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FLORIDA TAKEOVER LAW: CONTROL-SHARE ACQUISITIONS

ROBERT C. RASMUSSEN* AND JEFFERY M. FULLER**

Under Florida's new control-share acquisition law, a shareholder's right to vote will be determined in certain circumstances by a vote of the other shareholders. Merrs. Rasmussen and Fuller contend that the commerce clause precludes the law's interference with interstate commerce, that the law might be preempted by the Williams Act, and that the law's validity is questionable on other constitutional grounds. The authors also suggest answers to the many questions they raise regarding ambiguities in the law, and offer advice for both potential targets and stock acquirers on how to comply with the law.

THE STORM of corporate takeover activity during the last twenty-five years has generated a wave of state and federal laws.¹ In particular, target companies have sought shelter from hostile tender offers and state legislatures have responded with a variety of anti-takeover laws.² This Article reviews the regulation of corporate takeovers in Florida under the "control-share acquisition" provision of the Florida General Corporation Act.³ This statutory provision is one of two corporate laws enacted as of July 2, 1987, to regulate corporate takeovers in Florida.⁴

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1. See 9 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 73 (1987).

2. *Id.* Many state takeover laws were the result of pending hostile takeovers of significant local businesses. For example, Minnesota convened a special session of its legislature to strengthen its takeover laws when the Dart Group initiated a takeover of Dayton Hudson Corp., a local department store. Wall St. J., June 23, 1987, at 12, col. 1. Indiana adopted its takeover law to respond to a possible hostile takeover of Arvin Industries, Inc. *Id.*, July 1, 1987, at 1, col. 6. Washington passed its law to protect Boeing Co. from a threatened bid. Cahan, *States vs. Raiders: Will Washington Step In?*, BUS. WK., Aug. 31, 1987, at 56. Florida's new takeover law is no exception and was enacted to protect Harcourt Brace Jovanovich, Inc., a significant business headquartered in Orlando, Florida. Labaton, *States Protect Merger Targets*, N.Y. Times, Aug. 24, 1987, at 18, col. 1.

3. FLA. STAT. ch. 607 (1987).

4. Ch. 87-257, 1987 Fla. Laws 1785 (codified at FLA. STAT. §§ 607.108-.110, 607.244, 607.247 (1987)).

The first of these laws, the Affiliated Transactions Law, regulates the *exercise* of corporate control by requiring the approval of "affiliated transactions" by either a majority of the disinterested directors of the corporation or by two-thirds of the voting stock of the corporation, excluding shares owned by interested shareholders.⁵ The stated purpose of the Affiliated Transactions Law is to assure that shareholders in a hostile takeover receive a fair price in a second-step merger.⁶

The second new law, the Control-Shares Acquisition Law (the Act), regulates the *acquisition* of corporate control by denying voting rights to "control shares" unless the preexisting shareholders of the corporation reinstate those voting rights.⁷ The Act's purpose is to protect Florida shareholders by affording them an opportunity to decide whether a change in corporate control pursuant to a tender offer is desirable.⁸ The Act represents a legislative attempt to place existing shareholders on an equal footing with a takeover bidder. Both the Act and the Affiliated Transactions Law apply to Florida corporations and to certain foreign corporations that have been granted authority to transact business in Florida and have statutorily prescribed relationships with Florida.⁹

This Article begins by reviewing the history of corporate takeover regulation both in Florida and nationwide, and by highlighting recent state and federal legislative developments. A summary of the Act, including an analysis of interpretative issues, follows. The Article then addresses the validity and constitutionality of the Act under state and federal law, succeeded by a synopsis of relevant public policy consid-

5. FLA. STAT. § 607.108(1)-(6) (1987). The Affiliated Transactions Law applies to transactions between a corporation and any beneficial owner of more than 10% of its outstanding voting stock or any affiliate or associate of that beneficial owner (i.e., "interested party"). *Id.* § 607.108(1)(a), (b), (d), (k). For a discussion of the Affiliated Transactions Law, see Ames, *Florida's New Law Governing Corporate Takeovers*, 62 FLA. BAR J., Feb. 1988, at 57.

6. Staff of Fla. H.R. Comm. on Commerce, HB 358 (1987) Staff Analysis 4-5 (final June 22, 1987) (on file with committee) [hereinafter House Staff Analysis].

7. FLA. STAT. § 607.109(5) (1987).

8. House Staff Analysis, *supra* note 6, at 3-4.

9. FLA. STAT. § 607.110 (1987). In general, a foreign corporation (one incorporated in a state other than Florida) is subject to both the Act and the Affiliated Transactions Law if it has the following characteristics: (a) it has been granted authority to transact business in Florida by the Florida Department of State; (b) it has 100 or more shareholders; (c) it has its principal office, principal place of business, or substantial assets within Florida; (d) it has more than 500 Florida residents as employees; (e) its annual gross payroll for Florida residents is more than \$5 million; and (f) it has any of the following shareholder connections with Florida: (i) more than 1,000 of its shareholders are resident in Florida; (ii) more than 10% of its shareholders are resident in Florida; (iii) more than 10% of its shares are owned by Florida residents. *Id.* §§ 607.109(4), .110(1)-(2).

erations and pending federal legislation. Finally, guidelines for complying with the Act are suggested.

I. HISTORY OF TAKEOVER LAWS

In the sixties, corporate takeover activity began to attract the attention of federal and state lawmakers. In an effort to regulate these corporate takeovers, a number of statutes were adopted and focused primarily on the tender offer.

A. Federal Takeover Laws

The Williams Act, adopted in 1968 in response to an increasing number of cash tender offers, amended sections 13 and 14 of the Securities Exchange Act of 1934 (Exchange Act).¹⁰ Section 13(d)(1) of the Exchange Act requires a person acquiring the beneficial ownership of more than 5% of any class of equity security registered pursuant to section 12 of the Exchange Act to file a Schedule 13D with the Securities and Exchange Commission (SEC) within ten days after the last acquisition.¹¹ Section 14(d)(1) of the Exchange Act requires any person who makes a tender offer that will result in the person beneficially owning more than 5% of any class of equity security registered pursuant to section 12 of the Exchange Act to file concurrently with the SEC a Schedule 14D-1.¹²

The Williams Act was passed to "insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."¹³ The disclosure required by the Williams Act includes the following information: (1) the identity of each purchaser; (2) the amount and source of the funds to be used to make the purchases; and (3) the purpose of the purchases, including any plans to make any major change in the target corporation's business or corporate structure.¹⁴ The tender offeror must file this information with the SEC when the tender offer is commenced.¹⁵

10. Williams Act, Pub. L. No. 90-439, §§ 2, 3, 82 Stat. 454, 455-56 (current version at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982); *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 22-24 (1977).

11. 15 U.S.C. § 78m(d)(1) (1982); 17 C.F.R. § 240.13d-1, -101 (1987).

12. 15 U.S.C. § 78n(d)(1) (1982); 17 C.F.R. § 240.14d-1, -100 (1987).

13. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). See also H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2-4 (1968).

14. 15 U.S.C. §§ 78m(d)(1)(A)-(E), 78n(d)(1) (1982). The Act also requires the disclosure of similar information. Compare *id.* §§ 78m(d)(1)(A)-(E), 78n(d)(1) with FLA. STAT. § 607.109(6) (1987).

15. 15 U.S.C. § 78n(d)(1) (1982).

Although the Williams Act is essentially a disclosure statute, it does impose some substantive limitations on tender offers.¹⁶ A tender offer must remain open for at least twenty business days, and a shareholder who tenders shares pursuant to a tender offer may withdraw them at any time while the tender offer remains open and, if the offeror has not purchased the shares, at any time after sixty days from the commencement of the tender offer.¹⁷ If more shares are tendered than the offeror is willing to accept, the tendered shares must be purchased on a pro rata basis.¹⁸ Finally, the offeror must pay the same price for all the shares purchased pursuant to the tender offer, which must be the highest price offered for any of the tendered shares.¹⁹

B. State Takeover Laws

States also began to regulate tender offers around the time the Williams Act was adopted.²⁰ The first state takeover laws generally had precommencement filing requirements that acted to delay the commencement of a tender offer.²¹ These laws also gave state officials broad powers, including the right to request disclosure of information beyond that required by the Williams Act and the right to determine the fairness of a tender offer.²² Some state takeover laws also applied to foreign corporations and nonresident shareholders.²³ Following *Edgar v. MITE Corp.*,²⁴ however, courts held most of these state take-

16. *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8-9 (1985).

17. 15 U.S.C. § 78n(d)(5) (1982); 17 C.F.R. §§ 240.14d-7, 240.14e-1(a) (1987).

18. 15 U.S.C. § 78n(d)(6) (1982); 17 C.F.R. § 240.14d-8 (1987).

19. 15 U.S.C. § 78n(d)(7) (1982); 17 C.F.R. § 240.14d-10 (1987).

20. See 9 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 73 (1987). For a general discussion of the history of state takeover laws, see Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473 (1987); Warren, *Developments in State Takeover Regulation: MITE and Its Aftermath*, 40 BUS. LAW. 671 (1985); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1 (1976).

21. See sources cited *supra* note 20. For a general discussion of first and second generation takeover laws, see Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 SEC. REG. L.J. 332 (1986). See also ILL. REV. STAT. ch. 121¹/₂, para. 137.53.A (Supp. 1980) (requiring 20 days prior written notice of terms of offer).

22. See sources cited *supra* notes 20-21. For example, the Illinois statute allowed the Secretary of State to conduct a fairness hearing concerning a tender offer and determine whether there was full and fair disclosure to the offerees. The Secretary could also enjoin a tender offer if the statute's requirements were not satisfied. ILL. REV. STAT. ch. 121¹/₂, para. 137.57.A, .E (Supp. 1980).

23. ILL. REV. STAT. ch. 121¹/₂, para. 137.52-10 (Supp. 1980). The Illinois law was applicable to a target corporation having at least 10% of its shareholders resident in Illinois and satisfying any two of the three following conditions: (i) its principal executive office was located in Illinois; (ii) it was organized under Illinois law; or (iii) 10% of its stated capital and paid-in surplus was represented in Illinois. *Id.*

24. 457 U.S. 624 (1982) (plurality decision).

over laws unconstitutional as undue burdens on interstate commerce.²⁵

In *MITE*, a cash tender offer for all the outstanding shares of Chicago Rivet & Machine Co., an Illinois corporation, was initiated by MITE Corporation (MITE), a Delaware corporation with its principal office in Connecticut.²⁶ MITE filed with the SEC all the information required by the Williams Act, but did not comply with the Illinois Business Take-Over Act (Illinois Act).²⁷ MITE obtained a declaratory judgment that the Illinois Act was preempted by the Williams Act and also violated the commerce clause.²⁸ The district court permanently enjoined enforcement of the Illinois Act against MITE, and the Supreme Court affirmed, holding the Illinois Act unconstitutional under the commerce clause.²⁹

Many state legislatures responded to the *MITE* decision by either amending or repealing their statutes. Ohio adopted a law requiring the approval of the disinterested shareholders before a person could acquire shares representing specified thresholds of ownership.³⁰ The Ohio law applies only to Ohio corporations with fifty or more resident shareholders and a principal place of business, principal executive office, or substantial assets in Ohio.³¹ The constitutionality of this law is uncertain. Although the Sixth Circuit had decided that the law was unconstitutional,³² the Supreme Court has vacated that decision for reconsideration in light of *CTS Corp. v. Dynamics Corp. of America*.³³

25. *E.g.*, *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (Oklahoma); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Virginia); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (Michigan); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri).

26. *MITE*, 457 U.S. at 626-27.

27. *Id.* at 627-28.

28. *Id.* at 629.

29. *Id.* at 640-45. The Supreme Court held that the statute violated the commerce clause by placing an excessive indirect burden on interstate commerce. A plurality of the court held that the statute also violated the commerce clause by directly restraining interstate commerce. Three justices thought the Williams Act preempted the Illinois Act. Because the Illinois Act also applied to corporations not incorporated in Illinois and having their principal place of business outside Illinois, the Court held that Illinois had "no interest in regulating the internal affairs of foreign corporations." *Id.* at 645-46.

30. OHIO REV. CODE ANN. §§ 1701.01, .83.1-.85 (Anderson Supp. 1986). One commentator has referred to this type of law as a "shareholder approval model." See Pinto, *supra* note 20, at 478-79.

31. OHIO REV. CODE ANN. § 1701.01 (A), (Y) (Anderson Supp. 1986).

32. *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987). The court held that the law frustrated the objectives of the Williams Act, and therefore violated the supremacy clause. The court also held that the statute violated the commerce clause by directly regulating and indirectly burdening interstate commerce. *Holderman*, 796 F.2d at 138-39.

33. *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987); *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987).

Other states, such as Minnesota, adopted laws requiring disclosure to a target corporation's shareholders of information regarding the acquirer.³⁴ The Minnesota Takeover Act applies to any tender offer to purchase equity securities of a "target company" from Minnesota residents if the offeror would own more than ten percent of any class of equity securities of the company after the tender offer is complete.³⁵ If the disclosure is inadequate or misleading, the Commissioner of Commerce may suspend the tender offer.³⁶ This type of disclosure law has been upheld as facially constitutional.³⁷

Delaware's new state takeover law does not affect an offeror's ability to acquire or vote its shares.³⁸ Instead, the law prohibits a bidder who acquires more than 15% of a target company's stock from completing the takeover for three years unless one of the following requirements is satisfied: (1) the bidder acquires 85% of the target company's outstanding stock at one time, excluding shares held by director-officers and shares held by employee stock option plans; (2) the holders of two-thirds of the outstanding shares vote in favor of the stock acquisition, excluding those shares held by the bidder; or (3) the board of directors and shareholders decide to opt out of the law's provisions.³⁹ These restrictions apply only if the acquirer does not get prior approval from the target company's board of directors.⁴⁰ New York has a similar takeover law that is less favorable to bidders.⁴¹

Other states have adopted takeover laws that, instead of preventing or regulating the purchase of shares, deny voting rights to those shares unless certain conditions are satisfied.⁴² These laws require the vote of

34. *E.g.*, MINN. STAT. § 80B.03 (1986). These statutes are referred to as the "full disclosure model." See Pinto, *supra* note 20, at 481.

35. MINN. STAT. § 80B.01 (1986).

36. *Id.* § 80B.03 subd. 4a.

37. Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984). The Minnesota law was not facially unconstitutional under the commerce clause because it only applied when a target company had a substantial number of Minnesota shareholders. The Commissioner of Commerce was authorized to suspend a tender offer if the registration materials failed to apprise local investors fairly of the required information. The court found the law not unduly burdensome to interstate commerce, and thus constitutional under the commerce clause. The court also held the law was not in conflict with the Williams Act and so was facially constitutional under the supremacy clause, except for provisions that authorized the Commissioner to require disclosure beyond specified information. *Id.*

38. DEL. CODE ANN. tit. 8, § 203 (1988).

39. *Id.*

40. *Id.*

41. Compare *id.* with N.Y. BUS. CORP. LAW § 912 (McKinney 1986) (five year waiting period). The constitutionality of the Delaware law already has been challenged by takeover bidders. Wall St. J., Jan. 29, 1988, at 6, col. 2; *Id.*, Feb. 3, 1988, at 10, col. 3.

