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Jeffery M. Fuller

Robert C. Rasmussen

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# FLORIDA TAKEOVER LAW: AFFILIATED TRANSACTIONS

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

*Many states perceive corporate takeover activity as a threat to local business and industry. The Florida Affiliated Transactions Statute is one part of a comprehensive scheme of anti-takeover regulation in Florida. The authors of this Article explain the development of American takeover regulation, analyze this statute, and discuss surrounding constitutional and public policy issues.*

**T**HE AVALANCHE of state regulation of hostile takeovers under the guise of corporate governance has obstructed the course of corporate takeover activity.<sup>1</sup> The United States Supreme Court upheld an Indiana takeover law in 1987.<sup>2</sup> Since then, numerous states have enacted legislation designed to thwart hostile takeovers of in-state companies and protect local labor and markets.<sup>3</sup>

Florida has adopted a four-prong approach to protect local industry against hostile takeovers. Section 607.109, Florida Statutes, regulates the

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\* Associate, Glenn, Rasmussen, Fogarty, Merryday & Russo, Tampa, Florida; B.A., 1980, University of South Florida; M.B.A., J.D., 1984, University of Florida. Mr. Fuller is a member of The Florida Bar and practices primarily in the areas of corporate and securities law.

\*\* Partner, Glenn, Rasmussen, Fogarty, Merryday & Russo, Tampa, Florida; B.S.B.A., 1971, The American University; J.D., 1974, University of Iowa. Mr. Rasmussen is a member of the Florida Bar and practices primarily in the areas of corporate and securities law.

1. See Hackl & Testani, *Second Generation State Takeover Statutes and Shareholder Wealth: An Empirical Study*, 97 YALE L.J. 1193 (1988) (empirical evidence indicates that second generation state takeover statutes deter takeover attempts and reduce the likelihood of a successful acquisition).

2. See *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1644-48, 1652 (1987).

3. See, e.g., **Arizona:** ARIZ. REV. STAT. ANN. §§ 10-1201 to -1223 (Supp. 1989); **Delaware:** DEL. CODE ANN. tit. 8, § 203 (Supp. 1988); **Florida:** FLA. STAT. §§ 607.108-.111 (1989); **Louisiana:** LA. REV. STAT. ANN. §§ 12:135 to :140.2 (West Supp. 1990); **Massachusetts:** MASS. GEN. LAWS ANN. chs. 110D, 110F (West 1990); **Minnesota:** MINN. STAT. ANN. §§ 302.A.601-.673 (West Supp. 1989); **Missouri:** MO. ANN. STAT. §§ 351.015, .295, .407, .410-.459, .690 (Vernon 1987 & Supp. 1990); **Nevada:** NEV. REV. STAT. §§ 78.376-.378 (1987); **North Carolina:** N.C. GEN. STAT. art. 55-9, -9A (1990); **Washington:** WASH. REV. CODE §§ 23A.50.010-.50.901 (Supp. 1988).

Delaware's takeover law has withstood constitutional attack. See *BNS Inc. v. Koppers Co.*, 783 F. Supp. 458 (D. Del. 1988); *City Capital Assoc. v. Interco*, 696 F. Supp. 1551 (D. Del. 1988); *RP Acquisition Corp. v. Stanley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988). Nearly half the corporations listed on the New York Stock Exchange and 56% of all "Fortune 500" companies are domiciled in Delaware. 11 Sec. & Fed. Corp. L. Rep. (Clark Boardman) 26 (1989). Thus, because state takeover laws that apply to foreign corporations are probably unconstitutional, see *infra* text accompanying notes 128-35, Delaware takeover law will figure prominently in American takeover activity.

*acquisition* of corporate control.<sup>4</sup> Section 607.108 regulates the *exercise* of corporate control.<sup>5</sup> Section 607.111(9) authorizes directors to consider nonshareholder interests in discharging their duties, thus giving incumbent management additional ammunition to justify an anti-takeover position.<sup>6</sup> Section 607.058 authorizes Florida corporations to issue "poison pills"—stock rights and options designed to dilute the value of shares acquired in hostile takeovers.<sup>7</sup> Constitutional issues in this statutory scheme remain uncertain. Aside from those issues, however, Florida takeover law presents a formidable challenge to hostile bids for control of local corporations and provides these corporations with an imposing arsenal to combat corporate raiders.<sup>8</sup>

This Article focuses on the Florida Affiliated Transactions Statute,<sup>9</sup> the prong which regulates the exercise of corporate control. After examining federal and state takeover legislation, the Article discusses judicial responses to state takeover laws. The Article also examines this statute and identifies interpretative problems. The Article concludes by analyzing constitutional issues and public policy considerations.

## I. BACKGROUND

### A. Federal Takeover Law

In 1968, Congress responded to perceived abuses in unregulated cash tender offers by enacting the Williams Act,<sup>10</sup> which amended sections 13

4. FLA. STAT. § 607.109 (1989). Basically, voting rights of shares acquired in transactions that bring stock ownership above certain thresholds are conditioned on special approval by disinterested shareholders or management. *See id.*

5. *Id.* § 607.108. Basically, shareholders meeting certain ownership requirements may not engage in certain transactions with the corporation. *See id.* The prohibited transactions are various ways of combining with the corporation or obtaining more control; the statute is aimed at acquirers who buy control of a corporation at one price and then "squeeze out" the remaining shareholders at a lower price. *See infra* notes 137-64 and accompanying text.

6. *Id.* § 607.111(9).

7. *Id.* § 607.058. The validity of "poison pills" is uncertain in some jurisdictions. Compare *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (directors who adopted "poison pill" preferred stock protected by business judgment rule) with *West Point-Pepperell, Inc. v. Farley Inc.*, 711 F. Supp. 1088 (N.D. Ga. 1988) and *Amalgamated Sugar Co. v. NL Indus.*, 644 F. Supp. 1229 (S.D.N.Y. 1986).

8. The Florida Investor Protection Act was Florida's first takeover law. *See* ch. 77-441, § 1-8, 1977 Fla. Laws 1804-08 (repealed 1979). For a discussion of that law, see Louv, *Developments in Florida Corporate Law and Securities Regulation*, 32 U. MIAMI L. REV. 931 (1978); Rasmussen & Fuller, *Florida Takeover Law: Control-Share Acquisitions*, 16 FLA. ST. U.L. REV. 103, 109-110 (1988).

9. FLA. STAT. § 607.108 (1989). Effective July 1, 1990, there will be a major renumbering of the Florida corporate code, with this statute renumbered 607.0901. *See id.* § 607.0901. All citations are to the pre-July numbering system.

For a structurally similar analysis of Florida's control share acquisition statute, see Rasmussen & Fuller, *supra* note 8.

10. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C.A. §§ 78m(d)-(e), 78n(d)-(f) (1988)).

and 14 of the Securities Exchange Act of 1934.<sup>11</sup> Congress extended the coverage of the Williams Act in 1970 to include tender offers in which shareholders of the target corporation receive securities in exchange for their shares.<sup>12</sup> Thus, the Williams Act regulates tender offers for shares of a target corporation in which the tendering shareholders receive cash, securities, or a combination of cash and securities.

Neither the Williams Act nor the regulations thereunder define the term "tender offer." Courts interpret the term to mean a public invitation to all shareholders of a corporation to tender shares at a specified price.<sup>13</sup> The Securities and Exchange Commission (SEC) has proposed eight factors for use in determining whether an acquisition is a tender offer: (1) active and widespread solicitation of shareholders; (2) solicitation of a substantial percentage of the stock; (3) offer to purchase at a premium; (4) firm offer terms; (5) contingency of offer on the tender of a fixed percentage of shares; (6) limited duration of offer; (7) pressure on shareholders to sell; and (8) public announcements of a purchasing program preceding or accompanying rapid accumulation of stock.<sup>14</sup> The Williams Act was intended to protect investors confronted with tender offers.<sup>15</sup> It does so by imposing procedural safeguards and requiring potential acquirers to provide ample time and information for investors to evaluate tender offers.

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11. Ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C.A. § 78a et seq. (West 1981 & Supp. 1990)); see S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811-14. Only Virginia had a takeover statute when Congress enacted the Williams Act. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 n.6 (1982) (citing VA. CODE ANN. § 13.1-528 (1978) (effective March 5, 1968); Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 690 n.7 (1981)).

12. Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified at 15 U.S.C. § 78n(d)(1) (1988)).

13. See generally E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973). See Mathews, *The Elusive Definition of a Tender Offer*, 7 J. CORP. L. 503 (1982); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973); Note, *Defining Tender Offers: Resolving a Decade of Dilemma*, 54 ST. JOHN'S L. REV. 520 (1980).

14. See *Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979); *Branscan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 791 n.13 (S.D.N.Y. 1979) (citing criteria from Securities and Exchange Commission's amicus curiae brief).

15. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 22-24 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (Congress enacted the Williams Act 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."); S. REP. NO. 550, *supra* note 11, at 3-4; see also H.R. REP. NO. 1711, *supra* note 11, at 2-4. Senator Williams stated: "This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer . . ." 113 CONG. REC. 854 (1967).

Section 13(d) of the Exchange Act regulates both negotiated and open-market purchases of stock. A person who acquires beneficial ownership of more than five percent of any class of equity security registered pursuant to section 12 of the Exchange Act must file a disclosure document with the SEC and target corporation within 10 days after the last acquisition.<sup>16</sup> Section 14(d) of the Exchange Act regulates tender offers. A person who makes a "tender offer" that will result in the person beneficially owning more than five percent of any class of equity security registered pursuant to section 12 of the Exchange Act must file a similar disclosure document with the SEC and the target corporation "as soon as practicable on the date of the commencement of the tender offer."<sup>17</sup>

Although essentially a disclosure statute, the Williams Act does impose substantive limitations on tender offers. A tender offer must be open to all shareholders and treat all shareholders equally.<sup>18</sup> A tender offer must remain open for at least twenty business days.<sup>19</sup> A tendering shareholder may withdraw tendered shares at any time while the tender offer remains open and, if the offeror has not purchased the shares, at any time after the sixtieth day following the commencement of the tender offer.<sup>20</sup> If the shareholders tender more shares than the offeror will accept, the offeror must purchase the tendered shares on a pro rata basis.<sup>21</sup> The offeror must pay the same price, that is, the highest price offered for any of the tendered shares, for all the shares purchased pursuant to the tender offer.<sup>22</sup>

Since the enactment of the Williams Act, observers have argued about the precise nature of its "investor protection." According to one theory, the Williams Act embraces a "market approach" to the regulation of corporate takeovers and provides a framework within which market forces can function freely and openly; thus, a state takeover statute that upsets the congressionally selected "neutral balance"<sup>23</sup> be-

16. 15 U.S.C. § 78m(d)(1) (1988); 17 C.F.R. §§ 240.13d-1, -101 (1989).

17. 15 U.S.C. § 78n(d)(1) (1988); 17 C.F.R. §§ 240.14d-3 (1989).

18. 15 U.S.C. § 78n(e) (1988) (section 14(e) of the Exchange Act); 17 C.F.R. § 240.14d-10(a) (1989). However, acquirers may offer different packages if shareholders may elect among them. Also, acquirers may exclude shareholders in certain states or offer them different consideration if necessitated by state law. *Id.* § 14d-10(b)-(d).

19. 15 U.S.C. § 78n(d)(4) (1988) (section 14(d)(4) of the Exchange Act); 17 C.F.R. § 240.14e-1(a) (1989).

20. 15 U.S.C. § 78n(d)(5) (1988) (section 14(d)(5) of the Exchange Act); 17 C.F.R. §§ 240.14d-7, .14e-1(a) (1989).

21. 15 U.S.C. § 78n(d) (1988); 17 C.F.R. § 240.14d-8 (1989).

22. 15 U.S.C. § 78n(d)(7) (1988) (section 14(d)(7) of the Exchange Act); 17 C.F.R. § 240.14d-10 (1989).

23. The Senate committee stated that it took "extreme care to avoid tipping the balance of

tween management and the tender offeror frustrates the objectives of the Williams Act.<sup>24</sup> According to an opposing theory, the Williams Act's policy of neutrality does not prohibit states from upsetting that neutrality if the objective is increased shareholder protection.<sup>25</sup> These competing theories have influenced decisions such as *Edgar v. MITE Corp.*<sup>26</sup> and *CTS Corp. v. Dynamics Corp.*<sup>27</sup>

### B. State Takeover Laws

States began to regulate tender offers when the Williams Act was adopted.<sup>28</sup> During the ten-year period following the passage of the Williams Act, thirty-seven states enacted laws regulating tender offers.<sup>29</sup> These "first generation" state takeover laws focused on the tender offer phase of the takeover process but departed from the Williams Act in important respects. First, state takeover laws generally imposed pre-commencement filing requirements that would delay the commencement of a tender offer.<sup>30</sup> Second, those laws gave state officials broad discretionary powers, such as the right to require disclosure of information not required by the Williams Act<sup>31</sup> and the right to determine the fairness of a tender offer.<sup>32</sup> Some first generation state takeover

regulation either in favor of management or in favor of the person making the takeover bid" and drafted the legislation "to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." S. REP. NO. 550, *supra* note , at 3.

