIL OF ECONOMIC ADVISERS ANNUAL REPORT, 187-216 (1985) *printed with ECONOMIC REPORT OF THE PRESIDENT* (1985).

85. J. KINGDON, *supra* note 43.

86. *The Dukakis Candidacy*, Wall St. J., Apr. 21, 1988, at 30, col. 1.

87. See *Tax Treatment of Hostile Takeovers: Hearing on S. 420, S. 476, and S. 632 before Taxation and Debt Management Subcomm. of Senate Finance Comm., 99th Cong., 1st Sess.* (April 22, 1985) [hereinafter *Tax Treatment of Hostile Takeovers*].

88. Gigot, *Reaganite Regret: SEC Chief Is Just a Regulator Guy*, Wall St. J., July 8, 1988, at 12, col. 3.

89. For an excellent review of the political science literature endorsing this view of the presidency see Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1603-07 (1988).

B. *Public Opinion on Takeovers: the Saliency of the Issue.*

An important background factor that can strengthen the executive branch's resistance to congressional pork barrel on takeover legislation is the third factor appearing in the policy initiation literature, national mood. A conventional measure of national mood is public opinion polls.<sup>90</sup> In a comprehensive study of public opinion toward business and government, Seymour Lipset and William Schneider found two principal themes that were persistent over time and that provide a helpful context for interpreting public opinion on takeovers.<sup>91</sup> First, the public is distrustful of bigness in general, both in business and in government. For example, the public is uniformly more supportive of business, and more hostile toward government regulation, when questions refer to "small business" or "business", rather than "big business."<sup>92</sup> Similarly, the public expresses a decreasing degree of confidence in government as its size increases from local, to state, to federal.<sup>93</sup> Second, the public consistently expresses satisfaction with current levels of regulation, desiring neither to expand nor contract it. However, while the public generally opposes changing the level of regulation, there is more support for increasing regulation when the purpose is consumer protection (which includes regulation to prevent firms from charging higher prices or from polluting), than when the regulatory object is "telling people how to run their business."<sup>94</sup>

Attitudes toward takeovers are stable not only across polls, but also over time and across different classes of respondents. Tables 6-12 tabulate responses to questions concerning corporate takeovers and mergers included in public opinion polls over the past twenty-five years.<sup>95</sup> Given the constancy in responses over the polls, public

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90. Kingdon did not find public opinion poll data particularly useful in his study of national policymaking as polls did not provide direct information on the decision agenda issues of interest to him. J. KINGDON, *supra* note 43, at 231.

91. S. LIPSET & W. SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* (rev. ed. 1987).

92. *Id.* at 81-88, 168, 240, 255-56.

93. *Id.* at 82-83.

94. *Id.* at 237, 245-48.

95. The discussion in the text draws on 24 polls. The appendix provides the polling organization, polling beginning and ending dates, interview method, and sample size, for each poll. Twenty-three of the polls were located through a computer search of the poll database of the Roper Center for Public Opinion Research at the University of Connecticut and the American Public Opinion Index. I obtained separately a poll commissioned in 1988 by the Coalition to Stop the Raid Against America from Steven Wallman, their counsel. He forwarded the results to me independently of my research on this paper, and he graciously permitted me to include it in this discussion. The earliest poll I found through the Roper Center was a 1954 poll by the Opinion Research Corporation. the rest of the polls were conducted after 1980. The sampling errors of

opinion on takeovers can be summarized at the outset as follows: (1) a majority of the public is indifferent to, and at best casually informed about, takeovers; (2) a decisive plurality, and sometimes a majority, of the public has a negative opinion of takeovers; and (3) the public identifies shareholders and executives as winners, and workers as losers, in takeovers.

The first important finding, then, is that the public's judgment of takeovers is based on quite limited information and interest. Table 6 tabulates responses to questions concerning how informed respondents consider themselves to be on takeovers. Well over three-quarters of respondents express little knowledge of, or interest in, news on takeovers.<sup>96</sup> Of itself, this phenomenon is not particularly unusual. It is highly plausible that for most members of the public it is not cost justified to expend much effort at obtaining information about corporate takeovers, for takeovers are unlikely to be an issue of importance to them.<sup>97</sup> Moreover, even when the stakes are far higher in general elections, citizens need not be informed to vote their interest: they may be able to use political party labels as a proxy for determining which candidate to support,<sup>98</sup> or they may be able to infer from the preferences of the informed how they, the uninformed, should vote.<sup>99</sup> But the public's limited knowledge and interest in takeovers surely explains why in all of the polls, a sizeable proportion of respondents either choose answers indicating indifference to mergers and their effects or choose none of the offered responses.