42. ARIZ. REV. STAT. ANN. § 10.1211 (Supp. 1987); IND. CODE ANN. § 23-1-42-1 (Burns Supp. 1987).

at least a majority of the disinterested shares to restore those voting rights.⁴³ As applied to domestic corporations with shareholders in that state, this type of takeover law has been upheld as constitutional. In *CTS Corp. v. Dynamics Corp. of America*,⁴⁴ the Court upheld the constitutionality of the Indiana Control Shares Acquisition Act (Indiana Act). The Indiana Act applies to Indiana corporations that have a specified number of shareholders residing in Indiana and have opted for the Act's protection.⁴⁵ Under the Indiana Act, an acquirer of control shares gains voting rights only to the extent granted by a majority of all pre-existing disinterested shareholders.⁴⁶

Dynamics Corporation of America (Dynamics) announced a tender offer for an amount of shares of CTS Corporation (CTS) that subjected the transaction to the Indiana Act. CTS then opted for the Indiana Act's protection whereupon Dynamics, which had already filed suit in federal district court alleging federal securities law violations by CTS,⁴⁷ amended its complaint to challenge the Indiana Act's validity under the commerce clause and the supremacy clause. The district court granted Dynamics' motion for declaratory relief, ruling that the Williams Act preempted the Indiana Act. The district court also later held that the Indiana Act violated the commerce clause.⁴⁸ The Seventh Circuit affirmed the district court,⁴⁹ but the United States Supreme Court reversed, holding the Indiana Act valid under both the supremacy and commerce clauses.⁵⁰ The Florida Act is substantially identical to the Indiana Act.⁵¹

The Act is not the first Florida law regarding takeovers; the Florida Investor Protection Act (FIPA) was effective from October 1, 1977 until its repeal in 1979.⁵² In general, FIPA required a tender offer for any equity security of a Florida corporation or a foreign corporation that had its principal place of business in Florida to be accompanied by the filing of an information statement with both the Florida Divi-

43. ARIZ. REV. STAT. ANN. § 10.1211 (Supp. 1987); IND. CODE ANN. § 23-1-42-1 (Burns Supp. 1987).

44. 107 S. Ct. 1637 (1987).

45. IND. CODE ANN. §§ 23-1-17-3(b), 23-1-42-4(a) (Burns Supp. 1988); *CTS Corp.*, 107 S. Ct. at 1641.

46. IND. CODE ANN. § 23-1-42-9 (Burns Supp. 1988); *CTS Corp.*, 107 S. Ct. at 1641.

47. *CTS Corp.*, 107 S. Ct. at 1642.

48. *Id.*

49. *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987).

50. *CTS Corp.*, 107 S. Ct. at 1648, 1652.

51. Compare FLA. STAT. § 607.109(1)-(11) (1987) with IND. CODE ANN. § 23-1-42-1 (Burns Supp. 1988).

52. Ch. 77-441, §§ 1-8, 1977 Fla. Laws 1804-08 (repealed 1979).

sion of Securities (the Division) and the target corporation's registered agent in Florida.⁵³ The information statement contained more information than that required under the Williams Act.⁵⁴ FIPA did not require administrative clearance or advance notice to the target corporation, and was simply a disclosure law. FIPA offered only slightly more protection to investors and Florida corporations than the Williams Act already provided and did very little to eliminate the surprise of an attempt to take over a Florida corporation.⁵⁵ The legislature repealed FIPA in 1979, probably in response to the number of takeover laws that had been held unconstitutional.⁵⁶ The effect and scope of the new Florida Act are different from FIPA.

II. SUMMARY OF THE ACT

In general, the Florida Act protects issuing public corporations from hostile takeovers by denying voting rights to control shares unless the reinstatement of those rights is approved by the shareholders of the corporation.⁵⁷ The Act does not directly affect the acquisition of shares, but rather governs only the voting rights attendant to control shares.⁵⁸ Other shares of the same corporation owned or acquired by the same person are not affected by the Act.⁵⁹ Essentially, the Act is a statutory poison pill.⁶⁰ The regulatory effect of a similar act on tender offers has been aptly described:

No rational tender offeror will purchase shares without knowing whether they will include voting rights. To do so would be like buying a car before knowing whether it had an engine. Nor would any rational tender offeror buy shares lacking voting rights, leaving it unable to protect its investment. To do so would be like buying a house with no roof. By detaching the voting rights from the shares that are to be transferred in interstate tender offers, the [Act] necessarily regulates those tender offers.⁶¹

53. FLA. STAT. §§ 517.351, .355 (1977).

54. Compare *id.*, § 517.355(2) with 15 U.S.C. §§ 78m(d)(1)(A)-(E), 78n(d)(1) (1982).

55. FIPA did provide civil liability for damages or rescission against any offeror, participant, or aider and abettor who violated its provisions. FLA. STAT. § 517.359 (1977). The Division also had authority to enforce compliance or enjoin violations. *Id.* § 517.361.

56. For a full discussion of FIPA see Louv, *Developments in Florida Corporate Law and Securities Regulation*, 32 U. MIAMI L. REV. 931 (1978).

57. FLA. STAT. § 607.109(1)-(9) (1987).

58. *Id.* § 607.109(5). Compare *id.* with OHIO REV. CODE ANN. § 1701.83.1 (Anderson Supp. 1986) (acquisition itself hampered).

59. See FLA. STAT. § 607.109(1) (1987).

60. See, e.g., *Revlon, Inc. v. McAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Moran v. Household Int'l Inc.*, 500 A.2d 1346 (Del. 1985).

61. Brief for Appellee at 10, *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987) (Nos. 86-71 & 86-97) (describing Indiana provision).

A. Regulated Corporations

The Act applies to issuing public corporations, which include both Florida corporations and foreign corporations that have been authorized by the Florida Department of State to transact business in Florida *and* that have statutorily prescribed relationships to Florida.⁶² An issuing public corporation is one that has (a) 100 or more shareholders; (b) its principal place of business, its principal office, or substantial assets within Florida; and (c) either (i) more than 10% of its shareholders residing in Florida, (ii) more than 10% of its outstanding and issued shares owned by Florida residents, or (iii) 1,000 shareholders residing in Florida.⁶³ A foreign corporation—one incorporated in a jurisdiction other than Florida—is subject to the Act if it is an issuing public corporation and also has the following relationships with Florida: (a) it has more than 500 Florida residents as employees; (b) it has an annual gross payroll for Florida residents of more than \$5 million; and (c) the jurisdiction of its incorporation does not have any law “expressly inconsistent” with the Act.⁶⁴

The Act does not address what constitutes “substantial assets within Florida,”⁶⁵ or how that determination should be made with regard to transient assets such as airplanes, vessels, and rolling stock. Presumably, the meaning of that phrase differs from the meaning of the phrase “all or substantially all the assets,” which is used in connection with the sale or exchange of assets.⁶⁶ Moreover, that phrase is not used anywhere else in the Florida General Corporation Act.⁶⁷

Shares owned of record by banks, brokers, and nominees are disregarded for the purpose of calculating whether a corporation satisfies the above jurisdictional criteria relating to its shareholders.⁶⁸ Banks, brokers, and nominees commonly hold large amounts of stock in “street name” or “nominee name” for the benefit of individual and institutional investors. For example, shares held in an investment account for an individual investor generally are owned of record by the investment firm, but are held by that firm for the benefit of the indi-

62. FLA. STAT. §§ 607.004(5), .109(4), .110(2) (1987).

63. *Id.* § 607.109(4)(a).

64. *Id.* § 607.110(2)-(3). See *supra* note 9 and accompanying text. The address of a shareholder appearing in the corporation's records is presumed to be the shareholder's residence. FLA. STAT. § 607.109(4)(b) (1987).

65. FLA. STAT. § 607.109(4)(a) (1987).

66. *Id.* § 607.241. See Schwadel v. Uchitel, 455 So. 2d 401 (Fla. 3d DCA 1984).

67. FLA. STAT. ch. 607 (1987).

68. *Id.* § 607.109(4)(c).

vidual investor. Each individual is deemed the "beneficial owner" of such shares.⁶⁹

The exclusion of shares owned beneficially by Florida investors in determining whether the Act applies is inconsistent with one of its purposes, which is to protect Florida shareholders in hostile takeovers.⁷⁰ The Act should protect Florida beneficial owners just as it protects those who are the record owners of shares. Possibly, the distinction between record and beneficial owners was made because of the difficulty of determining the names and addresses of beneficial owners, but that difficulty has been overcome in other important areas.⁷¹

The Act does not prescribe a calculation date for making the determinations described above. The calculation date could be the date when the tender offer is announced, the shares are tendered, the shares are purchased, the tender offer is completed, the acquiring person's statement is filed, or some other date set by management in its discretion. If a tender offer is involved, the commencement date for that transaction would seem appropriate.⁷² The date when a control-share acquisition occurs would be appropriate in other instances. For example, if an acquirer begins to purchase a target company's stock in open-market trades that will result in a control-share acquisition, the date of the first purchase should be the calculation date, assuming all the shares were acquired in the same transaction.⁷³ Compounding the uncertainty over the calculation date are questions of whether the Act becomes inapplicable if a corporation's characteristics cease to satisfy the Act's jurisdictional test during the course of a control-share acquisition, and whether an acquiring person who is not an existing shareholder may obtain any of the information necessary to make the determinations inherent in that test before making a control-share acquisition.

Presumably the Act would remain applicable if one of the qualifying characteristics changes during the course of a control-share acquisition. The Act should provide for a specific date upon which the applicability of the Act will be determined and, once applicable, all the participants (bidders, shareholders, and management) should be bound to that determination during the term of a control-share acquisition. The Act should enable an acquiring person to determine in ad-

69. For a general discussion of shares held in street name, see H. BLOOMENTAL, *SECURITIES AND FEDERAL CORPORATE LAW* § 13.07 (rev. ed. 1987).

70. See *supra* note 8 and accompanying text.

71. See 17 C.F.R. § 14b-1 (1987).

72. See 17 C.F.R. § 240.14d-2 (1987).

73. FLA. STAT. § 607.109(2)(b) (1987).

vance whether it would apply to the acquiring person's proposed transaction so as not to foreclose preplanning. Moreover, because the corporation has access to the information necessary to make this determination, it should have the burden of proving the Act is applicable unless the Act is amended to require the corporation to provide the acquiring person with the requisite information before the initiation of a control-share acquisition.⁷⁴

B. Regulated Securities

The Act regulates the acquisition of the voting power—true ownership—of control shares.⁷⁵ The statute defines the term “control shares” to mean shares having voting power that, when added to all other shares the acquirer owns or has the power to vote, would give the acquirer (directly, indirectly, alone, or as part of a group) any of the following ranges of total voting power with respect to the election of a corporation's directors: (1) at least one-fifth, but less than one-third; (2) at least one-third, but less than a majority; or (3) a majority or more.⁷⁶ The Act's definition of control shares leaves unclear whether control shares are all the shares the person acquires in the control-share acquisition or only those shares that exceed the threshold levels of voting power.⁷⁷ For example, if a person owning 4% of a corporation's issued and outstanding shares purchases another 19%, the Act can be interpreted to either disfranchise all the shares constituting the 19% acquired in that control-share acquisition, or only the 4% that causes the acquirer's total voting power to equal or exceed the 20% threshold.

The definition of control shares also leaves unclear whether it applies to a separate acquisition of shares that results in a person's total voting power remaining within the same range; for example, a rise from 21% to 26%. The Act should not be interpreted to disfranchise stock acquisitions that result in a person's voting power remaining within the same voting range, because then the separate voting power levels of 33 $\frac{1}{3}$ % and 50% would be unnecessary, as *any* stock acquisition that raises a person's voting power over the 20% threshold would

74. Existing shareholders have the right to examine the corporation's list of shareholders for a proper purpose. *Id.* § 607.157 (1987). The issue is whether an impending tender offer or control-share acquisition is a proper purpose. *See Florida Tel. Corp. v. State ex rel. Peninsula Tel. Co.*, 111 So. 2d 677 (Fla. 1st DCA 1959). An acquiring person currently has limited rights to a shareholder list if a tender offer is involved, but the list is not made available until the tender offer commences. 17 C.F.R. § 14d-5 (1987).

75. FLA. STAT. § 607.109(2) (1987).

76. *Id.* § 607.109(1).

77. At least one commentator has noted this uncertainty. Ames, *supra* note 5, at 59.

be disfranchised. Such an interpretation would require continuous compliance with the Act by a person who already has consummated a control-share acquisition and received voting power for those shares. The drafters of the Act probably did not intend this result.

C. Regulated Persons

The Act applies to stock acquisitions that enable a "person," alone or as part of a "group," to exercise or direct the exercise of voting power of control shares.⁷⁸ The Act does not define what constitutes a group or under what circumstances a person will be a member of a group. The concept of a group differs from beneficial ownership and denotes owners acting in concert, whether they own the shares directly or beneficially.⁷⁹ When two or more persons act as a group for the purpose of holding, acquiring, or disposing of securities registered under the Exchange Act, they must aggregate their securities holdings to determine if they are subject to the reporting requirements of the Williams Act.⁸⁰ Courts applying the Williams Act generally have found a group to exist when several shareholders agree to pool their interests in corporate securities and to act in concert to carry out a plan to obtain control of a corporation.⁸¹ Any time shareholders agree to act in concert, they arguably constitute a group for purposes of the Act. Nevertheless, Florida courts have yet to decide this issue.⁸²

Assuming that several shareholders who agree to act in concert constitute a group, the Act does not address whether the mere formation of a group that collectively owns at the time of its association more than one of the threshold levels of voting power constitutes a control-share acquisition.⁸³ For example, assume that shareholders *A*, *B*, and *C* each own 7% of the outstanding voting stock of a corporation. If

78. FLA. STAT. § 607.109(1) (1987).

79. In certain instances, the formation of a group results in each member of the group receiving the beneficial ownership of the shares owned by the other members of the group, depending on the rights acquired by group members. Although interrelated, these concepts are treated differently in this Article because the Act does not expressly embrace the beneficial ownership concept. See *infra* notes 86-88 and accompanying text.

80. 15 U.S.C. §§ 78m(d)(3), 78n(d)(2) (1982); 17 C.F.R. § 240.13d-5 (1987).

81. *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972); *Trans World Corp. v. Odyssey Partners*, 561 F. Supp. 1315 (S.D.N.Y. 1983); *Bath Indus. v. Blot*, 305 F. Supp. 526 (E.D. Wis. 1969).

82. Florida courts probably will find a group to exist whenever a voting trust, shareholders' agreement, or other agreement exists regarding the voting of shares. See FLA. STAT. §§ 607.104, .107 (1987).

83. See 17 C.F.R. 13d-5(b)(1) (1987) (group deemed to have acquired beneficial ownership of all shares held by the group on the date of the agreement for purposes of sections 13(d) and (g) of the Exchange Act).

A, B, and C enter into a shareholders' agreement and agree to vote their shares in accordance with the decision of the majority, a control-share acquisition has occurred on the date of the agreement because that group has obtained the power to direct the exercise of more than 20% of the voting power of the corporation. This result is more likely if the concept of beneficial ownership is incorporated into the Act's definition of ownership. Further, if the Act applies to the group in the preceding example, the members of the group might not have voting rights for their shares even on matters unrelated to the purpose of the group. For example, if the group was formed to vote in unison on a pending merger, the shareholders might be prohibited from voting separately in an election of directors.

The mere formation of a group should not constitute a control-share acquisition until enough shares are actually acquired by the group or the group's members to raise the group's aggregate voting power above the next statutory level. Using the above example, a control-share acquisition should not occur until the group or a member of the group purchased shares subject to the group's voting agreement that caused the group's collective voting power to exceed 33 $\frac{1}{3}$ %. An agreement between existing shareholders should not trigger the Act's voting divestiture, as each shareholder in the group had voting rights before the formation of the group, and shareholders should be free to discuss pending corporate matters and to vote those shares to protect their investment. A different interpretation would not further the Act's purpose of protecting existing shareholders in hostile takeovers. This assumes, however, that the initial purchases were not made pursuant to a plan to effect a control-share acquisition.⁸⁴

The Act applies to "the acquisition, directly or indirectly, by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares."⁸⁵ The statutory language focuses on who controls the voting power of shares, and subjects any person who, directly or indirectly, owns or possesses the voting power of control shares to the Act's requirements. The Act does not address, however, what constitutes the ownership of voting stock or under what circumstances a person is deemed to have the power to direct the voting of shares. Consequently, neither the corporation, its legal counsel, nor the acquiring person will be able to determine with any certainty, except in the most obvious cases, whether sufficient ownership rights or control over the voting power

84. See *infra* notes 89-94 and accompanying text.

85. FLA. STAT. § 607.109(2)(a) (1987).

of shares have been acquired to subject the transaction to the Act. This uncertainty can only lead to litigation.

