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## The Constitutionality of Multistatute Antitakeover "Schemes" Under the Commerce Clause: Potential Consequences of the West Lynn Creamery Decision

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# The Constitutionality of Multistatute Antitakeover "Schemes" Under the Commerce Clause: Potential Consequences of the *West Lynn Creamery* Decision

Jennifer Erdman Shirkey\*

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### I. Introduction

There are some things money can't buy. State antitakeover statutes help achieve this result by protecting local corporations from perceived hostile predators.<sup>1</sup> Yet in taking such actions, states may not only violate sound economic policy,<sup>2</sup> but they may also run afoul of the Constitution's goal of maintaining interstate comity, a value embodied in Article I's Commerce Clause.<sup>3</sup> The United States Supreme Court's Commerce Clause

1. See *infra* notes 171-74 and accompanying text (discussing policies behind takeover legislation).

2. See *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 500 & n.5 (7th Cir.) (questioning economic wisdom of antitakeover legislation), *cert. denied*, 493 U.S. 955 (1989). Examining tender offers from an equity investor's perspective in *Amanda Acquisition*, Judge Easterbrook expressed concerns about antitakeover laws, including entrenchment of an inefficient management, *id.* at 500, declining profits and depressed stock prices after defeating a bid, *id.* at 501, and destruction of flexibility in a firm's ability to choose between different methods of dealing with a tender offer, *id.* at 501-02.

3. See U.S. CONST. art. I, § 8, cl. 3 (stating that "Congress shall have Power . . . To regulate Commerce . . . among the several States"); cf. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986) (positing three objections to state protectionism in general). Professor Regan's three objections comprise a "concept-of-union" objection, a "resentment/retaliation" objection, and an "efficiency" objection. *Id.* The concept-of-union objection renders state protectionism unacceptable because it is hostile, or inconsistent with the idea of political union. *Id.* Regan bases his second objection on the premise that state protectionism leads to a cycle of animosity and isolation that again threatens the political union. *Id.* at 1114. Finally, Regan claims that protectionism leads to inefficiency, defined as "divert[ing] business away from presumptively low-cost producers without any colorable justification in terms of a benefit that deserves approval from the . . . nation as a whole." *Id.* at 1118.

decisions on antitakeover statutes have tried to accommodate these competing values.<sup>4</sup> Just when the Court has struck a balance, however, a new case arrives to skew the old equations.

Until 1994, when the Court decided *West Lynn Creamery, Inc. v Healy*,<sup>5</sup> thwarted tender offerors had invoked the Commerce Clause to challenge antitakeover legislation contained only in single statutes.<sup>6</sup> Yet takeover targets can increasingly draw on multiple statutes to formulate defensive strategies.<sup>7</sup> *West Lynn Creamery* adds another twist to these situations with its holding that a two-part law may violate the Commerce Clause despite the constitutionality of its individual components.<sup>8</sup> The *West Lynn Creamery* Court reached this decision by assuming a functionalist approach, looking at the scheme's overall practical effect rather than testing separately its discrete, formal provisions.<sup>9</sup> Although this methodology answered the specific problem raised in *West Lynn Creamery*, the decision failed to address concerns regarding how and when to apply the new rule.<sup>10</sup> Even more importantly, *West Lynn Creamery* increased the divergence between the Supreme Court's analysis in past Commerce Clause cases involving antitakeover laws and in recent cases involving other types of commodities.<sup>11</sup> This growing schism raises fundamental questions about the nature of corporations and the proper roles of courts and legislatures in governing them.<sup>12</sup> These problems came home to roost in *WLR Foods, Inc. v Tyson Foods, Inc.*<sup>13</sup>

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4. See *infra* part III.B (providing background on Supreme Court's antitakeover law decisions).

5. 144 S. Ct. 2205 (1994).

6. See *infra* note 124 (discussing how in past courts have dealt with antitakeover laws individually).

7. See source cited *infra* note 106 (specifying number of states with multiple antitakeover statutes as of 1993).

8. *West Lynn Creamery, Inc. v Healy*, 114 S. Ct. 2205, 2214-15 (1994).

9. See *id.* at 2215 (stating that Court's Commerce Clause jurisprudence is not controlled by form by which state erects barriers to commerce but rather eschews formalism for "sensitive, case-by-case analysis of purposes and effects").

10. See *infra* text accompanying note 64 (introducing problems that extension of *West Lynn Creamery*'s rule would entail).

11. See discussion *infra* part IV.C.3 (tracing split in Supreme Court's Commerce Clause jurisprudence).

12. See *infra* notes 202-23, 229 and accompanying text (examining these issues).

13. 861 F Supp. 1277 (W.D. Va. 1994).

## II. Focusing West Lynn Creamery

### A. WLR Foods and West Lynn Creamery Background

When one of America's most aggressive takeover players faced fierce opposition from a group of Shenandoah Valley poultry growers, the battle surprised many in the financial world, including the tender offeror.<sup>14</sup> Tyson Foods, Inc. (Tyson)<sup>15</sup> eventually failed in its bid to acquire WLR Foods, Inc. (WLR),<sup>16</sup> largely because of WLR's effective use of three Virginia antitakeover statutes and Virginia's lenient statutory director conduct standard.<sup>17</sup> In its courtroom challenge to WLR's actions, Tyson

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14. See Jerry Knight, *A High-Stakes Game of Chicken — Wall Street's Fowl Play: The Bitter Merger Fight of Tyson and WLR Foods*, WASH. POST, May 16, 1994, at F1 (stating that Wall Street has never seen "the likes" of Tyson and WLR's takeover fight); David Ress, *Rulings Could Mean Virginia is For Corporations: Interpretation of Law Gives Boards of Directors Broad Powers*, RICHMOND TIMES-DISPATCH, Sept. 4, 1994, at E1 (referring to Wall Street's "stunned" reaction to growers' resistance). Tyson's bid offered WLR stock owners \$30 a share, which exceeded the market rate by nearly \$11 a share. Pat Murphey, *An Offer They Could Refuse — WLR Began Defying Tyson and the Odds a Year Ago*, DAILY NEWS-RECORD (Harrisonburg, Virginia), Jan. 24, 1995, at 13.

15. Tyson, based in Springdale, Arkansas, is America's largest poultry company Knight, *supra* note 14, at F1. According to one source, Don Tyson, Tyson's chairman, has a dream of building America's only meat conglomerate. *Id.* Another reporter wrote that Tyson already has chicken, beef, pork, lamb, and seafood facilities; turkey is the one thing it lacks. Murphey, *supra* note 14, at 14.

16. In 1994, before its acquisition of Cuddy Farms' turkey operations in North Carolina, WLR was the third-largest turkey producer in the United States. Knight, *supra* note 14, at F1. The "W" in the WLR acronym stands for Wampler, a family long involved in the poultry industry and now owning more than 10% of WLR. *Id.* The "L" is for Longacre, a family that merged its poultry business with the Wampers' but has since sold its WLR stock. *Id.* The "R" is for the Rockingham County Poultry Cooperative, a nonprofit chicken processor owned by poultry growers that joined Wampler-Longacre in 1988. *Id.* The 1988 merger with Wampler-Longacre left about one-third of WLR's stock in the growers' hands. *Id.*

17. See Jerry Knight, *Tyson's WLR Takeover Is Cooked — Poultry Giant Bows Out in Face of Virginia Competitor's Maneuvers*, WASH. POST, Aug. 5, 1994, at B1 (stating that WLR's legal and financial maneuvers made company "all but impossible to swallow"). Tyson's retreat reportedly produced "jubilation" in the Shenandoah Valley, where WLR is the largest employer and where poultry is the most important farm product. *Id.* The asserted deciding factor was WLR's acquisition of a North Carolina turkey company, which would give WLR insiders "enough shares to control WLR's board of directors even if Tyson Foods b[ought] all other shares." *Id.* However, Virginia's antitakeover law is "one of the reasons why Tyson's Shenandoah Valley campaign turned into one of the worst defeats since the locals routed the Yankees at the battle of New Market, which is just a few miles up the road from WLR's headquarters in Broadway." Jerry Knight, *Washington Investing — Main Street Beats Wall Street in Failed Tyson Deal*, WASH. POST, Aug. 15, 1994, at F25.

asserted that the four Virginia statutes operate as a scheme that unconstitutionally impedes hostile takeovers in violation of the dormant Commerce Clause.<sup>18</sup> Tyson claimed further that even if each Virginia statute is constitutional, the scheme as a whole could still be unconstitutional.<sup>19</sup> In a memorandum opinion accompanying a preliminary order in the case, Judge Michael, of the U.S. District Court for the Western District of Virginia, found that the Virginia statutes would probably pass constitutional muster.<sup>20</sup> Yet he also stated that dicta in a recent United States Supreme Court case could support the theory, if not the merits, of Tyson's argument.<sup>21</sup>

The case to which Judge Michael referred was *West Lynn Creamery, Inc. v Healy*.<sup>22</sup> In *West Lynn Creamery*, the Supreme Court decided whether a two-part Massachusetts regulation — one part imposing a surcharge on all milk sold by dealers to retailers in the state, and the other part distributing the surcharge's proceeds to Massachusetts milk producers — discriminated against interstate commerce in violation of the Commerce Clause.<sup>23</sup> Massachusetts legislators supported the pricing order as a measure to bolster the state's ailing dairy industry.<sup>24</sup> Challenging the order were dealers who had purchased out-of-state milk for sale to retailers in Massachusetts and who had lost their licenses after refusing to pay the prescribed premiums.<sup>25</sup> In reaching its decision, the Court compared the practical effect of the Massachusetts pricing order to protective tariffs, which the Court said it has long held to violate the Commerce Clause.<sup>26</sup>

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18. *WLR Foods, Inc. v Tyson Foods, Inc.*, 861 F Supp. 1277, 1281 (W.D. Va. 1994). Judge James H. Michael, Jr., who presided over the proceedings, apparently planned to scrutinize carefully Virginia's antitakeover law. He said he intended to "pick this statute up like you'd pick up a mouse by the tail and look at it." Jerry Knight, *Tyson Criticizes Virginia Takeover Law*, WASH. POST, July 8, 1994, at F3. Because a decision invalidating Virginia's law could potentially affect numerous Virginia companies, the state attorney general intervened to defend the statutes. *Id.*

19. *WLR Foods*, 861 F Supp. at 1281.

20. *Id.* at 1289.

21. *Id.* at 1282.

22. 114 S. Ct. 2205 (1994).

23. *West Lynn Creamery, Inc. v Healy*, 114 S. Ct. 2205 (1994).

24. *Id.* at 2209-10.

25. *Id.* at 2209, 2210.

26. *See id.* at 2211 (describing protective tariffs and states' attempts to reap tariffs' benefits by other means). Illustrative cases invalidating statutes with tariff-like effects include *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984) (striking down law granting tax exemption to certain liquors produced in Hawaii); *Hunt v Washington State Apple Advertising*

According to the Court, the Massachusetts order produced a tariff-like effect because the subsidy more than offset the tax's burden on Massachusetts dairy farmers.<sup>27</sup> As a result, the Court concluded that the subsidy discriminated against interstate commerce by strengthening the Massachusetts farmers' competitive position at the expense of out-of-state producers and their dealers.<sup>28</sup>

The *West Lynn Creamery* Court rejected the state's four counterbalancing arguments justifying this discriminatory effect. The Court first acknowledged that the Constitution permits both nondiscriminatory taxes and subsidies as exercises of state power when considered individually.<sup>29</sup> The Court, however, cautioned that one could not presume the laws' validity from their individual constitutionality because when considered together they formed a scheme removing safeguards against legislative abuse.<sup>30</sup> Even though the tax evenhandedly affected in-state and out-of-state interests, the subsidy mollified the in-state group, who would otherwise lobby the state legislature against the tax.<sup>31</sup> The Court explained further that, although the tax fell on dealers in out-of-state milk and not on out-of-state producers (who were the Massachusetts dairy farmers' direct competitors), the Commerce Clause protects against imposition of a differential burden on any part of the stream of commerce because a burden placed at any point eventually disadvantages the producer.<sup>32</sup> The Court then cited traditional Commerce Clause jurisprudence in dismissing the state's argument that no discrimination occurred because in-state consumers, not out-of-state interests, bore the brunt of the tax's cost.<sup>33</sup> Stating that preservation of local industry does not sufficiently outweigh the Commerce Clause's prohibition against economic protectionism, the Court also refused to accept

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Comm'n, 432 U.S. 333 (1977) (striking down North Carolina regulation requiring that all apples shipped or sold in state in closed containers be marked with federal grade or with designation that apples were not graded); and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (striking down minimum price order for all milk sold in Vermont).