A question asking respondents to "describe their feelings when they think about the mergers or proposed mergers of very large business corporations," provides a good gloss on public opinion because it was repeated in four Roper polls from 1981 to 1985. Table 7 tabulates the proportion of respondents selecting each choice

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the polls range between 3 and 5% (the larger samples have smaller errors). Two polls (those conducted by Penn & Schoen Associates) concerned takeovers exclusively; the rest were questions regarding takeovers or mergers included in general opinion surveys.

96. The 1988 Penn & Schoen survey included only respondents who stated that they had "heard something" about hostile takeovers. However, we do not know the source, extent, or accuracy of their knowledge on hostile takeovers.

97. Few individuals will ever be directly involved in a takeover. For example, over 80% of the respondents in a 1986 ABC News poll for the Washington Post had never worked for a firm that had been on either side of an acquisition. In addition, few Americans hold stock directly; those who hold it indirectly (through shares of mutual funds or pension plans) neither tender the shares in a takeover nor vote the shares in a merger.

98. For a succinct summary of the literature see Fitts, *supra* note 89, at 1607 n.130.

99. R. McKelvey & P. Ordeshook, *Information, Electoral Equilibria, and the Democratic Ideal* (manuscript 1986).

Table 6. Poll Responses (%): Knowledge about Mergers.

1. 1986, Opin. Res. (heard or read about large mergers)			
Great deal		12	
Fair amount		25	
Practically nothing		29	
Don't know/refused		33	
2. Roper (follow in news)			
	1985	1984	1981*
Follow closely	17	22	19
Follow casually	42	40	35
No attention/don't know	40	38	46

\* follow in news attempts by Seagrams, Mobil, Texaco, Dupont and others to buy Conoco.

Table 7. Poll Responses (%): Feelings on Mergers of Very Large Business Corporations (Roper polls).

	1985	1984	1982	1981
Absolutely delighted	1	1	.5	.5
Pleased	3	5	2	3
Somewhat satisfied	7	9	9	8
No real feelings	45	32	39	48
Somewhat dissatisfied	24	25	30	32
Angry	9	9	8	4
Boiling mad	2	4	2	1
Don't know	10	16	9	13

from seven possible choices and the proportion not making a selection ("don't know/no answer"). The choice of the largest group of respondents is consistently "no real feelings one way or the other." The second largest group's choice is consistently "somewhat dissatisfied." The proportion of respondents choosing one of the three positive responses is about the same as the proportion selecting the two most negative responses, and as the percentage not responding. The proportion of respondents having negative views is therefore about twice as large as the positive. When the responses are examined for cross-sectional variation in the respondents' income group, occupation, education, and union membership in each poll, there are no major deviations from the aggregated response.

Hostility or indifference to corporate acquisitions is persistent in all polls, whether respondents are asked for their views on the consequences of takeovers for the nation or for specific individuals or groups. For example, as Table 8 indicates, when asked whether mergers are good or bad for the economy, negative responses out-

Table 8. Poll Responses (%): Mergers and the Country/Economy.

	Good	Bad	No Diff.	Don't Know
1. 1987, ABC/Money Mag. (large merger, economic health)	20	36	31	13
2. 1987, Harris/Bus.Wk. (country)	16	45	34	—
3. 1987, NBC/Wall St.J. (nation's economy)	35	46	5#	14
4. 1986, ABC/Wash.Post (economic health)	24	37	31	8
5. 1984, Roper (large oil cos., country as a whole)	30*	52*	—	18
6. 1988, Penn & Schoen/Coal (hostile takeovers, U.S.)	13	63	—	22
	Beneficial	Hinders	No effect	Don't Know
7. 1986, Opin. Res. (large mergers, economic growth)	29	36	11	24
8. 1985, Opin. Res. (same as 7.)	25	41	16	17
9. 1983, Opin. Res. (same as 7.)	21	53	14	12
	Disagree	Agree	Don't Know	
10. 1985, Opin. Res. (reduce growth of productivity)	31+	60+	9	
11. 1983, Opin. Res. (same as 10.)	35+	57+	8	
12. 1985, Penn & Schoen/Tex. (good because make economy more efficient)	45	38	18	