Some states have incorporated the concept of beneficial ownership into their control-share acquisition laws⁸⁶—probably in an attempt to avoid the uncertainty described above. Under these laws, a beneficial owner of control shares generally includes any person who, directly or indirectly, through any agreement, arrangement, relationship, or understanding, has or shares the power to vote the shares, or has or shares investment power over the shares, including the power to dispose of, or direct the disposition of, the shares.⁸⁷

The acquisition of voting power over shares pursuant to a proxy, whether by a voting trust, shareholder's agreement, or other agreement, arguably constitutes a control-share acquisition if one of the threshold levels of voting power is exceeded. Other states that have adopted a control-share acquisition law have dealt with the uncertainty of whether a proxy is an acquisition. Those laws provide that a person is not the beneficial owner of shares that that person has the power to vote or to direct their voting pursuant to a revocable proxy received in response to a proxy solicitation made in accordance with the Exchange Act.⁸⁸ Accordingly, the solicitation of proxies by the management of a corporation would not result in a control-share acquisition in those states adopting the concept of beneficial ownership. The acquisition of voting power by proxy in other instances, though, would be subject to those acts. Because the Florida Act does not use the term "beneficial ownership," the solicitation of proxies by management might constitute a control-share acquisition. If so, the Act would impede the conduct of annual meetings of shareholders because

86. See, e.g., ARIZ. REV. STAT. ANN. § 10-1201(10) (Supp. 1987); MASS. GEN. LAWS ANN. ch. 110D, § 1(c)(1) (West Supp. 1988); MINN. STAT. § 302A.011 subd. 38 (Supp. 1987); N.C. GEN. STAT. § 55-90(a)(3) (Supp. 1987).

87. See ARIZ. REV. STAT. ANN. § 10-1201(5) (Supp. 1987); 1987 Mass. Acts 110D § 1(b); MINN. STAT. § 302A.011 subd. 41 (Supp. 1987); N.C. GEN. STAT. § 55-90(a)(1) (Supp. 1987). See also 17 C.F.R. §§ 240.13d-3(a), .16a-8(a) (1987); Insider Reporting and Trading, Exchange Act Release No. 18,114, 46 Fed. Reg. 48,147 (Sept. 23, 1981); Statement Re: Beneficial Ownership, Exchange Act Release No. 7793, 31 Fed. Reg. 1005 (Jan. 19, 1966); General Counsel's Opinion Re: Sec. 16(a), Exchange Act Release No. 1965, 11 Fed. Reg. 10,970 (Dec. 21, 1938).

88. ARIZ. REV. STAT. ANN. § 10-1201(5)(b) (Supp. 1987). This section is typical of other states' provisions in providing that:

A person is not deemed the beneficial owner of shares . . . which the person has the power to vote . . . arising solely from a revocable proxy given in response to a proxy solicitation . . . made in accordance with the applicable rules and regulations under the Securities Exchange Act of 1934 and is not then reportable under that act . . .

Id. (footnote omitted). See also 1987 Mass. Acts 110D(1)(b) (holder of a revocable proxy is not a beneficial owner).

the proxies would be disfranchised. Although this result must be an unintended consequence of the Act, the Act does require it.

Beneficial ownership includes the right to acquire shares through the exercise of rights, options, warrants, or the conversion of convertible securities. Again, the Act does not incorporate the concept of beneficial ownership, but the ownership of rights, options, warrants, or convertible securities might constitute the indirect ownership of the underlying voting stock under the Act. If this is so, the shares of voting stock issuable upon exercise or conversion of those securities should be considered issued and outstanding when calculating the percentages of voting power owned by that person. The drafters of the Act, in avoiding the concept, possibly did not intend for it to apply to shares that are only beneficially owned; but there does not seem to be a difference between "indirect ownership" and "beneficial ownership." Indirect ownership might mean that the determination of ownership or the control of voting power shares is more restrictive under the Act than it is under federal securities law or under other states' control-share acquisition laws. Unfortunately, the Act does not provide any guidance on the correct interpretation, and consequently, the Act's application will be unpredictable.

D. Regulated Transactions

The Act applies to the *acquisition* of control shares.⁸⁹ Under the Act, "shares acquired within [ninety] days or shares acquired pursuant to a plan to make a control-share acquisition" are deemed to have been acquired in the same acquisition.⁹⁰ The Act does not define what constitutes a plan to make a control-share acquisition, although intent to consummate a control-share acquisition by the acquiring person presumably is necessary.⁹¹

The Act does not indicate how the ninety-day period is to be applied, either.⁹² It might apply to stock acquisitions made both ninety days before and ninety days after the date of a control-share acquisition. This interpretation would cause all shares acquired within a 181-day period to be control shares. Alternatively, the Act might be inter-

89. See FLA. STAT. § 607.109(2)(a) (1987). A control-share acquisition is "the acquisition, directly or indirectly, by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares." *Id.*

90. FLA. STAT. § 607.109(2)(b) (1987).

91. Cf. 15 U.S.C. § 77(b)(11) (1982) (underwriter includes a person who purchases securities from an issuer with a view to distributing those securities); SEC v. Pig'N Whistle Corp., 359 F. Supp. 219 (N.D. Ill. 1973) (shareholder with pre-existing plan to distribute securities is an underwriter).

92. Ames has noted this issue. Ames, *supra* note 5, at 59.

preted strictly to limit the time period to ninety days. Even under this interpretation, however, the Act is unclear regarding whether the ninety-day period precedes or follows the date of a control-share acquisition. Finally, the ninety-day period might include the date of the control-share acquisition plus either the preceding eighty-nine days or succeeding eighty-nine days, or both. The resolution of this ambiguity in the Act is crucial to determining the voting rights of shares purchased by an acquiring person.

The date a person makes a binding and irrevocable commitment to acquire shares should be the date used for determining the ninety-day statutory period.⁹³ Consequently, the delivery and payment dates for the shares, which are subject to manipulation by the acquiring person anyway, should be irrelevant. If the shares are acquired in a normal brokerage transaction, the trade date, not the settlement date, should be the date of acquisition for purposes of the Act. These issues are yet to be settled by the courts, but the above recommendations would be consistent with the approach taken by federal courts interpreting section 16(b) of the Exchange Act.⁹⁴

Any person who becomes the owner or obtains the voting power of control shares is deemed to have acquired them for purposes of the Act, whether the acquisition is by purchase or otherwise.⁹⁵ The Act even applies to control shares acquired pursuant to the exercise of preemptive rights. In general, a preemptive right entitles an existing shareholder to purchase new capital stock of a corporation in an amount equal to the percentage of issued and outstanding stock that the shareholder already owns. For example, a 20% shareholder exercising preemptive rights would have the right to purchase 20% of the additional capital stock to be issued by the corporation. Shareholders of a Florida corporation no longer automatically have preemptive rights to acquire unissued or treasury shares of a corporation, unless these rights are expressly provided for in the corporation's articles of incorporation.⁹⁶

93. This would be consistent with the Exchange Act's definition of purchase which includes a contract to purchase. *Cf.* *Blau v. Ogsbury*, 210 F.2d 426 (2d Cir. 1954) (date of purchase was when a commitment to purchase was made, not three years later when payment was made).

94. *See, e.g.,* *Riseman v. Orion Research, Inc.*, 749 F.2d 915, 918-19 (1st Cir. 1984); *Provident Co. v. Foremost-McKesson, Inc.*, 506 F.2d 601, 606-07 (9th Cir. 1974), *aff'd*, 423 U.S. 232 (1976); *Champion Home Builders Co. v. Jeffress*, 940 F.2d 611, 615 (6th Cir.), *cert. denied*, 416 U.S. 986 (1974).

95. *See* 17 C.F.R. § 240.13d-5 (1987). The Act applies to the acquisition of control shares whether the person purchases those shares in a privately negotiated sale or in an open-market trade.

96. *FLA. STAT.* § 607.077(1) (1987). Shareholders of a Florida corporation that existed before January 1, 1976, however, still have preemptive rights unless the articles of incorporation have been amended to terminate those rights. *Id.* § 607.077(2).

A shareholder's exercise of preemptive rights normally would not constitute a control-share acquisition because the relative ownership percentages of each shareholder would remain constant. However, if an exercising shareholder has a right of over-allotment to purchase shares not purchased by the other shareholders, the Act might apply. This result is unwarranted because shareholders who have not elected to exercise their preemptive rights implicitly have agreed to dilute their ownership and control of the corporation. If a shareholder exercises rights of over-allotment, the other shareholders should not be able to maintain their existing voting control percentage by abstaining from exercising their preemptive rights and voting against reinstating the voting rights of shares acquired by the other shareholders pursuant to the exercise of preemptive rights.

The Act would also apply to control shares acquired directly from the corporation or a wholly-owned subsidiary, whether by a public or private offering.⁹⁷ This can lead to inadvertent control-share acquisitions. For example, assume that a corporation is making an initial public offering of 100,000 shares of its common stock. If an investor subscribes to purchase 15,000 shares but only a total of 50,000 shares are sold, the Act would disfranchise the purchased shares. And yet, the investor cannot cancel the subscription and, therefore, will be deprived of the full benefit of the investment. This result does not protect other shareholders. Rather, it penalizes a significant investor who wants to participate in the corporation. No large institutional investor would take such a risk unless the corporation's bylaws and articles of incorporation provide that the corporation has opted out of the act.⁹⁸

Shares acquired pursuant to the exercise of any right, option, or warrant, or pursuant to the conversion of convertible debt securities or nonvoting convertible preferred stock are similarly subject to the Act.⁹⁹ The effect of the exercise or conversion of those securities is the same as a direct purchase of voting stock. Unless the concept of beneficial ownership applies, acquisition of a mere right of conversion should not trigger the Act because the owner will not have any voting rights. Further, the Act should not apply to rights, options, warrants, or convertible securities acquired before the effective date of the Act

97. Other states have exempted control-share acquisitions made directly from the corporation. *E.g.*, MO. REV. STAT. § 351.015(4)(d) (Supp. 1987).

98. The disclosure of the potential effect of the Act presents a particularly interesting issue under the Securities Act of 1933, as amended. Also, it is questionable whether securities without voting rights would be approved for registration under Florida's Securities and Investor Protection Act, FLA. STAT. §§ 517.07, .081 (1987). See FLA. ADMIN. CODE ANN. r. 3E-700.001 (1987).

99. Missouri has exempted the conversion of debt securities into voting stock from the provisions of its state law. MO. REV. STAT. § 351.015(4)(f) (Supp. 1987).

but exercised or converted after that date. Otherwise, the holder of those securities would not receive the benefit of the bargain. To subject the exercise or conversion of securities acquired before the effective date would be particularly harsh if the owner of those securities could not exercise or convert those securities before the effective date of the Act, or if the subsequent exercise or conversion were involuntary.

The Act applies to voting stock acquired pursuant to a recapitalization of a corporation, even if the recapitalization is approved by a majority of the shareholders entitled to vote on the matter.¹⁰⁰ For example, assume that a corporation's shareholders approve a recapitalization that creates two additional classes of stock, one class of voting common stock and one class of nonvoting cumulative preferred stock. The corporation then offers to exchange each share of its outstanding voting stock for either one share of the new voting stock or two shares of the nonvoting cumulative preferred stock. The election to receive voting stock for voting stock might constitute a control-share acquisition and result in a forfeiture of voting rights for that stock. This result would be inequitable because a majority of the existing shareholders approved the recapitalization plan.

The Act applies as well to exchange offers between a corporation and the shareholders of another corporation. In an exchange offer, one corporation offers to exchange its stock for the stock of another corporation. For example, corporation *A* offers to exchange one share of its common stock for each share of common stock owned by corporation *B*'s shareholders. Applying the Act, corporation *A* might not receive voting stock if the shares tendered pursuant to the exchange offer exceed one of the Act's threshold levels of voting power; however, the shareholders of corporation *B* would receive voting stock if none of them surpasses the Act's prescribed levels of voting power. This result would also be inequitable.

If the percentage of a person's ownership of a corporation before the Act's effective date is below one of the threshold levels of voting power set forth in the Act, and the corporation repurchases sufficient outstanding shares to raise that person's ownership percentage above a threshold level, the Act is unclear whether the corporation's repurchase would constitute a control-share acquisition by the shareholder.¹⁰¹ For example, assume that a shareholder owns 19,000 shares

100. FLA. STAT. §§ 607.177, .181, .184 (1987).

101. The Act does not affect a corporation's voting rights in a repurchase of its own shares because it would be unable to vote those shares anyway. *Id.* §§ 607.097(2), .204. Further, the corporation would not have to comply with the disclosure provisions of the Act when repurchasing shares because those procedures are elective and necessary only to obtain full voting rights. *See id.* § 607.109(6).

of a corporation that has 100,000 shares issued and outstanding. If the corporation repurchases more than 5,000 shares from other shareholders, the person's ownership percentage would increase from 19% to above 20%. The Act should not apply to a person whose voting power increases because of corporate stock repurchases, because if applicable, a corporation could disfranchise unpleasant but influential shareholders by repurchasing stock. Similarly, the Act should not apply to spin-offs, split-offs, and reverse stock splits that increase a shareholder's percentage of voting power. However, since not all corporate actions take place without shareholder influence, the Act should apply if an influential shareholder persuades the corporation to repurchase its stock for the sole purpose of increasing that shareholder's ownership percentage of voting stock.

Certain acquisitions, in addition to those consummated before the effective date of the Act, are exempt.¹⁰² Thus, shares acquired by the laws of descent and distribution and, presumably, shares transferred pursuant to a will, are excluded.¹⁰³ The Act does apply, however, to other gratuitous transfers. For example, the transfer of control shares to a trust is subject to the Act.¹⁰⁴ The rationale for the distinction between testamentary and inter vivos transfers is unclear, and whether it furthers the stated purpose of the Act depends on the circumstances surrounding the transfer.¹⁰⁵

The acquisition of control shares pursuant to the satisfaction of a stock pledge agreement or the enforcement of a security interest created in good faith, and not for the purpose of circumventing the Act, does not constitute a control-share acquisition.¹⁰⁶ Presumably, the subsequent sale (public, private, or judicial) of the control shares held by the secured party would be subject to the Act and would thereby diminish the value of the collateral if the secured party sells the control shares as a block, because the acquirer would not obtain voting rights.¹⁰⁷ Accordingly, the Act might force a lending institution to remain an unwilling shareholder instead of a creditor, prevent a full re-

102. *Id.* § 607.109(2)(d). This probably saves the Act from being unconstitutional as an impairment of contract. *See* U.S. CONST. art. I, § 10, cl. 1.

103. FLA. STAT. § 607.109(2)(d)(3) (1987). *See* House Staff Analysis, *supra* note 6, at 4.

104. Other states have exempted these kinds of transfers. *See, e.g.,* ARIZ. REV. STAT. ANN. § 10-1201(10)(a) (Supp. 1987) (control-share acquisitions do not include inter vivos gifts); MINN. STAT. § 302A.011 subd. 38(b) (Supp. 1987) (control-share acquisition does not include acquisition by donee pursuant to inter vivos gift).

105. The Act does not address whether a trustee or beneficiary is an indirect owner of shares held in a trust. If the Act applied the concept of beneficial ownership, the answers would be clearer. *See supra* notes 88-89 and accompanying text.

106. FLA. STAT. § 607.109(2)(d)(4) (1987).

107. *See id.* § 679.504.

alization of the value of collateral, and preclude the sale of control shares to a new group of shareholders that has the financial resources to fund the ailing corporation. Further, if the Act prevents a debtor from redeeming control shares from a secured party by characterizing the redemption as a control-share acquisition, it would be an unfair result since the shares were already owned by the debtor prior to the default.

Shares acquired pursuant to a merger or consolidation are not subject to the Act if the corporation is a party to the agreement of merger or consolidation.¹⁰⁸ Control shares acquired pursuant to any savings, employee stock ownership, or other employee benefit plan of a corporation or its subsidiaries are not subject to the Act.¹⁰⁹ Presumably, this exemption permits management to establish an employee stock ownership plan to effect a leveraged buy-out of the corporation.

The Act exempts acquisitions made by agents, brokers, fiduciaries, and other persons who acquire record title to shares "in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing" the Act.¹¹⁰ These persons have voting power over only those shares to which they can exercise, or direct the exercise of, votes without further instructions from others.¹¹¹ The Act also exempts acquisitions by, or from, any person who previously has been accorded voting rights under the Act, or any person "whose previous acquisition of shares" would have been subject to the Act but for a transactional exemption provided by the Act.¹¹²

A person who acquires shares in an exempt transaction is not subject to the Act, regardless of that person's new total voting power percentage. For example, a person who inherits shares representing 25% percent of the voting power of an issuing public corporation is not subject to the Act.¹¹³ In addition, that person's stock ownership may be increased within the same statutory range of voting power, such as, 20% to 33 $\frac{1}{3}$ %, without being subject to the Act.¹¹⁴ However, if a subsequent acquisition of shares elevates that person's total voting

108. *Id.* § 607.109(2)(d)(5).