24. For a discussion of the "market approach," see Note, *A Failed Experiment: State Takeover Regulation After Edgar v. MITE Corp.*, 1983 U. ILL. L. REV. 457, 459-62 [hereinafter Note, *A Failed Experiment*]; see also Note, *Second Generation State Takeover Legislation: Maryland Takes a New Tack*, 83 MICH. L. REV. 433, 452-54 (1984) [hereinafter Note, *Maryland Takes a New Tack*]; Comment, *Minnesota's Corporate Takeover and Shareholder Protection Act of 1987: Economic Folly or Constitutional Viability—Or Both?*, 11 HAMLINE L. REV. 281, 293-95 (1987).

25. See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 646-47 (1982) (Powell, J., concurring); *id.* at 655 (Stevens, J., concurring); *CTS Corp. v. Dynamics Corp.*, 107 S. Ct. 1637, 1644-48, 1652 (1987).

26. 457 U.S. 624 (1982) (discussed *infra* notes 61-84 and accompanying text).

27. 107 S. Ct. 1637 (1987) (discussed *infra* notes 86-107 and accompanying text).

28. For a general overview of the history of state takeover laws, see Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 SEC. REG. L.J. 332 (1986); 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).

29. See Note, *A Failed Experiment*, *supra* note 24, at 457 n.4.

30. See, e.g., FLA. STAT. § 517.355(1) (1977) (required the filing of a disclosure statement with the Florida Division of Securities at the time of commencing a tender offer); ILL. REV. STAT. ch. 121 1/2, para. 137.54.A (1979) (required 20 days prior written notice of terms of offer).

31. See FLA. STAT. § 517.355(2)(a) (1977).

32. See, e.g., ILL. REV. STAT. ch. 121 1/2, para. 137.57.A, .E (1979). The Illinois statute empowered the Secretary of State to conduct a fairness hearing to determine whether the offerees in the tender offer would receive full and fair disclosure and to enjoin a tender offer if the state's requirements were not satisfied. *Id.*

laws applied to foreign corporations and nonresident shareholders.<sup>33</sup> In 1982, the United States Supreme Court held an Illinois takeover law unconstitutional as an indirect burden on interstate commerce,<sup>34</sup> and lower courts began to invalidate other state takeover laws.<sup>35</sup>

Many state legislatures, including Florida's, responded by repealing their takeover laws or amending them to withstand constitutional scrutiny.<sup>36</sup> Generally, second-generation state takeover laws apply to a takeover only if (1) some nexus exists between the target corporation and the regulating state, and (2) the takeover results in the acquisition of a specified percentage of the voting power of the target corporation.<sup>37</sup> Second-generation state takeover laws typically fit into two broad categories: (1) "control-share acquisition" laws, which require approval of voting rights by a target corporation's shareholders or board of directors for an acquisition of a specified percentage of the target corporation's securities; and (2) "fair price/business combination" laws, which prohibit or impose significant restrictions on statutorily specified business transactions with shareholders who control more than a specified percentage of the voting power.<sup>38</sup> The business combination statutes are directed at "two-step front-end-loaded" tak-

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33. See, e.g., FLA. STAT. § 517.351(7) (1977) (applied to any corporation incorporated in Florida or having its principal place of business within Florida); ILL. REV. STAT. ch. 121 1/2, para. 137.52-10 (1979) (applied to a tender offer to shareholders of a foreign corporation if the target corporation had at least ten percent of its shareholders resident in Illinois or satisfied any two of the following three conditions: (a) its principal executive office was located in Illinois; (b) it was organized under Illinois law; or (c) ten percent of its stated capital and paid-in surplus was represented in Illinois).

34. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

35. See, e.g., *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425 (10th Cir. 1983) (Oklahoma Take-Over Bid Act violates commerce clause); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (Virginia Take-Over Bid Disclosure Act violates commerce clause); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982) (Michigan Take-Over Offers Act violates commerce clause); *National City Lines v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982) (Missouri Takeover Bid Disclosure Act violates both the commerce clause and supremacy clause). Many state takeover laws had been invalidated before *MITE* under both the commerce clause and supremacy clause. See Note, *Maryland Takes a New Tack*, *supra* note 24, at 440 n.44. Only the Massachusetts takeover law withstood judicial scrutiny. See *Agency Rent-A-Car v. Connolly*, 686 F.2d 1029 (1st Cir. 1982). Unpredictably, the Massachusetts takeover law was later declared unconstitutional based on the Court's decision in *CTS*. See *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988).

36. See, e.g., Law of October 1, 1977, ch. 77-441, §§ 1-8, 1977 Fla. Laws 1804-08 (repealed 1979); see Note, *The Constitutionality of Second Generation State Takeover Statutes—A New Life For State Regulation*, 40 U. FLA. L. REV. 209, 222 (1988); see also Pinto, *supra* note 28, at 478-83 (discussing various kinds of takeover laws enacted in response to *MITE*); Sargent, *supra* note 11; Note, *Maryland Takes a New Tack*, *supra* note 24, at 441.

37. Comment, *supra* note 24, at 290.

38. *Id.* at 290. Courts and commentators classify state takeover laws in a variety of ways. See Pinto, *supra* note 28, at 478-83 (identifying shareholder approval, second-tier, share redemption, fiduciary duty, and full disclosure models of takeover statutes).

covers, in which a tender offer at a very high price is followed by acquisition of the remaining shares, by any of numerous methods, at a lower price.

### C. *Judicial Response to State Takeover Laws*

Judicial challenges to state anti-takeover laws have been premised on commerce clause and supremacy clause grounds.<sup>39</sup>

The supremacy clause<sup>40</sup> of the United States Constitution prohibits states from regulating an area in which Congress is competent to legislate if: (1) an express congressional intent to exclude state regulation exists;<sup>41</sup> (2) congressional intent to exclude state regulation is implied by a pervasive scheme of federal regulation;<sup>42</sup> (3) a direct conflict exists between state and federal regulatory schemes so that compliance with both is physically impossible;<sup>43</sup> or (4) state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>44</sup>

Article I, section 8, clause 3 of the United States Constitution empowers Congress to "regulate Commerce . . . among the several States."<sup>45</sup> The commerce clause limits state power to regulate interstate commerce, even absent federal regulation.<sup>46</sup> In general, the commerce clause prohibits the direct regulation of interstate commerce by a state,<sup>47</sup> state regulation that discriminates against interstate commerce<sup>48</sup> or subjects interstate commercial activities to inconsistent regulation by different states,<sup>49</sup> and state regulation of interstate commerce which

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39. See, e.g., *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *reversed sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 17 (1979).

40. "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.

41. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

42. See, e.g., *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 632 (1973) (pervasive scheme of federal aircraft noise regulation suggests preemption of state law).

43. See, e.g., *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (discussing hypothetical physical impossibility and citing relevant cases).

44. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

45. U.S. CONST. art. I, § 8, cl. 3.

46. See, e.g., *Cooley v. Board of Wardens*, 57 U.S. (12 How.) 624, 640 (1851).

47. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925).

48. See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

49. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986).



imposes a burden on interstate commerce that is excessive in relation to the local interests served by the regulation.<sup>50</sup>

*Great Western United Corp. v. Kidwell*<sup>51</sup> was the first appellate court decision to address the constitutionality of a state tender offer law.<sup>52</sup> In that case, the hostile bidder was a Delaware corporation with its principal offices in Texas. The target was a Washington corporation with its principal office and substantial assets in Idaho. The target shareholders lived all across the United States. The target corporation also had a subsidiary in Maryland and conducted business in New York.<sup>53</sup>

The bidder challenged the validity of the Idaho Takeover Statute, which regulated target companies that had substantial assets in Idaho or which had securities registered under the Idaho Code or Exchange Act and were incorporated or headquartered in Idaho.<sup>54</sup> To acquire such a target, an offeror had to file a registration statement with the Idaho Director of Finance and target management. The offer could not begin until the Director of Finance declared the registration statement effective. The Director of Finance *or* target management could require a hearing, and the offer was delayed until the final determination of any administrative or injunctive proceeding brought by the Director of Finance.<sup>55</sup>

The United States Court of Appeals for the Fifth Circuit invalidated the statute on both supremacy clause and commerce clause grounds. In discussing preemption, the court noted that Congress did not explicitly preempt state takeover regulation, and the court did not decide whether Congress had implicitly done so. The court relied instead on its finding that the statute conflicted with the Williams Act's policy of neutrality.<sup>56</sup> The court found that the statute favored incumbent man-

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50. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); see *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1649-52 (1987); *MITE*, 457 U.S. at 643. One Justice has questioned the necessity of applying this balancing test to state takeover laws. *CTS*, 107 S. Ct. at 1652-53 (Scalia, J., concurring).

51. 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom.* *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).

52. T. HAZEN, *THE LAW OF SECURITIES REGULATION* 393 (1985).

53. *Kidwell*, 577 F.2d at 1260-62. In its commerce clause discussion, the court noted the possibility of the bidder being subject to conflicting regulation from Idaho and New York, but concluded that other evidence supported its findings. *Id.* at 1284-85.

54. *Id.* at 1263 n.12 (citing IDAHO CODE § 30-1501(6) (1978)). The *Kidwell* bidder passed both tests, with principal offices and substantial assets in Idaho. *Id.*

55. *Id.* at 1263 (citing IDAHO CODE § 30-1503 (1978)). There was no time limit within which the Director of Finance had to make a final determination. *Id.*; see IDAHO CODE 30-1503(4), (5) (1978) (Director of Finance had to announce a decision within thirty days of the registration's filing *unless* more time was needed.).

56. *Kidwell*, 577 F.2d at 1274-81.

agement by giving them advance notice of tender offers and the power to postpone offers indefinitely and by not regulating target defenses as strictly as hostile bids.<sup>57</sup>

The court also struck the Idaho statute under the balancing-test branch of the commerce clause. The court considered the local interests of preserving local industry, maintaining civic leadership, and protecting investors, and concluded that these interests did not outweigh the statute's interference with transactions all over the country. The court noted that in this case the statute had halted thirty-one million dollars worth of interstate commerce and that Idaho had little reason to protect investors in other states.<sup>58</sup> One judge dissented on personal jurisdiction and venue grounds, but would have agreed with the majority on the merits.<sup>59</sup> On appeal the Supreme Court disposed of the case on a venue issue and never addressed the constitutionality of the statute.<sup>60</sup>

In the wake of *Kidwell*, the SEC adopted new tender offer rules, which were intended to preempt state regulation by creating a direct conflict with most state statutes. Before the rules could be tested, however, the Fourth and Seventh Circuits reached opposite results regarding the Virginia and Illinois statutes. The Supreme Court decided to review the Illinois case; thus, in *Edgar v. MITE Corp.*,<sup>61</sup> the constitutionality of a state tender offer law was squarely before the Court for the first time.<sup>62</sup>

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57. *Id.* at 1278. The Idaho statute allowed incumbent management to exclude any offer from state regulation by approving it. *Id.* (citing IDAHO CODE 30-1501(5)(3)).

58. *Id.* at 1282-86.

59. *Id.* at 1287-96 (Godbold, J., dissenting in part and concurring in part).

60. *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). In a dissenting opinion, Justices White, Brennan, and Marshall disagreed with this disposition and would have reached the merits of the case. These Justices and the Fifth Circuit would have based personal jurisdiction and venue on section 27 of the 1934 Act, 15 U.S.C. § 78aa (1988). The Fifth Circuit's theory was that section 28 of the Act, *id.* § 78bb, saving state securities laws not in conflict with federal law, implicitly proscribed inconsistent state law, and enforcement of inconsistent state law was thus a "violation" over which section 27 gave jurisdiction and venue. *Kidwell*, 577 F.2d at 1256, 1270-74. While Justice White did not cite section 28, his reasoning was virtually identical: venue was proper where the defendant had sought to enforce the inconsistent law. *Leroy*, 443 U.S. at 187-92 (White, J., dissenting). Justice White never discussed the merits of the case, but the tone of his personal jurisdiction and venue discussion foreshadows his later positions: "[T]he very enactment and existence of the Williams Act pre-empts and invalidates all conflicting state efforts to regulate cash tender offers." *Id.* at 190. Of course, the word "conflicting" makes this statement tautological.