# Voluntary responses.  
 \* These entries collapse "very and mostly" responses.  
 + These entries collapse "strongly and somewhat" responses.

number the positive by a wide margin. However, the proportion of respondents choosing an indifferent answer (mergers make "no difference;" mergers have "no effect") is not far behind the proportion expressing a negative view. The sizeable percentage of respondents believing that mergers are a problem for the economy is quite likely related to the Lipset and Schneider finding of the public's distrust of big business and dislike of corporate concentration. Many of the questions refer to "large mergers," and a well-known difficulty in polling is that responses are extremely sensitive to a question's wording.<sup>100</sup> The negative responses persist when the adjective

100. See generally F. FOWLER, SURVEY RESEARCH METHODS (1984). The comparability of the higher negative responses in the 1988 Penn & Schoen poll must be viewed with

"large" is omitted, but the word merger itself may conjure up the image of a large corporate entity.<sup>101</sup> This particular reading of public opinion polls, that apprehension over corporate concentration provides the backdrop for public opinion on mergers, is consistent with statements of concern about big business and industrial concentration in congressional hearings on takeovers.<sup>102</sup> It suggests that the burden of proof in policymaking is being placed on those supporting acquisitive activity, for it is associated in the public's mind with a decline in competition.

When the questions about mergers are phrased more concretely as affecting individuals than the state of the economy, such as the effect of takeovers on "average Americans" or on product prices and quality, as tabulated in Table 9, the proportion of the public with a negative view, ranging between twenty and forty percent, is still greater than the positive. But the proportion responding that mergers have no effect, ranging from thirty-five to forty-eight percent, is frequently higher than the proportion giving negative answers. The percentage with a negative view drops even more dramatically, to less than one-third, when the question concerns the effect of mergers on customers of the acquired entity, but the percentage of respondents who view mergers as having positive effects is about the same. In addition, the percentage of respondents with favorable views of mergers in these questions is substantially lower than the proportion believing that mergers are good for the economy. It is hard to explain the discrepancies between beliefs on how consumers are affected by mergers in contrast to the effect on the country as a whole. While, as Lipset and Schneider discuss, individ-

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some caution as well. The Penn & Schoen respondents were asked about "hostile takeovers," a far less neutral term than "mergers" or "large mergers." But it would be hard to sort out public opinion toward hostile takeovers without using that explicitly pejorative phrase; from this perspective, the attitudes to mergers appear to understate the magnitude of negative opinion that would be expressed concerning "hostile" mergers. In this regard, incumbent management has won the day in public relations: public sentiment would undoubtedly differ if friendly mergers were called "collusive acquisitions" and hostile takeovers called "independent acquisitions."

101. A conglomerate view of mergers is supported by the response to an Opinion Research Corporation poll question asking whether mergers result in executives being responsible for running companies in fields in which they have little knowledge or expertise: 65% in 1983 and 58% in 1985 agreed with that statement. The new entity, however, need not be larger. The 1980s is the age of the "bust-up" takeover, in which the target corporation is streamlined, sheds divisions, and ends up smaller in asset size than before the acquisitive transaction.

102. *E.g.*, *Market Performance and Competition in the Petroleum Industry Hearings*, *supra* note 62, at 1455 (statement of Sen. Jackson); *Interfuel Competition: Hearings on S. 489 before the Antitrust and Monopoly Subcomm. of the Sen. Judiciary Comm.*, 94th Cong., 1st Sess. (1975); *Tax Treatment of Hostile Takeovers*, *supra* note 87 (statement of Sen. Domenici).

Table 9. Poll Responses (%): Mergers and Consumers.

	Good	Bad	No Diff.	Don't Know
1. 1986, ABC/Wash. Post (average American)	17	35	42	6
2. 1986, Roper Org. (large merger, product prices)	12*	41*	35	11
3. 1986, Roper Org. (very large merger, product quality)	19+	20+	48	13
4. 1985, Roper Org. (consumers of merged entity)	16#	26#	38	20
5. 1983, Roper Org. (same as 4.)	19#	22#	39	20

\* Good=lower prices response; bad=higher prices response.

+ Good=better quality response; bad=worse quality response.