109. *Id.* § 607.109(2)(d)(6).

110. *Id.* § 607.109(2)(c).

111. *Id.*

112. *Id.* § 607.109(2)(e). This exemption is conditioned on the acquisition being made "in good faith and not for the purpose of circumventing [the Act]." Furthermore, the exemption does not apply if "the acquisition entitles any person, directly or indirectly, alone or as part of a group, to exercise or direct the exercise of the voting power of the corporation in the election of directors in excess of the range of the voting power otherwise authorized." *Id.*

113. FLA. STAT. § 607.109(2)(d)(3) (1987).

114. *Id.* § 607.109(2)(e)(2).

power to a higher statutory range, such as 33 $\frac{1}{3}$ % to 50%, the shares acquired in that transaction would be subject to the Act.¹¹⁵

E. The Poison Pill

Control shares have the same voting rights they had before the control-share acquisition to the extent granted by the shareholders of the corporation.¹¹⁶ Whether shareholders can vote to grant control shares lesser voting rights than they had before their acquisition is unclear.¹¹⁷ The shareholder resolution must be approved by disinterested shareholders, and may have to be approved by all the shareholders. Under the Act, "interested shares" are those owned by the following persons: (1) the acquiring person or group; (2) any officer of the issuing public corporation; and (3) any employee of the issuing public corporation who is also a director of it.¹¹⁸ The Act does not set forth a calculation date for determining if shares are interested or disinterested.¹¹⁹

If the date of the shareholder meeting at which the voting rights of the control shares will be determined is selected as the calculation date, the solicitation of proxies for that meeting either by management or the acquiring person would be futile if a revocable proxy constitutes the power to direct the voting of shares for purposes of the Act.¹²⁰ In *CTS Corp. v. Dynamics Corp. of America*, the Court assumed that the determination of interested shares under a similar statute would be made as of the record date.¹²¹ The date when the acquiring person's statement is filed, however, would be subject to less manipulation by management. The voting rights of control shares are determined at the first special or annual meeting of shareholders following the date when they were acquired, unless the acquirer requests an earlier determination, undertakes to pay the corporation's expenses for the meeting, and files an acquiring person statement (APS).¹²² The directors of the corporation have ten days to call a spe-

115. *Id.* § 607.109(2)(e).

116. *Id.* § 607.109(9)(a).

117. Subsection (5) provides that control shares "have *only such voting rights* as are conferred by subsection (9)." *Id.* § 607.109(5) (emphasis added). This implies that less than full voting rights can be conferred.

118. *Id.* § 607.109(3).

119. See *supra* notes 72-74 and accompanying text.

120. The solicitation of proxies might constitute a control-share acquisition. Other states have avoided this interpretative issue. See *supra* text accompanying notes 88-89.

121. 107 S. Ct. 1637, 1641 n.2 (1987) (Indiana Statute).

122. FLA. STAT. § 607.109(7) (1987). The acquiring person may file an APS at the corporation's principal office. The APS must set forth prescribed information, including the identity of

cial meeting of shareholders, to be held within fifty days, to determine the voting rights of the control shares.¹²³ The acquirer may request that the special meeting be held not sooner than thirty days after the issuing public corporation's receipt of the APS.¹²⁴

The Act does not provide any consequences for a corporation's failure to comply with its provisions. Presumably, an acquirer who is an existing shareholder would have the right to force the corporation to comply with the Act. If the acquiring person is not an existing shareholder, the Act possibly cannot be enforced against the corporation, except by the other shareholders.

The Act also is unclear as to whether, in the absence of a fundamental corporate change, a second vote to approve the reinstatement of voting rights is required of all shareholders or of all shareholders in each class.¹²⁵ The Court did not express an opinion on an identical provision under the Indiana Act.¹²⁶ The SEC and Dynamics Corporation argued that the Indiana Act required a vote by all shareholders of record in addition to a vote by all disinterested shareholders of each class of stock. The SEC specifically argued that a separate vote must be taken by all shareholders and that the vote must be taken by separate groups if the acquisition would result in one of the statutorily enumerated transactions. Dynamics argued that a second vote was required only if the acquisition would result in a fundamental corporate

the acquiring person or persons; the number of shares owned; the range of voting power under which the control share acquisition would fall; and the terms of the proposed acquisition. *Id.* § 607.109(6). Some of this information is similar to that required under the Williams Act. *See supra* notes 14-15 and accompanying text.

123. FLA. STAT. § 607.109(7)(a), (b) (1987). The acquiring person may agree to a different date. *Id.* § 607.109(7)(b). If a special meeting is requested, the issuing public corporation must give notice of the meeting "as promptly as reasonably practicable" to all shareholders of record as of the record date for the meeting, regardless of whether they are entitled to vote at the meeting. The notice of an annual or special meeting at which control share voting rights will be considered must be accompanied by both a copy of the APS received by the corporation and a statement of the position or recommendation of the corporation's board of directors regarding authorizing voting rights for the control shares. *Id.* § 607.109(8).

124. FLA. STAT. § 607.109(7)(c) (1987).

125. *Id.* § 607.109(9)(b)(1). The Act provides that the resolution must be approved by:

1. Each class or series entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by the class or series, with the holders of the outstanding shares of a class or series being entitled to vote as a separate class if the proposed control-share acquisition would, if fully carried out, result in any of the changes described in s. 607.184; and

2. Each class or series entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

Id. § 607.109(9)(b).

126. *See CTS Corp.*, 107 S. Ct. at 1641-42 n.3. The CTS lower courts decided two separate votes were required. *Dynamics Corp. of Am. v. CTS Corp.*, 637 F. Supp. 389, 398 (N.D. Ill. 1986), *aff'd.*, 794 F.2d 250 (7th Cir.), *rev'd.*, 107 S. Ct. 1637 (1987).

change. The Court did not interpret that provision, and therefore, because of its similarity to the Indiana Act, the Act's voting requirements remain unclear.

A class or series of voting stock is entitled to vote separately on the proposal to give voting rights to control shares if the acquisition involves an amendment to the corporation's articles of incorporation that would require class voting under section 607.184 of the Florida General Corporation Act.¹²⁷ The Act probably requires two separate votes: one by a majority of all shareholders or by class or series if the acquisition would result in an organic corporate change, and a second by a majority of all disinterested shareholders.

F. *Redemption of Control Shares*

The Act provides that, unless an APS has been filed, the corporation may redeem control shares for their "fair value" at any time during the period ending sixty days after the last day of their acquisition.¹²⁸ The corporation may redeem those control shares only if permitted by its bylaws or articles of incorporation before the control-share acquisition. The Act does not specifically address whether the corporation may redeem shares that are given limited or restricted voting rights. A corporation can probably redeem those shares since the Act authorizes redemption rights if the control shares are not given *full* voting rights. The status of control shares that are neither accorded full voting rights nor redeemed by the corporation is still uncertain, however. If all voting rights are denied, it is unclear whether the holders of control shares will be allowed to vote on certain matters despite that denial.¹²⁹ The corporation may redeem control shares at any time after the denial of voting rights by the shareholders.¹³⁰

The Act does not provide a method for restoring voting rights to shares after they have been resold or disfranchised by the Act. This suggests that once the voting rights of the control shares are denied, those rights are terminated forever. Under this interpretation, a person with nonvoting control shares would be unable to resell them. In addition, this interpretation increases the relative voting power of the other shareholders without further cost or expense to them, legislatively creates a separate class of securities, and possibly creates a forfeiture or an impermissible restraint on the alienation of property.

127. FLA. STAT. § 607.184(1) (1987).

128. *Id.* § 607.109(10)(a).

129. *Id.* § 607.184.

130. *Id.* § 607.109(10)(b).

To avoid such results, the voting rights taint attendant to control shares should evaporate when those shares are transferred to a person in whose hands they are not control shares.¹³¹ The policy behind the Act will be fully served if purchasers of limited amounts of control shares do not inherit any voting rights restrictions attributable to them in the hands of the seller.

G. Dissenters' Rights

If a person acquires control shares representing a majority of the total voting power of an issuing public corporation and those control shares are accorded *full* voting rights, all the shareholders have dissenters' rights to be paid the fair value of their shares.¹³² The Act's language impliedly precludes dissenters' rights for shares granted limited or restricted rights. The Act provides dissenters' rights to *all* shareholders of the corporation,¹³³ without regard to whether a shareholder dissents or votes in favor of giving the control shares full voting rights. This result is contrary to the procedures applicable to other dissenters' rights transactions, such as mergers, liquidations, or sales of all or substantially all the assets of a corporation. Usually, a shareholder who votes for the transaction, or who fails to affirmatively object to the transaction, is not entitled to exercise any dissenters' rights.¹³⁴

Moreover, the Act expressly requires that the fair value payable to dissenters for their shares must not be less than the highest price per share paid for any of the control shares.¹³⁵ This prevents an acquirer from offering a premium price to obtain a controlling block of stock and then offering a lower price for the remaining stock. Thus, a partial tender offer for shares of an issuing public corporation is converted by the Act into a total tender offer. Whatever the merit of this objective, the Act allows a disinterested, minority shareholder to vote in favor of giving control shares full voting rights just so the shareholder may exercise dissenters' rights.¹³⁶ Such a result seems incongruous and contrary to the commonly recognized purpose of dissenters' rights. And yet the Act still permits a delayed, limited, two-tier price offer in the event control shares happen to be purchased for less than

131. *Id.* § 607.109(2)(e).

132. *Id.* §§ 607.109(11), .244, .247.

133. *Id.* § 607.109(11). Interpreting the Act literally, even the acquiring person is entitled to dissenters' rights, although this surely was not intended, and it probably will not result.

134. *Id.* § 607.247(1).

135. *Id.* § 607.109(11)(c).

136. Usually, the highest price paid for any of the control shares would be higher than the current market price of the stock.

non-control shares, which result is contrary to the purpose of the Act.

Finally, the Act's provision for dissenters' rights seemingly does not incorporate the exclusions applicable to all other transactions for which shareholders are accorded dissenters' rights under Florida law. Specifically, the Act disregards the exclusions for corporations that have 2,000 or more shareholders and for holders of shares that are registered on a national securities exchange.¹³⁷ These exclusions from dissenters' rights are traditionally premised on the theory that dissenters may liquidate their ownership interests in stock through the public market.

H. Opting Out and Other Elections

The Act expressly authorizes a corporation to amend its bylaws or articles of incorporation to: (i) exempt future acquisitions of its shares from the Act, in which case the corporation would not receive the benefit of the law's takeover deterrence; (ii) deny dissenters' rights to its shareholders with respect to the award of full voting rights to control shares; and (iii) give it redemption power over control shares.¹³⁸ If its bylaws or articles of incorporation so provide, an issuing public corporation may redeem control shares for which an APS has not been filed for fair value at any time during the sixty day period following the date of the last acquisition of control shares.¹³⁹

III. CONSTITUTIONALITY OF ACT

The validity of control-share acquisition laws uniformly has been assailed on constitutional grounds, and, until *CTS Corp. v. Dynamics Corp. of America*,¹⁴⁰ these attacks had been successful¹⁴¹ under both

137. FLA. STAT. § 607.244(3)(b) (1987).

138. *Id.* § 607.109(5), (10), (11)(a).

139. *Id.* § 607.109(10). "Fair value" for redemption apparently does not mean the same thing as it does for dissenters' rights under subsection (11), which limits its definition to that subsection. *Id.* § 607.109(11)(c).

140. 107 S. Ct. 1637 (1987) (holding the Indiana Act valid under commerce clause and supremacy clause).

141. *See, e.g.*, *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986) (Ohio act violated commerce clause and supremacy clause), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987); *Gelco Corp. v. Coniston Partners*, 652 F. Supp. 829 (D. Minn. 1986), *vacated in part on other grounds*, 811 F.2d 414 (8th Cir. 1987) (Minnesota act violated commerce clause and supremacy clause); *Terry v. Yamashita*, 643 F. Supp. 161 (D. Haw. 1986) (Hawaii act violated commerce clause); *APL Ltd. Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn. 1985) (Minnesota act violated commerce clause); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985) (Missouri act violated commerce clause and supremacy clause; statute also alleged to violate contract clause, full faith and credit clause, and the fourteenth amendment rights to freedom of contract and alienation of property). *See also* Edgar

the commerce clause¹⁴² and the supremacy clause.¹⁴³ The discussion that follows addresses the issues raised by the Act and similar control-share acquisition laws with regard to these constitutional issues, as well as whether the Act violates the full faith and credit clause or the due process and equal protection clauses of the fourteenth amendment. Further, the Act's application to foreign corporations calls for an inquiry into the proper application of the "internal affairs doctrine" of conflicts of laws.

A. Supremacy Clause

The supremacy clause¹⁴⁴ invalidates a state law that is superseded or preempted by federal law.¹⁴⁵ A federal law will supersede state law if Congress manifests an intent to do so "by so stating in express terms."¹⁴⁶ Absent express preemption, congressional intent to preempt all state law regarding an entire subject will be inferred if the federal interest in the subject is dominant or the scheme of federal regulation is sufficiently pervasive to indicate that Congress intended to occupy that subject of regulation.¹⁴⁷ A state law is void to the extent that it conflicts with federal law.¹⁴⁸ A conflict between state and federal law exists if "compliance with both federal and state regulations is a physical impossibility"¹⁴⁹ or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁵⁰

v. MITE Corp., 457 U.S. 624 (1982) (Illinois act violated commerce clause and supremacy clause); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978) (Idaho act violated commerce clause and supremacy clause), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

142. U.S. CONST. art. I, § 8, cl. 3.

143. U.S. CONST. art. VI, cl. 2.

144. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . , *any Thing* in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (emphasis added).

145. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707 (1985); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

146. *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1150 (1988); *Automated Medical Labs.*, 471 U.S. at 713; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

147. *Schneidewind*, 108 S. Ct. at 1150; *Automated Medical Labs.*, 471 U.S. at 713; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See Hines v. Davidowitz*, 312 U.S. 52 (1941).

148. *Automated Medical Labs.*, 471 U.S. at 713; *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982). *See CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1644 (1987).

149. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), *cited with approval and quoted in CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1644 (1987); *MITE*, 457 U.S. at 631; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978).

150. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *cited with approval and quoted in CTS*

With respect to the Act's validity under the supremacy clause, the issue is whether it is preempted by the Williams Act. To the extent that the Act applies to tender offers that result in the acquisition of control shares, both the Act and the Williams Act regulate the same subject. Nevertheless, Congress has not explicitly superseded or prohibited state regulation of tender offers. Section 28(a) of the Exchange Act, which was not amended by the adoption of the Williams Act, permits concurrent jurisdiction over securities transactions.¹⁵¹ Moreover, compliance with both the Act and the Williams Act is entirely possible. Therefore, the pertinent question is whether the Act is "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act.¹⁵²

In *CTS Corp. v. Dynamics Corp. of America*, the Court held that the Indiana Act, upon which the Florida Act is modeled, was not preempted by the Williams Act.¹⁵³ This precedent seemingly should sustain the validity of the Act under the supremacy clause. Nevertheless, two distinguishing features of the Act and the Court's shifting majority on the preemption issue leave some room for doubt. The Court has confronted on three occasions whether state laws regulating corporate takeovers are preempted by the Williams Act.¹⁵⁴ In *Leroy v. Great Western United Corp.*, the Court disposed of the case on a venue ground, thus it never considered the preemption issue.¹⁵⁵ In a dissenting opinion, however, Justice White, joined by Justices Brennan and Marshall, opposed the majority's decision to obviate the preemption issue and stated their view that "the very enactment and existence of the Williams Act pre-empts and invalidates all conflicting state efforts to regulate cash tender offers."¹⁵⁶

In *Edgar v. MITE Corp.*, the Court addressed the preemption issue with respect to the Illinois Act.¹⁵⁷ Although five Justices agreed that the Illinois Act violated the commerce clause, the Court was unable to

Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1644 (1987); *MITE*, 457 U.S. at 632. *Accord* Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977); DeCanas v. Bica, 424 U.S. 351, 363 (1976).