61. 457 U.S. 624 (1982).

62. T. HAZEN, *supra* note 52, at 395 (citing Sec. Act Rel. No. 6022 (SEC Feb. 5, 1979); Sec. Act Rel. No. 6158 (SEC Nov. 29, 1979); Sec. Act Rel. No. 6159 (SEC Nov. 29, 1979); *Telvest v. Bradshaw*, 618 F.2d 1029 (4th Cir. 1980); *MITE Corp. v. Dixon*, 633 F.2d 486 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982)). The Supreme Court noted that the new rules were not at issue in *MITE*. *Edgar v. MITE Corp.*, 457 U.S. 624, 636 n.11 (1982).

*MITE* involved a cash tender offer by MITE, a Delaware corporation with its principal office in Connecticut, for all the outstanding shares of Chicago Rivet & Machine Co., an Illinois corporation.<sup>63</sup> MITE filed with the SEC all the information required by the Williams Act, but did not comply with the Illinois Business Take-Over Act, electing instead to seek a declaratory judgment and injunctive relief in federal court.<sup>64</sup>

The Illinois Act required the registration of any tender offer for shares of a "target company" with the Secretary of State of Illinois. A "target company" was defined as any corporation of which shareholders located in Illinois owned ten percent of the equity securities subject to the tender offer *or* for which any two of the following three conditions were satisfied: the corporation was incorporated in Illinois; the corporation's principal executive office was in Illinois; or at least ten percent of the corporation's stated capital and paid-in surplus was represented within Illinois.<sup>65</sup>

A tender offer registration became effective twenty days after filing the registration with the Secretary of State and notifying the target of the terms of the offer, unless the Secretary of State, believing it necessary for the protection of investors, called a hearing to adjudicate the substantive fairness of the offer.<sup>66</sup> This hearing was mandatory if requested by a majority of the target company's outside directors or by Illinois shareholders owning ten percent of the class of securities subject to the tender offer.<sup>67</sup> After the hearing, the statute directed the Secretary of State to deny registration if the tender offer "[failed] to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or . . . [was] inequitable or would work or tend to work a fraud or deceit upon the offerees."<sup>68</sup> During the waiting period, the bidder could not communicate with target shareholders, although incumbent management could contact these shareholders freely.<sup>69</sup>

A majority of the Court invalidated the statute using the balancing test under the commerce clause, stating that "even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served

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63. *MITE*, 457 U.S. at 627.

64. *Id.* at 628.

65. *Id.* at 626-27 (citing ILL. REV. STAT. ch. 121 1/2, paras. 137.52-10, .54.A (1979)).

66. *Id.* (citing ILL. REV. STAT. ch. 127 1/2, para. 137.57.E (1979)).

67. *Id.* (citing ILL. REV. STAT. ch. 127 1/2, para. 137.57.A (1979)).

68. *Id.* (citing ILL. REV. STAT. ch. 127 1/2, para. 137.57.E (1979)).

69. *Id.* at 635 (citing ILL. REV. STAT. ch. 121 1/2, para. 137.54.A (1979)).

by the statute.”<sup>70</sup> The Court stated that the most obvious burden imposed by the statute was its “nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere.”<sup>71</sup> The Court noted that the effects of this burden were substantial: shareholders were deprived of an opportunity to tender their shares at a premium; reallocation of economic resources to their highest value was impeded; and the incentive for management to perform well was reduced.<sup>72</sup>

Illinois argued that the statute advanced two legitimate local interests: (1) protection of investors and (2) regulation of the internal affairs of Illinois corporations. The Court found these interests insufficient to outweigh the burden imposed.<sup>73</sup> The Court agreed that protecting local investors was a legitimate state objective, but reasoned that “the State has no legitimate interest in protecting non-resident shareholders.”<sup>74</sup> The Court also observed that the Illinois Act exempted issuer tender offers for its own securities, and reasoned that this undermined the state’s assertion that the statutory purpose was shareholder protection.<sup>75</sup> Moreover, because many of the statute’s provisions were similar to the requirements of the Williams Act, the Court questioned whether the statute would “substantially enhance the shareholders’ ability to make informed decisions.”<sup>76</sup>

The Court also rejected Illinois’ argument that the statute was justified by its interest in regulating the internal affairs of its corporations.<sup>77</sup> The Court stated that tender offers, which involve the transfer of stock by shareholders to third parties, do not implicate the internal affairs doctrine.<sup>78</sup> The Court found the internal affairs argument “somewhat incredible” because the Illinois Act applied to corporations that were not incorporated in Illinois and had their principal places of business outside of Illinois.<sup>79</sup>

Four Justices considered the Illinois Act a direct burden on interstate commerce because it could apply to target corporations without a single Illinois shareholder.<sup>80</sup> Further, these Justices expressed concern that

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70. *Id.* at 643 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

71. *Id.* at 640.

72. *Id.*

73. *Id.* at 644.

74. *Id.*

75. *Id.*

76. *Id.* at 645 (quoting the Seventh Circuit’s decision, *MITE Corp. v. Dixon*, 633 F.2d 486, 500 (7th Cir. 1980), *aff’d sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982)).

77. *Id.*

78. *Id.* (citations omitted).

79. *Id.*

80. *Id.* at 642-43 (plurality opinion). The four Justices were White, Burger, Stevens and O’Connor. *Id.* at 626.

other states could impose similar regulations and “thoroughly stifle[ ]” interstate tender offers.<sup>81</sup>

Three Justices concluded that the Illinois Act violated the supremacy clause.<sup>82</sup> These Justices reasoned that the statute frustrated the objectives of the Williams Act by upsetting the balance struck by Congress between the interests of tender offerors and target companies.<sup>83</sup> They pointed to three provisions of the Illinois statute that upset this balance: (1) the provision for a mandatory twenty-day waiting period after filing the registration during which only the target could communicate with shareholders, which gave incumbent management additional time to take defensive steps, (2) the hearing provisions, which gave both the Secretary of State and incumbent management the opportunity to delay the offer indefinitely, and (3) the provision allowing the Secretary of State to determine the substantive fairness of a tender offer, which conflicted with a fundamental purpose of the Williams Act—investor autonomy.<sup>84</sup>

After *MITE*, states began developing “second generation” anti-takeover statutes designed to pass constitutional muster.<sup>85</sup> The Supreme Court upheld one such statute in *CTS Corp. v. Dynamics Corp.*<sup>86</sup> The Indiana statute involved in *CTS* was of the “control share acquisition” model. Voting rights of stock acquired in a transaction that brought voting power to or above any of three thresholds were conditioned on approval by a majority of pre-existing, disinterested shareholders.<sup>87</sup>

The shareholders decided whether to grant voting rights at their next regularly scheduled meeting or at a specially scheduled meeting. The bidder could require management to hold a special meeting within fifty

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81. *Id.* “It is therefore apparent that the Illinois statute . . . has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other states; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.” *Id.*

82. *Id.* at 630-40 (plurality opinion). Justices White, Burger, and Blackmun joined this part of the opinion. *Id.* at 626.

83. *Id.* at 633. The Court noted that one objective of the Williams Act was to protect investors, but stated: “[I]t is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder.” *Id.* The Court noted that the Williams Act had originally been drafted with a strong pro-management bias, but Congress had “become convinced ‘that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management.’” *Id.* (quoting S. REP. No. 550, *supra* note 11, at 3-4). The Court also quoted Senator Williams’ statement in the Congressional Record: “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.” *Id.* (citing 113 CONG. REC. 24,664 (1967)).

84. *Id.* at 634-40.

85. See *supra* notes 36-38 and accompanying text.

86. 107 S. Ct. 1637 (1987).

87. *Id.* at 1641 (citing IND. CODE § 23-1-42-9(a) (Supp. 1986)).

days by filing an "acquiring person statement"<sup>88</sup> and agreeing to pay the expenses of the meeting.<sup>89</sup> This statute applied *only* to target corporations incorporated in Indiana *and* meeting all three of the following requirements: (1) having 100 or more shareholders; (2) having its principal place of business, its principal office, or substantial assets within Indiana; and (3) having either more than ten percent of its shareholders resident in Indiana, more than ten percent of its shares owned by Indiana residents, or 10,000 shareholders resident in Indiana.<sup>90</sup> During a transitional phase, such corporations could elect to be governed by the statute, and subsequently, all such corporations would be governed unless they elected out.<sup>91</sup>

Dynamics Corporation owned 9.6% of the stock of CTS, an Indiana corporation. Six days after the statute went into effect, Dynamics made a tender offer for another million shares and sued CTS in federal court alleging various violations of federal securities law. CTS then elected to be governed by the statute, and Dynamics amended its complaint to allege that the Indiana statute was preempted by the Williams Act and void under the commerce clause.<sup>92</sup>

The Court first addressed the *MITE* plurality's finding that the Illinois statute had violated the supremacy clause by upsetting the balance between offerors and targets<sup>93</sup> and recounted the three offending provisions that the plurality had identified. The Court emphasized that the plurality opinion in *MITE* did not represent the views of a majority of the Court and thus was not binding. Nevertheless, the Court stated: "We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated by Justice WHITE in *MITE*."<sup>94</sup> The Court reasoned that both the Williams Act and the Indiana statute operated on the assumption that tender offers are coercive and leave independent shareholders at a disadvantage, particularly "two-step" tender offers in which the tender offer is followed by a merger or other transaction in which untendered shares are acquired at a lower price.<sup>95</sup>

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88. *Id.* at 1642 (citing IND. CODE § 23-1-42-6 (Supp. 1986)).

89. *Id.* (citing IND. CODE § 23-1-42-7 (Supp. 1986)).

90. *Id.* at 1641 (citing IND. CODE § 23-1-42-4(a) (Supp. 1986)).

91. *Id.* (citing IND. CODE § 23-1-17-3 (Supp. 1986)).

92. *Id.* at 1642.

93. The Court offered a somewhat more limited articulation of the Williams Act's policy of neutrality: "[T]he overriding concern of the *MITE* plurality was that the Illinois statute considered in that case operated to favor management against offerors, to the detriment of shareholders." *Id.* at 1645 (emphasis added).

94. *Id.*

95. *Id.* at 1646. Business combination statutes, such as the Florida Affiliated Transactions Statute, are aimed more directly at two-step offers. Some commentators have argued that the

The Court reasoned that the Indiana Act protected investors from such coercive offers because "the shareholders as a group . . . could reject the offer, although individual shareholders might be inclined to accept it."<sup>96</sup>

The Court also rejected an argument that the Indiana statute conflicted with the Williams Act requirement that a tender offer be kept open for twenty days because, in practice, the statute imposed a fifty-day delay:<sup>97</sup>

The [Indiana] Act does not impose an absolute 50-day delay on tender offers, nor does it preclude an offeror from purchasing shares as soon as federal law permits. If the offeror fears an adverse shareholder vote under the Act, it can make a conditional tender offer, offering to accept shares on the condition that the shares receive voting rights within a certain period of time.<sup>98</sup>

The Court further stated that even if the statute imposed some additional delay, "nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should 'be free to go forward without *unreasonable* delay.'"<sup>99</sup>

The Court began its commerce clause analysis by addressing two arguments that the statute burdened interstate commerce directly. Dynamics argued that the statute discriminated against interstate commerce, reasoning that it would apply most often to out-of-state bidders because "as a practical matter, most hostile tender offers are launched by offerors outside Indiana."<sup>100</sup> The Court rejected the argument that this amounted to discrimination against out-of-state offerors: "Because nothing in the Indiana Act imposes a greater burden on

coerciveness of a two-step offer counteracts the "holdout" problem inherent in a one-step offer and is thus in the best long-run interests of shareholders. Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 710 (1982); Banoff, *The Securities Commission's Takeover Proposals: A "Law and Economics" Perspective*, 2 CANTERBURY L. REV. 298, 310 (1985) (citing Easterbrook & Fischel, *supra*). Of course, if the second step price is less than the fair market value of the shares at that time, dissatisfied shareholders will have a state-law action for self-dealing and, in many states, a statutory "appraisal right" to receive the fair market value of their shares. See, e.g., FLA. STAT. § 607.247 (1989).

96. *Id.* at 1646. Justice White, dissenting, pointed to this same fact to argue that the Indiana statute conflicted with the Williams Act's concern for individual investor autonomy. *Id.* at 1654 (White, J., dissenting).