# Good=benefits response; bad=hurt response.

uals are generally more optimistic about their personal future than about the country's prospects,<sup>103</sup> the differences here are not systematically more optimistic, nor are the relevant variables even arguably within the respondents' control. These mixed responses may indicate that the public is generally confused about mergers and their effects. Confusion in public perceptions is not surprising as the benefits of corporate mergers are a subject of controversy across academic disciplines, with financial economists identifying substantial increases in value at the time of an acquisition while industrial organization researchers find losses in the years after the transaction.<sup>104</sup>

Additional interesting findings concern the public's perception of who wins and loses in corporate acquisitions, as detailed in Tables 10 and 11. The responses reflect general ignorance of the findings in the economic research on takeovers. A substantial majority—over sixty percent—identify shareholders and officers of acquiring firms as benefiting from a merger, but only a plurality—roughly forty-five percent—believes that shareholders of the acquired firm benefit. Yet empirical research has conclusively shown that shareholders of acquired firms benefit most substantially—the average abnormal percentage stock price return over 1962-1987 is thirty-

103. S. LIPSET & W. SCHNEIDER, *supra* note 91, at 126-29.

104. Compare Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983) with D. RAVENSCHRAFT & F. SCHERER, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY* (1987).

Table 10. Poll Responses (%): Mergers and Employment.

	More	Fewer	No Eff.	Don't Know
1. 1986, Roper Org. (large mergers, number of jobs)	17	42	31	10
	Disagree*	Agree*	Don't Know	
2. 1985, Opin. Res. (mergers result in too many layoffs)	29	67	4	
3. 1983, Opin. Res. (same as 2.)	35	59	6	
	Good	Bad	No Diff+	Don't Know
4. 1987, NBC/Wall St. J. (are mergers good or bad for people who work for cos. involved?)	33	48	5	14
	Lose jobs	Not lose jobs	Don't Know	
5. 1988, Penn & Schoen (hostile takeovers, cause people to. . .)	71	22	7	
	Agree	Disagree	Don't Know	
6. 1985, Penn & Schoen (disrupt business and cause communities to lose jobs)	58	34	8	

\* Combines separate responses of "strongly" and "somewhat" disagree and agree respectively.

+ Voluntary response.

two percent—while the evidence of gains to acquiring shareholders is inconclusive.<sup>105</sup> More important, a majority of respondents believe that acquisitions reduce employment. Approximately forty percent believe that employees of the acquired firm are hurt by a merger and thirty-five percent believe that officers of the acquired

105. M. Bradley, A. Desai & E.H. Kim, *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. Fin & Econ. 3 (1988); see generally Jensen & Ruback, *supra* note 104; Jarrell, Brickley & Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSPECTIVES 49 (1988). While many studies find acquiring firms earn on average zero abnormal returns and some find abnormal positive returns, see Jarrell, Brickley & Netter, *supra*; Jensen & Ruback, *supra* note 104; Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 191 n.45 (1988) (citing additional studies), others find negative returns, see Bradley, Desai & Kim, *supra* (in 1980s acquiring firm shareholders have averaged an abnormal return of -2.79%); Jensen & Ruback, *supra* note 104; Jarrell, Brickley & Netter, *supra*; and sources cited in Schwartz, *supra*.



firm are hurt. This perception of the public is odd. For there is no empirical evidence that acquisitions systematically result in greater job loss than would occur in the absence of the takeover, although turnover at the very top is higher after a contested bid.<sup>106</sup>

The public's perception that mergers reduce jobs is, of course, in accord with the concern of many legislators. It also may be a source of the overall negative attitude toward mergers, because public confidence in institutions shifts with unemployment levels.<sup>107</sup> The puzzling aspect, that public opinion on takeovers appears to be independent of the actual consequences of takeovers, might be explained by what social psychologists call the "availability heuristic," that in judging the relative frequency of an event, such as layoffs after a takeover, people tend to be influenced by the accessibility of the event in their cognitive processes, even though accessibility may be correlated with factors unrelated to the event's objective frequency.<sup>108</sup> For example, news of a plant closing following a takeover may be vividly remembered and assimilated as corroborating evidence on the negative consequences of acquisitions while a takeover in which no employee was fired might not provide disconfirming evidence because such an acquisition is not dramatic enough to register with the observer. To the extent that social psychological research has found that subjective availability affects judgments of causality,<sup>109</sup> the more vividly remembered takeover resulting in unemployed workers may disproportionately influence public opinion on mergers. If such an inference heuristic operates, we would further expect a more negative view of hostile takeovers than friendly acquisitions. Because both sides favor a friendly merger, there is little attendant publicity, or primarily positive press emanating from management concerning the event, which will make such an event less vivid or cognitively available than a hostile takeover in which the management of the target of the unwanted bid generates intensely vocal negative publicity.