151. 15 U.S.C. § 78bb(a) (1982). "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." *Id.*

152. *Hines*, 312 U.S. at 67.

153. 107 S. Ct. 1637, 1648 (1987).

154. *CTS Corp.*, 107 S. Ct. 1637; *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

155. 443 U.S. 173, 180 (1979).

156. *Id.* at 190 (White, J., dissenting).

157. 457 U.S. 624 (1982). See *supra* notes 21-30 and accompanying text.

agree on the preemption issue. Justice White expressed the opinion of a plurality of the Court that the Illinois Act was unconstitutional under the supremacy clause.¹⁵⁸ Justices Brennan and Marshall, who would have held that the Idaho takeover law in *Great Western* was preempted by the supremacy clause, dissented in *MITE* on the ground that the case was moot.¹⁵⁹ The plurality in *MITE* concluded that the Illinois Act frustrated the objectives of the Williams Act by upsetting "the careful balance struck by Congress" between the interests of tender offerors and target companies.¹⁶⁰ A major objective of the Williams Act was neutrality—to "avoid favoring either management or the takeover bidder."¹⁶¹

The plurality pointed to three provisions of the Illinois Act that frustrated the neutrality objective of the Williams Act: first, the provision for a mandatory twenty-day waiting period after filing the tender offeror registration with the Secretary of State; second, the provision for a hearing by the Secretary of State; and third, the provision allowing the Secretary of State to determine the substantive fairness of a tender offer.¹⁶² The first two provisions were found objectionable because they interjected too much delay into the tender offer process—furnishing incumbent "management with a powerful tool to combat tender offers."¹⁶³ The twenty-day precommencement notification re-

158. *MITE*, 457 U.S. at 634.

159. *Id.* at 655. Presumably, if Justices Brennan and Marshall had addressed the merits of the case, they would have joined with the plurality to create a majority opinion holding that the Illinois Act was preempted by the supremacy clause. The Illinois Act required any tender offer for shares of a "target company" to be registered with the Secretary of State of Illinois. See *supra* notes 22-23 and accompanying text. A tender offer registration became effective 20 days after it was filed, unless the Secretary of State called a hearing to adjudicate the substantive fairness of the offer. ILL. REV. STAT. ch. 121½, para. 137.57.E (Supp. 1980). Such a hearing could be called either if the Secretary believed it was necessary to protect the shareholders of the target company or if it was requested by a majority of the target company's outside directors or Illinois shareholders owning 10% of the class of securities subject to the tender offer. *Id.* para. 137.57.A.

160. 457 U.S. at 634.

161. *Id.* at 633. The legislative history of the Williams Act expounds the economic utility of takeover bids and evidences concern that the Williams Act not discourage takeover bids. "[T]akeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." S. REP. NO. 550, 90th Cong., 1st Sess. 3-4 (1967), quoted in *MITE*, 457 U.S. 624, 633 (1982) [hereinafter SENATE REPORT]. "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids." 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams, sponsor of Williams Act).

162. *MITE*, 457 U.S. at 634-40.

163. *Id.* at 635. Delay is a crucial weapon in defending a takeover:

[D]elays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with [sic] antitakeover statute, or negotiating costly lifetime employment con-

quirement also favored management by allowing it to disseminate its views on the forthcoming tender offer before the bidder could publish its offer.¹⁶⁴ In addition, the provision for the Secretary of State to hold a hearing on the proposed tender offer not only created an opportunity for indefinite delay, but also favored management over the tender offeror by requiring a hearing at the request of either a majority of the target company's outside directors or its Illinois shareholders owning ten percent of the class of securities subject to the tender offer.¹⁶⁵ Allowing the Secretary of State to determine the substantive fairness of a tender offer was held to conflict with a fundamental purpose of the Williams Act—investor autonomy.¹⁶⁶

In *CTS Corp.*, the Court held that the Indiana Act was not preempted by the supremacy clause,¹⁶⁷ even considering “the broad interpretation of the Williams Act articulated by Justice White in *MITE*.”¹⁶⁸ The Court distinguished *MITE* by pointing out that none of the three objectionable provisions of the Illinois Act were present in the Indiana Act.¹⁶⁹ The Court limited the general rule of neutrality enunciated in *MITE* by providing that a state cannot enact a takeover statute that operates “to favor management against offerors, *to the detriment of shareholders*.”¹⁷⁰ In the Court's view, the effect of the Indiana Act was “to grant shareholders the power to deliberate collectively about the merits of tender offers. *This result is fully in accord*

tracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful.

122 CONG. REC. 30,877 (1976) (statement of Rep. Rodino describing consequences of delay in discussing the relationship between Hart-Scott-Rodino Act and Williams Act). See also Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977); Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433, 1437-42 (1977).

164. A 20-day advance notice requirement proposed by Senator Williams in 1965 in S. 2731 was considered by the SEC to be “unnecessary for the protection of security holders.” 112 CONG. REC. 19,005 (1966). In 1967, Senator Williams proposed a five-day, confidential pre-commencement filing requirement in S. 510, which was deleted from the bill before it was enacted as the Williams Act because “prior review was not necessary and in some cases might delay the offer when time was of the essence.” SENATE REPORT, *supra* note 161, at 4.

165. *MITE*, 457 U.S. at 637. The Court noted that management, as a group, is likely to own 10% of the outstanding equity securities of any particular target company.

166. *Id.* at 640. The Williams Act was designed to make the relevant facts known so shareholders would have a fair opportunity to make their decision. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4 (1968); SENATE REPORT, *supra* note 161, at 3.

167. Curiously, Justices Brennan and Marshall joined the majority opinion, apparently shunning their dissenting opinion in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

168. *CTS Corp. v. Dynamics Corp. v. Am.*, 107 S. Ct. 1637, 1645 (1987).

169. *Id.* at 1646.

170. *Id.* at 1645 (emphasis added).

with the purposes of the Williams Act.”¹⁷¹ Having interpreted the purposes of the Williams Act in the foregoing manner, the Indiana Act’s compatibility with the Williams Act was a foregone conclusion.

The Court rejected as “illusory” any conflict with the Williams Act based on the Indiana Act’s imposition of a fifty-day minimum delay before a shareholders’ meeting could be held to determine the voting rights of control shares purchased in a tender offer.¹⁷² The Court reasoned that the Indiana Act did not *require* a fifty-day delay before a tender offeror could purchase tendered shares, and a tender offeror could avoid any voting rights risk by making a tender offer contingent on receiving voting rights.¹⁷³ In any event, the Court did not view a fifty-day delay as unreasonable, noting that *MITE* only denounced “unreasonable delay.”¹⁷⁴ Further, the Court observed that “[t]he longstanding prevalence of state regulation in this area suggests that, if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly.”¹⁷⁵

In *CTS Corp.*, the Court noticeably abstained from mentioning any of the numerous pro-management features of the Indiana Act, choosing instead to beg the question whether it tilts the takeover contest in favor of management and against the takeover bidder. The Indiana Act favors management by allowing it to opt in and out of the act merely by amending the corporation’s bylaws, by imposing delay in the tender offer process, by prohibiting a partial tender offer, by converting every tender offer into a proxy contest that management may finance with corporate funds and in which it enjoys preferential access to shareholder lists and data, and by conditioning the attainment of voting rights on a vote of a majority of all outstanding shares, so that abstentions are effectively “no” votes against the tender offeror.

In *MITE*, three Justices concluded that the Illinois Act was pre-empted by the Williams Act because it conflicted with the “neutrality” objective of the Williams Act by favoring management over the

171. *Id.* at 1646 n.7 (emphasis added).

172. *Id.* at 1647. The United States Court of Appeals for the Seventh Circuit held that this 50-day delay mandated preemption under the supremacy clause because it was in direct conflict with the shorter 20-business-day period the Williams Act condones as the minimum period a tender offer must remain open. *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 261 (7th Cir. 1986), *rev’d*, 107 S. Ct. 1637 (1987). If the shareholder meeting to determine the voting rights of the control shares is held more than 60 days after the commencement of a tender offer, the tendering shareholders may withdraw their shares. *See* 15 U.S.C. § 78n(d)(5) (1982).

173. *CTS Corp.*, 107 S. Ct. at 1647.

174. *Id.*

175. *Id.* at 1648.

takeover bidder.¹⁷⁶ In *CTS Corp.*, the Court reformulated the preemption test to provide that only favoritism towards management "to the detriment of shareholders" is preempted by the Williams Act.¹⁷⁷ This reformulation, coupled with the Court's interpretation that one purpose of the Williams Act is to grant shareholders the power to deliberate collectively about the merits of tender offers, leads to the result that reasonable delay and pro-management provisions pass constitutional muster if they further that purpose. Since the Act is modeled after the Indiana Act, it should withstand supremacy clause scrutiny under the *CTS Corp.* rationale. Unlike the Indiana Act, however, the Act applies to certain foreign corporations. At least one other control-share acquisition act has been held invalid because it applied to foreign corporations.¹⁷⁸ Arguably, such acts interfere with the pervasive scheme of federal regulation embodied by the Williams Act. Given the changes in the composition of the Court since *CTS Corp.*, the application of the Act to foreign corporations might be enough to trigger preemption by the Williams Act.

B. *Internal Affairs Doctrine*

The Act raises the issue whether a state may apply its corporate laws to a foreign corporation. Traditionally, the internal affairs doctrine¹⁷⁹ required the corporate laws of the state of incorporation to be applied to issues involving corporate matters, such as the voting rights of a shareholder.¹⁸⁰ The Court's application of the internal affairs doctrine with respect to state takeover laws casts doubt on whether the Act's purported application to foreign corporations will be given effect.

Litigants have asserted the internal affairs doctrine as a defense for sustaining state takeover laws from preemptory constitutional chal-

176. 457 U.S. at 633.

177. 107 S. Ct. at 1645-46.

178. *Icahn v. Blunt*, 612 F. Supp. 1400, 1420 (W.D. Mo. 1985). See also *Fleet Aerospace Co. v. Holderman*, 796 F.2d 135 (6th Cir. 1986) *vacated and remanded sub nom. Ohio v. Fleet Aerospace Co.*, 107 S. Ct. 1949 (1987) (vacated in light of *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987)).

179. The internal affairs doctrine is a conflict of laws principle providing for the law of a single jurisdiction to govern the internal affairs of a corporation:

The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2) (1971). See R. LEFLAR, *AMERICAN CONFLICTS OF LAW* § 255 (3d ed. 1977); 2 J. BEALE, *THE CONFLICT OF LAWS* 893-98 (1935).

180. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971).

lenges under the commerce and supremacy clauses.¹⁸¹ This argument uses a conflict of laws rule as a substantive constitutional defense. In *MITE*, the Illinois Secretary of State contended that the state's interest in regulating the internal affairs of a local corporation was a sufficient local interest to outweigh any indirect burden the Illinois Act imposed on interstate commerce.¹⁸² The Court characterized the doctrine as a conflict of laws principle and stated that it was "of little use to the State in this context."¹⁸³ The Court rejected as "somewhat incredible" the use of the doctrine to justify the Illinois Act's burden on interstate commerce because "[t]ender offers . . . do not themselves implicate the internal affairs of the target company," and because the act regulated corporations that were not incorporated in Illinois.¹⁸⁴ The Court punctuated its point by stating that "Illinois has no interest in regulating the internal affairs of foreign corporations."¹⁸⁵

In *CTS Corp.*, Indiana asserted the internal affairs doctrine to sustain the validity of the Indiana Act against invalidation under the commerce clause.¹⁸⁶ This time the Court embraced the doctrine to dispel the argument that the Indiana Act adversely affected interstate commerce by subjecting stock acquisitions to inconsistent regulation by different states:

So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one state. No principle of *corporation law* and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders.¹⁸⁷

Also, the Court reasoned that the doctrine was important to interstate capital markets because it provided uniformity and stability in the regulation of a corporation's affairs. "This beneficial free market system depends at its core upon the fact that a corporation—*except in the rarest situations*—is organized under, and governed by, the law of a

181. See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1649 (1987); *Edgar v. MITE Corp.*, 457 U.S. 625, 645 (1982).

182. 457 U.S. at 645.

183. *Id.*

184. *Id.* at 645 (citing *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1280 n.53 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979)).

185. *MITE*, 457 U.S. at 645-46.

186. 107 S. Ct. at 1649.

187. *Id.* (emphasis added) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 304 (1971)).

single jurisdiction, traditionally the corporate law of the State of its incorporation."¹⁸⁸

The Court distinguished its opinion in *MITE* by noting that *MITE* addressed:

[A]n Illinois law that applied as well to out-of-state corporations as to in-state corporations. *We agree that Indiana has no interest in protecting nonresident shareholders of nonresident corporations.* But [the Indiana Act] applies only to corporations incorporated in Indiana. . . . Moreover, unlike the Illinois statute invalidated in *MITE*, the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.¹⁸⁹

The Court's discussion of the internal affairs doctrine as rationale for the validity of the Illinois Act under the commerce clause creates ideological confusion.¹⁹⁰ Conflict of laws rules determine which of two or more *valid* laws of different jurisdictions will govern a particular issue. A conflict of laws rule should have nothing to do with determining whether a particular state's law is valid under the Constitution. Perhaps the Court implicitly was confirming that the same rationale and public interests underlying the internal affairs doctrine justify any burdens on interstate commerce arising from a state's regulation of the voting rights of a corporation incorporated under its laws. The Court's articulation of the internal affairs doctrine in *CTS Corp.* and *MITE* indicates that tender offers do not constitute "internal affairs of a corporation," but voting rights resulting from a tender offer do.¹⁹¹ The Court's opinions in *CTS Corp.*, *MITE*, and earlier cases seem to require that the law of the state of incorporation govern the voting rights of corporate securities.¹⁹² As the Court explained in *Shaffer v. Heitner* with respect to the application of the internal affairs doctrine to determine the law governing director liability, "[t]he

188. *CTS Corp.*, 107 S. Ct. at 1650 (emphasis added).

189. *Id.* at 1651-52 (citations omitted and emphasis added).

190. The *CTS Corp.* opinion has been criticized for effecting an "embedding of the state-of-incorporation version of the internal affairs doctrine in the Constitution via the dormant Commerce Clause." Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29, 54 (1987).

191. *MITE*, 457 U.S. at 645; *CTS Corp.*, 107 S. Ct. at 1649.

192. See generally *CTS Corp.*, 107 S. Ct. 1637; *MITE*, 457 U.S. 624. See also *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Cort v. Ash*, 422 U.S. 66 (1975); *Broderick v. Rosner*, 294 U.S. 629 (1935); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (shareholders implicitly agree to be governed by laws of state of incorporation).

rationale for the general rule appears to be based more on the need for a uniform and certain standard to govern the internal affairs of a corporation than on the perceived interest of the State of incorporation."¹⁹³ The Court previously has articulated this need for "uniformity and certainty"¹⁹⁴ and observed that "investors commit their funds . . . on the understanding that . . . state law will govern the internal affairs of the corporation."¹⁹⁵ If the internal affairs doctrine requires applying the law of the state of incorporation, the Act should be unenforceable against a foreign corporation.

Some commentators suggest that the choice of law should not turn on where the corporation is incorporated, but rather on which state has a more significant relationship to the corporation and its shareholders.¹⁹⁶ The advocates for a "most significant relationship" test argue that the modern theory of conflicts is that the law of the forum state will apply if the forum state has a substantial interest in the parties or the subject matter. Some authority exists for this position.¹⁹⁷

Other courts have recognized a "pseudo-foreign" corporation exception to the internal affairs doctrine that permits the enforcement of mandatory policies and interests of a state having the only real contacts with a corporation.¹⁹⁸ In *Mansfield Hardwood Lumber Co. v. Johnson*, the court applied the law of the forum state to a case involving the fiduciary obligations of corporate management and majority

193. 433 U.S. 186, 215 n.44 (1977).

194. Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947) (full faith and credit clause requires application of laws of the state of incorporation). For a discussion of the full faith and credit clause, see *infra* notes 220-30 and accompanying text.