27. *West Lynn Creamery*, 114 S. Ct. at 2212.

28. *Id.*

29. *Id.* at 2214.

30. *Id.* at 2215. "By conjoining a tax and a subsidy," the Court opined, "Massachusetts has created a program more dangerous to interstate commerce than either part alone." *Id.* at 2214-15.

31. *Id.* at 2215.

32. *Id.* at 2216.

33. *See id.* at 2216-17 (stating that *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984), thoroughly repudiates this contention).

the state's fourth assertion — that the statutes were necessary to the continued vitality of the Massachusetts dairy industry.<sup>34</sup> The *West Lynn Creamery* Court thus held that the Massachusetts statutes violated the Commerce Clause by discriminating against interstate commerce without sufficient justification.<sup>35</sup>

*WLR Foods, Inc. v Tyson Foods, Inc.*<sup>36</sup> presents the first application of *West Lynn Creamery*'s rationale to corporate takeover statutes. In *WLR Foods*, the U.S. District Court for the Western District of Virginia denied a preliminary injunction to support Tyson's constitutional challenge of four Virginia statutes affecting its takeover bid for WLR.<sup>37</sup> The specific issues facing the court were whether the Williams Act<sup>38</sup> preempts the Virginia statutes and whether the Virginia statutes violate the Commerce Clause.<sup>39</sup> The four statutes involved were Virginia's Control Share Acquisitions Act (Control Share Act),<sup>40</sup> Affiliated Transactions Act,<sup>41</sup> section 646 (Poison Pill Statute),<sup>42</sup> and section 690 (Business Judgment Statute).<sup>43</sup>

The court noted first that dicta in *West Lynn Creamery* could support Tyson's assertion that a statutory scheme could be invalid even if each of its components is constitutional.<sup>44</sup> In *West Lynn Creamery*, the Supreme

34. *Id.* at 2217

35. *Id.* at 2209.

36. 861 F Supp. 1277 (W.D. Va. 1994).

37. *WLR Foods, Inc. v Tyson Foods, Inc.*, 861 F Supp. 1277 (W.D. Va. 1994).

38. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988). Implementation of the Williams Act in 1968 preempted, interestingly enough, Virginia's four-month-old Take-Over Bid Disclosure Act, VA. CODE ANN. §§ 13.1-528 to -541 (Michie 1973) (repealed). Mary H. Ackerly & Wade M. Fricke, Note, "May We Have the Last Dance?" - States Take Aim at Corporate Raiders and Crash the Predator's Ball, 45 WASH. & LEE L. REV. 1059, 1059 (1988). Virginia's short-lived disclosure act was the first statute regulating tender offers in the country. *Id.* It required a person acquiring a controlling interest in a target corporation to disclose certain information to shareholders. *Id.* The Act also attempted to regulate other aspects of takeover bids, including a bid's duration. *Id.* at 1059 n.1.

39. *WLR Foods*, 861 F Supp. at 1279.

40. VA. CODE ANN. §§ 13.1-728.1 to -728.9 (Michie 1993); see also *infra* note 109 (discussing Control Share Act).

41. VA. CODE ANN. §§ 13.1-725 to -727.1 (Michie 1993); see also *infra* note 110 (discussing Affiliated Transactions Act).

42. VA. CODE ANN. § 13.1-646 (Michie 1993); see also *infra* note 111 (discussing Poison Pill Statute).

43. VA. CODE ANN. § 13.1-690 (Michie 1993); see also *infra* note 112 (discussing Business Judgment Statute).

44. *WLR Foods*, 861 F Supp at 1282.



Court had included in its Commerce Clause analysis dicta about the Court's general perspective on Commerce Clause cases.<sup>45</sup> The *West Lynn Creamery* Court stated, "Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects bars to commerce. Rather, our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects."<sup>46</sup> Quoting from *Best & Co. v Maxwell*,<sup>47</sup> the Supreme Court reiterated: "The [C]ommerce [C]lause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."<sup>48</sup> Relying on this functional approach, the *West Lynn Creamery* Court concluded that statutes may operate as an unconstitutional scheme even though they are individually constitutional.<sup>49</sup> In *WLR Foods*, the court assumed, without deciding, that *West Lynn Creamery's* rationale extends to statutes a legislature has not purposefully linked,<sup>50</sup> unlike *West Lynn Creamery's* explicitly integrated regulations.

Addressing the merits, the *WLR Foods* court concluded that the Williams Act does not preempt the Virginia laws because the statutes do not favor management or the tender offerors over investors and thus do not interfere with the federal statute's objective of protecting investors by ensuring an informed decision regarding any tender offer for their shares.<sup>51</sup> The court then decided that the Virginia statutes do not offend the Com-

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45. See *West Lynn Creamery, Inc. v Healy*, 114 S. Ct. 2205, 2215-16 (1994) (expressing Court's perspective on Commerce Clause jurisprudence).

46. *Id.* at 2215.

47. 311 U.S. 454 (1940).

48. *West Lynn Creamery*, 114 S. Ct. at 2215-16; *Maryland v Louisiana*, 451 U.S. 725, 756 (1981); *Exxon Corp. v Governor of Maryland*, 437 U.S. 117, 147 (1978); *Best & Co. v Maxwell*, 311 U.S. 454, 455 (1940). In *Best*, the Supreme Court considered whether a North Carolina statute violated the Commerce Clause. *Id.* at 455. The statute levied an annual license tax on out-of-state merchants who rented North Carolina hotel rooms to display samples for sales purposes. *Id.* The Court first assumed that North Carolina residents competing with the out-of-state merchants would normally be regular North Carolina retail merchants, who avoided the levy. *Id.* at 456. The Court then reasoned that the statute discriminated against interstate commerce because North Carolina required the tax of out-of-state retailers but not of their local competitors. *Id.* at 456-57. Consequently, the Court held the tax unconstitutional. *Id.* at 457.

49. See *West Lynn Creamery*, 114 S. Ct. at 2215 (stating that use of constitutional means cannot guarantee constitutionality of program as whole).

50. *WLR Foods*, 861 F Supp. at 1283.

51. *Id.* at 1286.

merce Clause for two reasons.<sup>52</sup> First, the court found that the Virginia statutes do not discriminate against out-of-state tender offerors because the laws apply evenhandedly and do not completely eliminate the interstate commerce flow in hostile takeovers of Virginia corporations.<sup>53</sup> Second, the court found that the Virginia statutes satisfy the balancing test established by the Supreme Court in *Pike v Bruce Church, Inc.*<sup>54</sup> because states may neutralize any potential harm that hostile takeovers may cause the corporations that states create and define.<sup>55</sup> Such a scheme passes constitutional muster, even though its regulation incidentally affects interstate commerce.<sup>56</sup> The court therefore concluded that the Virginia statutes, even viewed as a scheme, should survive both Williams Act and Commerce Clause attacks.<sup>57</sup>

*B. Initial Concerns About Applying West Lynn Creamery to Nonintegrated Takeover Legislation*

Despite his assumption in *WLR Foods* that *West Lynn Creamery* applies beyond an integrated statutory program, Judge Michael expressed concerns over actually doing so.<sup>58</sup> He stated that this extension would create "enormous" difficulties in application for district courts.<sup>59</sup> According to Judge Michael, the *West Lynn Creamery* Court could invalidate the two-part milk pricing order because Massachusetts never intended either component of the order to stand alone.<sup>60</sup> Problems occur, said Judge Michael, when

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52. *Id.* at 1287-89.

53. *Id.* at 1287-88.

54. *See id.* at 1288 (describing *Pike* test). Under the test enunciated in *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970), statutes violate the Commerce Clause if they impose a burden on interstate commerce that clearly exceeds their putative local benefits. *Id.* at 142; *see also infra* notes 55-57 and accompanying text (discussing *Pike* test).

55. *WLR Foods*, 861 F Supp. at 1289

56. *Id.*

57. *Id.* Because the court was merely deciding Tyson's motion for a preliminary injunction, Judge Michael did not determine whether Tyson would actually succeed on the merits of its claims but only whether Tyson was *likely* to succeed on them at trial. *See id.* at 1281 (indicating that likelihood of success on merits would determine court's grant of preliminary injunction). The court later fixed these conclusions in the final judgment and order in the case. *WLR Foods, Inc. v Tyson Foods, Inc.*, 869 F Supp. 419 (W.D. Va. 1994).

58. *WLR Foods*, 861 F Supp. at 1283.

59. *Id.* at 1282.

60. *Id.*

separately constitutional statutes that a legislature did not purposely conjoin operate together to create a scheme that is unconstitutional as a whole.<sup>61</sup> Because these nonintegrated statutes often serve more than one purpose, courts cannot simply strike down the statutes themselves.<sup>62</sup> The situation would instead force courts to distinguish between particular constitutional and unconstitutional *uses* of the statutes.<sup>63</sup> Judge Michael concretely illustrated this predicament in the following series of rhetorical questions and hypotheticals:

[W]hat is the particular unconstitutional way in which the Virginia statutes were used [by WLR]? At what point did WLR enter the realm of unconstitutionality? Was it when they approved the poison pill? Was it when they called for a control share referendum? Does it matter whether they understood the implications of the Affiliated Transactions Act when they took action? Could they approve a poison pill if they opt out of the Control Share Act? Could they utilize the Control Share Act if they do not adopt a poison pill? If the collective statutes were used unconstitutionally, what part should be enjoined? Perhaps the management could be given a choice — either redeem the poison pill or opt out of the Control Share Act. Perhaps management could be precluded from utilizing the Control Share Act or adopting a poison pill anytime the Affiliated Transactions Act applies. The Affiliated Transactions Act applies, however, every time that the Control Share Act applies because of the ownership percentage requirements that trigger each statute. This would mean that management would always be precluded from using the Control Share Act, which as a practical matter is the same as declaring the Control Share Act unconstitutional.<sup>64</sup>

Judge Michael's musings demonstrate the practical hazards of applying *West Lynn Creamery's* Commerce Clause analysis to multistatute antitakeover schemes. Underlying doctrinal difficulties also exist.<sup>65</sup> To understand best where the Court might be going on this issue, however, one must understand first from where the Court came.

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1282-83.

65. See discussion *infra* part IV.C.3 (pointing out doctrinal difficulties existing in Commerce Clause jurisprudence).

### III. Background on Dormant Commerce Clause and Its Application to State Takeover Legislation

#### A. Dormant Commerce Clause Generally

The Commerce Clause authorizes Congress to govern interstate commerce.<sup>66</sup> Even though the Commerce Clause does not explicitly restrict state regulation when Congress has not acted,<sup>67</sup> the Supreme Court has stricken a myriad of regulations in such instances.<sup>68</sup> This construction is known as the Commerce Clause's "dormant"<sup>69</sup> or "negative"<sup>70</sup> aspect. The Court's interpretation of the dormant Commerce Clause, as inherently limiting state activity even absent congressional action, developed over a 140-year span.<sup>71</sup>

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66. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate commerce among states).

67. Arthur R. Pinto, *The Constitution and the Market for Corporate Control: State Take Over Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699, 743 (1988).

68. See Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 574-75 (listing as examples invalidations of state licensing requirements, train length restrictions, mudguard requirements, truck length prohibitions, and various produce regulations). In their article, Professors Redish and Nugent actually argue against the dormant Commerce Clause's validity *Id.* at 573. According to Redish and Nugent, the doctrine upsets the Constitution's inherent balance of power. *Id.* They categorize the Commerce Clause as one of the constitutional provisions that allocates legislative control to the states unless Congress preempts or overrules the particular state action. *Id.* at 591. The authors claim that the dormant Commerce Clause upsets this balance by imposing a judge-made barrier to state regulation of interstate commerce that only affirmative congressional action can overcome. *Id.* at 592. Their second reason for the asserted invalidity of the dormant Commerce Clause is that the doctrine thwarts the advantages of a federal system, such as individual state experimentation. *Id.* at 574.

69. See Pinto, *supra* note 67, at 705 (describing so-called "dormant" Commerce Clause).

70. See *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994) (quoting language denoting "negative" aspect of Commerce Clause). In a footnote, the *West Lynn Creamery* Court stated that James Madison, the Constitution's author, considered the negative aspect of the Commerce Clause more important than the positive one. *Id.* at 2211 n.9. Madison wrote in a letter that the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *Id.* (quoting M. FARRAND, 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 478 (1911)).

71. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), as authority for proposition that dormant Commerce Clause theory has been settled for over a century); *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (quoting language from *Great Atl. & Pac. Tea Co. v.*

Professor Arthur Pinto writes that in analyzing dormant Commerce Clause cases, the Supreme Court first distinguishes between direct and indirect state regulation.<sup>72</sup> The Court strikes down laws if they regulate commerce directly, discriminate against interstate commerce, or favor in-state economic interests over out-of-state interests.<sup>73</sup> By contrast, the Court draws on a balancing test developed in *Pike v Bruce Church, Inc.*<sup>74</sup> to evaluate indirect and nondiscriminatory statutes.<sup>75</sup> Under the *Pike* test, a statute is constitutional when "[it] regulates even-handedly to effectuate a legitimate local public interest[ ] and its effects on interstate commerce are only incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>76</sup>

*B. Application of Dormant Commerce Clause to  
State Takeover Legislation*

*1 Edgar v MITE Corp.*

In *Edgar v MITE Corp.*,<sup>77</sup> the first major takeover legislation case of the 1980s, the Supreme Court used the *Pike* test to strike down an Illinois statute designed to discourage hostile takeovers.<sup>78</sup> The Court's plurality

Cottrell, 424 U.S. 366, 370-71 (1976), claiming that Commerce Clause's implicit limitation has been clear at least since *Cooley*).

72. Pinto, *supra* note 67, at 705.

73. *Id.* Professor Pinto also includes Professor Laurence Tribe's argument that the direct-indirect distinction is conclusory and misleading and that the Supreme Court will uphold even a direct regulation if it is rationally related to a legitimate state end and satisfies the *Pike* test. *Id.* at 705 n.23. Pinto writes, however, that the Court recognizes the difficulties but still uses the distinction. *Id.*, see *Brown-Forman Distillers Corp. v New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (recognizing that no clear line separates direct regulation, which is virtually per se unconstitutional, from indirect regulation, which is subject to *Pike* test).

74. 397 U.S. 137 (1970).

75. See Pinto, *supra* note 67, at 705 (describing, but not naming, *Pike* test).

76. *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In *Pike*, a grower of cantaloupes sought to enjoin enforcement of an Arizona statute requiring that all Arizona-grown cantaloupes be packed and processed in the state. *Id.* at 138-39. The state's goal was to identify the superior melons as originating in Arizona, thereby enhancing the reputation of local cantaloupe growers. *Id.* at 144. Compliance would have required the grower to build an unneeded \$200,000 packing plant. *Id.* at 145. The Court rejected Arizona's asserted interest as insufficient to justify this burden on interstate commerce. *Id.* The Court accordingly affirmed the lower court's judgment striking down the Arizona statute. *Id.* at 146.

77. 457 U.S. 624 (1982).

78. *Edgar v MITE Corp.*, 457 U.S. 624, 643 (1982). The Illinois Business Take-Over

opinion rejected assertions that the state regulation served legitimate state interests by protecting resident shareholders<sup>79</sup> and by merely regulating internal affairs of companies incorporated under Illinois law<sup>80</sup> After weighing these interests against the substantial effects of the asserted ability of the Illinois Secretary of State to block a tender offer anywhere in the country,<sup>81</sup> the *MITE* majority concluded that the statute's burden on interstate commerce overshadowed its putative local benefits.<sup>82</sup> The Court accordingly held the Illinois Act invalid under the Commerce Clause.<sup>83</sup>

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Act required tender offerors to notify the Illinois Secretary of State and the target company of any impending offer 20 days before the offer's effective date and to register the offer with the Secretary of State. *Id.* at 626-27 The statute also purportedly vested the Secretary with power to hold a hearing and to enjoin nationwide any offer deemed unfair. *Id.* at 627, 643. The statute applied to attempted takeovers of corporations of which 10% of the class of equity securities subject to the offer belonged to Illinois shareholders or of corporations meeting two of three criteria: location of the corporation's principal executive office in Illinois, organization under Illinois law, or representation of at least 10% of the corporation's stated capital and paid-in surplus within Illinois. *Id.* at 627 Professor Pinto describes the Illinois statute as typical of "first generation" takeover statutes, which are the first type of statutes state legislators enacted to enable corporate management to defend against unwanted takeover bids. Pinto, *supra* note 67, at 704.

79. See *MITE*, 457 U.S. at 644-45 (reasoning that statute reached nonresident shareholders whom state had no interest in protecting and that even in-state shareholders received similar protection from federal Williams Act).

80. See *id.* at 645 (reasoning that statute permitted decisions regarding corporations incorporated in other states and with no principal place of business in Illinois and that transfers of stock by shareholders to third parties generally do not implicate internal affairs doctrine). The *MITE* Court defined the internal affairs as a conflict of laws principle recognizing that only one state's laws should regulate matters peculiar to relationships between a corporation and its current officers, directors, and shareholders to avoid placing conflicting demands on the corporation. *Id.*

81. See *MITE*, 457 U.S. at 643 (finding that Secretary's power deprived shareholders of opportunity to sell stock at premium, hindered reallocation of resources to their highest valued use, and reduced incentive that tender offer mechanism provides incumbent management to keep stock prices high through performing well). *But cf.* Randall Morck et al., *Characteristics of Targets of Hostile and Friendly Takeovers*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 101-02 (Alan J. Auerbach ed., 1988) (stating that, although hostile takeovers often seek to correct "non-value-maximizing" practices of target firm management, diversification-motivated takeovers may meet resistance as well).

82. *MITE*, 457 U.S. at 646. The plurality also concluded that, in addition to failing the *Pike* balancing test, the Illinois Act violated the Commerce Clause by directly regulating and preventing interstate takeovers that in turn generate interstate transactions. *Id.* at 640. Justice Powell joined only the Court's Commerce Clause analysis under the *Pike* balancing test because it left room for state regulation of takeovers. *Id.* at 646.

83. *Id.* at 643, 646. Three Justices dissented on the ground that the case was moot. *Id.* at 655, 664.

## 2. CTS Corp. v Dynamics Corp. of America

In 1987, the Supreme Court again addressed the constitutionality of state takeover legislation in *CTS Corp v Dynamics Corp. of America*.<sup>84</sup> *CTS* involved Indiana's Control Share Acquisitions Chapter, which required a majority vote of all disinterested shareholders<sup>85</sup> before an entity acquiring 20%, 33⅓%, or 50% of an Indiana corporation's shares could acquire its corresponding voting rights.<sup>86</sup> According to the Court, this act had the practical effect of conditioning a tender offeror's acquisition of control of a corporation on the approval of a majority of pre-existing disinterested shareholders.<sup>87</sup>

In determining that the Indiana act was constitutional, the *CTS* Court observed that the legislation applied evenhandedly to interstate and local businesses and thus did not discriminate against out-of-state offers.<sup>88</sup> The Court also found that the statute did not inconsistently regulate corporations because the statute applied only to Indiana-created corporations.<sup>89</sup> The Court then noted that, in regulating corporations, states merely exercise control over entities whose very existence and attributes are products of state law<sup>90</sup> Indiana thus had a substantial interest in protecting the voting autonomy of resident shareholders in corporations incorporated in Indiana.<sup>91</sup> Finally, the Court dismissed the argument that the law was unconstitutional because the

84. 481 U.S. 69 (1987).

85. The statute defined "interested shares" as shares enabling an acquiror, officer, or inside director of the corporation to vote in the election of directors. *CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 73 n.2 (1987).

86. *Id.* at 73 (1987). Professor Pinto places control share statutes in the second generation of state takeover regulations, which attempted to avoid the characteristics that proved constitutionally fatal in *MITE*. Pinto, *supra* note 67, at 709. Second-generation takeover statutes affect the process of the takeover. *Id.* The part of the process affected in *CTS* was the tender offeror's power to influence the target corporation through exercising its voting rights.

87. *CTS*, 481 U.S. at 74.

88. *Id.* at 87. That the Indiana statute would most often affect out-of-state entities did not sway the *CTS* Court because the Supreme Court in an earlier case had declared that "[this] fact does not, by itself, establish a claim of discrimination against interstate commerce." See *id.* at 88 (quoting *Exxon Corp. v Governor of Maryland*, 437 U.S. 117, 126 (1978)).

89. *CTS*, 481 U.S. at 88-89.

90. *Id.* at 89.

91. *Id.* at 93. According to the Court, the *CTS* situation differed from *MITE* in that only corporations incorporated in Indiana and having a substantial number of in-state shareholders qualified for protection. *Id.*

law limited the number of successful takeovers.<sup>92</sup> The Court reasoned that states have the freedom to define the entities they create, as long as residents and nonresidents have equal access to any market for control of these entities.<sup>93</sup> The Court therefore held that Indiana's Control Share Acquisitions Chapter did not violate the Commerce Clause.<sup>94</sup>

### 3. *Post-CTS*

After *CTS*, states that had enacted statutes designed to survive *MITE* challenges could breathe a partial sigh of relief because the Supreme Court had approved at least one type of takeover regulation.<sup>95</sup> Although the Supreme Court never repudiated *MITE*'s invalidation of a state's direct, governmental regulation of tender offers, *CTS* left room for less direct regulation.<sup>96</sup> In terms of policy, the *CTS* decision retreated from *MITE*'s

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92. *Id.* at 93-94.

93. *Id.* at 94.

94. *See id.* at 87, 94 (addressing holding of court of appeals that Indiana act violated Commerce Clause and reversing that judgment).

95. *See supra* notes 88-94 and accompanying text (describing how Supreme Court approved control share act in *CTS*).

96. These regulations include Professor Pinto's so-called second, third, and fourth generation. Pinto's classification of state takeover legislation comprises several, roughly chronological groups of statutes. He places pre-*MITE* statutes in the first generation. Pinto, *supra* note 67, at 709. Post-*MITE*, pre-*CTS* statutes constitute the second generation. *Id.* at 709. These statutes affect the tender offer process and follow a variety of models: shareholder approval (the model challenged in *CTS*), second tier (guaranteeing shareholders either a supermajority vote or a fair price on nontendered shares after the tender offeror's initial offer but before a newly controlling offeror can freeze out the nontendering shareholders' equity positions), share redemption (compelling acquiror of certain percentage of shares to buyout remaining shares at a fair price), fiduciary duty (expanding the fiduciary concept to allow a corporation's board of directors to legitimately implement defenses to takeovers that may negatively affect the corporation's constituents other than shareholders, including the corporation's employees, customers, and community), and full disclosure (requiring offeror to give shareholders within the enacting state a variety of information regarding the offer). *Id.* at 709-13; *see also* Arthur R. Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law*, 41 U. MIAMI L. REV. 473, 478-83 (1987) (describing various statutory models). The third generation includes the voting rights and business combination models. Pinto, *supra* note 67, at 713. The former model demands a majority vote of disinterested shareholders before an entity acquiring a certain percentage of shares can obtain voting rights. *Id.* The latter requires board approval before the shareholder can acquire additional shares over a specific threshold or for proposed business combinations with the shareholder. *Id.* Pinto's fourth and final generation classification encompasses statutes that protect corporations not incorporated in a state but having a substantial nexus with the state. *Id.* at 714. According to Pinto, the fourth-generation statutes were legislative responses to



refusal to acknowledge any legitimate state interest in protecting nonresident shareholders and from *MITE*'s emphasis on freeing the market for corporate control.<sup>97</sup> The *CTS* Court instead focused on allowing states "in which [a] corporation is incorporated [to] play a role in protecting investors in the tender offer context" and on reinforcing the internal affairs doctrine.<sup>98</sup> The Court stressed a "state's power to enact corporate laws governing resident corporations even though those laws could interfere with tender offers and interstate commerce."<sup>99</sup>

Yet the Supreme Court's resolution of *CTS* also raised new Commerce Clause questions. For example, the *CTS* Court never expressly mentioned the *Pike* test or even cited the *Pike* case in its Commerce Clause analysis.<sup>100</sup> This omission has led some courts and commentators to argue that the Supreme Court has rejected the *Pike* balancing test.<sup>101</sup> Others claim, however, that the Court has not abandoned the *Pike* test.<sup>102</sup> Perhaps most significantly, *CTS*'s two policy motivations potentially conflict in certain situations.<sup>103</sup> By

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possible takeovers of corporations significant to the state. *Id.* Presence within the state of a principal place of business or executive offices, substantial number of assets, and shareholders and employees often satisfies the nexus requirement. *Id.*

97. *Id.* at 722-23.

98. *Id.* at 724.