97. *Id.* at 1646-48. Fifty days was the latest incumbent management could schedule a meeting after the bidder filed its "acquiring person statement." *Id.* at 1642 (citing IND. CODE § 23-1-42-10(a) (Supp. 1986)).

98. *Id.* at 1647.

99. *Id.* (emphasis in original) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 639 (1982)).

100. *Id.* at 1649.

out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce."<sup>101</sup> Because the Indiana statute applied only to targets incorporated in Indiana, the Court also rejected the argument that the statute might subject acquirers to inconsistent state regulation: "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."<sup>102</sup>

The Court also held that the statute passed the balancing test under the commerce clause. The Court found that the statute served two legitimate state interests: (1) regulating voting rights and other internal affairs of the corporations created by the state,<sup>103</sup> and (2) protecting shareholders against coercive tender offers by "allowing shareholders collectively to determine whether the takeover is advantageous to their interests."<sup>104</sup> The Court distinguished the statement in *MITE* that a state has "no legitimate interest in protecting the nonresident shareholders"<sup>105</sup> on the basis that the Indiana statute applied only to targets incorporated in Indiana *and* having a substantial number of shareholders in Indiana.<sup>106</sup> Although the Court was unconvinced that the statute would substantially limit the number of successful tender offers, it emphasized that its commerce clause analysis would not change even if this were true.<sup>107</sup>

Since *CTS*, federal courts have reviewed a number of state takeover laws. Although some questions remain regarding the constitutionality of state takeover laws that delay tender offers but still permit them to be completed within the sixty day period required by the Williams

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101. *Id.*

102. *Id.*

103. *Id.* at 1650-51.

104. *Id.* at 1651. The Court reasoned that the statute protected shareholders by giving them "an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity." *Id.*

105. *Id.* (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982)).

106. *Id.* at 1651-52.

107. *Id.* at 1652. Justice Scalia joined in all parts of the majority opinion except the balancing-test analysis. In his view, this branch of commerce clause analysis should be abandoned: "As 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, whether it promotes shareholder welfare or industrial stagnation." *Id.* at 1653 (Scalia, J., concurring). Justice Scalia concluded: "I do not share the Court's apparent high estimation of the beneficence of the state statute at issue here. But a law can be both economic folly and constitutional. The Indiana Control Shares Acquisition Chapter is at least the latter." *Id.*



Act,<sup>108</sup> state takeover laws that regulate the exercise of control after the acquisition of shares are generally constitutional if they apply only to target businesses incorporated in the state implementing the regulation.<sup>109</sup>

In *Amanda Acquisition Corp. v. Universal Foods Corp.*,<sup>110</sup> the United States Court of Appeals for the Seventh Circuit upheld the constitutionality of the Wisconsin Business Combination Statute (Wisconsin Act).<sup>111</sup> The Wisconsin Act prohibits a firm incorporated in Wisconsin and having its headquarters, substantial operations, or ten percent of its shares or stockholders in Wisconsin from "engag[ing] in a business combination with an interested stockholder . . . for three years after the interested stockholder's stock acquisition date unless the board of directors of the corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock."<sup>112</sup> The Wisconsin Act defines "business combination" much as Florida's statute defines "affiliated transaction":<sup>113</sup> A Wisconsin "business combination" is a merger with an interested stockholder or affiliate, a sale of more than five percent of the assets to an interested stockholder or affiliate, a liquidation of the acquired corporation, a transaction by which the acquired corporation guarantees a debt of an interested stockholder or affiliate, or a transaction by which the acquired corporation passes tax benefits to a bidder or affiliate.<sup>114</sup>

Amanda Acquisition Corporation sued for a declaratory judgment that the Wisconsin Act was "preempted by the Williams Act and in-

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108. Compare *Veere Inc. v. Firestone Tire & Rubber Co.*, 685 F. Supp. 1027 (N.D. Ohio 1988) (holding Ohio Control Share Acquisition Act, OHIO REV. CODE ANN. § 1701.831 (Anderson 1964 & Supp. 1989), constitutional) with *Batus, Inc. v. McKay*, 684 F. Supp. 637 (D. Nev. 1988) (holding Nevada Takeover Act, NEV. REV. STAT. § 78.3772(1) (1986), unconstitutional under both the commerce clause and the supremacy clause).

109. Compare *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 506-09 (7th Cir. 1989) (holding Wisconsin's Business Combinations Act, WIS. STAT. § 180.726 (1987), constitutional) and *BNS Inc. v. Koppers Co.*, 683 F. Supp. 458, 473 (D. Del. 1988) (holding Delaware Business Combinations Statute, DEL. CODE ANN. tit. 8, § 203 (1988), probably constitutional) with *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 100 (6th Cir. 1989) (holding Tennessee Business Combination Act, TENN. CODE ANN. §§ 48-35-201-209 (1988), along with three other statutes, unconstitutional "to the extent that they apply to target corporations organized under the laws of states other than Tennessee") and *Grand Metro., P.L.C. v. Butterworth*, Civ. A. No. 88-40317WS, slip op. at 14-15 (N.D. Fla. Nov. 29, 1988) (holding Florida Affiliated Transactions Statute, FLA. STAT. § 607.108 (1987), and two other statutes, unconstitutional because they "purport to regulate the internal affairs of out-of-state corporations even though Florida has no legally recognizable interest in doing so").

110. 877 F.2d 496 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989).

111. *Id.*

112. WIS. STAT. § 180.726(2) (1987).

113. See FLA. STAT. § 607.108(1)(b) (1989).

114. WIS. STAT. § 180.726(1)(e) (1987).

consistent with the Commerce Clause.”<sup>115</sup> The court’s supremacy clause analysis of Amanda’s preemption claim turned on the court’s articulation of the neutrality objective of the Williams Act:

To say that Congress wanted to be neutral between bidder and target—a conclusion reached in many of the Court’s opinions, e.g. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977)—is not to say that it also forbade the states to favor one of these sides . . . . Nothing in the Williams Act says that the federal compromise among bidders, targets’ managers, and investors is the only permissible one.<sup>116</sup>

Observing that the Williams Act regulates the process of tender offers—such as timing, disclosure, and proration—and that the Wisconsin Act does not address the tender offer process, the court rejected Amanda’s assertion of supremacy clause preemption. The court found that the Wisconsin Act neither alters any procedures governed by federal law nor conditions its application on how a party acquires its stock, whether by tender offer, open-market purchases, or privately negotiated transactions. The court noted that the Wisconsin Act is similar to many other state laws governing the internal affairs of a domestic corporation and that the Act is “no different in effect from one saying that for the three years after a person acquires 10% of a firm’s stock, a unanimous vote is required to merge.”<sup>117</sup>

The court also rejected Amanda’s argument that the Williams Act entitled investors to receive the benefit of tender offers and that the Wisconsin statute was therefore preempted because it made tender offers less attractive to potential bidders:

Only if the Williams Act gives investors a right to be the beneficiary of offers could Wisconsin’s law run afoul of the federal rule. No such entitlement can be mined out of the Williams Act . . . . Investors have no right to receive tender offers. More to the point—since Amanda sues as bidder rather than as investor seeking to sell—the Williams Act does not create a right to profit from the business of making tender offers. It is not attractive to put bids on the table for Wisconsin corporations, but because Wisconsin leaves the process alone once a bidder appears, its law may co-exist with the Williams Act.”<sup>118</sup>

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115. *Amanda*, 877 F.2d at 499.

116. *Id.* at 503 (citing Fischel, *From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 SUP. CT. REV. 47, 71-74 (1987)).

117. *Id.* at 504.

118. *Id.* at 504-05 (citations omitted).

Similarly, the court rejected the "meaningful opportunity" test developed for analyzing business combination statutes by the United States District Court for Delaware.<sup>119</sup> In *BNS, Inc. v. Koppers Co.*,<sup>120</sup> the plaintiff attacked the constitutionality of the Delaware Business Combination Statute.<sup>121</sup> The plaintiff argued that the Williams Act preempted the Delaware statute because the Delaware law favors the target corporation's management over the offeror and, therefore, frustrates the shareholder protection purpose of the Williams Act.<sup>122</sup> The Delaware district court conceded that "allowing [states] to deprive the tender offeror of . . . a business combination [ ] would permit a de facto frustration of the goals of the Williams Act," but stated that the Delaware statute would not be preempted "so long as hostile offers which are beneficial to target shareholders have a meaningful opportunity for success."<sup>123</sup> The circuit court in *Amanda* rejected this test.<sup>124</sup>

The circuit court also rejected plaintiff's commerce clause challenges because it determined that the Wisconsin Act neither discriminates against interstate commerce nor subjects corporations to the risk of inconsistent state regulation any more than did the Indiana statute upheld in *CTS*.<sup>125</sup> The court declined to apply the balancing test used in *MITE* on the grounds that "*CTS* dispatched this concern by declaring it inapplicable to laws that apply only to the internal affairs of firms incorporated in the regulating state."<sup>126</sup> The court concluded that

119. *Id.* at 508 ("The Commerce Clause does not demand that states leave bidders a 'meaningful opportunity for success.'). See *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458, 469 (D. Del. 1988); see also *RP Acquisition Corp. v. Stanley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988); *City Capital Assocs. v. Interco*, 696 F. Supp. 1551 (D. Del. 1988); accord *West Point-Pepperell, Inc. v. Farley Inc.*, No. 3:88-cv-57-GET (N.D. Ga. February 2, 1989).

120. 683 F. Supp. 458 (D. Del. 1988).

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

122. *BNS*, 683 F. Supp. at 460.

123. *Id.* at 468-69. Based on *CTS*, the court concluded that four questions determine whether a state takeover law is preempted by the Williams Act and sustained the validity of the Delaware Act under the supremacy clause:

First, does the statute protect independent shareholders from coercion? Second, does the statute give either management or the offeror an advantage in communicating with stockholders? This question may be reformulated to fit the circumstances of the present case by phrasing it as whether the statute gives either management or the offeror an advantage in consummating or defeating an offer. Third, does the statute impose an indefinite or unreasonable delay on offers? And fourth, does the statute allow the state government to interpose its views of fairness between willing buyers and sellers? The answers to these questions indicate that, although the issue is not an easy one, on this preliminary injunction record, the Delaware statute does not conflict with the purposes of the Williams Act to an impermissible degree.

*Id.* at 469 (citing *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1646 (1987)).

124. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 508 (7th Cir. 1989).

125. *Id.* at 506-07 (citing *CTS*, 107 S. Ct. at 1649-50).

126. *Amanda*, 877 F.2d at 507 (citing *CTS*, 107 S. Ct. at 1649-52. This is consistent with

“Wisconsin’s law may well be folly; we are confident that it is constitutional.”<sup>127</sup>

Although *Amanda* and *CTS* indicate that business combination laws that apply only to domestic corporations are constitutional, courts have invalidated state takeover laws that regulate companies incorporated in states other than the regulating state.<sup>128</sup> In *Tyson Foods, Inc. v. McReynolds*,<sup>129</sup> the United States Court of Appeals for the Sixth Circuit affirmed a preliminary injunction against the enforcement of Tennessee takeover laws, ruling them unconstitutional under the commerce clause to the extent that they regulated foreign corporations.<sup>130</sup> The case involved a nationwide cash tender offer for the common stock of Holly Farms Corporation, a Delaware corporation, by Tyson Foods, through its wholly owned subsidiary, Holly Acquisition Corporation, both of which are Delaware corporations. The Tennessee Authorized Corporation Act allowed a qualified foreign corporation to elect to be subject to Tennessee takeover regulation; Holly Farms made that election. The court held that the Tennessee Authorized Corporation Act directly regulated interstate commerce and also imposed an excessive burden on interstate commerce relative to the local interests it served.<sup>131</sup>

In *Grand Metropolitan P.L.C. v. Butterworth*,<sup>132</sup> the United States District Court for the Northern District of Florida enjoined the Pillsbury Company (Pillsbury) and the Florida Attorney General from enforcing both the Florida Affiliated Transactions Statute and the

*MITE*: “Insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law.” *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982).

127. *Amanda*, 877 F.2d at 509; see also *BNS Inc. v. Koppers Co.*, 683 F. Supp. 458, 461 (D. Del. 1988) (upholding the constitutionality of the Delaware Business Combinations Statute, DEL. CODE ANN. tit. 8, § 203 (1988), against supremacy and commerce clause challenges).