The opinion polls, then, provide a clue as to why takeover-related legislation, when proposed or adopted, is so one-sided against offers: the public, which is generally uninterested in the subject, is ig-

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106. See Address by Joseph A. Grundfest, "Job Loss and Takeovers," University of Toledo College of Law, March 11, 1988; Brown & Medoff, *The Impact of Firm Acquisitions on Labor*, CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 9 (A. Auerbach ed. 1988); K. J. Martin, *Firm Performance and Managerial Discipline in Contests for Corporate Control* (manuscript 1986)

107. S. LIPSET & W. SCHNEIDER, *supra* note 91, at 61-66.

108. See R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18-19 (1980).

109. *Id.* at 21-22.

Table 11. Poll Responses (%): Merger Winners and Losers.

	Benefits	Hurt	Not Much Aff.	Don't Know
<b>Target Employees</b>				
1985 Roper	15	42	24	19
1983 Roper	16	39	26	19
<b>Target Officers</b>				
1985 Roper	28	34	17	20
1983 Roper	27	36	18	19
<b>Bidder Employees</b>				
1985 Roper	31	18	35	17
1983 Roper	30	14	39	17
<b>Bidder Officers</b>				
1985 Roper	61	6	15	17
1983 Roper	58	7	19	17
<b>Target Shareholders</b>				
1985 Roper	46	19	16	20
1983 Roper	44	19	17	20
<b>Bidder Shareholders</b>				
1985 Roper	64	6	14	16
1983 Roper	62	6	16	16
<b>Target Consumers</b>				
1985 Roper	16	26	38	20
1983 Roper	19	22	39	20
1986 Opin. Res. (Group)		Hurt most		Benefits most
Corp. Executives		6		36
Employees		50		4
Stockholders		4		41
Customers		10		2
Public		18		8
All about the same(vol.)		1		1
Don't Know		11		8
To what extent are interests other than stockholders' taken into account when a merger is considered?				
	Great extent		11	
	Fair extent		36	
	Only very little		34	
	Not at all		10	
	Don't Know/refused		9	
1985 Penn & Schoen/Tex.: only financial manipulators, bankers and lawyers benefit from mergers:				
Agree	37	Disagree	51	Don't Know 12

norant of who actually wins and loses from takeovers and the inference heuristic operating in such a low-saliency context favors target management. This situation creates an environment congenial for regulation. There are opinion polls that measure directly the sentiment for takeover legislation, which are consistent with such an assessment. As tabulated in Table 12, a majority of the public supports government regulation of hostile takeovers. In a May 1987 Louis Harris poll for Business Week, sixty-four percent of respondents favored "new government restrictions" on hostile takeovers, although in the same poll only forty-five percent had responded that takeovers were bad for the economy. Similarly, in a March 1985 Opinion Research Corporation poll, sixty-five percent of respondents agreed that Congress should limit hostile takeovers and greenmail.<sup>110</sup> In the same poll, fifty-four percent agreed that government should limit mergers, takeovers or acquisitions.<sup>111</sup>

The federalism aspect of takeover regulation is the focus of a 1988 Penn & Schoen poll for the Coalition to Stop the Raid Against America, in which respondents were asked to choose between various forms of state regulation of hostile takeovers or state provisions permitting firms to block takeovers, and federal government preemption of the state action. Over half of the respondents chose state regulation over federal intervention.<sup>112</sup> The Lipset and Schneider study again provides a helpful interpretive gloss. The

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110. In this poll, 32% chose the response "strongly agree" and 33% chose the response "somewhat agree." These opinions may reflect a desire for "balanced" legislation. But as discussed earlier, *supra* note 42, whether a greenmail prohibition is a regulation of target management or hostile bidders is ambiguous. The responses favoring regulation of both hostile bids and greenmail are, therefore, not necessarily balanced or inconsistent, although to the extent that they are inconsistent, they are further evidence of the public's general ignorance of the takeover phenomenon.