99. *Id.*

100. Donald H. Regan, *Siamese Essays: (I) CTS Corp. v Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV 1865, 1867 (1987).

101. See, e.g., *Amanda Acquisition Corp. v Universal Foods*, 877 F.2d 496, 507 (7th Cir.) (asserting that states may regulate corporate transactions without having to demonstrate that benefits outweigh consequences under unfocused balancing test), *cert. denied*, 493 U.S. 955 (1989); *Hyde Park Partners, L.P v Connolly*, 839 F.2d 837, 844 (1st Cir. 1988) (stating that balancing test appears abandoned when state law merely regulates intrastate corporation governance but not when legislative purpose extends beyond intrastate concerns); Regan, *supra* note 100, at 1869 (claiming that Court has replaced balancing with discrimination analysis). In an article predating *CTS*, Regan argues that the Court should be concerned exclusively with preventing purposeful economic protectionism and not with balancing in "movement-of-goods" Commerce Clause cases. Regan, *supra* note 3, at 1092-93. Regan defines movement-of-goods cases in the negative as all cases except those involving instruments of interstate transportation, taxation of interstate commerce, or the state as market participant. *Id.* at 1098-99. Regan claims that despite what the Court says it has been doing, it has not been balancing. *Id.* at 1092.

102. Pinto, *supra* note 67, at 746; see *WLR Foods, Inc. v Tyson Foods, Inc.*, 861 F Supp. 1277, 1288 (W.D. Va. 1994) (indicating that *CTS* Court implicitly invoked logic of *Pike* without explicitly naming *Pike* test).

103. See Pinto, *supra* note 67, at 746 (illustrating situations involving potential policy clashes by posing hypotheticals in which state corporate law found unprotective of investors

failing to reconcile — much less acknowledge — this rift, the Court left unsettled questions about the validity of antitakeover laws designed to protect nonshareholder interests.<sup>104</sup>

With its sweeping dicta, *West Lynn Creamery* may only increase the confusion that *CTS* engendered. *MITE* and *CTS* both addressed single takeover statutes, but corporations increasingly draw on several laws to fend off hostile tender offers.<sup>105</sup> Although the statutes may pass constitutional muster individually under *CTS* (setting aside the issue of whether *Pike* or any other test is still a valid means of evaluating laws), *West Lynn Creamery* presents a basis for arguing that a corporation's union of defenses forms an unconstitutional scheme. Of course, one may recognize that *CTS* establishes an increased acceptance of state regulation of tender offers and that *West Lynn Creamery* is not factually a tender offer case. These points, however, do not establish that *West Lynn Creamery* will never play a role in striking down state takeover legislation. The next Part of this Note examines further the interplay between the Supreme Court's past approach to single takeover statutes and what *West Lynn Creamery* might mean for multistatute schemes in the future.

#### *IV Application of West Lynn Creamery to State Takeover Legislation As Viewed Through the Lens of WLR Foods*

*West Lynn Creamery* could signal a departure from the Supreme Court's tolerant position in *CTS* when applied to corporations that draw on multiple statutes to create takeover defenses. If courts adopt *West Lynn Creamery*'s reasoning even in situations involving nonintegrated legislation, many takeover statutes will be vulnerable to a new form of constitutional attack.<sup>106</sup> In

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or designed to protect other corporate interests such as employees or in which state other than state of incorporation attempts to protect investors or other interests).

104. Cf. Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 856 (1989) (pointing to troubling constitutional questions regarding takeover legislation and stating that difficult questions of fact, policy, and doctrine are only beginning to receive deserved attention).

105. See *infra* note 106 (citing study on number of states with multistatute antitakeover schemes as of 1993).

106. Cf. Memorandum in Opposition to Tyson's Attack on the Constitutionality of Four Virginia Statutes at 44 & n.10, *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277 (W.D. Va. 1994) (No. 94-012-H) [hereinafter *WLR Memorandum*] (referring to study describing number of states with multistatute antitakeover schemes). As of 1993, 21 states had both control share and affiliated transaction statutes, and 10 had control share, affiliated transaction, and poison pill statutes. *Id.* (citing INVESTOR RESPONSIBILITY RESEARCH CENTER, STATE TAKEOVER LAWS (1993)).

choosing this path, however, the courts would march toward increasing antitakeover law chaos, both practical and doctrinal.<sup>107</sup> Closer examination of the statutes and issues in *WLR Foods* provides a case study in these difficulties.

Tyson's challenge to WLR's takeover defense strategy implicated four Virginia statutes.<sup>108</sup> Three of the statutes provide methods for blocking the takeover: the Control Share Act,<sup>109</sup> the Affiliated Transactions Act,<sup>110</sup>

107 See discussion *infra* parts IV.A-D (examining these issues).

108. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1279-80 (W.D. Va. 1994).

109. VA. CODE ANN. §§ 13.1-728.1 to -728.9 (Michie 1993). Virginia's Control Share Acquisitions Act requires shareholder approval before persons acquiring enough shares to control (1) one-fifth to one-third, (2) one-third to less than a majority, or (3) a majority or more of a corporation's voting power can exercise their voting rights. *Id.* §§ 13.1-728.1, -728.3. Section 13.1-728.3 describes the approval procedure:

A. Notwithstanding any contrary provision of this chapter, shares acquired in a control share acquisition have no voting rights unless voting rights are granted by resolution adopted by the shareholders of the issuing public corporation. If such a resolution is adopted, such shares shall thereafter have the voting rights they would have had in the absence of this article.

B. To be adopted under this section, the resolution shall be approved by a majority of all votes which could be cast in a vote on the election of directors by all the outstanding shares other than interested shares. Interested shares shall not be entitled to vote on the matter, and in determining whether a quorum exists, all interested shares shall be disregarded. For the purpose of this subsection, the interested shares shall be determined as of the record date for determining the shareholders entitled to vote at the meeting.

C. If no resolution is adopted under this section in respect of shares acquired in a control share acquisition and beneficial ownership of such shares is subsequently transferred in circumstances where the transferor no longer has beneficial ownership of such shares and the transferee is not engaged in a control share acquisition, then such shares shall thereafter have the voting rights they would have had in the absence of this article.

*Id.* § 13.1-728.3. According to one commentator, the statute adds to "the arsenal of antitakeover weapons available to Virginia corporations." Donald E. King, *Annual Survey of Virginia Law: Business and Corporate Law*, 23 U. RICH. L. REV. 491, 503 (1989).

WLR stockholders demonstrated this statute's power when they "overwhelmingly" voted against allowing Tyson to vote its shares at a special shareholders meeting in May 1994. Murphey, *supra* note 14, at 13. During the meeting, numerous WLR employees and growers urged one another to reject Tyson's request. Matt Siegel, *Tyson's Rooster*, CORP. COUNS. MAG., Fall 1994, at 53. Tyson's General Counsel Jim Blair recalled, "It was pretty funny. It was like being, you know, the only whore in church at a Baptist revival meeting." *Id.* The crucial bloc of voters comprised the 13% of WLR stock owned by the company's officers and directors and another one-third to one-fourth held by Virginia poultry growers. *Id.*

110. VA. CODE ANN. §§ 13.1-725 to -727.1 (Michie 1993). The Affiliated Transactions Act prohibits the following transactions between a corporation and an interested shareholder for three years without shareholder approval:

1. Any merger of the corporation or any of its subsidiaries with any interested shareholder or with any other corporation that immediately after the merger would be an

and the Poison Pill Statute.<sup>111</sup> The fourth, the Business Judgment Statute,

affiliate of an interested shareholder that was an interested shareholder immediately before the merger;

2. Any share exchange pursuant to §13.1-717 in which any interested shareholder acquires one or more classes or series of voting shares of the corporation or any of its subsidiaries;

3. Except for transactions in the ordinary course of business, (i) any sale, lease, exchange, mortgage, pledge, transfer or other disposition to or with any interested shareholder of any assets of the corporation or of any of its subsidiaries, or (ii) any guaranty by the corporation or any of its subsidiaries of indebtedness of any interested shareholder in an amount in excess of five percent of the corporation's consolidated net worth,

4. The sale or other disposition by the corporation or any of its subsidiaries to an interested shareholder of any voting shares of the corporation or any of its subsidiaries except pursuant to a share dividend or the exercise of rights or warrants distributed or offered on a basis affording substantially proportionate treatment to all holders of the same class or series of voting shares;

5. The dissolution of the corporation if proposed by or on behalf of an interested shareholder; or

6. Any reclassification of securities, including any reverse stock split, or recapitalization of the corporation, or any merger of the corporation with any of its subsidiaries or any distribution or other transaction, whether or not with or into or otherwise involving an interested shareholder, which has the effect, directly or indirectly, of increasing by more than five percent the percentage of the outstanding voting shares of the corporation or any of its subsidiaries beneficially owned by any interested shareholder.

*Id.* §§ 13.1-725, -725.1. An "interested shareholder" means any person that is "1. The beneficial owner of more than ten percent of any class of the outstanding voting shares of the corporation, or 2. An affiliate or associate of the corporation and at any time within the preceding three years was an interested shareholder of such corporation." *Id.* Sections 13.1-725.1 and 13.1-726 allow affiliated transactions within three years when the transaction is approved "by the affirmative vote of a majority (but not less than two) of the disinterested directors and by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder," *id.* § 13.1-725.1, and after three years when "approved by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder," *id.* § 13.1-726. Section 13.1-727 provides a mechanism for avoiding the shareholder voting requirement if, for example, a majority of disinterested directors approves the transactions or the interested shareholder meets certain procedural requirements and sets a fair price.

A main target of this provision is the front-end loaded, two-tiered tender offer. Stanley K. Joynes, III & Steven J. Keeler, *Virginia's "Affiliated Transactions" Statute: Indulging Form over Substance in Second Generation Takeover Legislation*, 21 U. RICH. L. REV. 489, 490 (1987). In this type of offer, the acquiror offers to buy at a premium price only enough shares to gain control of the target corporation. *Id.* at 490 n.4. The offeror then merges with the target corporation and freezes out remaining shareholders by forcing them to accept a lower price. *Id.* The act's practical effect, however, is to require either approval by disinterested shareholders or by disinterested directors or compliance with strict fairness prerequisites before an offeror can squeeze out minority shareholders. *Id.* at 497

111. VA. CODE ANN. § 13.1-646 (Michie 1993). Virginia's Poison Pill Statute provides:

A. Unless reserved to the shareholders in the articles of incorporation and subject

prescribes a standard for measuring directors' actions in implementing those measures.<sup>112</sup>

to the provisions of § 13.1-651, a corporation may create or issue rights, options or warrants for the purchase of shares of the corporation upon such terms and conditions and for such consideration, if any, and such purposes as may be approved by the board of directors.

B. Notwithstanding the provisions of subsection A of § 13.1-638, the terms and conditions of rights, options or warrants created or issued by a corporation may include, without limitation, restrictions or conditions that preclude or limit the exercise, transfer or receipt thereof by designated persons or classes of persons or that invalidate or void such rights, options, or warrants held by designated persons or classes of persons. Any action or determination by the board of directors with respect to the issuance, the terms and conditions or redemption of rights, options, or warrants shall be subject to the provisions of § 13.1-690 and shall be valid if taken or determined in compliance therewith.

*Id.* Poison pills have both defensive and offensive uses. Wendy B. Gayle, Note, *The Defensive and Offensive Use of "Poison Pills" Within the Business Judgment Rule*, 24 U. RICH. L. REV 127, 132 (1989). If triggered, WLR's defensive poison pill would have allowed all shareholders except those who had accumulated at least 15% of the shares (i.e., Tyson), to purchase \$136 of WLR stock for only \$68. *WLR Foods*, 861 F Supp. at 1280.

112. VA. CODE ANN. § 13.1-690 (Michie 1993). Section 13.1-690 prescribes the following general standards of conduct for corporate directors:

A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.

B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

1. One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented;
2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or
3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.