128. See *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 100 (6th Cir. 1989) (holding the Tennessee Investor Protection Act, TENN. CODE ANN. §§ 48-35-101 to -113 (1988), the Tennessee Business Combination Act, *id.* §§ 48-35-201 to -209, the Tennessee Control Share Acquisition Act, *id.* §§ 48-35-301 to -312, and the Tennessee Authorized Corporation Protection Act, *id.* §§ 48-35-401 to -406, unconstitutional under the commerce clause “to the extent that they apply to target corporations organized under the laws of states other than Tennessee”). As *Tyson* illustrates, both control share acquisition acts and business combination acts that apply to foreign corporations are considered unconstitutional under the commerce clause. See also *TLX Acquisition Corp. v. Telex Corp.*, 679 F. Supp. 1022, 1029 (W.D. Okla. 1987) (the Oklahoma Control Shares Act, 1987 Okla. Sess. Laws ch. 146, §§ 15-23, “violates the Commerce Clause because the Act creates an impermissible risk of inconsistent regulation of tender offers and voting rights in stock by different states. Further, it imposes an indirect burden on interstate commerce that is excessive in relation to Oklahoma’s interest in protection of resident shareholders and businesses . . .”).

129. 865 F.2d 99 (6th Cir. 1989).

130. *Id.* at 100.

131. *Id.*

132. Civ. A. No. 88-40317WS (N.D. Fla. Nov. 29, 1988).

Control-Share Acquisitions Statute. Plaintiffs, Grand Metropolitan, P.L.C. and Wendell Investments, Limited (together "Grand Met"), each organized under the laws of England, offered to purchase all the outstanding stock of Pillsbury, a Delaware corporation. Grand Met sought a preliminary injunction against the enforcement of both laws and a declaratory judgment that those laws, as applied to foreign corporations, were unconstitutional under the commerce clause, the supremacy clause, the due process clause, and the full faith and credit clause.<sup>133</sup> The court held Florida's laws unconstitutional on commerce clause grounds because they improperly "regulate[d] the internal affairs of out-of-state corporations" and subjected foreign corporations to the risk of inconsistent regulation by different states.<sup>134</sup> Citing *MITE*, the court found that Florida lacked a legally recognizable interest in regulating the internal affairs of a foreign corporation. The court did not address the plaintiffs' other asserted grounds for unconstitutionality.<sup>135</sup>

Notably, both *Tyson* and *Grand Metropolitan* struck down state takeover laws notwithstanding that each law contained a savings clause that purported to avoid the risk of inconsistent regulation by different states. Both courts concluded that savings clauses are not effective in overcoming the risk of inconsistent regulation. In addition, the courts noted that a savings clause would not be effective in resolving different states' attempts to regulate foreign corporations.<sup>136</sup>

## II. SUMMARY OF STATUTE

Second-generation anti-takeover statutes are generally of two types: "control-share acquisition" statutes, such as the one involved in *CTS*, and "business combination" statutes, which regulate what acquirers

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133. *Id.* at 2.

134. *Id.* at 14.

135. *Id.* at 15.

136. *Id.* at 15 (citing *Tyson Foods, Inc. v. McReynolds*, Civ. A. No. 3-88-0881, slip op. at 10 (M.D. Tenn. Nov. 23, 1988), *aff'd*, 865 F.2d 99 (6th Cir. 1989)). The Tennessee Act provides:

If any jurisdiction under the laws of which an authorized corporation is organized adopts any laws containing provisions that are expressly inconsistent with the provisions of this part as applicable to such authorized corporation, the provisions of this part shall be inapplicable to such authorized corporation to the extent necessary to resolve such inconsistency.

TENN. CODE ANN. § 48-35-405 (1988).

Likewise, the Florida Act provides:

If the laws of any jurisdiction under which a foreign corporation is organized contain provisions that are expressly inconsistent with the provisions of this section as applicable to such foreign corporation, the provisions of this section shall be inapplicable to such foreign corporation to the extent necessary to resolve such inconsistency.

FLA. STAT. § 607.110(3) (1989).

can do in the second step of a two-step acquisition.<sup>137</sup> Some commentators have argued that control-share acquisition statutes *favor* hostile bidders by allowing them to bypass management and demand a shareholder vote on the proposed acquisition.<sup>138</sup> In contrast, business combination statutes are aimed at “front-end loaded” acquisitions, in which a bidder acquires control through an initial tender offer and subsequently attempts to acquire all remaining shares at a lower price. The Florida Affiliated Transactions Statute follows the same general scheme as other business combination statutes: it defines certain regulated transactions and then requires that these transactions either gain special approval from disinterested management or shareholders or that a statutory “fair price” be paid to shareholders.

The Florida Affiliated Transactions Statute<sup>139</sup> regulates certain transactions between a corporation and an “interested shareholder”—one who beneficially owns more than ten percent of the corporation’s outstanding voting shares.<sup>140</sup> “Affiliated transaction” means:

137. R. GILSON & R. KRAAKMAN, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 307-15 (Supp. 1988) (comparing the Indiana statute involved in *CTS* with the Delaware business combination statute, loosely modeled on an earlier New York statute).

138. See, e.g., *id.* at 310. Gilson and Kraakman relate that Delaware drafted a control share acquisition statute *before* it drafted its now-famous business combination statute, and that this draft “was withdrawn almost as rapidly as it had been drafted, largely because the bar correctly suspected that a control share acquisition statute was more likely to aid acquirers than target managers.” *Id.* at 313 (citing Black, *Why Delaware is Wary of Anti-Takeover Law*, Wall St. J., July 10, 1987, at 20, col. 3). It might be more accurate to argue that such statutes benefit bidders by allowing them to air their views at a shareholder meeting, since shareholders always get to vote on any tender offer by deciding whether or not to tender.

139. FLA. STAT. § 607.108 (1989).

140. *Id.* § 607.108(1)(k). The corporation and its subsidiaries, along with savings, employee stock ownership, and other employee benefit plans and the fiduciaries of such plans, are excepted. *Id.* The statute does not address how to count classified stock with different voting rights.

The statute delineates beneficial ownership as follows:

A person is deemed to be a “beneficial owner” of voting shares as to which such person and such person’s affiliates and associates, individually or in the aggregate, have or share directly, or indirectly through any contract, arrangement, understanding, relationship, or otherwise:

1. Voting power, which includes the power to vote or to direct the voting of the voting shares;
2. Investment power, which includes the power to dispose of or to direct the disposition of the voting shares; or
3. The right to acquire the voting power or investment power, whether such right is exercisable immediately or only after the passage of time, pursuant to any contract, arrangement, or understanding, upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise; however, in no case shall a director of the corporation be deemed to be the beneficial owner of voting shares beneficially owned by another director of the corporation solely by reason of actions undertaken by such persons in their capacity as directors of the corporation.

*Id.* § 607.108(1)(e). Shares described in (e)(3) are counted as outstanding voting shares to deter-

1. Any merger or consolidation of the corporation or any subsidiary of the corporation with:

- a. The interested shareholder; or
- b. Any other corporation (whether or not itself an interested shareholder) which is, or after such merger or consolidation would be, an affiliate or associate<sup>141</sup> of the interested shareholder;

2. Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition (in one transaction or a series of transactions)<sup>142</sup> to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the corporation or any subsidiary of the corporation:

- a. Having an aggregate market value equal to 5 percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of the corporation;

mine whether a person is an interested shareholder, but shares issuable to other persons under similar rights are not. *Id.* § 607.108(1)(k). This definition of "beneficial ownership" is similar to the one under the Exchange Act. 17 C.F.R. § 240.13d-3(a) (1989); 17 C.F.R. § 240.16a-8(a) (1989); Exchange Act Release No. 34-18114 (Sept. 23, 1981) (promulgating 17 C.F.R. § 241.18114); Exchange Act Release No. 34-7793 (Jan. 19, 1966) (promulgating 17 C.F.R. § 241.7793); SEC Release No. 34-1965 (Dec. 21, 1938) (promulgating 17 C.F.R. § 241.1965). However, federal law counts such rights owned by other shareholders in determining the total number of shares outstanding. 17 C.F.R. § 240.13d-3(d) (1989).

The statute provides:

"Person" means an individual, including the estate of an incompetent or deceased individual; a corporation, whether or not organized for profit or under the law of this state or any other jurisdiction; a profit or not-for-profit unincorporated association; a business trust, an estate, a partnership, a trust, or two or more persons having a joint or common economic interest; and a state, the United States or a foreign government, including any political or quasi-political subdivision thereof.

*Id.* § 607.108(1)(l). In particular, the "common economic interest" test is disturbingly vague. Would shareholders who together own more than ten percent of the stock of the corporation be a "person" and thus an interested shareholder? Courts applying the Williams Act generally find that a "group" exists 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. *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).

141. "Affiliate" means a person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person." FLA. STAT. § 607.108(1)(a) (1989). "Associate" means

any entity, other than the corporation or any of its subsidiaries, of which such person is an officer, director or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of voting shares; any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is an officer or director of the corporation or any of its affiliates.

*Id.* § 607.108(1)(d).

142. This seems to prohibit even sales in the ordinary course of business that cumulatively exceed the statutory threshold.

b. Having an aggregate market value equal to 5 percent or more of the aggregate market value of all the outstanding shares of the corporation; or

c. Representing 5 percent or more of the earning power or net income, determined on a consolidated basis, of the corporation;<sup>143</sup>

3. The issuance or transfer by the corporation or any subsidiary of the corporation (in one transaction or a series of transactions) of any shares of the corporation or any subsidiary of the corporation which have an aggregate market value equal to 5 percent or more of the aggregate market value of all the outstanding shares of the corporation to the interested shareholder or any affiliate or associate of the interested shareholder except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all shareholders of the corporation;<sup>144</sup>

4. The adoption of any plan or proposal for the liquidation or dissolution of the corporation proposed by, or pursuant to any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder;

5. Any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of shares in respect of shares, or any reverse stock split) or recapitalization of the corporation, or any merger or consolidation of the corporation with

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143. "Fair market value" means, in the case of shares, the highest per-share price quoted on the first of the following that is applicable: (1) the New York Stock Exchange, (2) the principal exchange registered under the Exchange Act on which the shares are traded, or (3) NASDAQ. If none are applicable, a majority of the disinterested directors determines the fair market value of share. In the case of property other than cash or shares, fair market value is determined by a majority of disinterested directors. *Fla. Stat.* § 607.108(1)(j) (1989).

144. A majority of disinterested directors determines whether this test is met. *Id.* § 607.108(3)(d). They also determine whether a person is an interested shareholder, the number of voting shares beneficially owned by any person, and whether a person is an affiliate or associate of another. *Id.* § 607.108(3). The statute does not explain how directors are to make these determinations or how an affected person may challenge them.

Remember that shares that can be acquired pursuant to conversion or other rights are considered shares beneficially owned. *Id.* § 607.108(1)(e)(3). Thus, the issue of certain convertible securities, warrants, or other rights could be a prohibited affiliated transaction. Should value, for purposes of this test, be the value of the right or the value of the share that can be acquired? The latter seems harsh if the right is worthless because exercise price equals fair market value.

The exception in the last clause covers the situation in which rights to buy shares are offered pro rata to all shareholders, but some rights expire without being exercised, and exercising shareholders experience an increase in percentage of control. Are preemptive rights "rights" for purposes of the exception? See *id.* § 607.077 (shareholders of Florida corporations have no preemptive rights unless provided in the articles of incorporation; corporations existing before January 1, 1976 have same preemptive rights as immediately before effective date of law unless articles are amended).



any subsidiary of the corporation, or any other transaction (whether or not with or into or otherwise involving the interested shareholder), with the interested shareholder or any affiliate or associate of the interested shareholder, which has the effect, directly or indirectly (in one transaction or a series of transactions during any 12-month period), of increasing by more than 5 percent the percentage of the outstanding voting shares of the corporation or any subsidiary of the corporation beneficially owned by the interested shareholder;<sup>145</sup> or

6. Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly (except proportionately as a shareholder of the corporation), of any loans, advances, guaranties, pledges, or other financial assistance or any tax credits or other tax advantages provided by or through the corporation.<sup>146</sup>

Affiliated transactions must be approved by a supermajority shareholder vote<sup>147</sup> or a majority of the "disinterested directors,"<sup>148</sup> or come within other exemptions in subsection (4).