111. Of those surveyed, 28% "strongly agreed" and 26% "somewhat agreed". This data, that the public supports restricting hostile takeovers, could be viewed as consistent with the general objection, which Lipset and Schneider report, *see supra* text and accompanying note 94, to regulation interfering with the running of business operations. In the March 1985 Opinion Research Corporation poll, 54% of respondents agreed that companies were "forced to devote too much effort to avoid hostile takeovers." To the holder of such an attitude, regulation that reduces hostile takeovers might not be seen as interference with the operations of business. But this effort at smoothing the conflict between the data on attitudes toward regulation in general and toward hostile takeovers in particular is, in my opinion, too heroic a rationalization to be given much weight. The support of regulation is more likely indicative of a desire to curb the "bad" behavior connoted by the pejorative term "hostile" takeover.

112. As Table 12 indicates, the largest percentage in the Penn & Schoen poll supporting the states (79%) was in response to a question phrasing the state action as protecting shareholder rights. Questions on state action permitting boards to take various defensive tactics all have lower margins of support (under 60%).

Table 12. Poll Responses (%): Government Regulation of Takeovers.

1. 1987, Harris/Bus.Wk., restrictions on hostile takeovers:			
	Favor	64	
	Oppose	30	
	Not sure	6	
2. 1985, Opin.Res., Congress should limit hostile takeovers and greenmail:			
	Strongly disagree	11	Strongly agree 33
	Somewhat disagree	14	Somewhat agree 32
	Don't know/no response	10	
3. 1985, Opin.Res., in free economy govt should not do anything to limit takeovers:			
	Strongly disagree	28	Strongly agree 18
	Somewhat disagree	26	Somewhat agree 22
	Don't know/no response	6	
4. 1982, Harris/Atl.Rich., should govt forbid mergers that reduce competition:			
	Should	50	
	Should not	43	
	Not sure	7	
5. 1988, Penn & Schoen, states should pass laws [ ], fed. govt. should stop states from doing so; which position is closer to your view?			
		States	Fed Not sure
	[making takeovers more difficult]	66	25 9
	[letting shrs approve a takeover]	79	14 7
	[letting bd make takeover harder]	59	30 11
	[permitting issuance of poison pill to block takeover]	58	27 14
	[permitting issuance of dual class stock to block takeover]	56	29 14

strong support for state regulation in the Penn & Schoen survey could well be a function of the public's greater trust in state rather than federal government, as well as of the public's dislike of hostile takeovers. I would not make too much out of the Penn & Schoen poll responses because the poll did not include as a possible response, no government regulation. In addition, the wording of the questions is troubling, for they imply that the states are protecting the freedom of shareholders and corporations to choose to engage

in defensive tactics. However, given the responses in other polls, if Penn & Schoen had asked for views on the different forms of state takeover regulation without the juxtaposition of federal intervention, my hunch is that a majority of respondents would still have supported state regulation.

The 1988 Penn & Schoen poll provided cross-sectional information on respondents' direct ownership of stock. Majorities of both shareholder and nonshareholder respondents favored state regulation. This is an interesting finding, again placing respondents' opinions at odd with empirical research, because several studies have documented negative stock price effects of state takeover statutes and poison pill defenses, which were the subject of the poll questions.<sup>113</sup> The responding shareholders' support of regulation could indicate ignorance. The stock price effects are driven by the expectations of the informed, and in particular, institutional investors, who are unlikely to be well-represented in a poll based on a random sample of the population. A random sample of shareholders is likely to underrepresent informed shareholders, since it is larger shareholders—particularly institutions—who will be the more informed investors and most shareholders (most members of the public) own very few shares. Indeed, in a poll of relatively well-informed individuals, a poll of security analysts, a majority of respondents favored federal action to stop the states from regulating takeovers.<sup>114</sup> However, the Penn & Schoen responses may also be evidence that some shareholders prefer to trade off the decreased likelihood of a takeover bid, the likely result of state regulation, for the statutes' other effect, a higher premium should a bid occur. Such explanations are consistent with the widespread approval by shareholders of shark repellent amendments to corporate charters that raise the cost of a hostile takeover.