195. Cort v. Ash, 422 U.S. 66, 84 (1975). *Accord* Santa Fe Indus. v. Green, 430 U.S. 462, 479 (1977). See also Rogers v. Guaranty Trust Co., 288 U.S. 123, 130 (1933); Broderick v. Rosner, 294 U.S. 629 (1935) (New York law applied to shareholder assessments against New Jersey residents).

196. E.g., Buxbaum, *supra* note 190, at 33. *Contra* Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1.

197. Hoopston Canning Co. v. Cullen, 318 U.S. 313, 320 (1943) ("Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere.") (insurance regulation case); *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir.) (per curiam) (distinguishable because holding based on actionable fraud in *transfer* of stock, a transaction not involving internal affairs of a corporation), *cert. denied*, 361 U.S. 885 (1959); Tankersley v. Albright, 374 F. Supp. 538 (N.D. Ill. 1974) (Illinois law applied to determine validity of voting trust for shares of a Delaware corporation that owned the Chicago Tribune); *Western Air Lines v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961) (California cumulative voting requirement applied to corporation incorporated in Delaware, even though Delaware law permitted unit voting). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

198. *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317 (5th Cir.) (per curiam), *cert. denied*, 361 U.S. 885 (1959). See Tankersley v. Albright, 374 F. Supp. 538 (N.D. Ill. 1974) (headquarters and principal place of business in Illinois). See generally Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955).

shareholders in purchasing stock from a minority shareholder.¹⁹⁹ All the corporation's contacts, other than incorporation, were with the forum state. This narrow exception to the internal affairs doctrine would not sustain the Act's jurisdictional test for foreign corporations, because the Act could apply to a foreign corporation that has more substantial ties to its state of incorporation than to Florida. Specifically, the Act would apply to a foreign corporation even if its principal office and place of business were in another state, eighty-nine percent of its shareholders were residents of that other state, eighty-nine percent of its shares were owned by residents of that other state, and a majority of its employees were residents of that other state.²⁰⁰

Other states have tried to extend their corporate laws to foreign corporations. Since the turn of the century, New York has statutorily imposed a variety of its corporate laws on foreign corporations.²⁰¹ Although the jurisdictional test has varied over the years, the courts have allowed this application to foreign corporations.²⁰² In addition, Section 2115 of the California Corporations Code²⁰³ applies California law to *all* the internal affairs of a foreign corporation if (a) a majority of its stock is held in California and is not traded over a national securities exchange, and (b) at least fifty percent of its "business" (measured by sales, assets, and payroll) is connected with California. A California appellate court has upheld the constitutionality of this statute as applied to impose cumulative voting on a corporation incorporated in Utah but lacking any other significant contact with that state.²⁰⁴ Despite these few judicial deviations and the evolution of conflicts theory from "choice-of-law" rules to the modern "balancing of interests" methodology, the "umbilical tie of the foreign corporation to the state of its charter" still dominates the determination of state law applicable to internal corporate affairs.²⁰⁵

199. 263 F.2d 748 (5th Cir.) (distinguishable because holding based on principles of actionable fraud in *transfer* of stock, a transaction not involving internal affairs of corporation), *aff'd on reh'g*, 268 F.2d 317 (per curiam), *cert. denied*, 361 U.S. 885 (1959).

200. See FLA. STAT. §§ 607.109, .110(2) (1987).

201. See N.Y. BUS. CORP. LAW §§ 719-27, 1315-20 (McKinney 1986).

202. *International Ticket Scale Corp. v. United States*, 165 F.2d 358 (2d Cir. 1948); *International Paper Co. v. United States*, 88 F. Supp. 891 (Ct. Cl. 1950). See generally Kozyris, *supra* note 196, at 66-76.

203. CAL. CORP. CODE § 2115 (West 1977).

204. *Wilson v. Louisiana-Pac. Resources, Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982).

205. In his 1985 review of the status of the internal affairs doctrine, Professor Kozyris noted over 100 cases applying the internal affairs doctrine during the preceding 25 years. See Kozyris, *supra* note 196. See also, e.g., *Gregg v. United States Indus.*, 715 F.2d 1522 (11th Cir. 1983); *Jacobs v. Adams*, 601 F.2d 176 (5th Cir. 1979) (applying Florida law as law of state of incorpo-

The internal affairs doctrine also is expressly entrenched in many states' corporation laws, including Florida's. The Model Business Corporation Act, adopted by many states, provides: "This Act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state."²⁰⁶ The Florida General Corporation Act expressly excludes a "foreign corporation" from its definition of "corporation" for all purposes.²⁰⁷ In addition, section 607.304, which requires foreign corporations to qualify to transact business in Florida, provides that "nothing contained in [the Florida General Corporation Act] shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation."²⁰⁸ When interpreting internal affairs in light of *CTS Corp.*, this provision conflicts directly with section 607.110 of the Florida General Corporation Act, which applies the Act to foreign corporations. Under Florida law, however, the enactment of the Act implicitly amended section 607.304 of the Florida General Corporation Act because of the irreconcilable conflict between them.²⁰⁹ The Act creates a conflict between the common law choice of law rule of a foreign corporation's state of incorporation and Florida's statutory choice of law rule, which applies the Act to foreign corporations with a significant relationship to Florida.²¹⁰

This conflict should be resolved in favor of the internal affairs doctrine for a variety of reasons. The historical precedent of the internal affairs doctrine has created expectations that will be frustrated by enforcement of the Act's choice of law provision. These expectations are held by not only existing shareholders and takeover bidders, but also by creditors, customers, investors, and suppliers. The Act poses a slippery slope for the application of statutory choice of law provisions to other intracorporate relationships, such as fiduciary duties, dividend

ration); *Bryan v. Brock & Belvins Co.*, 490 F.2d 563 (5th Cir.) (Georgia law applied), *cert. denied*, 419 U.S. 844 (1974); *Hausman v. Buckley*, 299 F.2d 696 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962); *Hasan v. Clevetrust Realty Investors*, 548 F. Supp. 1146 (N.D. Ohio 1982) (modern conflicts theory rejected), *vacated on other grounds*, 729 F.2d 372 (6th Cir. 1984); *Gadd v. Pearson*, 351 F. Supp. 895 (M.D. Fla. 1972) (Florida conflicts rule).

206. MODEL BUSINESS CORP. ACT. ANN. 2D § 15.05(c) (West Supp. 1987). The official commentary to the Model Business Corporation Act explains that this provision "preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states." *Id.*

207. FLA. STAT. § 607.004(5) (1987).

208. *Id.* § 607.304(1).

209. *State v. J.R.M.*, 388 So. 2d 1227 (Fla. 1980).

210. The conflict also presents an issue under the full faith and credit clause of the Constitution, U.S. CONST. art. IV, § 1, which is discussed elsewhere in this article. See *infra* text accompanying notes 220-30.

distributions, dissenters' rights, and corporate indemnification. The internal affairs of a corporation involve an array of interrelationships among creditors, officers, directors, and shareholders of various classes—not just two parties to a takeover transaction. As repeatedly observed by the Court, corporate internal affairs need certain, stable, and uniform regulation to avoid unfair surprise, and to assure predictability in corporate transactions. Those persons who engage in transactions with corporations need to know the rules of the game in advance, so they can plan their transactions, and assess their corresponding rights and liabilities under standards and procedures that are fixed and predetermined.

In addition, shareholders expect and require equal treatment without regard to where they reside, where a lawsuit is filed, or where the corporation has assets or conducts business. The internal affairs doctrine enforces the expectations of the founders and incorporators, who “contracted” for the law of the state of incorporation. Both modern and traditional conflicts theories attribute substantial weight to the parties' choice of law, unless it is arbitrary.²¹¹ The validation of statutory provisions applying state corporate laws to foreign corporations would subject foreign corporations to regulation under varying laws of different states based on changing business contacts and uncontrollable factors, such as the residence of its shareholders. A corporation conceivably could satisfy the jurisdictional test set forth in the Act with respect to several states. If each of these states had a control-share acquisition act with different procedures and voting rights consequences, which state's law would control? Compliance with all the different acts might be a physical impossibility.

The prospect of varying regulation under different states' laws should trigger invalidation under the commerce clause,²¹² and the substantial interference with the Williams Act's comprehensive scheme of federal regulation should invoke supremacy clause preemption.²¹³ This conflict of laws will signal a “race to the courthouse.” A takeover bidder for a foreign corporation subject to the Act would most likely couple the commencement of its tender offer with a suit in the state of incorporation to enjoin enforcement of the Act and for a declaratory judgement that the Act is invalid or inapplicable to the foreign corporation. As discussed below, a Florida court would be required to give

211. See *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (by purchasing shares, shareholders implicitly agree to be governed by laws of state of incorporation).

212. See *infra* text accompanying notes 230-55.

213. See *supra* text accompanying notes 144-78.

that judgment preclusive effect pursuant to the full faith and credit clause.²¹⁴

The obvious legislative cure for this potential invalidity of the Act is to eliminate its application to foreign corporations. Less drastic alternatives might suffice, however. The infirmity in the Act might be cured by limiting its application to only those foreign corporations that have amended their articles of incorporation to incorporate the Act. This cure would be consistent with the law sustaining the validity of poison pills.²¹⁵ Also, this would give effect to the "contract" of the shareholders embodied in the articles of incorporation.

Alternatively, the Act's jurisdictional criteria for foreign corporations could be tightened so that the Act applies only to pseudo-foreign corporations. Although the United States Supreme Court has not endorsed this exception to the internal affairs doctrine, other courts have, and its intrusion on the doctrine is minimal.²¹⁶

The Act's application to foreign corporations could be modified to fit within the parameters of legal precedent upholding the constitutionality of state blue sky laws.²¹⁷ This might entail requiring every tender offer made to Florida residents to be registered with the Florida Division of Securities, and conditioning registration on a determination that the tender offer's terms and structure are "fair, just, and equitable" to residents of Florida.²¹⁸ This alternative would limit the Act's scope, however, to transactions with Florida shareholders. It would be similar to the current provisions of the Florida Securities and Investor Protection Act²¹⁹ that require the registration of offers to *sell* securities to Florida residents, but instead would regulate offers to *purchase* securities from Florida residents. Because it would not have any extraterritorial effect, the regulation would be constitutional, provided that any delay imposed on the tender offer were reasonable and definite.

C. Full Faith and Credit and Due Process

As mentioned above, the full faith and credit clause²²⁰ may bar Florida from applying the Act to a foreign corporation. A correlative

214. See *infra* text accompanying notes 220-30.

215. E.g., *Revlon, Inc. v. McAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

216. See *supra* note 198 and accompanying text.

217. See, e.g., *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

218. See FLA. STAT. § 517.081(7) (1987).

219. FLA. STAT. § 517.011 (1987).

220. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

issue is whether a Florida court must give full faith and credit to a judgment entered by a court in another jurisdiction regarding the applicability of the Act to a foreign corporation. The Supreme Court originally interpreted the full faith and credit clause to require application of the law of the state of incorporation to resolve issues involving the internal affairs of a corporation²²¹ and treated the clause as a constitutional conflict of laws rule. Since then, however, courts increasingly have deferred to the law of the forum state.²²²

To reflect that trend in deference, the Court has enunciated a modern rule regarding the application of the full faith and credit clause:

[I]n view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests. Accordingly, the fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather . . . the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.²²³

This rule usually results in courts validating the application of the forum state's law.²²⁴ Accordingly, the full faith and credit clause should not prohibit Florida from applying the Act to a foreign corporation if a sufficient relationship exists between Florida and the corporation. The question will be whether the statutory contacts prescribed by the Act²²⁵ establish a sufficient relationship. Courts will have to resolve that factual issue on a case-by-case basis.

221. See, e.g., *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947); *Broderick v. Rosner*, 294 U.S. 629 (1935) (residents of New Jersey who are shareholders of a company incorporated in New York submit themselves to law and jurisdiction of New York); *Converse v. Hamilton*, 224 U.S. 243 (1912).

222. See *Alaska Packers Ass'n. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). There, the Court held:

Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing . . . that of the conflicting interests involved those of the foreign state are superior to those of the forum.

Id. at 547-48.

223. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (plurality opinion) (Stevens, J., concurring) (footnotes omitted).

224. See Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 442 (1982).

225. See FLA. STAT. § 607.110(1) (1987).

The application of the Act to a foreign corporation also raises the issue whether it violates the due process clause of the fourteenth amendment. The Court has described this constitutional inquiry as requiring an analysis of whether application of the forum state's law creates "unfair surprise" to the justified expectations of a party.²²⁶ In *Allstate Insurance Co. v. Hague*, the court implied that application of the law of any state that has any "significant" contact or aggregation of contacts with, and an interest in the controversy will satisfy the due process requirement.²²⁷ Under this test, the Act seemingly satisfies the due process requirements because it requires substantive contacts before it applies to foreign corporations. Nevertheless, *CTS Corp.* and *MITE* clearly proclaim that a state "has no interest in regulating the internal affairs of foreign corporations"²²⁸ or "in protecting nonresident shareholders of nonresident corporations."²²⁹ Therefore, the application of the internal affairs doctrine to the Act leaves Florida without a legitimate interest in applying the Act to a foreign corporation. Absent a legitimate interest in the parties or controversy, the application of the Act to a foreign corporation arguably violates due process.

D. Commerce Clause

The commerce clause grants to Congress the power to "regulate Commerce . . . among the several States."²³⁰ The Court has held for over a century that the negative implication of the commerce clause limits the states' power to regulate interstate commerce, even in the absence of federal regulation.²³¹ The Act's application to foreign corporations²³² is doomed by Justice Scalia's statement that "[a]s long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause."²³³

226. *Allstate Ins. Co.*, 449 U.S. at 327 (Stevens, J., concurring); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 457-60 (1959), reprinted in revised form in R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).

227. 449 U.S. 302, 312-13 (1981) (plurality opinion). See also *Clay v. Sun Ins. Office*, 377 U.S. 179, 183 (1964); *Richards v. United States*, 369 U.S. 1, 15 (1962) (dicta); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72-73 (1954).

228. *Edgar v. MITE Corp.*, 457 U.S. 624, 645-46 (1982) (emphasis added).

229. *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1651 (1987) (emphasis omitted).

230. U.S. CONST. art. I, § 8, cl. 3.

231. E.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852).

232. See FLA. STAT. § 607.110 (1987).

233. *CTS Corp.*, 107 S. Ct. 1637, 1653 (Scalia, J., concurring).

The Act is a direct assertion of extraterritorial regulation because it applies to stock acquisitions that occur outside of Florida and do not involve a Florida corporation or a single Florida resident.²³⁴ Statutes that directly assert extraterritorial jurisdiction over persons or property are invalid under the commerce clause.²³⁵ The commerce clause also invalidates state laws that subject interstate commercial activities to a risk of inconsistent regulation by different states.²³⁶ Unlike the Indiana act validated under the commerce clause in *CTS Corp.*, the Florida law applies to foreign corporations.²³⁷ In *CTS Corp.*, the Court concluded that the Indiana act did not subject stock acquisitions to inconsistent regulation by different states because it applied solely to Indiana corporations. "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State."²³⁸ The Court also distinguished the Indiana act from the Illinois act invalidated under the commerce clause in *MITE*, by pointing out that the Indiana act applied only to corporations having "a substantial number of shareholders in Indiana."²³⁹ The Florida law fails to satisfy this commerce clause condition.

In addition to prohibiting direct regulation of interstate commerce, the commerce clause prohibits indirect state regulation of interstate commerce that either discriminates against or imposes an excessive burden on interstate commerce.²⁴⁰ Only *incidental* burdens on interstate commerce are permitted.²⁴¹ Thus, the test for commerce clause validity requires a determination of the legitimate state interests served by the statute and a balancing of those local interests against the statute's burden on interstate commerce. In *CTS Corp.*, the Court held that the "limited extent" of the Indiana act's effect on interstate commerce was justified by its local interest in "defining the attributes

234. This would be so if the seller(s) and purchaser(s) of shares in a foreign corporation were all nonresidents of Florida. The residence requirements that trigger the Act are for shareholders or employees, but the private sale of stock is a transaction that need not involve Florida shareholders and has nothing to do with the employees. See FLA. STAT. §§ 607.109(4), .110(2) (1987).

235. *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 (1925).

236. *E.g.*, *CTS Corp.*, 107 S. Ct. at 1649; *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080, 2086 (1986); *MITE*, 457 U.S. at 642.