Subsection (4) waives the voting requirements if certain conditions are met. Two important waivers extend to dominant shareholders and to a "fair price" alternative to section (2)'s voting requirement. First, the voting requirements do not apply if "the interested shareholder has been the beneficial owner of at least 80 percent of the corporation's outstanding voting shares for at least 5 years preceding the announcement date"<sup>149</sup> or if "[t]he interested shareholder is the beneficial owner

145. Would a bankruptcy reorganization proposed by the interested shareholder that met this test be prohibited?

146. FLA. STAT. § 607.108(1)(b) (1989). Interestingly, no exception exists for transactions that require approval of a court or other authority, such as securities issues requiring registration with the Florida Division of Securities, bank mergers and acquisitions requiring the approval of state or federal banking authorities, and transactions by insurance companies requiring the approval of an insurance commissioner. *Cf.* 15 U.S.C. § 77c(a)(10) (1988).

147. Section 2 provides:

Except as provided in subsection (4), in addition to any affirmative vote required by any other section of this chapter or by the articles of incorporation, an affiliated transaction shall be approved by the affirmative vote of the holders of two-thirds of the voting shares other than the shares beneficially owned by the interested shareholder.

FLA. STAT. § 607.108(2) (1989).

148. *Id.* § 607.108(4). A "disinterested director" is one who was a member of the board before January 1, 1987, or the determination date, *see infra* note 151, whichever is later, or who was recommended for election by a majority of the disinterested directors, or who was elected to fill a vacancy on the board by a majority of the disinterested directors. *Id.* § 607.108(1)(h). A corporation can provide a different definition in the articles of incorporation initially filed with the Department of State. *Id.*

149. *Id.* § 607.108(4)(c). The announcement date is the date of the first general public announcement of the proposed affiliated transaction or of the intention to propose an affiliated transaction or the date on which the pro-

of at least ninety percent of the outstanding voting shares of the corporation, exclusive of shares acquired directly from the corporation in a transaction not approved by a majority of the disinterested directors.”<sup>150</sup>

Second, the voting requirements are waived if a very complicated “fair price” condition is satisfied:

In the affiliated transaction, consideration shall be paid to the holders of each class or series of voting shares and *all* of the following conditions shall be met:

1. The aggregate amount of the cash and the fair market value as of the valuation date of consideration other than cash to be received per share by holders of each class or series of voting shares in such affiliated transaction are at least equal to the *highest* of the following:

a. If applicable, the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers’ fees, paid by the interested shareholder for any shares of such class or series acquired by it within the 2-year period immediately preceding the announcement date or in the transaction in which it became an interested shareholder, whichever is higher;

b. The fair market value per share of such class or series on the announcement date or on the determination date,<sup>151</sup> whichever is higher;

c. If applicable, the price per share equal to the fair market value per share of such class or series determined pursuant to subparagraph b., multiplied by the ratio of the highest per share price, including any brokerage commissions, transfer taxes, and soliciting dealers’ fees, paid by the interested shareholder for any shares of such class or series acquired by it within the 2-year period immediately preceding the announcement date, to the fair market value per share of such class or series on the first day in such 2-year period on which the interested shareholder acquired any shares of such class or series; and

d. If applicable, the highest preferential amount, if any, per share to which the holders of such class or series are entitled in the event of any voluntary or involuntary dissolution of the corporation.<sup>152</sup>

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posed affiliated transaction or the intention to propose an affiliated transaction is first communicated generally to the shareholders of the corporation, whichever is earlier.

*Id.* § 607.108(1)(c).

150. *Id.* § 607.108(4)(d).

151. The determination date is “the date on which an interested shareholder became an interested shareholder.” *Id.* § 607.108(1)(g).

152. *Id.* § 607.108(4)(f) (emphasis added).

The statute also requires certain types of consideration<sup>153</sup> and prohibits use of the fair-price alternative if there have been certain dividend reductions.<sup>154</sup> Further, the fair-price alternative is unavailable if the interested shareholder received any loans, loan-like arrangements, or tax advantages from the corporation in the three years before the affiliated transaction was proposed, unless these were approved by a majority of the disinterested directors.<sup>155</sup> Also, unless the board of directors approves otherwise, the interested shareholder must mail a proxy or information statement meeting federal proxy requirements to holders of voting shares at least twenty-five days before consummation of the affiliated transaction, whether or not required by federal law.<sup>156</sup>

The voting requirements of subsection (2) are also waived for small corporations and investment companies.<sup>157</sup>

Obviously, the word "corporation" includes any company incorporated in Florida, since the entire anti-takeover scheme is contained in Florida's general corporate law.<sup>158</sup> But in light of the constitutional jurisprudence surrounding state anti-takeover laws, the application of the affiliated transactions statute (and control-share acquisition statute as well) to foreign corporations in section 607.110 is extremely important:

The provisions of [the affiliated transactions statute] shall also apply to a foreign corporation that has:

- (a) Been granted authority pursuant to this chapter to conduct business in this state;
- (b) One hundred or more shareholders;
- (c) Its principal place of business, its principal office, or substantial assets within this state;
- (d) More than 500 residents of this state as employees; and
- (e) Gross annual payroll of more than \$5 million to residents of this state; and
- (f) Either:
  - 1. More than 10 percent of its shareholders resident in this state;
  - 2. More than 10 percent of its shares owned by residents of this state; or
  - 3. More than 1,000 shareholders resident in this state.<sup>159</sup>

153. *Id.* § 607.108(4)(f)(2).

154. *Id.* § 607.108(4)(f)(3).

155. *Id.* § 607.108(4)(f)(4).

156. *Id.* § 607.108(4)(f)(5).

157. *Id.* § 607.108(4)(b), (e).

158. *Id.* ch. 607.

159. *Id.* § 607.110. In a very circuitous way, the control share acquisition statute applies to foreign corporations if exactly the same test is met. *See id.* §§ 607.110(2), .109(4).

Section 607.110 also contains a curious savings clause:

If the laws of any jurisdiction under the laws of which a foreign corporation is organized contain provisions that are expressly inconsistent with the provisions of this section as applicable to such foreign corporation, the provisions of this section shall be inapplicable to such foreign corporation to the extent necessary to resolve such inconsistency.<sup>160</sup>

The presence of the words “[e]xcept as provided in [the savings clause]” in the subsection dealing with the control-share acquisitions statute, but not in the one dealing with the affiliated transactions statute, adds further confusion.<sup>161</sup> The savings clause seems directed at the implication in *CTS* that statutes not limited to domestic corporations might be unconstitutional for subjecting bidders to the risk of inconsistent state regulation.<sup>162</sup>

Subsection (5) of section 607.108 governs election out of and back into the statute’s coverage and provides that the statute does not apply to affiliated transactions with certain interested shareholders that became such inadvertently.<sup>163</sup>

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160. *Id.* § 607.108(3).

161. *Id.* § 607.108.

162. *See supra* note 102 and accompanying text; *see also supra* note 136 and accompanying text. This section is rife with ambiguity. Unanswered questions include: whether a corporation is within the scope of the statute solely by virtue of a partnership, joint venture, or subsidiary that satisfies the test of section 607.110; what constitutes “substantial assets”; how to determine the situs of transient assets, such as vessels, airplanes, and rolling stock, or intangible assets, such as stock, patents, goodwill, and accounts receivable; whether market value or book value is relevant in determining whether assets are “substantial”; and whether the jurisdictional test is to be applied on the determination date, the announcement date, or the date the transaction is completed. Presumably, “substantial assets” is a less stringent test than “all or substantially all the assets,” the test for determining whether a sale of assets must be approved by shareholders. FLA. STAT. § 607.241 (1989); *see Schwadel v. Uchitel*, 455 So. 2d 401 (Fla. 3d DCA 1984).

To determine the residency of shareholders, a corporation may rely on its records and disregard shares held in “street name” by banks, brokers, or nominees. FLA. STAT. § 607.110(1) (1989). This seems inconsistent with the statute’s purported purpose of protecting shareholders, particularly considering how common “street name” ownership is. The provision is apparently directed at the practical difficulty in determining the names and addresses of beneficial owners. However, that difficulty has been overcome in other important areas. *See* 15 U.S.C. § 78n(c) (1988); 17 C.F.R. §§ 240.14a-13, .14b-1 (1989).

A foreign corporation should have the burden of proving to an acquirer that it is protected by the Act, because it has access to the information necessary to make that determination. The statute should be amended to require a corporation to provide to any ten-percent shareholder, upon request, the information necessary to determine if the Act applies. This would be consistent with the Act’s vesting of authority in a majority of the disinterested directors to determine whether a person is an interested director, whether a person is an affiliate or associate of a shareholder, and the number of voting shares beneficially owned by a person.

163. FLA. STAT. § 607.108(5) (1989).

The stated purpose of the statute is to protect resident shareholders. It is intended to inhibit coercive "two-step, front-end loaded" takeovers of a Florida corporation or a foreign corporation with substantial ties to Florida.<sup>164</sup> It does not prohibit tender offers, regulate the acquisition of voting control of a corporation, or even preclude a corporate raider from taking complete control of a corporation's board of directors. Rather, it regulates corporate transactions that may directly or indirectly benefit a purchaser after obtaining a controlling interest in a target corporation.

### III. CONSTITUTIONAL ISSUES

The Florida Affiliated Transactions Statute raises several constitutional issues. The following discussion addresses the constitutionality of the statute under the supremacy clause, the commerce clause, the full faith and credit clause, and the due process clause.

#### A. Supremacy Clause

Because Congress did not intend to preempt state takeover regulation,<sup>165</sup> the pertinent issues concerning the constitutionality of a state takeover law under the supremacy clause are whether "compliance with both federal and state regulations is a physical impossibility" and whether the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act.<sup>166</sup> The outcome of a supremacy clause challenge depends largely on a court's view of the neutrality purpose of the Williams Act.<sup>167</sup> If the United States Supreme Court could agree on a preemption analysis, no lingering controversy would exist regarding the constitutional status of state takeover statutes like Florida's. Of course, the resolution of the preemption issue would require the Court to decide whether neutrality is an independent objective of the Williams Act, which a majority of the Court has been unable to do,<sup>168</sup> and to examine the effect of state regulation on that objective. If a majority of the Court ever adopts the neutrality theory expressed by Justice White in *MITE*,<sup>169</sup> the Florida statute would be unconstitutional under the supremacy clause. Given

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164. Staff of Fla. H.R. Comm. on Commerce, H.B. 358 (1987) Staff Analysis 5 (final June 22, 1987) (on file with committee).

165. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982).

166. *Id.* (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

167. See *infra* notes 23-27 and accompanying text.

168. Compare *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) with *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987).

169. *MITE*, 457 U.S. at 633-34 (plurality).

the current state of the law, a court probably would rule that the Williams Act does not preempt the Florida statute.

The statute does not regulate the tender offer process or restrict a tender offeror's freedom to acquire shares; rather, it restricts a tender offeror's actions after purchase of a statutorily prescribed percentage of shares in a corporation covered by the statute. While the Williams Act regulates aspects of the tender offer process such as timing, disclosure, and pro-rata purchases, the Florida statute, like the Indiana statute upheld in *CTS*, leaves the tender offer process alone but reduces the anticipated benefits that accrue from acquiring the shares. Thus, compliance with both the Williams Act and the Florida Affiliated Transactions Statute is not a physical impossibility.

An inquiry into whether the statute is "an obstacle to the accomplishment and execution of the full purposes and objectives" of the Williams Act must begin with an articulation of the "full purposes and objectives" of the Williams Act. Courts that have considered supremacy clause challenges to state takeover laws have not uniformly articulated the purpose of the Williams Act. The United States District Court for Nevada held that a Nevada takeover statute violated the supremacy clause because it "frustrate[d] the objective of *neutrality* under the Williams Act."<sup>170</sup> The United States District Court for the Northern District of Ohio, on the other hand, has stated:

The conclusion appears inescapable to this court that a majority of the [United States Supreme] Court now views the purpose of the Williams Act, not as a guarantee of a level playing field for offeror and management in the takeover game, although that level playing field must be regarded as a means toward achieving the Act's real purpose, but as protection for the investor while management and offeror are on the field.<sup>171</sup>

These disparate holdings indicate the lingering controversy caused by Justice White's plurality opinion in *MITE*, which suggests that neutrality is an independent objective of the Williams Act.<sup>172</sup> However, a majority of the Court has clearly stated in other contexts that the "sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer"<sup>173</sup> and that "[n]eutrality is . . . but one

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170. *Batus, Inc. v. McKay*, 684 F. Supp. 637, 640 (D. Nev. 1988) (emphasis added) (holding unconstitutional NEV. REV. STAT. § 78.3772(1) (1986)).

171. *Veere Inc. v. Firestone Tire & Rubber Co.*, 685 F. Supp. 1027, 1030 (N.D. Ohio 1988).

172. *MITE*, 457 U.S. at 633-34; see also *CTS*, 107 S. Ct. at 1645 (explicitly stating that the Court is not bound by the reasoning of the plurality opinion in *MITE*).

173. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 35 (1977).

characteristic of legislation directed toward a different purpose—the protection of investors.”<sup>174</sup>

Thus, a state law that does not frustrate the investor protection objective of the Williams Act is not preempted by the supremacy clause merely because it affects the balance between tender offerors and management that the Williams Act enacted. In the words of the United States Court of Appeals for the Seventh Circuit, “[t]o say that Congress wanted to be neutral between bidder and target—a conclusion reached in many of the Court’s opinions—is not to say that it also forbade the states to favor one of these sides.”<sup>175</sup> The Florida Affiliated Transactions Statute arguably furthers the investor protection goals of the Williams Act by reducing the coercive aspects of tender offers. Because Florida’s statute thus cannot be said to conflict with the goals of the Williams Act, the statute’s effect on the balance between tender offerors and management is immaterial to its constitutionality under the supremacy clause. Therefore, the statute is not preempted by the Williams Act.

### B. Commerce Clause

A statute violates the commerce clause if it discriminates against interstate commerce,<sup>176</sup> adversely “affect[s] interstate commerce by subjecting activities to inconsistent regulations,”<sup>177</sup> or imposes a more than incidental burden on interstate commerce that is “clearly excessive in relation to the putative local benefits.”<sup>178</sup> Under *CTS*, the Florida Affiliated Transactions Statute appears constitutional as applied to Florida corporations, unless a court would make the distinction not present in *Amanda*—that is, the distinction between control share acquisition statutes and business combination statutes. However, the statute as applied to foreign corporations has been held violative of the commerce clause.<sup>179</sup>

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174. *Id.* at 29.

175. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 503 (7th Cir. 1989) (citing *Piper*, 430 U.S. at 1).

176. *See, e.g.*, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (cited in *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1648 (1987)).

177. *CTS*, 107 S. Ct. at 1649 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

178. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

179. *Grand Metro. P.L.C. v. Butterworth*, Civ. A. No. 88-40317WS, slip op. at 15 (N.D. Fla. Nov. 28, 1988).

### 1. Domestic Corporations

As applied to domestic corporations, the statute, like the Indiana statute upheld in *CTS*, neither discriminates against interstate commerce nor subjects interstate activities to inconsistent regulations. Because nothing in the Florida statute imposes a greater burden on out-of-state offerors than it does on Florida offerors, the statute does not discriminate against interstate commerce.<sup>180</sup> Likewise, because “[s]o 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,”<sup>181</sup> the Florida statute as applied to domestic corporations does not create a risk of inconsistent regulation by different states.

Determining whether the burdens imposed by the Florida statute are “clearly excessive in relation to the putative local benefits” requires identification of those benefits or interests. In *CTS*, the Court identified internal affairs regulation and shareholder protection as legitimate interests served by the statute in that case.<sup>182</sup> This rationale appears to apply to section 607.108 as well, particularly in light of *Amanda*. The statute impedes two-tier, front-end loaded tender offers and permits shareholders to deliberate collectively regarding the merits of an affiliated transaction. These local benefits are identical to those approved in *CTS*.<sup>183</sup>

*CTS* affirms the right of each state to regulate the corporate governance of its domestic corporations and establishes that voting rights are a matter of corporate governance.<sup>184</sup> The statute as applied to Florida corporations conforms to the *CTS* constitutional mold because it simply requires a specified vote of particular directors or shareholders as a prerequisite to effecting certain corporate transactions. Furthermore, the affiliated transactions statute arguably does not differ from other provisions of Florida corporate law that require shareholder approval of a merger, a consolidation, a dissolution, or a sale, lease, exchange, or other disposition of all or substantially all of a Florida corporation’s assets.<sup>185</sup> This analysis, however, disregards the policy reasons for invoking shareholder suffrage rights with respect to fundamental organic changes in a corporation.<sup>186</sup>

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180. See *CTS*, 107 S. Ct. at 1649-52.

181. *Id.* at 1649.

182. *Id.* at 1651-52. The Court’s decision in *CTS* has been criticized for “embedding . . . 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 Corporate Law*, 75 CALIF. L. REV. 29, 54 (1987).

183. *CTS*, 107 S. Ct. at 1651.

184. *Id.* at 1650-52.

185. See FLA. STAT. §§ 607.221, .241, .257 (1989).

186. See *infra* notes 208-10 and accompanying text.



## 2. Foreign Corporations

The Florida Affiliated Transactions Statute as applied to foreign corporations has been held invalid because it "create[s] the risk of inconsistent regulation, which is an intolerable burden on interstate commerce."<sup>187</sup> The statute as applied to foreign corporations might also fail the *Pike* balancing test because it "purport[s] to regulate the internal affairs of out-of-state corporations even though Florida has no legally recognizable interest in doing so";<sup>188</sup> recall that one state interest identified in *CTS* was that of regulating the internal affairs of corporations the state creates. Moreover, the statute as applied to foreign corporations directly affects corporate transactions that may occur entirely outside of Florida, and is thus unconstitutional because "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."<sup>189</sup>

Section 607.110, which extends the affiliated transactions statute to certain foreign corporations, contains a "savings clause,"<sup>190</sup> which apparently is intended to mitigate the statute's vulnerability to invalidation under the commerce clause as posing a risk of inconsistent state regulation. The savings clause provides that the affiliated transactions statute does not apply to a foreign corporation if the law of its state of incorporation is "expressly inconsistent" with provisions of the statute applicable to foreign corporations.<sup>191</sup> Federal courts, however, have uniformly ruled that savings clauses are ineffective to cure the unconstitutionality of state takeover laws that otherwise subject a foreign corporation to a risk of inconsistent regulation by different states.<sup>192</sup> With regard to Florida's savings clause, it has been noted that the affiliated transactions statute

might be consistent with the laws of the state of incorporation yet inconsistent with the laws of other states also attempting to regulate tender offers involving foreign corporations. In such a case, Florida's

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187. *Grand Metro., P.L.C. v. Butterworth*, Civ. A. No. 88-40317WS, slip op. at 14 (Nov. 29, 1988).

188. *Id.*

189. *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (citing *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945)).

190. FLA. STAT. § 607.110(3) (1989).

191. *Id.*

192. *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99 (6th Cir. 1989); *Grand Metro., P.L.C. v. Butterworth*, Civ. A. No. 88-40317WS (Nov. 29, 1988); see *supra* note 136 and accompanying text.

“savings clause” would not help to shield a target corporation from the inconsistent regulations of an untold number of states.<sup>193</sup>

The statute as applied to foreign corporations is void under the commerce clause.

### C. Full Faith and Credit Clause and Due Process Clause

The statute *as applied to foreign corporations* is also subject to attack under the full faith and credit clause and the due process clause.<sup>194</sup> The United States 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 corporation<sup>195</sup> and treated the clause as a constitutional conflict-of-law rule. Beginning with *Alaska Packers Association v. Industrial Accident*

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193. *Grand Metro*, Civ. A. No. 88-40317WS, slip op. at 15. Nevertheless, savings clauses are considered by Florida courts on the issue of severability. Usually, courts will sever a constitutionally invalid provision based on the assumption that the legislature would have enacted the law without the invalid provision. *Barndollar v. Sunset Realty Corp.*, 379 So. 2d 1278 (Fla. 1979). Thus, the constitutionally permissible portions of the Act may be severed from the invalid portion and given effect.

194. 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 . . .”). This argument, that application to foreign corporations has constitutional implications *besides* those under the commerce clause, was made in *Grand Metro*, Civ. A. No. 88-40317WS, slip op. at 15; the court’s references to the due process clause and to the full faith and credit clause *both* go to this argument. The plaintiffs in that case did *not* make any due process argument based on deprivation of property rights, i.e., that shareholders deprived of the right to sell their shares in affected two-step acquisitions had suffered a taking. *See* Plaintiffs’ Memorandum in Support of Motion for Preliminary Injunction, *Grand Metro*, Civ. A. No. 88-40317WS.

The due process argument involved in *Kidwell* was very different: that argument was premised on the anti-delegation doctrine. The plaintiffs argued that the state had unlawfully delegated the decision to invoke the statute’s protection to private citizens—that is, management. The court stated that this doctrine had been eroded and that in any event state-law fiduciary duties offered adequate guidance for making any decisions that had been delegated. *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1287 (5th Cir. 1978), *rev’d sub nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).

Professors Butler and Ribstein have argued that because corporations can be seen as a set of contracts among shareholders, managers, creditors, and others, state anti-takeover laws raise contract clause issues as well. Butler & Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611 (1988).

195. *See, e.g.*, *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947) (full faith and credit clause requires court of forum state to apply the law of the state of incorporation); *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 the law and jurisdiction of New York); *Converse v. Hamilton*, 224 U.S. 243 (1912) (Wisconsin court must apply Minnesota law to suit involving Minnesota corporation).

*Commission*,<sup>196</sup> however, courts increasingly have deferred to the law of the forum state. The United States Supreme 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 unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.<sup>197</sup>

This rule usually results in courts validating the application of the forum state's law.<sup>198</sup> Accordingly, the full faith and credit clause should not prohibit Florida from applying the statute to a foreign corporation if a sufficient relationship exists between Florida and the foreign corporation. This issue was not present in *CTS* because the Indiana law did not apply to foreign corporations. Nor was it addressed in *MITE* or in subsequent lower court opinions concerning state takeover laws that apply to foreign corporations. Nevertheless, the jurisdictional nexus with Florida necessary to subject a foreign corporation to the affiliated transaction statute should be sufficient to defeat a challenge on the grounds of the full faith and credit clause.

#### IV. PUBLIC POLICY CONSIDERATIONS

Section 607.108, Florida Statutes, is disguised as regulating only the internal affairs of Florida corporations and foreign corporations having a substantial nexus with Florida. In reality, however, it is designed to impede two-step takeovers in which shareholders receive less per share in the second step than in the first. The broader statutory scheme is designed to impede takeovers in general. Even if section 607.108 is

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196. 294 U.S. 532 (1935). In *Alaska Packers*, the Court held that:

*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.

197. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (plurality opinion) (Stevens, J., concurring) (citations omitted).

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

constitutional, the question whether it is sound policy persists. Should Florida discourage control transfers between willing buyers and sellers to protect local industry or should it leave those individual economic decisions to the parties involved?

John Coffee has offered four hypotheses to explain why acquirers are willing to pay substantially more than market value for the shares of a corporation. The difference between market value and offering price may represent: (1) gain from replacing incompetent management, (2) gain from moving resources to more productive use, (3) gain from "synergy"—that is, the value of a new corporation is greater than the sum of the values of two corporations from which it was formed, or (4) the premium that the acquirer is willing to pay to serve its own inefficient "empire-building" ambitions.<sup>199</sup> The first three theories are really variations of the same one: acquirers are willing to pay more because it is possible to manage the corporation more efficiently than current management is doing.<sup>200</sup> The last theory seems less credible: an acquirer who places "empire building" ahead of efficiency may soon itself become the target of efficiency-oriented acquirers.<sup>201</sup> Thus, takeover activity seems to represent at least *perceived* efficiency gains.<sup>202</sup>

However, even if these efficiency gains are real, wealth-transfer and other effects must be evaluated independently. If a target is worth more in the hands of an acquirer, the acquirer could pay exactly present market value for shares and keep 100% of the efficiency gain, or could pay so much for shares that tendering shareholders keep 100%.<sup>203</sup> The "investor protection" rationale behind federal and state takeover regulation is concerned with this potential wealth transfer between tendering shareholders and acquirers, and section 607.108 per-

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199. Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1162-73 (1984).

200. However, Professor Coffee's trifurcation of this theory does make an important point: bumbling incumbent management is not the only source of corporate inefficiency. For example, the acquirer may be taking advantage of economies of scale by merging the target into a larger operation. See also *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985) (corporation with tax credits but no taxable income merging with corporation with taxable income but no tax credits).

201. See Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeover*, 76 AM. ECON. REV. 323, 323-24 (1986).

202. Of course, an acquirer may be wrong in its perception of its ability to make efficiency gains, and pay (and probably borrow) more than the target is actually worth. If so, this represents a wealth transfer *to* tendering shareholders who sold at the excessive tender offer price, *from* the acquirer and those from whom it borrows to make the acquisition. This hardly seems to justify anti-takeover legislation, which views tendering shareholders as potential *victims*.