The lack of interest in, and knowledge about, takeovers on the public's part suggests that perceptions are not well-formed and thus potentially malleable. In such a setting, it is possible that the public can be educated on the beneficial effects of takeovers, and a changed, positive sentiment may breed an environment for legislators, or at least for the executive branch, more resilient to particu-

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113. Ryngaert & Netter, *Shareholder Wealth Effects of the Ohio Antitakeover Law*, 4 J. L., ECON., & ORG.— (forthcoming 1988); L. Schumann, *State Regulation of Takeovers and Shareholder Wealth: The Effects of New York's 1985 Takeover Statutes* (manuscript 1986); J. G. Sidak & S. Woodward, *supra* note 25; Office of the Chief Economist of the SEC, *The Effects of Poison Pills on the Wealth of Target Shareholders* (Oct. 23, 1986).

114. *See supra* text and note 6 (1988 New York Society of Security Analysts' membership survey).

larized constituent demands for takeover regulation. There is some support for this conjecture. Individuals with experience of mergers have a more favorable attitude toward acquisitions than the public at large. In a May 1986 poll conducted by ABC News for the Washington Post, of the seventeen percent who had been employed by a company involved in a merger, seven percent stated that the merger was good for the company, three percent said it had no effect and the remaining six percent said it was bad for the company. Mirroring those responses, four of the seventeen percent stated that the merger was good for themselves, seven percent said they had not been effected, and six percent said it was bad for themselves.

Lipset and Schneider are skeptical of the efficacy of educational efforts at changing negative opinions toward business because they believe that some attitudes toward business are an ideological commitment. In discussing public attitudes toward business profits, they note that surveys find the public believes that business profits are too high but the public also incorrectly calculates profits, producing a highly exaggerated figure.<sup>115</sup> But Lipset and Schneider reject the notion that providing the public with information on the proper way to calculate profits will alter public opinion; they assert instead that hostility to business profits is a "reflection of an [anti-business] attitude," that is self-interested or ideologically-based.<sup>116</sup> I am dubious of their explanation. The public may be slow to update its prior opinion upon receiving contradictory information, but there is no evidence that it does not update its beliefs. The takeover issue provides ready examples for testing the proposition: the hostile view of takeovers emanating from the public's suspicion of size and fear of concentration should be mitigated by information that hostile bidders profit from selling off significant divisions of targets and have, in fact, played an important role in the deconglomeration of American industry. In addition, publication of the empirical findings of who wins and loses in takeovers, and a campaign to increase the cognitive availability of the positive effects of acquisitions should affect public opinion.

There is, of course, an important feasibility problem with an educational agenda: who will pay for the time and expense of informing the public? The likely candidates are institutional investors, for

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115. S. LIPSET & W. SCHNEIDER, *supra* note 91, at 176-80, 361-64.

116. *Id.* The position on information in the text may not be strictly inconsistent with Lipset and Schneider's view. My contention is that the public lacks information on what its self-interest in takeovers is, and in the business profits example, Lipset and Schneider suggest that the self interest of the members of the public expressing a hostile view on profits conflicts with the interest of business.

holding larger blocks of stock than individual investors makes the benefit closer to the cost of organizing to stop legislation that would restrict takeovers.<sup>117</sup> Acquirors also have an interest in educating the public, and are thus another source of organizational entrepreneurs. In recent years institutional investors have begun to organize, establishing associations to share information on proxy voting positions and to "protect their rights as shareholders," as have some corporate raiders.<sup>118</sup> These investors have gone beyond opposing shark repellent amendments both to begin introducing shareholder proposals requesting that management stop engaging in defensive tactics such as issuing poison pills, and to coordinating with other institutions on the proxy votes.<sup>119</sup> The step after organization on policy issues at the individual firm level is organization at the state or national legislation level. The more states expropriate shareholder wealth through takeover statutes benefiting other interest groups, the greater will be the individual and group benefits from organizing.

#### CONCLUSION

This Article contends that the best predictive evidence—the content of takeover-related bills over the last twenty-five years—suggests that were Congress to legislate further on takeovers, the most probable result would be greater restriction of bids. Although Congress moves more slowly to regulate takeovers than the states, this appears to be more a matter of higher coordination costs and lower issue saliency rather than differences in the political process. While there are limits to generalizing from a case study of takeover regulation, one safe conclusion is that we must be more careful in drawing the implications for policymaking of the traditional externality analysis of federalism. My data indicate that, although the analysis may be right as to direction—the states are subject to a negative externality that can be internalized at the federal level—the magnitude of

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117. See, e.g., Borges, *Anti-Takeover Measures Protect Management*, Hartford Courant, Apr. 10, 1988, at B3 (Conn. state treasurer, in charge of state pension funds, educating public by editorial against proposed Indiana-type takeover statute).