C. A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

D. A person alleging a violation of this section has the burden of proving the violation.

*Id.* Judge Michael interpreted Virginia's Business Judgment Statute as limiting review of directors' conduct to the "process" by which directors make decisions. *WLR Foods, Inc. v Tyson Foods, Inc.*, 857 F Supp. 492, 494 (W.D. Va. 1994). Under this construction, the directors' resort to an informed decision-making process, not the rationality of their ultimate decision, measures good faith. *Id.*

Codified director conduct standards are a relatively recent phenomenon. *See* MODEL BUSINESS CORP ACT ANN. § 8.30 annotation at 8-172 (3d ed. 1985). They spring from the common-law duties originally developed by the judiciary. *Id.* As of 1994, 41 jurisdictions followed the Model Act pattern of imposing a statutory standard of care on directors. *Id.* at 8-175. Most states measure director conduct in terms of the care "an ordinarily prudent person

These statutes presented the *WLR Foods* court, either explicitly or implicitly, with four main issues: First, do the Virginia statutes form a scheme under *West Lynn Creamery's* reasoning?<sup>113</sup> Second, should *West Lynn Creamery's* reasoning encompass nonintegrated statutory schemes?<sup>114</sup> Third, when does an asserted antitakeover scheme exceed Commerce Clause validity?<sup>115</sup> Fourth, what is the proper remedy to an unconstitutional antitakeover scheme?<sup>116</sup> The first two issues relate to whether *West Lynn Creamery's* scheme analysis is pertinent to a particular group of challenged statutes. The second set of issues reveals problems in applying *West Lynn Creamery* once a court finds the case apposite. In particular, the issue of when a scheme surpasses constitutional limits serves as a springboard for examining a split that has developed in Commerce Clause jurisprudence and for deciding which mode of analysis best provides the answer to whether a nonintegrated, multistatute antitakeover scheme violates the Commerce Clause.<sup>117</sup>

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would exercise under similar circumstances." *Id.* at 8-176. Virginia stands alone in defining the director's responsibility as "good faith business judgment as to the best interests of the corporation." *Id.* The Virginia standard derives from the court-created business judgment rule. This rule generally shields management from liability for its decisions and actions. RALPH C. FERRARA ET AL., TAKEOVERS — ATTACK AND SURVIVAL. A STRATEGIST'S MANUAL 276 (Johnathon E. Richman ed., 1987).

The issue of management's obligations in takeovers has engendered two schools of thought. *Id.* at 275-76. Some believe "managerial passivity" during takeovers best serves shareholder interests. *Id.* at 274. Others maintain that directors should remain free to thwart bids they consider contrary to the corporation's best interests. *Id.* at 275. Delaware courts resolved the dispute by ruling that directors must take extra steps beyond good faith to ensure that their decisions are fair and reasonable in takeover situations. *See* Ress, *supra* note 14, at E1 (describing Delaware's approach to directors' responsibilities in takeovers). Virginia's antitakeover statutes, however, specifically refer to § 690 as the standard for director conduct in implementing them. *Id.* at E3. Virginia thus statutorily breaks with Delaware's common-law rule requiring extra responsibility. *Id.* Tyson maintained that, when Virginia's three antitakeover defenses and the "extra kick" of its lenient director-conduct law are combined, "there is simply no way a tender offer can succeed." *Id.*

113. *See* *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F Supp 1277, 1281 (W.D. Va. 1994) (addressing Tyson's assertion that Virginia's four separate statutes constitute antitakeover scheme under *West Lynn Creamery*).

114. *See id.* at 1282-83 (discussing problems with extending *West Lynn Creamery* beyond integrated statutory program).

115. *See id.* at 1286-89 (analyzing constitutionality of Virginia antitakeover laws under Commerce Clause).

116. *See id.* at 1282-83 (describing difficulty of structuring remedy for antitakeover scheme's unconstitutionality).

117. *See* discussion *infra* part IV.C (analyzing schism in Supreme Court's Commerce Clause decisions).

A. *Do Virginia's Four Antitakeover Statutes Constitute a Scheme?*

A necessary first step to declaring Virginia's antitakeover statutes unconstitutional was finding a scheme. Absent this finding, the *WLR Foods* court could probably have easily upheld the individual Virginia statutes.<sup>118</sup> Regarding Virginia's Control Share Act, the Supreme Court in *CTS* validated a control share statute closely resembling Virginia's.<sup>119</sup> All courts considering the constitutionality of affiliated transactions statutes have also upheld them.<sup>120</sup> Neither have courts invalidated poison pill statutes.<sup>121</sup> Finally, the Business Judgment Statute merely codifies Virginia's standards for reviewing director conduct, again arguably a traditional area of statutory regulation of internal corporate affairs that should not in itself raise Commerce

118. See *infra* notes 119-22 and accompanying text (supporting constitutionality of Virginia statutes).

119. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987); see also *infra* note 134 (comparing Indiana and Virginia control share statutes).

120. See *WLR Memorandum, supra* note 106, at 3-4 (citing *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), cert. denied, 493 U.S. 955 (1989); *West Point-Pepperell v. Farley, Inc.*, 711 F. Supp. 1096 (N.D. Ga. 1989); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988); *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458 (D. Del. 1988)). *But cf.* *Topper Acquisition Corp. v. Emhart Corp.*, No. CIV.A.89-00110-R, 1989 WL 513034, at \*4 (E.D. Va. Mar. 23, 1989) (expressing "some reservations" about constitutionality of Virginia's affiliated transactions statute). In *Amanda Acquisition Corp. v. Universal Foods Corp.*, the United States Court of Appeals for the Seventh Circuit upheld the Commerce Clause validity of a Wisconsin law that required a tender offeror to wait three years to merge with the target corporation or acquire more than 5% of its assets unless the target's board of directors agrees to the transaction in advance. *Amanda Acquisition*, 877 F.2d at 509. In its opinion by Judge Easterbrook, the court questioned the economic wisdom of the statute by stating that "[i]f our views of the wisdom of state law mattered, Wisconsin's takeover statute would not survive." *Id.* at 500. The Seventh Circuit nevertheless reasoned that Wisconsin's facially neutral statute did not discriminate against interstate commerce, *id.* at 506, and that a state with the power to forbid mergers also has the power to defer them, *id.* at 508-09.

121. In the companion case to *CTS*, Judge Posner described as "frivolous" the petitioner's argument that Indiana's poison pill violated the Commerce Clause. *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986). Judge Posner characterized the statute as a private contract, which the Commerce Clause does not require states to outlaw. *Id.* One commentator writes that the "private" nature of poison pills has defused constitutional challenges in the past. P. John Kozyris, *Corporate Takeovers at the Jurisdictional Crossroads: Preserving State Authority over Internal Affairs While Protecting the Transferability of Interstate Stock Through Federal Law*, 36 UCLA L. REV. 1109, 1126 n.59 (1989). The commentator also cites *Gelco Corp. v. Conston Partners*, 652 F. Supp. 829 (D. Minn. 1986), *aff'd in part and vacated in part*, 811 F.2d 414 (8th Cir. 1987), and *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del. 1985), to support his proposition. Kozyris, *supra*, at 1126 n.59. *WLR* similarly argued that poison pills regulate only internal corporate affairs and hence involve no state action subject to constitutional challenge. *WLR Memorandum, supra* note 106, at 37

Clause issues.<sup>122</sup> Thus, like the separate tax and subsidy components of *West Lynn Creamery's* pricing order, the *WLR Foods* court was unlikely to conclude that the individual Virginia statutes violate the Commerce Clause.

Tyson accordingly needed *West Lynn Creamery's* scheme approach, which initially required that Tyson demonstrate a nexus among the four Virginia laws. Tyson did so by arguing that the facially independent statutes work in practical effect to render the hostile acquisition of a Virginia corporation difficult or impossible.<sup>123</sup> WLR rejoined that other courts considering challenges to similar statutes had never grouped the statutes together for constitutional analysis.<sup>124</sup> WLR stated further that the statutes address separate aspects of corporate affairs.<sup>125</sup>

Just because the Virginia statutes perform distinct functions, however, does not mean that they could not all play roles in defeating an attempted hostile takeover. The first three Virginia statutes increase either the amount of time or money required to complete an acquisition, while the fourth's lax standard grants a target corporation's directors broad discretion to implement these provisions.<sup>126</sup> A court, therefore, could properly group the four Vir-

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122. WLR Memorandum, *supra* note 106, at 37, 40.

123. See Counterclaim-Plaintiffs' Supplemental Memorandum on Constitutional Issues Raised in its Motion for Preliminary Injunction at 5-6, 30, *WLR Foods, Inc. v Tyson Foods, Inc.*, 861 F Supp. 1277 (W.D. Va. 1994) (No. 94-012-H) [hereinafter *Tyson Memorandum*] (identifying statutes implicated in scheme and stating that they accomplish effective ban on hostile tender offers for Virginia corporations).

124. WLR Memorandum, *supra* note 106, at 44. WLR cited several illustrative cases. *Id.* at 44-45 (citing *Amanda Acquisition Corp. v Universal Foods Corp.*, 877 F.2d 496, 498 n.1 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989) (noting that Wisconsin's control share statute was "not pertinent" to constitutional analysis of Wisconsin's control share statute); *Realty Acquisition Corp. v Property Trust of Am.*, No. JH-89-2503, 1989 WL 214477, at \*4-6 (D. Md. Oct. 27, 1989) (separately analyzing constitutional validity of Maryland's business combination and control share statutes); *BNS, Inc. v Koppers Co.*, 683 F Supp. 458, 464-76 (D. Del. 1988) (separately addressing constitutional validity of Delaware's shareholder rights plan and affiliated transactions statute)).

125. WLR Memorandum, *supra* note 106, at 42-43. WLR characterized the Control Share Act as regulating voting rights of a potentially large shareholder, the Affiliated Transactions Act as protecting shareholders against unfairly priced freeze-out transactions, the Poison Pill Statute as regulating terms of securities issued by Virginia corporations, and the Business Judgment Statute as a standard of review for director conduct not only in tender offers but in all situations. *Id.*

126. The Control Share and Affiliated Transaction Acts may prolong the time before a tender offeror can either exercise its voting rights or begin the transactions necessary for merger. The Poison Pill Statute dilutes the value of the tender offeror's acquired stock and forces the bidder to purchase even more shares before it can acquire control of the target corporation. Judge Michael's interpretation of Virginia's Business Judgment Statute prompted



gma statutes as a scheme in practical effect.

*B. Should West Lynn Creamery Encompass Nonintegrated  
Statutory Schemes?*

Even with the statutes' functional interrelation established, Tyson still sought a substantial extension of *West Lynn Creamery* because the *WLR Foods* scheme differed in one key respect: The Virginia statutes were not integrated. By contrast, the Massachusetts scheme was intentionally integrated;<sup>127</sup> the pricing order depended on the milk tax to fund the dairy subsidy.<sup>128</sup> None of Virginia's antitakeover statutes, however, depends on any other for its existence; indeed, the Virginia legislature adopted the laws to fulfill facially distinct roles.<sup>129</sup> For the *West Lynn Creamery* holding to apply in a situation such as *WLR Foods*, the decision must extend beyond the *West Lynn Creamery* facts.<sup>130</sup> The basis for making such a leap lies in *West Lynn Creamery*'s functionalist approach to Commerce Clause issues. If function, or effect, is paramount, the labels "nonintentional" and "nonintegrated" are irrelevant to save a putative statutory scheme if it operates unconstitutionally.<sup>131</sup>

one commentator to query, "Do we want a standard of [corporate board of directors'] conduct to be so low as subjective good faith, and if it is, should we reduce the standard of review so that there's no substantive review of decisions?" Ress, *supra* note 14, at E3 (quoting Professor Leslie Kelleher). Another commented, "Delaware is going to get out-Delawared by Virginia." *Id.* at E1 (quoting Professor Lyman Johnson).

127. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1282 (W.D. Va. 1994).

128. *See West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2215 (1994) (refusing to "divorce" and analyze separately "two parts of an integrated regulation").

129. *See supra* note 125 (describing distinct roles of statutes implicated in Virginia's antitakeover scheme); *cf. WLR Foods*, 861 F. Supp. at 1282 (stating that Virginia's antitakeover statutes have separate, constitutional applications).

130. *See WLR Foods*, 861 F. Supp. at 1282 (stating that *West Lynn Creamery* is not directly on point).