237. FLA. STAT. § 607.110(2) (1987).

238. *CTS Corp.*, 107 S. Ct. at 1649.

239. *Id.* at 1652. This distinction is puzzling, however, because both acts applied to a corporation having as few as 10% of its shares owned by residents of the state.

240. *MITE*, 457 U.S. at 643; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Huron Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

241. *MITE*, 457 U.S. at 640.

of shares in its corporations and in protecting shareholders."²⁴² The Court also held that the Indiana act operated evenhandedly and did not discriminate between resident and nonresident shareholders of Indiana corporations. Like the Florida law, the Indiana act denies voting rights to acquired shares that cause a shareholder's total voting power to exceed statutorily prescribed levels, until the corporation's shareholders vote to give those shares voting rights.

In *CTS Corp.*, the Court based its commerce clause holding on three key factors. First, the Indiana act's effect on interstate commerce was incidental because the act applied only to Indiana corporations having a substantial number of Indiana shareholders. Second, the Court attributed great importance to each state's local interest in regulating the "corporate governance" of corporations formed under its laws.²⁴³ The Court relied on the internal affairs doctrine of conflict of laws as support for this state interest and recognized voting rights as an internal affair of a domestic corporation.²⁴⁴ Third, the Court recognized the state's interest in protecting shareholders from the "coercive aspects" of two-tier tender offers and giving them "an opportunity to decide collectively whether the resulting change in voting control of the corporation . . . would be desirable. A change in management may have important effects on the shareholders' interests."²⁴⁵ Notably, the importance of these two state interests differed from the Court's interpretation in *MITE*, where the Court held that Illinois' interests in protecting resident shareholders and regulating the internal affairs of corporations did not outweigh the burden the Illinois act imposed on interstate commerce.²⁴⁶ The Court in *CTS Corp.* distinguished this aspect of *MITE* on two grounds. First, the Illinois act at issue in *MITE* applied to foreign corporations, and a state "has no interest in protecting nonresident shareholders of *nonresident corporations*."²⁴⁷ Second, the Indiana act, unlike the Illinois act, applies only to corporations with a substantial number of shareholders in Indiana.²⁴⁸ These distinctions imply that a state has a legitimate interest in protecting *resident* shareholders of a foreign corporation having a substantial number of shareholders resident in that state. The distinctions also raise a question regarding what the Court meant by its in-

242. 107 S. Ct. at 1652.

243. *Id.* at 1651.

244. *Id.* at 1649. See *supra* text accompanying notes 179-218.

245. *CTS Corp.*, 107 S. Ct. at 1651 (emphasis in original).

246. 457 U.S. 624, 644 (1982).

247. 107 S. Ct. at 1651.

248. *Id.* at 1652.

ference that the scope of the Indiana act's application is limited to corporations having a substantial number of Indiana residents.

Both the Illinois and Indiana acts applied to a corporation having only ten percent of its shares owned by residents of that state. The Indiana act also applied if, alternatively, a corporation had either 10,000 shareholders or ten percent of its shareholders resident in Indiana. The three shareholder tests under the Indiana act were disjunctive. If the Court misread the Indiana act to require 10,000 Indiana shareholders before that act attached, the Florida law might be invalid even if its application to foreign corporations is eliminated because it requires *only one* of these shareholder levels: (1) 10% of the corporation's shares are owned by Florida residents; (2) 10% of the corporation's shareholders are Florida residents; or (3) 1,000 of the corporation's shareholders are Florida residents. If the Court's reference in *CTS Corp.* to substantially more shareholders refers to the "10,000 shareholder" test, the Act could be invalid because it has only a 1,000 shareholder test.

The Illinois act differed from the Indiana act in several other important respects. First, the Illinois act exempted tender offers by a corporation for its own shares and accordingly it did not evenhandedly apply to all tender offers. Second, the Illinois act had extraterritorial effect because it applied to both Illinois and foreign corporations having their principal place of business outside Illinois. Finally, the Illinois act prohibited certain transactions in interstate commerce, at least until statutory procedures were observed, and possibly indefinitely. The Court in *CTS Corp.* emphasized this last difference: "We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control."²⁴⁹

In summary, the Florida law fails the test of commerce clause validity administered in *CTS Corp.* because it applies to foreign corporations and to nonresident shareholders of foreign corporations. Also, none of the shareholder nexus tests of the Act assure that "every application of the . . . Act will affect a substantial number of [Florida] residents."²⁵⁰ Accordingly, there is no justification for the Act's burden on interstate commerce.

The Act contains a savings clause that apparently is intended to mitigate its vulnerability to invalidation. Thus, the Act does not apply to

249. *Id.* This argument understates the economic reality of the Indiana Act's effect, as Dynamics contended. See *supra* note 61 and accompanying text.

250. *CTS Corp.*, 107 S. Ct. at 1652 (discussing the Indiana Act).

a foreign corporation if the law of its state of incorporation is expressly inconsistent with the Act.²⁵¹ The savings clause might protect the Act from commerce clause invalidation by insuring that control share acquisitions are not subject to a risk of inconsistent regulation by different states.²⁵² However, the savings clause only resolves inconsistencies with a foreign corporation's state of incorporation and does not purport to surrender jurisdiction to any other state that might claim to have the same or a greater relationship to the corporation than Florida. Because the jurisdictional test applicable to foreign corporations under the Act permits at least a few states to have concurrent substantial relationships to a foreign corporation, the savings clause does not prevent a risk of inconsistent state regulation.

In its more liberal version, the internal affairs doctrine requires only that the internal affairs of a corporation be governed by the corporate laws of a single jurisdiction—whether that jurisdiction is the state of incorporation or the state having the most substantial relationship to the corporation and its shareholders.²⁵³ If a foreign corporation's state of incorporation observes the liberal version of the internal affairs doctrine, the savings clause is needless, if it observes the "state-of-incorporation" version, the savings clause is partially ineffective. In any event, the savings clause raises interpretative questions. The Act does not specify when a home state's laws will be considered inconsistent with provisions of the savings clause. A related ambiguity is the requirement that the home state's law must be *expressly* inconsistent. The home state's law might need to specifically state that no other state can regulate control-share acquisitions involving its corporations. Or, it may be sufficient that the home state lack a takeover law. If the home state has a takeover law that is different yet consistent with the Florida Act, such as the Affiliated Transactions Law, the clause leaves unclear whether that would be expressly inconsistent with the Act.

If the savings clause is not enough to protect the Act's application to foreign corporations from being unconstitutional, the Act could possibly be severed. Generally, courts will sever the invalid provision assuming that the legislature would have been content to enact the law without the invalid provision.²⁵⁴ This rule of law bodes well for the Act because as originally adopted by the Florida Legislature it did not

251. FLA. STAT. § 607.110(3) (1987).

252. See *supra* text accompanying note 238.

253. See *supra* text accompanying notes 196-97.

254. *Eastern Air Lines v. Department of Revenue*, 455 So. 2d 311, 317 (Fla. 1984); *Barndollar v. Sunset Realty Corp.*, 379 So. 2d 1278, 1280 (Fla. 1979); *Small v. Sun Oil Co.*, 222 So. 2d 196, 199 (Fla. 1969).

apply to foreign corporations.²⁵⁵ Accordingly, if the Act's foreign corporation provisions are held invalid, the balance of the Act could be severed from the invalid provision and given effect.

E. Due Process and Equal Protection

The Act deprives buyers and sellers of stock of certain liberties and property rights. The ensuing discussion analyzes whether those liberties and property rights are protected by the due process clause of the fourteenth amendment.²⁵⁶ Also considered is whether the Act creates classifications that deprive any person of equal protection of the law as guaranteed by the fourteenth amendment.²⁵⁷ If accorded the same judicial scrutiny given to statutes that restrain personal liberty, the Act is susceptible to constitutional challenge. Nevertheless, those who would question the constitutionality of the Act under the fourteenth amendment should heed the warning of the United States Supreme Court: "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications."²⁵⁸ In the past thirty years, the Court has generally refrained from invalidating a state economic regulation based on the due process clause.

The Act affects the rights of existing shareholders and prospective stock purchasers to enter into contracts for the sale of control shares. The sale and purchase of control shares is restricted because the Act imposes an automatic forfeiture of voting rights that can be restored only through its procedures. This restriction burdens persons wishing to buy control shares, existing major shareholders desiring to sell control shares, and even minority shareholders who desire to sell their shares pursuant to a tender offer or otherwise. Accordingly, the Act deprives these persons of their fourteenth amendment rights to freedom of contract and alienation of property:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth

255. House Staff Analysis, *supra* note 6, at 5.

256. U.S. CONST. amend. XIV, § 1. The fourteenth amendment guarantees that a state shall not "deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws." *Id.* (emphasis added). The Act applies only to corporations that have qualified to transact business in Florida. FLA. STAT. § 607.110(1)(a) (1987). The affected corporations will therefore be within the jurisdiction of Florida, and thus will be protected by the equal protection clause. See *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

257. U.S. CONST. amend XIV, § 1.

258. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.²⁵⁹

The term "liberty" in the Amendment "denotes not merely freedom from bodily restraint, but also the right of the individual to contract."²⁶⁰

Further, the Act deprives control share buyers and sellers of property rights. It deprives selling shareholders of the control premium value of their stock²⁶¹ and buyers of voting rights unless the other shareholders approve those rights. The Act also deprives interested shareholders of the right to vote on whether control shares receive voting rights²⁶² and, effectively, who will manage the corporation. Ironically, the shareholders with the very most at stake in the matter are disfranchised.

Absent infringement of a "fundamental right"²⁶³ or use of a "suspect classification," the "rational basis" test is used to determine whether a state law violates the due process or equal protection guarantees.²⁶⁴ With respect to substantive due process, the test is a rather lax one: whether a statute has a real and substantial relationship to a legitimate state purpose.²⁶⁵ Due process only bars a state from exercising its police power in an arbitrary, capricious, or unreasonable manner. With respect to equal protection, the rational basis test is whether

259. *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948), *quoted in Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972). The Court in *Lynch* stated, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . ." *Id.* See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

260. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

261. See generally *Jensen & Ruback, The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983). A contributing factor to the unconstitutionality of the Illinois Act was that "[s]hareholders [were] deprived of the opportunity to sell their shares at a premium." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

262. FLA. STAT. § 607.109(3) (1987).

263. A fundamental right is one explicitly or impliedly guaranteed by the Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

264. *Id.* at 40, 44 (equal protection); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (equal protection); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (equal protection); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (due process); *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (due process).

265. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Liggett Co. v. Baldridge*, 278 U.S. 105, 113 (1928).

the statutory classification furthers some legitimate state purpose.²⁶⁶ In assessing the legitimacy of a statutory purpose, the courts now seem to focus on the *articulated* purpose of the statute.²⁶⁷

The Act does not include a statement of legislative intent to evidence its purpose. However, the legislative staff analysis indicates that its purposes were to protect minority shareholders from coercive two-tier tender offers,²⁶⁸ to create a disincentive for existing Florida corporations to reincorporate in other states, and to attract foreign corporations to reincorporate in Florida.²⁶⁹

Are these *legitimate* state interests? The answer is less than clear. The United States Supreme Court has recognized a state's interest in protecting its residents in securities transactions.²⁷⁰ On the other hand, the Court has decreed that a state "has no legitimate interest in protecting nonresident shareholders" of nonresident corporations.²⁷¹ Business climate enhancement purposes, such as inducing businesses to incorporate in a state, have not been approved as a state interest served by control share acquisition acts.²⁷² A federal district court has ruled that protection of local economic interests was not a state interest served by Missouri's control share acquisition act because it did nothing to actually protect local economic interests.²⁷³ Thus,

266. *San Antonio Indep. School Dist.*, 411 U.S. at 40. See also *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) (the legitimate state purpose need not be the primary purpose of the statute).

267. In the early years of rational basis analysis of economic regulation, the courts looked behind a statute to determine its true purpose and actively reviewed whether the statute or classification was reasonably related to achieving that purpose. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). These precedents are now discredited as reflecting an era of judicial interventionism. This approach to state economic regulation was followed by a "hands off" approach to the equal protection clause. *Levy v. Louisiana*, 391 U.S. 68 (1968) ("[We] give great latitude to the legislature. . ."). In the past 25 years, the pronouncements of the Court have required "some rational relationship to legitimate state purposes." *San Antonio Indep. School Dist.*, 411 U.S. at 40.

268. A two-tier tender offer typically involves a partial tender offer at a premium price for a controlling stake of a target corporation (but less than all its shares) followed by a second tender offer for the remaining shares at a substantially lower price.

269. House Staff Analysis, *supra* note 6, at 2, 4-5.

270. *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1651-52 (1987) (Indiana Act); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (Illinois Act); *Lemieux v. Young*, 211 U.S. 489 (1908) (blue sky laws).

271. *MITE*, 457 U.S. at 644. *Accord CTS Corp.*, 107 S. Ct. at 1651; *Terry v. Yamashita*, 643 F. Supp. 161 (D. Haw. 1986); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985).

272. *Yamashita*, 643 F. Supp. at 166 ("purely speculative"). *But see Gelco v. Coniston Partners*, 652 F. Supp. 829, 842 (D. Minn. 1986), *vacated in part on other grounds*, 811 F.2d 414 (8th Cir. 1987).

273. *Icahn v. Blunt*, 612 F. Supp. 1400, 1417 (W.D. Mo. 1985). See also *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986) (only speculation that every acquirer will

“[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose,”²⁷⁴ and shielding local corporations from acquisition by out-of-state buyers (and resulting relocation out-of-state) presumably is not a legitimate purpose.²⁷⁵ Although Florida need not adopt the least restrictive means²⁷⁶ to achieve the Act’s legitimate purposes, the Act’s regulation of control share acquisitions must be reasonably related to those purposes. The Act should not regulate every control-share acquisition without distinction as to whether it is a two-tiered tender offer or coercive to minority shareholders, whether it will result in a change of managerial control, or whether it will adversely affect the local economy or business climate of the state. A statute prohibiting two-tier tender offers to Florida shareholders or regulating the substantive terms of tender offers would suffice to assure that shareholders are not coerced in their investment decisions. If shareholder protection through disclosure is a purpose, the filing of the acquiring person statement (APS) should be required of all acquiring persons. Currently, only buyers who desire voting rights need to file an APS. A corporation repurchasing its own shares presumably would never file an APS because it does not care about voting rights.²⁷⁷ If collective shareholder approval of changes in management or business location is a purpose of the Act, Florida could require shareholder approval of those actions through regular procedures for shareholder action.²⁷⁸ The Florida legislature could protect Florida citizens and local economy against business relocation attributable to mergers and acquisitions, a seemingly per se invalid purpose, by enacting laws imposing excise taxes, protecting employees through mandatory severance pay, or requiring advance notice of business relocations. If direct regulation of these economic mischiefs would be invalid under the commerce clause, indirect regulation through the

relocate the target corporation’s business), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987). The Missouri statute did not limit its application to corporations having a minimum level of employment and exempted a corporation’s purchases of its own shares without regard to the effect on the local economy. MO. REV. STAT. § 351.407 (Supp. 1987).

274. *Maine v. Taylor*, 106 S. Ct. 2440, 2453 (1986).

275. Protecting local corporations could be a “true” purpose of the Act. The acquisition of a local corporation by a larger out-of-state corporation often adversely affects the local economy because of the ensuing business consolidation activities such as relocation of corporate executives, corporate headquarters, and manufacturing facilities.

276. The “least restrictive means” analysis is part of the “close scrutiny” test that is applicable only if the state action impinges the exercise of fundamental constitutional rights. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973).

277. A Florida corporation may never vote treasury shares (shares that were issued and outstanding that are presently owned by the issuing corporation). FLA. STAT. § 607.097(2) (1987).

278. *See* FLA. STAT. §§ 607.181, .221 (1987).

Act is unreasonable and only fortuitously related to those purposes.