118. See *Pension Fund Trustees Form Council*, Wash. Post, Jan. 25, 1985, at D1; *Institutional Investors Join Forces for Clout*, Wash. Post, May 12, 1985, at F1. One raider, T Boone Pickens, has formed his own lobbying group, the United Shareholders Association, which distributes a newspaper flagging for its readers, among other items, introductions in state legislatures and Congress of bills regulating takeovers and which lobbied against Delaware's second generation takeover statute. See *Appearances Likely to Prove Deceiving When It Comes to T. Boone Pickens*, Wall St. J., Aug. 22, 1986, at 6, col. 1; Sontag, *supra* note 14.

119. See *Holder Resolutions Against Poison Pills Win More Support at Annual Meetings*, Wall St. J., May 13, 1988, at 4, col. 2.

any internalization effect is very small relative to the other forces influencing federal legislators. In this regard, federal preemption of state takeover regulation is a problematic policy, as the hypothesized benefits of avoiding state competition will not be realized, but the costs of a federalized corporation law will.

The low saliency of takeovers as an issue for most voters, evidenced by the public's widespread lack of interest and knowledge concerning corporate acquisitions, most likely also contributes to Congress' one-sided yet dilatory progress toward takeover regulation. Not many people care about the problem and by the time Congress can act, the fire—a particular hostile bid—is out. Low visibility issues provide lobbyists with a large voice in policymaking because legislators can satisfy the most concerned parties with little personal cost, as evidenced by the speedy, near-unanimous passage of state takeover statutes. The public opinion poll data reinforce the prediction that were Congress to act, it would not be able to internalize fully the costs of takeover regulation, and it would behave in a similar fashion to the states. Given public attitudes toward and ignorance about takeovers, the policy recommendation of this Article is that advocates of preemption might best serve their cause by seeking to educate the public concerning the theoretical and empirical findings on the beneficial effects of takeovers and a competitive market for corporate control. Otherwise they will, in all likelihood, be sorely disappointed in the legislation that is produced.



## Appendix

	<u>Polling Organization</u>		<u>Polling Dates</u>	<u>Method</u>	<u>Size</u>
1)	ABC News; Money Magazine	1987	Mar.26-Apr.5	tel	500
2)	ABC News; Washington Post	1986	May 15-19	tel	1506
3)	CBS News; New York Times	1986	Jan. 19-23	tel	1581
4)	Louis Harris & Assocs. Business Week	1987	May 8-12	tel	1250
5)	Louis Harris & Assocs. Business Week	1985	Mar. 2-5	tel	1256
6)	Louis Harris & Assocs. Atlantic Richfield	1982	Oct. 15-26	tel	1252
7)	NBC News; Wall Street Journal	1987	Mar. 12	tel	1198
8)	Opinion Research Corp.	1986	Jul. 11-14	tel	1009
9)	Opinion Research Corp.	1985	Mar. 22-28	tel	1005
10)	Opinion Research Corp.	1983	Jan. 3-8	tel	1003
11)	Opinion Research Corp.	1954	Aug.23-Sep.3	per	564
12)	Penn & Schoen Assocs. Texaco (TX only)	1985	Dec. 1-2	tel	900
13)	Penn & Schoen Assocs. Coalition to Stop the Raid Against America	1988	Feb. 13-14	tel	800
14)	Public Policy Analysis Group; L.A. Times; N.Y.S.E.; U.C.L.A. Grad. Mgmt. School	1985	Jan. 2-14	tel	1017
15)	Roper Organization	1986	Feb. 8-22	per	1993
16)	Roper Organization	1985	Aug. 17-24	per	1996
17)	Roper Organization	1985	Mar. 23-30	per	2000
18)	Roper Organization	1985	Feb. 4-23	per	2000
19)	Roper Organization	1984	Aug. 11-18	per	2000
20)	Roper Organization	1984	Jul. 7-14	per	2000
21)	Roper Organization	1984	Apr. 18-28	per	2000
22)	Roper Organization	1983	Feb. 12-26	per	2000
23)	Roper Organization	1982	Oct. 23-30	per	2000
24)	Roper Organization	1981	Aug. 15-22	per	2000

tel = telephone interview

per = personal interview