131. *But see* Regan, *supra* note 3, at 1125-43 (defining protectionism and reasoning that only protectionist purpose, not effect, should lead to unconstitutionality). Regan identifies three features of classical protectionism: explicitness, effect, and purpose. *Id.* at 1126. Regan claims that protectionist purpose is the most centrally relevant feature in connection with the three objections to state protectionism. *Id.*, *see supra* note 3 (describing Regan's concept-of-union, resentment/retaliation, and efficiency objections to protectionism). Regan defines a law as having a protectionist purpose "if it was adopted for the purpose of improving the competitive position of local economic actors, just because they are local, vis-a-vis their foreign competitors." Regan, *supra* note 3, at 1138. "Purpose" includes both ultimate and intermediate purposes because excluding laws with merely an intermediate

Assuming *West Lynn Creamery's* rationale extends to nonintegrated schemes (as Judge Michael assumed in his memorandum opinion in *WLR Foods*),<sup>132</sup> courts dealing with antitakeover defenses invoking multiple statutes will face a myriad of difficulties. These courts must first separate the constitutionality of the independent statutes from the constitutionality of the overall schemes in which the statutes play roles. For example, the *CTS* Court held the individual Indiana control share law constitutional.<sup>133</sup> One would accordingly assume that Virginia's Control Share Act, which operates nearly identically to its Indiana counterpart,<sup>134</sup> is equally constitutional. At some point, however, if a corporation uses the Virginia Control Share Act in conjunction with a sufficient number of other statutes, *West Lynn Creamery's* rationale would hold that the use crosses the boundary of constitutional acceptability. Yet if used alone, the Control Share Act would remain perfectly lawful.

This conflict highlights a key practical difficulty in extending *West Lynn Creamery* to encompass nonintegrated schemes. The *West Lynn Creamery* Court could strike down both regulations because without each other they served no purpose.<sup>135</sup> All four statutes implicated in *WLR Foods*, however, serve independent purposes apart from any conjunctive use.<sup>136</sup> Courts dealing with alleged statutory schemes resembling the pattern in *WLR Foods* would accordingly face the application problems that Judge Michael raised in his *WLR Foods* opinion.<sup>137</sup> These questions fall into two main categories

protectionist purpose would create too many defenses. *Id.* at 1138-39 (illustrating distinction between ultimate and intermediate purposes by describing going to grocery to buy bread (intermediate purpose) in order to have toast for breakfast (ultimate purpose)). Regan then argues that courts should strike down a state law "if and only if it finds by a preponderance of the evidence that a protectionist purpose on the part of the legislators contributed substantially to the adoption of the law or any feature of the law." *Id.* at 1148.

132. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1283 (W.D. Va. 1994).

133. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987).

134. Both the Indiana and Virginia control share statutes require shareholder approval before a tender offeror holding shares that would bring its voting power to either one-fifth, one-third, or one-half of a target corporation's outstanding voting rights could exercise those rights. Compare IND. CODE §§ 23-1-42-1 to -11 (1995) (setting forth control share acquisition legislation) with VA. CODE ANN. §§ 13.1-728.1 to -728.9 (Miche 1993) (same).

135. Cf. *WLR Foods*, 861 F. Supp. at 1282 (stating that Massachusetts legislature never intended either statute to stand alone).

136. See *supra* note 125 (enumerating distinct functions of Virginia's four antitakeover laws).

137. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1282-83 (W.D.

of concern: First, how do courts determine the point at which the scheme steps beyond validity? Second, how do courts remedy the situation?

*C. The Primary Application Problem: When Does an Antitakeover Scheme Step Beyond Commerce Clause Validity?*

The *WLR Foods* outcome was not inevitable; current Commerce Clause jurisprudence does not necessarily secure the Virginia antitakeover scheme's constitutionality.<sup>138</sup> Individual antitakeover statutes fit uncomfortably within current modes of Commerce Clause analysis.<sup>139</sup> *West Lynn Creamery* only exacerbates the problem by authorizing courts to examine the effects of multistatute schemes.<sup>140</sup> As antitakeover schemes (as opposed to single statutes) grow increasingly effective at rebuffing takeover bids,<sup>141</sup> the dissonance between past Commerce Clause cases involving antitakeover laws and more recent cases involving other types of commodities intensifies.<sup>142</sup> This incompatibility forms a critical doctrinal impasse, an impasse lurking beneath Judge Michael's opinion in *WLR Foods*. Trying to evaluate Virginia's antitakeover scheme under current methods of Commerce Clause analysis helps one understand the predicament more fully

In Commerce Clause cases generally, courts must first identify the regulated commodity and then determine whether the regulation improperly affects interstate commerce.<sup>143</sup> In antitakeover cases, the regulated commodity is more than just individual shares of stock. Rather, tender offerors

Va. 1994) (describing "enormous difficulties" that extending *West Lynn Creamery* would create for district courts).

138. See *infra* notes 161-69 and accompanying text and note 195 (arguing that court could potentially find Virginia antitakeover scheme unconstitutional under current modes of Commerce Clause analysis).

139. See *infra* text accompanying notes 198-201 (describing schism between *CTS* and recent Commerce Clause decisions).

140. See *West Lynn Creamery, Inc. v Healy*, 114 S. Ct. 2205, 2209 (1994) (holding that Massachusetts milk pricing order consisting of conjoined regulations unconstitutionally discriminates against interstate commerce).

141. See *Tyson Memorandum*, *supra* note 123, at 33 (claiming that Virginia antitakeover scheme's burden on interstate commerce greatly exceeds that of single statute upheld in *CTS*).

142. See discussion *infra* part IV.C.3 (describing increasing conflicts in Commerce Clause jurisprudence).

143. See *C & A Carbone, Inc. v Town of Clarkstown*, 114 S. Ct. 1677, 1681, 1682 (1994) (confirming at outset that local ordinance regulates interstate commerce and describing regulated article of commerce as service of processing and disposing of solid waste); *Edgar v MITE Corp.*, 457 U.S. 624, 642-43 (1984) (determining that Illinois act at issue regulated interstate commerce).

seek sufficient shares to gain control of a target corporation.<sup>144</sup> In other words, the commodity desired is "corporate control."<sup>145</sup> Courts do not doubt that state antitakeover laws influence the interstate market for corporate control.<sup>146</sup> The issue then becomes whether a particular scheme's effect violates the Commerce Clause.

Current forms of antitakeover regulation may violate the Commerce Clause in two ways.<sup>147</sup> First, they can discriminate, either on their face or

144. Cf. Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5-6 (1978) (describing methods for shifting corporate control). Tender offers are only one of three methods for acquiring control of a corporation. *Id.* The other two are buying shares either through negotiation with large individual shareholders or on the open market. *Id.* Fischel claims that a tender offer is the best way to acquire control if shares are widely held, especially because buying shares on the open market requires disclosure to the Securities and Exchange Commission and because such disclosure drives up prices. *Id.* at 6.

145. Cf. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (identifying markets for securities and corporate control as areas of commerce affected by Indiana control share statute).

146. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1287 (W.D. Va. 1994). "In fact," stated Judge Michael in *WLR Foods*, "this principle was so obvious to the Supreme Court in *CTS* that it did not bother to say so; it simply considered whether the statute at issue violated the Commerce Clause." *Id.* (citing *CTS*, 481 U.S. at 87). Tyson argued that the Securities Exchange Act of 1934 provided authority for the proposition that securities transactions like those in *WLR Foods* "constitute an important part of the current of interstate commerce and directly affect and influence the volume of interstate commerce." Tyson Memorandum, *supra* note 123, at 26 (quoting 15 U.S.C. § 78b(1) (1988)). Tyson additionally insisted that even shares exchanged exclusively between Virginia residents flow through interstate commerce because the exchanges are effected by means of interstate commerce. *Id.* at 27

147 This discussion assumes that the antitakeover statutes at issue apply only to corporations incorporated in the regulating state. These statutes are the type upheld in *CTS*. See *CTS*, 481 U.S. at 88-89 (concluding that Indiana control share statute, applying only to Indiana corporations, posed no impermissible threat of regulation). Legislation purporting to affect corporations incorporated in other states raise different questions. See Pinto, *supra* note 67, at 755-56 (pointing to issues of inconsistent regulation and of validity of regulating internal affairs of foreign corporations that arise when state of incorporation is not used as nexus for regulating tender offers). Such laws can exceed Commerce Clause validity. See *Tyson Foods, Inc. v. McReynolds*, 700 F. Supp. 906, 910-14 (M.D. Tenn. 1988), *aff'd*, 865 F.2d 99 (6th Cir. 1989) (striking down Tennessee statutes that allowed non-Tennessee corporations to invoke benefits of state's antitakeover laws). The *Tyson Foods* court carefully limited its holding and analysis only to the case at hand; it did not pass judgment on the statutes as applied to Tennessee corporations. *Id.* at 910. In reaching its conclusion, the court reasoned that the Tennessee laws improperly attempted to regulate directly offers for non-Tennessee corporations, *id.* at 910; created a risk of inconsistent regulation, *id.* at 910-12; and imposed excessive burdens on interstate commerce in relation to local interests served

in practical effect, without justification by a valid purpose unrelated to economic protectionism.<sup>148</sup> Second, nondiscriminatory regulations can impose a burden on interstate commerce that exceeds their legitimate local benefits.<sup>149</sup> In *WLR Foods*, Judge Michael concluded that the Virginia statutes satisfy both standards of constitutionality.<sup>150</sup> The legitimacy of Virginia's statutory scheme, however, is actually a closer question than the *WLR Foods* decision indicates.

### 1. *The Discriminatory Effect Argument*

The first attack on the Virginia antitakeover laws relied on a line of cases culminating in *C & A Carbone, Inc. v Town of Clarkstown*.<sup>151</sup> Under

by the statute, *id.* at 912-14. A more detailed examination of state antitakeover laws governing nonstate corporations is beyond the scope of this Note.

This discussion also assumes that current antitakeover laws do not regulate commerce directly. Such regulations are per se invalid. See *Brown-Forman Distillers Corp. v New York State Liquor Author.*, 476 U.S. 573, 579 (1986) (stating that Court strikes down such regulations without further inquiry). *Brown-Forman* presents a classic case of direct regulation. The regulation implicated required any distiller or agent selling alcoholic beverages to New York wholesalers to affirm that its price for a particular item is no higher than the lowest price at which the same item would be sold to any other wholesaler in the country. *Id.* at 575-76. The Court reasoned that the practical effect of New York's affirmation law was to control liquor prices in other states. *Id.* at 583. The Court, therefore, concluded that the law violated the Commerce Clause because New York "project[ed] its legislation into other States, and directly regulated commerce therein." *Id.* at 584 (alteration in original).

The *MITE* plurality held the Illinois takeover statute invalid because the law purported to regulate directly. *MITE*, 457 U.S. at 643. The *CTS* Court did not apply the "direct regulation" prong of Commerce Clause analysis to Indiana's second-generation-style takeover regulation beyond citing *Brown-Forman* for the proposition that statutes subjecting activities to inconsistent regulations are invalid. *CTS*, 481 U.S. at 88. But see *id.* at 97 (White, J., dissenting) (stating that Indiana act substantially burdens market for corporate control and therefore directly inhibits interstate commerce). One would accordingly assume that most post-*MITE* takeover legislation, which follows the *CTS* mold, does not directly regulate interstate commerce.

148. *WLR Foods*, 861 F Supp. at 1287 (citing *C & A Carbone, Inc. v Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994)).

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

150. *Id.* at 1289.

151. 114 S. Ct. 1677 (1994). See generally *Fort Gratiot Sanitary Landfill, Inc. v Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992) (invalidating statute prohibiting landfill operators from accepting solid waste generated outside of county because of statute's protectionist nature); *Dean Milk Co. v Madison*, 340 U.S. 349 (1951) (invalidating ordinance that made it unlawful to sell milk as pasteurized unless it was processed within five miles of city because ordinance protected local industry from any competition from out of state); *Brimmer*

these cases, regulations discriminate when they hoard a local resource for the benefit of local businesses by preventing all attempts at acquiring a commodity located in the state.<sup>152</sup> The geographic origin of the thwarted attempt does not matter.<sup>153</sup> Virginia's antitakeover statutes arguably discriminate by impermissibly hoarding the resource of control of Virginia corporations for the benefit of local business interests.<sup>154</sup> The only way to save such discriminatory statutes is justification by a purpose unrelated to economic protectionism.

The *WLR Foods* court had little difficulty finding Virginia's statutory scheme nondiscriminatory. Judge Michael concluded that the antitakeover laws pass discrimination standards partly because they do not completely

v. *Rebman*, 138 U.S. 78 (1891) (invalidating Virginia statute imposing special inspection fees on meat from animals slaughtered more than 100 miles from place of sale because statute effectively prevented sale of meat from animals slaughtered in distant states).

152. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682-83 (1994). In *Carbone*, the Supreme Court considered whether a local "flow control ordinance" violated the Commerce Clause. *Id.* at 1680. The ordinance required all solid waste to be processed at a designated transfer station before leaving the town. *Id.* In reviewing the ordinance, the Court first confirmed that the regulation affected interstate commerce in practical effect because it drove up the cost for out-of-state interests to dispose of their solid waste and because it deprived out-of-state businesses of access to the local market in solid waste. *Id.* at 1681. The Court next examined the ordinance under the discrimination prong of Commerce Clause analysis. *Id.* at 1682. The Court found that the ordinance discriminated against interstate commerce because it favored the local waste transfer station over other operators. *Id.* The Court then searched for a legitimate interest served by the discriminatory ordinance to save it from per se unconstitutionality. *Id.* at 1683. The Court, however, found that the town had numerous nondiscriminatory alternatives for remedying the health and environmental problems allegedly justifying the flow control ordinance. *Id.* Accordingly, the majority concluded that the ordinance was unconstitutional. *Id.* at 1684.

In her concurring opinion in *Carbone*, Justice O'Connor asserted that the ordinance did not discriminate because it lacked the key feature of discrimination on the basis of geographic origin. *Id.* at 1688 (O'Connor, J., concurring). According to Justice O'Connor, the ordinance did not prefer local interests over out-of-town economic interests and thus did not discriminate against interstate commerce. *Id.* at 1689. Justice O'Connor instead concurred with the majority on the basis of a *Pike* balancing analysis. *Id.* at 1691. Justice Souter, with whom Justices Rehnquist and Blackmun joined, also rejected the majority's discrimination analysis. *See id.* at 1692 (Souter, J., dissenting) (stating that majority invokes "well-settled" Commerce Clause principles to strike down ordinance unlike anything that Court has ever invalidated). The dissent also declared that the Commerce Clause did not call upon the Court "to judge the ultimate wisdom of creating this local monopoly." *Id.* at 1694.

153. *See id.* at 1682 (stating that ordinance is no less discriminatory because it also covers in-state attempts).

154. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F. Supp. 1277, 1287 (W.D. Va. 1994); Tyson Memorandum, *supra* note 123, at 30.

eliminate interstate commerce in the corporate control market, unlike the regulations in the *Carbone* line of cases.<sup>155</sup> He stated that tender offerors making adequate bids could still acquire Virginia corporations.<sup>156</sup> The Virginia statutes just render the procurement more expensive.<sup>157</sup> Judge Michael stated furthermore that under *CTS* no discrimination occurs when statutes treat similarly situated entities similarly.<sup>158</sup> Judge Michael reasoned that because the Virginia antitakeover scheme favors neither in-state nor out-of-state tender offerors, the statutes place everyone on equal footing in attempting to gain control of Virginia corporations.<sup>159</sup> The Virginia statutes thus treat similarly situated entities similarly, again unlike the regulations in the *Carbone* line of cases.<sup>160</sup> The *WLR Foods* court accordingly concluded that Virginia's scheme does not discriminate.

Despite the *WLR Foods* court's conclusion, however, the Virginia anti-takeover laws' nondiscriminatory nature is less than certain under the recent Commerce Clause cases. The scheme clearly does not facially discriminate against interstate commerce.<sup>161</sup> Nevertheless, the laws could

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155. *WLR Foods*, 861 F Supp. at 1287-88.

156. *Id.* at 1288.

157. *Id.* Judge Michael cited *Louisville & Nashville R.R. v Kentucky*, 161 U.S. 677, 701-04 (1896), to support the proposition that states could ban mergers completely without violating the Commerce Clause. *WLR Foods*, 861 F Supp. at 1289. *Louisville & Nashville* involved a state constitutional provision that forbade consolidation of parallel and competing railway lines. *Louisville & Nashville*, 161 U.S. at 679. The Court reasoned that nearly all railways in the country had been constructed under state authority and that such power necessarily involves power to regulate operations in the public interest. *Id.* at 702. The Court furthermore appealed to "a large number of cases" that directly upheld the prohibition against mergers. *Id.* at 703. The only other modern case that has cited *Louisville & Nashville* in the takeover regulation area is *Amanda Acquisition Corp. v Universal Foods Corp.*, 877 F.2d 496, 506 (7th Cir.), *cert. demed.*, 493 U.S. 955 (1989).

158. *WLR Foods*, 861 F Supp. at 1288 (citing *CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987)).

159. *Id.*

160. *Id.* The *WLR Foods* court stated that in *Carbone*, 114 S. Ct. 1677 (1994), one transfer station could separate waste, but others could not. *WLR Foods*, 861 F Supp. at 1288. In *Fort Gratiot*, 502 U.S. 1024 (1992), some solid waste producers could dump their waste, but other could not. *WLR Foods*, 861 F Supp. at 1288. In *Brimmer*, 138 U.S. 78 (1891), some dealers could sell their meat without a special fee, but others could not. *WLR Foods*, 861 F Supp. at 1288.

161. Nothing in the Virginia antitakeover scheme prevents target corporations from using the statutes equally against in-state or out-of-state tender offerors. *See supra* text accompanying note 159 (reciting *WLR Foods* court's reasoning that Virginia statutes treat all tender offerors alike).

discriminate in practical effect if, contrary to the position of the *WLR Foods* court,<sup>162</sup> the scheme causes a complete ban on commerce for control of Virginia corporations. The increased expense of acquiring Virginia corporations under the scheme may erect just as effective a barrier against successful takeovers as the regulations in the *Carbone* line of cases.<sup>163</sup> The result is precisely the same "hoarding" of a local resource that the *Carbone* Court decried.<sup>164</sup> The *WLR Foods* court instead seemed to assume, without substantiation, that any added expense would not have so drastic an effect.<sup>165</sup>

*West Lynn Creamery* provides yet another avenue for finding the Virginia statutes indirectly discriminatory. The *West Lynn Creamery* Court found the Massachusetts pricing order to be discriminatory, even though the tax component considered alone affected in-state and out-of-state milk producers equally.<sup>166</sup> The pricing order's danger lay in its removal of safeguards against legislative abuse because the order's subsidy component mollified the in-state group that would otherwise have lobbied against the nondiscriminatory milk tax.<sup>167</sup> The effect was discriminatory because the pricing order operated to return to the in-state producers as much as (or more than) the order took away.<sup>168</sup> Similarly, Virginia's antitakeover statutes treat out-of-state and in-state tender offerors alike.<sup>169</sup> The in-state corporations, however, also enjoy the benefits of the statutes' protection should they become targets of a takeover bid. They are in this sense not in identical positions with out-of-state corporations. Under *West Lynn Creamery's* reasoning, the protected in-state corporations will not lobby the Virginia General Assembly to change the laws even if they do not wish to be hampered in trying to acquire other Virginia corporations, thereby leaving the *West Lynn Creamery* Court's concerns about legislative abuse

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162. See *supra* text accompanying note 156 (asserting that tender offerors can still acquire Virginia corporations).

163. Virginia's Business Judgment Statute provides an alternative barrier argument. See *supra* note 112 (describing contention that Business Judgment Statute provides "extra kick" rendering hostile acquisition of Virginia corporations impossible).

164. Cf. *C & A Carbone Inc. v Town of Clarkstown*, 114 S. Ct. 1677, 1682-83 (1994) (stating that hoarding of local resource constitutes discrimination).

165. See *supra* text accompanying note 156 (asserting that tender offerors can still acquire Virginia corporations).

166. *West Lynn Creamery, Inc. v Healy*, 114 S. Ct. 2205, 2214-16 (1994).

167. *Id.* at 2215.

168. *Id.* at 2212.

169. See *supra* text accompanying note 159 (maintaining that tender offerors stand on equal footing in attempting to acquire Virginia corporations).



unassuaged. In-state and out-of-state corporations thus stand on unequal footing from a holistic perspective.

If the Virginia scheme is indeed discriminatory, only justification by a purpose unrelated to economic protectionism can save it from invalidity.<sup>170</sup> One can hardly argue that antitakeover statutes serve a purpose other than local protectionism.<sup>171</sup> Indeed, the Virginia legislature itself conclusively established this point.<sup>172</sup> The laws stemmed from the legislature's express desire to protect Virginia public corporations.<sup>173</sup> The legislature reasoned that hostile takeovers adversely affect target corporations and disrupt communities by causing high unemployment and erosion of the economy and tax base.<sup>174</sup>

170. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) (stating that discriminatory regulation is per se unconstitutional unless demonstrated under rigorous scrutiny that proponent has no other means to advance legitimate local interest).

171. See Tyson Memorandum, *supra* note 123, at 37 (asserting that motive behind Virginia antitakeover scheme was pure economic protectionism). Tyson cited one commentator on this point as follows:

All recent state takeover statutes share a common purpose: To discourage hostile takeover attempts by creating obstacles that require approval by target managers, thereby causing delay, uncertainty, and increased costs. Many of these laws use the rhetoric of shareholder welfare, but their primary goal is to protect nonshareholder interests thought to be affected adversely by hostile takeovers.

*Id.* at 36 (quoting Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV 865, 909 (1990) (footnotes omitted)).

172. See *infra* note 174 (setting forth reasons why Virginia desired study of hostile takeovers).

173. Tyson Memorandum, *supra* note 123, at 32; see H.J. Res. 139, Reg. Sess., 1988 VA. ACTS 2180 (providing reasons for requesting State Corporation Commission to study hostile corporate takeovers in Virginia).

174. H.J. Res. 139, *supra* note 173, at 2180. The legislative resolution resembles provisions passed by other states in similar situations and reads as follows:

WHEREAS, corporations are a major contributor to Virginia's economy as they pay a significant amount of taxes, provide employment to a large number of citizens, and contribute to community projects; and

WHEREAS, in recent years increased activity in regards to hostile corporate takeovers has adversely affected corporations throughout the United States, including some in Virginia; and

WHEREAS, such activity can be highly disruptive to communities by causing, among other things, high unemployment and erosion of the economy and the tax base; and

WHEREAS, several states have enacted and many more are considering legislation that will block hostile corporate takeovers that they fear will cost them jobs and revenue; and

WHEREAS, in 1985, as part of the revision of the Stock Corporation Act,

According to Tyson in *WLR Foods*, these considerations constitute pure state protectionism, ensuring that Virginia's public corporations will continue to operate in Virginia with a consistent, even if inefficient, management.<sup>175</sup> Tyson additionally tried to distinguish *CTS's* milder and valid state protectionism by stating that the Virginia scheme effectively bans any tender offer to which the target board does not consent, whereas the *CTS* statute only slightly delayed tender offers.<sup>176</sup> Tyson claimed that with a discriminatory effect established *WLR* bore the burden of showing, under the strictest scrutiny, that no other means existed to advance a legitimate local interest, such as protection of health and safety.<sup>177</sup>

Judge Michael did not reach this argument because he dismissed the discrimination question at its first stage. Yet even though the *WLR Foods* court's ultimate position that the Virginia scheme is constitutional may be valid, *Carbone* and *West Lynn Creamery* do not firmly mandate this outcome. Other forces were most likely at work in shaping the court's final decision. An examination of these forces follows the discussion of the second argument for striking down the Virginia scheme.<sup>178</sup>

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Virginia enacted provisions designed to discourage certain types of transactions that involve an actual or threatened change in control of the corporation, but such provisions may need to be strengthened; and

WHEREAS, Virginia has a vital interest in protecting its citizens, corporations, and itself from the adverse effects of hostile corporate takeovers; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the State Corporation Commission is requested to study hostile corporate takeovers in Virginia. The State Corporation Commission shall focus its efforts upon, but not be limited to, a determination of the extent of the problems associated with corporate takeovers in Virginia and their impact on the Commonwealth's economy, a consideration of what other states and the federal government are doing to address the problem, and a consideration of possible legislation to protect Virginia's corporations and employees from the adverse effects of such takeovers.

Upon completion of this study the State Corporation Commission should report its findings to the Governor and the 1989 Session of the General Assembly as provided in procedures of the Division of Legislative Automated Systems for processing legislative documents.

*Id.*

175. Tyson Memorandum, *supra* note 123, at 32; *see also* Fischel, *supra* note 144, at 7 (stating that empirical evidence shows that target corporations are poorly managed).

176. Tyson Memorandum, *supra* note 123, at 33.

177. *Id.* at 34 (citing *C & A Carbone, Inc. v Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994), and *Maine v Taylor*, 477 U.S. 131 (1986)).

178. *See* discussion *infra* part IV.C.3 (examining policy concerns underlying decisions in antitakeover cases).