203. Arguably, the *acquirer* should keep 100% of the gain, because that will cause *more* takeovers to be successfully completed, and thus there will be more total efficiency gain. According to this theory, there is no wealth transfer component to consider at all, because shareholders whose holdings are adequately diversified own shares in both targets and acquirers, and thus keep 100% of the gain either way. See Banoff, *supra* note 95, at 300.

ceives "front-end loaded" tender offers as coercing target shareholders into making this transfer.<sup>204</sup>

Other wealth transfers may be involved as well. For example, efficiency gains may be available by relocating corporate operations to another, more appropriate location. Relocation is efficient if the loss to employees, businesses, and the community in general in the old location is less than gains to other persons, including employees, businesses, and the community in general in the new location. But the "losers" in the old location are unlikely to favor this transfer simply because they understand that it results in a net efficiency gain.<sup>205</sup> Thus, one objective of state anti-takeover legislation is simply protectionism. Indeed, the staff analyses of the 1987 act that contained Florida's control share acquisition and affiliated transaction statutes flatly state that the legislative purpose is to protect Florida industry.<sup>206</sup>

Moreover, the mechanism for achieving the protectionism objective is to provide advantages to incumbent management: after all, management decides where to incorporate and do business, and managers do not like to lose their jobs, even if a takeover is in the best interest of the shareholders. Protecting shareholders against extremely coercive two-tier offers which offer a choice between a low average per-share

204. But, of course, if the *average* price per share received in the two steps of the takeover is at least equal to the previous per-share value, tenderors have transferred *only* the efficiency gain and not any of the value they previously held. Thus, the two-step tender offer in which the average per-share price received is exactly equal to the previous per-share value appears to be the ideal one under the "holdout coercion" and "diversification" theories. See *supra* notes 95 & 203.

205. Justice Powell, concurring in *MITE*, noted this concern:

The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.

*MITE*, 457 U.S. at 646 (Powell, J., concurring).

206. The Senate staff analysis states:

The intent of this bill is to protect Florida corporations from hostile takeovers . . . . By offering a safe haven where Florida corporations cannot be easily subjected to hostile takeovers, corporations will be more attracted to Florida when deciding where, among other states, to locate.

Staff of Fla. S. Comm. on Judiciary-Civ., HB 358 (1987) Staff Analysis 3 (rev. May 26, 1987) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1628, Tallahassee, Fla.).

The House staff analysis states:

[I]t is believed that the proposed legislation will create a disincentive for existing Florida corporations to reincorporate in other states, while attracting foreign corporations to reincorporate in Florida.

Staff of Fla. H.R. Comm. on Commerce, HB 358 (1987) Staff Analysis 3-4 (April 24, 1987) (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 1737, Tallahassee, Fla.).

price or an even lower second-step price may be a desirable policy goal, but management entrenchment is not. In this respect, section 607.108 makes choices that are not the proper province of the legislature. Corporations are fueled by capital, and capital is driven by shareholders. 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, select management, and influence fundamental corporate decisions. Government should not interfere with the lawful choices of those whose capital is at risk.

Moreover, the "fair price" requirements of the statute effectively deprive controlling shareholders of the judicially recognized "control premium" value of their shares.<sup>207</sup> If acquirers are forced to pay the same price to every shareholder, they will spread the "control premium" across the per share price rather than paying it only to those shareholders who possess control. Thus, one ultimate effect of the statute is to remove control and the premium it commands from majority shareholders and give it to management and minority shareholders.

Shareholders are deprived of the opportunity to make individual investment decisions concerning a tender offer, because offers will be conditioned on shareholder or management approval of the second step of the acquisition. Shareholders are deprived of their right to vote on a merger<sup>208</sup> that constitutes a second step unless the approval required by section 607.108 is also secured.<sup>209</sup> Moreover, incumbent management has an inherent conflict of interest in evaluating takeover efforts because officers and directors do not want to lose their jobs; this conflict is tempered only by state-law fiduciary duties. This is not corporate governance, but management entrenchment and the antithesis of corporate democracy. Thus, "protection" by the provisions of section 607.108 may not be in shareholders' best interests. The "opt-out" provisions, given their inherent delay and management's ability to resist opting out,<sup>210</sup> do not adequately address this concern.

## V. LESS RESTRICTIVE APPROACHES

Even if the statute's purposes are sound policy, a less restrictive approach is possible. First, the five-year holding period and its limitation

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207. See *Zetlin v. Hanson Holdings, Inc.*, 48 N.Y.2d 684, 421 N.Y.S.2d 877, 397 N.E.2d 387 (1979).

208. FLA. STAT. § 607.221 (1989).

209. The approval required by section 607.108 is *in addition to* any other approval required by law. *Id.* § 607.108(2) (1989).

210. See FLA. STAT. § 607.108(5) (1989).

to eighty percent shareholders seems harsh.<sup>211</sup> Additionally, the statute should state in plain language that it is directed toward two-step takeovers. As currently written, the statute prohibits transactions with shareholders who have engaged in neither the first nor second step of a takeover. Finally, to eliminate uncertainty the definitions in the statute should conform as much as possible to those in federal securities law.

A better statute might read as follows:

*Acquisition Transactions.* No person or group may acquire a corporation if the acquisition occurs within two years after the commencement of a tender offer by that person or group in which the per share value of the cash and other consideration received by the tendering shareholders exceeds the per share value of the cash and other consideration received by the corporation or its remaining shareholders in the acquisition.

*Definitions.* As used in this section, the terms defined below have the respective meanings ascribed to them:

“Acquisition of a corporation” means the acquisition, directly or indirectly, of a corporation, all its outstanding voting stock, or all or substantially all its assets pursuant to a merger, tender offer, consolidation, liquidation, recapitalization, stock purchase, stock redemption, reverse stock split, a sale or exchange of a corporation’s assets, or any combination of the foregoing transactions;

“Person” means a trust, estate, partnership, corporation, association, cooperative, joint venture, business trust, or limited liability company, as well as a natural person;

“Group” means two or more persons who agree to act in concert with respect to a tender offer or an ensuing acquisition, and includes with respect to any particular person the spouse and every relative of the person, any relative of the person’s spouse who has the same home as the person, and every other person who, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, that person;

“Tender offer” has the same meaning that is judicially ascribed to that term as used in section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d) (1988).

*Per Share Value.* For purposes of this section, the value of all noncash consideration received by a corporation or a shareholder will be its aggregate market value, and the per share value received by a corporation will be determined by dividing its total number of

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211. See *id.* § 607.108(4)(c).

outstanding shares, excluding all shares having a specified liquidation or redemption value, into the aggregate value of all cash and other consideration received by the corporation, after deducting the amount of any accumulated dividend preferences and the aggregate liquidation or redemption value of all capital stock having a specified liquidation or redemption value, whether or not any consideration received by the corporation is paid or distributed to its shareholders in connection with an acquisition. If both the corporation and any of its shareholders receive cash or other consideration in connection with an acquisition, whether the acquisition is prohibited will be determined by the per share value received by the corporation, and the per share value received by the corporation will be calculated by adding the aggregate value of all cash and other consideration received by the shareholders to the aggregate value of all cash and other consideration received by the corporation and by treating as still outstanding any shares redeemed, cancelled, converted, or otherwise extinguished in exchange or substitution for the consideration received by the shareholders.

*Exemptions.* Nominal differences between the per share value received by shareholders in a tender offer and the per share value received by the corporation or its remaining shareholders in a subsequent acquisition will not by itself cause an acquisition to be prohibited. In addition, an acquisition that is subject to this section will not be prohibited, regardless of the per share value received by the corporation or its shareholders pursuant to it, if the acquisition is approved in advance by the affirmative vote or written consent of the holders of a majority of the outstanding voting shares of the corporation, excluding all shares tendered pursuant to the tender offer that preceded the acquisition (regardless of who then owns them) and either all shares that are beneficially owned by the person or group that made the tender offer, or, if the person or group making the acquisition is not the same person or group that made the tender offer, any shares that are beneficially owned by the person or group that is making the acquisition and that previously were beneficially owned by the person or group who made the tender offer at any time on or after the commencement of the tender offer.

*Successors in Interest.* This section applies to an acquisition of a corporation by a person or group that occurs within two years after the commencement of a tender offer by a different person or group, if the person or group making the acquisition beneficially owns, as of either the date when the acquisition is approved by the corporation's shareholders or the date when the acquisition is effective, more than fifty percent of the outstanding voting shares of the corporation, excluding any shares acquired or to be acquired pursuant to the acquisition, and acquired from the person or group who made the tender offer, directly or indirectly through one or more



intermediaries, after the commencement of the tender offer, beneficial ownership of an amount of voting shares that resulted in the total number of voting shares beneficially owned by the person or group making the acquisition exceeding fifty percent of the outstanding voting shares of the corporation.

To assure shareholders the right "to deliberate collectively" about the merits of an acquisition, the Florida Legislature could enact a law permitting shareholders to approve a plan of merger or consolidation or for the sale or exchange of all or substantially all of a corporation's assets without the prior approval of the plan by the corporation's board of directors. This would preclude management from preempting the shareholders' opportunity to consider the merits of an acquisition.

The Florida General Corporation Act permits a special meeting of shareholders to be called by shareholders owning at least ten percent of all the shares entitled to vote at the meeting.<sup>212</sup> However, the Act also requires, as a prerequisite to shareholder approval of a merger, consolidation, or sale, lease, exchange, or other disposition of all or substantially all of a corporation's assets, that the board of directors adopt a resolution recommending the transaction and submit it to a vote at a shareholders' meeting.<sup>213</sup> Thus, current law enables a board of directors acting in its self-interest in entrenchment to deny shareholders the opportunity to consider an acquisition offer by merely refraining from adopting the required statutory resolution.

In fact, this is the reason that takeover offers are increasingly cast as tender offers: a tender offer allows a takeover bidder to submit its acquisition offer for shareholder deliberation when management opposes the offer. If Florida is to continue to regulate tender offers, bidders should be able to submit their acquisition offers for shareholder consideration if a sufficient number of shareholders are interested in the offer to call a special meeting for the purpose of acting on it.

These changes would achieve the purpose of restricting "front-end loaded" tender offers without infringing on transactions in interstate commerce or serving the local protectionism objective of the affiliated transactions statute. Protection of shareholders does not require prohibition of other transactions which are "affiliated transactions" within the meaning of section 607.108. Shareholders are adequately protected against self-dealing by state-law fiduciary duty, statutory appraisal rights,<sup>214</sup> and perhaps even federal securities anti-fraud provisions.<sup>215</sup>

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212. *Id.* § 607.084(3)(b).

213. *Id.* § 607.2141, .221, .241.

214. *Id.* § 607.247.

215. *See, e.g.,* Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977). This strained opinion was

## VI. GUIDELINES FOR COMPLIANCE WITH THE STATUTE

A corporation that is subject to section 607.108 should decide whether it desires the statute's protection. This decision will depend on the corporation's existing takeover posture and future objectives. Some corporations might already have effective takeover deterrents, such as classified stock, cumulative voting, staggered directors, or poison pills. Corporations are also already protected by the control-share acquisition statute.<sup>216</sup> In addition, some corporations might favor being acquired for sufficient value, and might therefore might want to utilize the opt-out provisions to facilitate friendly takeovers. However, any election to opt out of the statute is not effective for eighteen months.<sup>217</sup>

Acquirer strategies are somewhat limited. Of course, transactions with less-than-ten-percent shareholders are not regulated, but with that small degree of control, hostile acquirers will be unable to effect the transaction. The only effective acquirer strategy is to condition the tender offer on the approval of the second step required by the statute.

## VII. CONCLUSION

The Florida Affiliated Transactions Statute is a thinly veiled attempt by the Florida Legislature to protect local industries. Its application to foreign corporations is almost certainly unconstitutional under the commerce clause; additionally, while the Supreme Court has validated one control share acquisition statute, business combination statutes are substantially more pro-management. Moreover, its protectionism and management entrenchment aspects and its interference with efficiency goals appear to be poor public policy.

Given the remoteness of the possibility of definitively preemptive federal legislation, the only threat to the statute is partial invalidation by the courts or repeal by the legislature. Until then, the statute imposes a substantial burden on Florida takeover activity.

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215. See, e.g., *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977). This strained opinion was written in the wake of the Supreme Court's decision that garden-variety self-dealing does not constitute a violation of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989), absent fraud or misrepresentation by the self-dealing directors. See *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977). The Second Circuit read *Santa Fe* as not completely foreclosing a 10b-5 action for corporate mismanagement, and went on to answer the intriguing question of how a corporation can be deceived and what the appropriate standard of materiality is. *Goldberg*, 567 F.2d at 214-21.

216. FLA. STAT. § 607.109 (1989).

217. *Id.* § 607.108(5).