The Act will violate the equal protection clause if it creates classifications that are not rationally related to a proper governmental purpose. Of course, the courts apply a relatively loose standard of "reasonableness" to classifications in economic legislation.²⁷⁹ Also, a statutory classification will be presumed rational if *any* set of facts reasonably can be conceived to justify the classification and the classification is not totally unrelated to the statutory purpose.²⁸⁰

The Act's classifications of persons who are subject to the Act seem unrelated to any legitimate purpose described above. The Act does not even mention "coercive two-tier tender offers"—the primary articulated purpose of the Act—nor does it otherwise limit its application only to that method of a control-share acquisition. The transactions regulated by the Act are not confined to changes in control that result in corporate relocation. In fact, the Act does not even require a change of control as a condition of regulation. The levels of total voting power that trigger control-share status are arbitrary and do not have any common significance to the corporations subject to the Act. The acquisition of 33% of the voting power will never be as significant to some corporations as the acquisition of even 10% of the total voting power is to others.

The Act subjects a corporation to its regulation based on the number and residence of its shareholders. This classification lacks any relationship whatsoever to the economic importance of the corporation to Florida or its shareholders' need for protection.²⁸¹ A corporation with only a few shareholders could be more economically important to the state than a bankrupt corporation with over 10,000 shareholders. Minority shareholders of corporations with fewer than 100 shareholders could be more susceptible to coercion than a minority shareholder of a corporation whose shares are traded on a national securities exchange.

Even assuming the classifications in the Act are reasonable, they are not rationally related to a legitimate state purpose. The Act's classifications are concurrently overinclusive and underinclusive. The Act does not embrace every two-tier tender offer. A two-tier tender offer by a corporation to repurchase its own shares would not, as a practical matter, be affected by the Act.²⁸² Also, a two-tier tender offer in-

279. *E.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1968).

280. *Lindsley v. Natural Carbonic Co.*, 220 U.S. 61 (1911).

281. Foreign corporations are subject to a higher standard. The Act requires 500 employees resident in Florida and a Florida payroll exceeding \$5 million. FLA. STAT. § 607.110 (1987).

282. The corporation would be subject to the automatic forfeiture of voting rights, but corporations cannot vote treasury shares anyway. *See supra* note 277.

volving a Florida corporation having fewer than 100 shareholders would not be subject to the Act. Furthermore, a two-tier tender offer supported by the management of the target corporation would not be subject to the Act because the bylaws can be amended to escape the Act.²⁸³ On the other hand, many good faith transactions not involving coercion or two-tier pricing will be subject to the Act. For example, tender offers for all the shares of a corporation are subject to the Act, as are privately negotiated purchases of control shares. These transactions do not present any of the ills the Act seeks to thwart. The classifications are similarly unsuited to other possible legitimate purposes.

The Act's classification of regulated corporations is unreasonable. As mentioned above, the classification is based primarily on the number and residence of shareholders. The effect is to discriminate between corporations with fewer than 100 shareholders and those with 100 or more shareholders. The corporation's total number of shareholders seems unrelated to the protection needed by a single shareholder. With respect to corporations with at least 100 shareholders, the Act is overinclusive, or at least superfluous. It requires corporations that are subject to the Williams Act to observe the same statutory procedures as corporations that are not, even though the Williams Act requires the filing of identical information as included in an APS.²⁸⁴

The Act also causes the Florida General Corporation Act to discriminate between methods of corporate acquisition. For example, a merger or sale of substantially all assets only requires approval of a majority of the shares entitled to vote on the transaction. A control-share acquisition that has practically the same consequences as a merger, however, seems to require approval of a majority of the shares owned by the minority shareholders.²⁸⁵ No reason exists for this different standard of shareholder approval. Correspondingly, the Florida General Corporation Act discriminates in the dissenters' rights applicable to a control-share acquisition versus a merger, consolidation, or asset sale or exchange.²⁸⁶ This discriminatory classification of dissenting shareholders based on the form of the corporate acquisition affects both dissenting shareholders and their corporations, and does not appear to be reasonably related to the purpose of protecting shareholders.

283. FLA. STAT. §§ 607.081, .109(5) (1987).

284. Generally, a corporation will be subject to the Williams Act if it has more than 500 shareholders and \$5 million worth of total assets. 15 U.S.C. §§ 781(g), 78m(d) (1982).

285. Compare FLA. STAT. § 607.109(a)(b) (1987) with *id.* § 607.221(2).

286. *Id.* §§ 607.109(11), .244, .247. See *supra* notes 132-37 and accompanying text.

As discussed briefly above, the Act also unreasonably discriminates between control-share acquisitions that would actually result in a change of management or a business relocation and those that would not. The quantity of voting power a purchaser acquires does not necessarily determine whether a change of control or business relocation will occur. For example, the acquisition of one Florida corporation by another is unlikely to result in a business relocation. In some corporations a relatively small percentage of voting power will represent working control and in others anything less than 50% will not affect control. The Act regulates the latter, but not the former.

In summary, the constitutionality of the Act under the due process and equal protection clauses of the fourteenth amendment is open to question. Although courts are timid to invalidate economic legislation based on the due process clause, the Act's scheme of regulation seems fraught with opportunity to challenge the assertion that the Act bears a reasonable and substantial relationship to its articulated purposes. The Act seems even more troublesome with respect to its infringement on equal protection. The classifications created by the Act, on its face and in operation, are both under- and over-inclusive. Although economic regulations do not require "mathematical nicety" or the avoidance of all inequality, the Constitution does require a reasonable basis for statutory discriminations.²⁸⁷ Measured thusly, the constitutionality of the Act's classifications seem problematic.

IV. PUBLIC POLICY CONSIDERATIONS

Assuming, *arguendo*, that the Act is constitutional, the question remains whether the State of Florida should regulate stock transfers between willing buyers and sellers. Traditionally, states have regulated the internal affairs of corporations organized under their laws.²⁸⁸ Although the Act purportedly regulates only the internal affairs of Florida corporations and foreign corporations having a substantial nexus with Florida,²⁸⁹ the Act in reality regulates stock transactions.

The regulation of stock transactions that achieve the same result as a merger, consolidation, or a sale or exchange of all or substantially all the assets of a corporation is a neutral and justifiable objective. To do so in a way that discriminates against one form of transaction and jeopardizes individual economic rights is quite a different matter. The Act goes too far in imposing a forfeiture of voting rights that are re-

287. *Dandridge v. Williams*, 397 U.S. 471 (1970).

288. *See supra* notes 179-211 and accompanying text.

289. *See supra* notes 62-66 and accompanying text.

coverable only by an expensive and burdensome procedure that favors management. The expressed purposes of the Act do not require these extreme means.

True, tender offers normally are on a short time schedule and some two-tier tender offers coerce shareholders into selling their shares out of concern that they will be left in a minority position with a controlling shareholder.²⁹⁰ In these instances, shareholders are forced to sell their shares regardless of the corporate control issues inherent in the transaction. In this respect, the Act achieves a worthwhile purpose. But not every tender offer is followed by a second-step transaction.²⁹¹ Florida already regulates the way in which tender offerors may use their voting power to effect fundamental corporate changes.²⁹² If regulation of two-tier tender offers is required, the Florida Legislature should enact a law to regulate those offers specifically.

The Act disserves the stated purpose of shareholder protection and distorts shareholder choice. The Act gives management, who otherwise would have no direct role in a tender offer except for providing an opinion on its merits to the shareholders, the opportunity to prevent shareholder choice by using an array of promanagement provisions against a tender offer. Corporations are fueled by capital, and capital is driven by shareholders, and those with the greatest stake in the outcome historically have been free to exercise corporate control within the limits of fiduciary responsibility. The principal tool of corporate control is the right to vote, to select management, and influence fundamental corporate decisions. The Legislature should not interfere in the lawful choices of those whose capital is at risk. Shareholder protection is one thing, but management entrenchment is quite another. Even if the shareholders vote, the Act permits a minority of so-called disinterested shareholders to block a majority of shareholders from selling their stock. This is corporate folly and contrary to the economic theory of corporate democracy by which shareholders historically have invested in corporations. Apparently, the State of Florida prefers existing managers over prospective major shareholders. The State has no basis on which to make such an arbitrary choice. The Act effectuates a forfeiture of property rights and a direct restraint on the alienation of property. The Act prevents the alienation of stock by denying voting rights, and voting rights do not exist in a vacuum, rather they are attached to securities. Florida's legitimate in-

290. House Staff Analysis, *supra* note 6, at 1-2.

291. SEC. & EXCH. COMM'N'S ADVISORY COMM. ON TENDER OFFERS, *The Economics of Partial and Two-Tier Tender Offers*, 49 Fed. Reg. 26,755 (1984).

292. See FLA. STAT. § 607.184 (1987).

terest in promoting local industry and economic growth should not be twisted to inflict its judgment on controlling shareholders with respect to who is best to serve as custodian of the shareholders' corporate business.

The Act seeks to insulate Florida corporations and foreign corporations having a nexus with Florida from corporate takeovers. Companies whose activities and ownership are national in scope should not be given protection by a state where the production facilities are located. The argument that anti-takeover laws protect local communities from plant closings and unemployment is unfounded when friendly acquisitions, leveraged buy outs, and internal corporate downsizing and restructuring that have the same effects go unregulated. These activities are not affected by the Act.

Congress is likely to pass major tender offer legislation in light of *CTS Corp.*²⁹³ and the recent insider trading scandals. The federal government is the proper forum for establishing national rules governing the national market for corporate control. Congress is less likely to be influenced by local economic pressures and interests. U.S. Representatives Dingell and Markey, U.S. Senators Proxmire and Riegle, and U.S. Representatives Lent and Rinaldo have introduced bills to address tender offers and other related matters.²⁹⁴ Congress may outlaw "greenmail"²⁹⁵ and amend Rule 13(d) of the Exchange Act²⁹⁶ to require bidders to disclose within one day, rather than ten, their acquisition of five percent of a company's stock. Other legislative proposals include lengthening the twenty business day minimum period for holding open tender offers, limiting "creeping tender offers" that result from open market purchases, prohibiting "street sweeping" by bidders after the termination of a tender offer, and prohibiting corporate anti-takeover defenses such as poison pills and "golden parachutes."

V. GUIDELINES FOR COMPLIANCE WITH THE ACT

A corporation that is subject to the Act should decide whether it desires to take advantage of various elections allowed under the law. First, the corporation should decide whether it wishes to be subject to the Act.²⁹⁷ If it does, the corporation should answer two additional

293. *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987).

294. H.R. 2668, 100th Cong., 1st Sess. (1987); S. 1323, 100th Cong., 1st Sess. (1987); H.R. 2172, 100th Cong., 1st Sess. (1987).

295. Greenmail refers to a target corporation's payment to an aggressor to buy back acquired shares at a premium in exchange for the aggressor's agreement not to pursue a takeover.

296. 15 U.S.C. § 78m(d)(1) (1982).

297. Corporations may amend their bylaws or articles of incorporation to elect not to be covered by the law. See *supra* notes 138-39 and accompanying text.

questions: (1) whether it wishes to recognize statutory dissenters' rights when control shares constituting a majority of its total voting power are accorded full voting rights; and (2) whether it wishes to have redemption rights with respect to control shares that are not given full voting rights or for which an APS is not filed.

Whether a corporation desires or requires the protection afforded by the Act depends on its existing takeover posture and its future objectives. Some corporations already might have effective takeover deterrents, such as classified stock, cumulative voting, staggered directorships, or anti-takeover provisions like poison pills in their articles of incorporation. These corporations should evaluate whether these tactical measures are sufficient without resort to the Act. Some corporations might favor being acquired for sufficient value, and might therefore avoid the Act with its possibility for impairment of friendly takeovers.²⁹⁸ Of course, a corporation may elect at any time not to be governed by the Act merely by amending its bylaws, which usually requires only the approval of the board of directors. Therefore, most corporations should not opt out of the Act, reserving the ever present right to do so. A corporation that remains subject to the Act seemingly would desire redemption power over control shares. The redemption power need not be exercised, but the existence of it gives the corporation the ability to eliminate a pesky, avaricious shareholder without relenting to greenmail.

Persons seeking to acquire a corporation that is subject to the Act should first seek a friendly acquisition. All else being equal, friendly suitors will prefer some other form of acquisition besides a stock sale, principally to avoid the discriminatory voting and dissenters' rights provisions of the Act that do not apply to mergers or assets sales. With respect to hostile tender offers, every ardent bidder should sue to enjoin and invalidate the Act concurrently with the commencement of its tender offer.²⁹⁹ If the tender offer involves a foreign corporation, the suit will undoubtedly receive a warmer welcome in the foreign corporation's home state. An APS should be filed at the commencement of the tender offer along with a specific request for a record date, meeting date, and proxy material for the shareholders meeting that will ensue.

298. See *supra* note 100 and accompanying text.

299. Complaints have already been filed in Florida and New York by CRTF Corp., a wholly owned subsidiary of Campeau Corp., a Canadian corporation, which was formed for the purpose of acquiring Federated Department Stores, Inc., a Delaware corporation with its principal offices in Cincinnati, Ohio. CRTF Corp. v. Federated Dep't. Stores, Inc., No. 88-0133 (S.D. Fla. filed Jan. 25, 1988); Wall St. J., Mar. 7, 1988, at 4, col.e2.

Timing then becomes crucial. The tender offeror should avoid acquiring any shares before the record date of the shareholders meeting. Shares acquired before the record date will not have any voting rights unless approved by the pre-existing shareholders. The proposed acceptance of tendered shares needs to be carefully timed to avoid any withdrawal rights available to tendering shareholders under the Exchange Act. Naturally, consideration should be given to a conditional tender offer, dependent on the receipt of full voting rights. Further, if interested shares are determined on the record date for the shareholder meeting, tendered shares should not be accepted until after that date. One author has suggested having the tender offer transmittal letter irrevocably appoint the bidder as proxy for the tendering shareholder, effective on acceptance of the shares for payment.³⁰⁰ Then, to avoid the issue whether its shares are "interested" because of concurrent proxy solicitation, a bidder should separate its proxy solicitation from the tender offer. Rule 14a-2(a)(2) under the Exchange Act exempts from the proxy rules a solicitation by a beneficial owner, which the bidder will be when the proxy becomes effective. However, this arrangement poses logistical problems with respect to shares held in street name or with a clearing agency. Finally, the acquirer should disclose in its APS that it intends to seek voting rights for as much of the target corporation's stock that it would ever consider purchasing. If the bidder receives shareholder approval for a maximum range of voting power, further shareholder approval does not seem to be required by the Act for later stock purchases.

VI. CONCLUSION

Acknowledging its articulated purpose to protect the investors, the Act is really a thinly veiled attempt by the Florida Legislature to protect local business. This activity, however, will probably provide additional incentive to the SEC and Congress to seek preemptive federal legislation.³⁰¹ The effect of congressional action might upset the balance underlying the Williams Act that has functioned reasonably well over the past twenty years. Moreover, the Act probably is unconstitutional as applied to foreign corporations, and the entire Act might be struck down if challenged in court on constitutional grounds. Until then, buyers of stock of corporations regulated by the Act must attempt to comply with its provisions, which are ambiguous as applied

300. 9 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 50-55 (1987).

301. SEC Chairman David S. Ruder believes federal law should preempt state laws that unduly interfere with free transferability of securities. *Chairman Ruder Sees National Approach to Takeovers*, Fed. Sec. L. Rep. (CCH) No. 1256, at 8 (1987).

to most situations. The Act likely will give rise to a torrent of judicial scrutiny that will determine its ultimate scope and validity.

ADDENDUM

Subsequent to the preparation of this Article, the Florida Legislature amended the Act in the 1988 regular session to provide that family members shall not be deemed to be part of a "group" if such persons act together in exercising or directing the exercise of the voting power of an issuing public corporation (whether through a voting trust, shareholder agreement, or otherwise) if all the parties are related by blood or marriage, or are trustees or personal representatives of a person, and if each party has been a shareholder since July 1, 1987. Ch. 83-111, 1988 Fla. Laws ____ (to be codified at FLA. STAT. 607.109(2)(f)). This is consistent with the argument that the mere formation of a group should not constitute a control share acquisition. The acquisition of voting power after the formation of a group through the acquisition of stock, however, should be subject to the Act; otherwise, six related purchasers owning nominal amounts of stock before July 1, 1987, could agree to act in concert and then purchase 9% of the outstanding stock of an issuing public corporation and not be subject to the Act. The result probably would be an unintended consequence of the amendment to the Act.

The Act also was amended to provide that the voting trustee of any voting trust shall not be deemed an "acquiring person." This amendment is intended to protect family-owned businesses.