## 2. *The Pike Balancing Argument*

Tyson's second argument against the Virginia scheme's validity developed from the balancing test enunciated in *Pike v Bruce Church, Inc.*<sup>179</sup> Under the *Pike* test, the Virginia antitakeover statutes violate the Commerce Clause if they impose a burden on interstate commerce that clearly exceeds their putative local benefits.<sup>180</sup> With antitakeover laws, the question is not whether they burden interstate commerce, but how much.<sup>181</sup> In *WLR Foods*, Tyson pointed to Supreme Court and Fourth Circuit decisions recognizing that antitakeover statutes impose significant, direct hardships on the national economy.<sup>182</sup> Tyson argued that the only counterbalancing concerns were entirely protectionist.<sup>183</sup> Tyson asserted that these protectionist motives were "evident in WLR's emotional appeals to shareholders and arguments to this Court as it repeatedly made an issue of the fact that an Arkansas corporation should not be allowed to purchase control of WLR, a Virginia corporation based in the Shenandoah Valley, without management's consent."<sup>184</sup> According to Tyson, "WLR plainly used the Virginia Statutory Scheme in the manner the Virginia General Assembly intended, bringing out parochial 'Valley' interests and purposely 'excit[ing] those jealousies the Constitution was designed to prevent.'"<sup>185</sup> Tyson claimed additionally that its tender offer posed no threat to WLR shareholders or to WLR as a corporation.<sup>186</sup> Tyson reasoned that these circumstances embody the Virginia scheme's improper purpose, which in turn produces illegitimate benefits for the local economy.<sup>187</sup> Accordingly, Tyson asserted that the Virginia scheme fails the *Pike* test because it pro-

179. 397 U.S. 137 (1970). For a discussion of the *Pike* test's continuing validity, see *supra* notes 100-02 and accompanying text.

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

181. See *supra* note 146 and accompanying text (asserting that courts do not doubt that antitakeover laws affect interstate commerce).

182. Tyson Memorandum, *supra* note 123, at 35 (citing *Edgar v MITE Corp.*, 457 U.S. 624, 643 (1982), and *Telvest, Inc. v Bradshaw*, 697 F.2d 576, 580 (4th Cir. 1983)).

183. *Id.*, see also *supra* notes 173-74 (exploring Virginia's purposes in enacting antitakeover measures).

184. Tyson Memorandum, *supra* note 123, at 36.

185. *Id.* (quoting *C & A Carbone, Inc. v Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994)).

186. See *id.* at 37 (citing depositions from WLR's own directors to support proposition).

187. *Id.* (citing *Lewis v BT Inv Managers, Inc.*, 447 U.S. 27, 43-44 (1980)).

duces no legitimate local benefits counterbalancing the significant burden it imposes on interstate commerce.<sup>188</sup>

The *WLR Foods* court did not overtly reject Tyson's *Pike* argument. Rather than focusing on the statutes' protectionist effects, however, Judge Michael emphasized the Supreme Court's approach to antitakeover statutes in *CTS*.<sup>189</sup> *CTS* invoked the internal affairs doctrine to define states' counterbalancing local interests.<sup>190</sup> According to the *CTS* Court, a state has a sufficient interest in defining the attributes of corporations organized under its laws to justify any burdens on interstate commerce associated with the Commerce Clause.<sup>191</sup> Applying this rationale to *WLR Foods*, Judge Michael stated that Virginia merely defines the attributes of its corporations through its antitakeover scheme:

Based upon the four Virginia statutes, a Virginia corporation is an entity (1) in which shareholders holding over one-fifth of the shares have no voting rights absent consent of the directors or the disinterested shareholders (Control Share Act); (2) that cannot be merged into another entity for three years without consent of its directors (Affiliated Transactions Act); (3) that can issue discriminatory rights to the detriment of some of its shareholders, provided that such discrimination is in the best interests of the corporation (Poison Pill Statute); and (4) whose directors must conduct themselves based upon their good faith business judgment of the best interests of the corporation, and who may satisfy this standard by relying in good faith on competent advice received pursuant to an informational process undertaken in good faith (Business Judgment Statute).<sup>192</sup>

A state need not define its corporations as other states do; it need only provide residents and nonresidents equal access to them.<sup>193</sup> Judge Michael

188. *Id.*

189. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F Supp. 1277, 1288 (W.D. Va. 1994).

190. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-93 (1987) (discussing nature of corporate governance and legitimacy of state actions in regulating it).

191. *WLR Foods*, 861 F Supp. at 1288 (citing *CTS*, 481 U.S. at 89-92). *CTS* actually focused on the state's interests in protecting shareholder's rights, but also used language indicating that states' creation of corporations, prescription of corporate powers, and definition of corporate rights are an "accepted part of the business landscape in this country" *CTS*, 481 U.S. at 91. The Supreme Court furthermore emphasized a state's interest in "promoting stable relationships among parties involved in the corporations it charters." *Id.* One could read the "parties involved" as including not only the corporation's shareholders and directors but also its employees, community, and other nonshareholder interests.

192. *WLR Foods*, 861 F Supp. at 1288-89.

193. *CTS*, 481 U.S. at 94; *WLR Foods*, 861 F Supp. at 1289.

further asserted that the Virginia statutes simply give shareholders and management tools to ensure that takeovers are successful only if consistent with the corporation's long-term interests.<sup>194</sup> By evaluating Virginia's interests from a different perspective, the *WLR Foods* court found that the *Pike* balances weigh in favor of upholding the Virginia scheme.<sup>195</sup>

### 3. *A Developing Schism in Commerce Clause Jurisprudence*

The *WLR Foods* court thus refused to strike down Virginia's antitakeover statutes on either a discrimination or *Pike* balancing basis. Statutes must satisfy both tests to be constitutional.<sup>196</sup> The Virginia statutory scheme's validity under both tests, however, actually presents a close question.<sup>197</sup> Although Judge Michael's *Pike* analysis dovetails fairly well with *CTS*'s analysis, the court's conclusion under the *Carbone* line of cases leaves something to be desired.

As Judge Michael noted at the end of his discrimination analysis, however, *CTS* does not address the *Carbone* line of cases.<sup>198</sup> Judge Michael claimed that this omission amplified the distinction between the regulations invalidated in those cases and takeover statutes.<sup>199</sup> *CTS* would uphold antitakeover measures that are facially neutral as between in-state and out-of-state tender offerors, no matter that the statutes' burdens will fall more often on out-of-state corporations.<sup>200</sup> This premise indicates a split

194. *WLR Foods*, 861 F Supp. at 1289.

195. *Id.* If Judge Michael had focused on protectionist effects, the *Pike* balancing scales may have tipped in the opposite direction. *CTS* invoked shareholder protection as a counterbalancing state interest in addition to the internal affairs doctrine. *CTS*, 481 U.S. at 91. By purporting to defend more than shareholder interests, *see supra* notes 173-74 and accompanying text (discussing purposes behind Virginia's antitakeover laws), Virginia's scheme does not necessarily fall within a narrow reading of *CTS*. In this respect, the Virginia statutes could fail to satisfy the *Pike* balancing test. A broader reading of *CTS*, however, might encompass a defense of nonshareholder interests. *See supra* note 191 (describing *CTS* Court's emphasis of state interest surrounding "parties involved" in state's corporations).

196. *See supra* text accompanying notes 73-74 (setting forth two bases for invalidating statutes under Commerce Clause).

197. *See supra* notes 161-68 and accompanying text and note 195 (arguing that court could potentially find Virginia antitakeover scheme unconstitutional under current modes of Commerce Clause analysis).

198. *WLR Foods, Inc. v. Tyson Foods, Inc.*, 861 F Supp. 1277, 1288 n.11 (W.D. Va. 1994).

199. *Id.*

200. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

in Commerce Clause jurisprudence based merely on formal titles. If labeled as a corporate governance measure, a statute or regulation will be subject to the less strict facial neutrality standard of *CTS*, whereas other types of regulations will be subject to the more functional, indirect discrimination standards of the *Carbone* and *West Lynn Creamery* cases.<sup>201</sup> A unified system of analysis would simplify matters, but if antitakeover measures are truly different creatures from milk pricing orders and solid waste processing regulations, then the dichotomy is justified. Reconciling this split was an implicit yet core issue implicated in *WLR Foods*. The solution requires a closer examination of the policies underlying courts' decisions in antitakeover cases.

In analyzing antitakeover laws under the Commerce Clause, courts become embroiled in a doctrinal controversy over the fundamental role of corporate law.<sup>202</sup> One view holds that corporate law should aim to create legal structures that maximize shareholder wealth.<sup>203</sup> Advocates of this shareholder primacy norm rely on a "contractarian," antiregulatory, individualistic stance.<sup>204</sup> Conversely, a "communitarian" view posits that legal rules should structure relations among the corporation's diverse constituencies, such as the corporation's employees, suppliers, and communities.<sup>205</sup>

201. See *supra* note 152 and notes 166-68 and accompanying text (discussing discrimination analysis under *Carbone* and *West Lynn Creamery*).

202. Cf. David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1373 (1993) (detailing ongoing "crisis of uncertainty over corporate law's normative foundations").

203. *Id.* at 1374.

204. *Id.* at 1377 Professor Millon writes, "Contractarians start from the presumption that people ought to be free to make their own choices about how to live their lives (subject to an overriding duty not to harm others)." *Id.* at 1382. Contractarians would eschew state laws that mandate or inhibit particular relationships between participants in corporate activity (for example, management, shareholders, workers, and creditors) in favor of laws allowing the parties to specify their rights and obligations through contract. *Id.* at 1378.

205. *Id.* at 1378-79. Communitarians presume that "[s]imply by virtue of membership in a shared community, individuals owe obligations to each other that exist independently of contract." *Id.* at 1382. They call for state action to enforce the duties of interdependence, which necessarily restricts freedom. *Id.* at 1382-83. The communitarian approach doubts the efficacy of contract as a means of protecting nonshareholders before damage is done. *Id.* at 1379. While many communitarians still share the contractarians' esteem of individual autonomy and choice, they believe that "meaningful choice requires a social framework that cannot itself be constructed entirely out of private, bilateral transactions." *Id.* at 1383.

Interestingly (and perhaps counterintuitively), conservatism fits rather comfortably within the communitarian position. As Professor Johnson writes, "Traditionally, conserva-

Communitarians see corporations not as agglomerations of private contracts but as powerful institutions whose conduct substantially affects the public.<sup>206</sup> Put simply, contractarians would tend to meet antitakeover laws with jeers;<sup>207</sup> communitarians with cheers.<sup>208</sup>

Another way to frame the problem facing courts in antitakeover cases is as a conflict between the dual natures of the corporate form. In one sense, public corporations, being made up of equity securities, are pure

tism has meant more than a strong preference for the private sector as a counterpoise to the public sphere. It has also been keenly protective of institutions such as family, church, and local communities as vibrant sources of energy and influence." Lyman Johnson, *State Takeover Statutes: Constitutionality, Community, and Heresy*, 45 WASH. & LEE L. REV 1051, 1055 (1987). Such noneconomic concerns benefit communitarians. Johnson further maintains that today's "preference for the private sphere and the imperative of economics" threatens the latter component of conservatism. *Id.* The WLR/Tyson takeover battle epitomized the clash between community-oriented conservatism and the contractarian approach that exalts the value of nationwide economic "efficiency" over traditional local institutions.

206. Millon, *supra* note 202, at 1379.

207. Cf. David Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV 903, 919 (1988) (describing how shareholders lose when hostile takeovers are deterred). See generally Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV L. REV 1161 (1981) (arguing that antitakeover laws decrease shareholder welfare). In this leading article advocating shareholder primacy, Easterbrook and Fischel assert that tender offers benefit shareholders by providing a premium over market price during the initial bid. *Id.* at 1173. Further, the threat of a takeover encourages management to perform efficiently for shareholders. *Id.* at 1174. The authors later denigrate those who argue that a target corporation's directors have a duty to consider nonshareholder interests. *Id.* at 1190. They claim that takeovers enhance everyone's interests by improving economic efficiency, that incumbent managers cannot predict whether the new owners' policies will be detrimental to nonshareholder interests, and that consideration of nonshareholder interests rejects the idea that agents (managers) are accountable to their principals (shareholders). *Id.* at 1190-91. Interestingly in *CTS*, the Supreme Court drew on shareholder primacy theory to uphold an antitakeover measure. See *CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (asserting that state's interest in protecting shareholders outweighs limited effect of Indiana antitakeover law on interstate commerce). *CTS*'s focus raises the question of what other interests antitakeover regulation can protect without violating the Commerce Clause. Pinto, *supra* note 67, at 724.

208. Cf. Millon, *supra* note 202, at 1375-76 (describing shifting perceptions of hostile takeovers' benefits and increasing resistance). The principal assertion contains some exaggeration because antitakeover laws may not present an effective means for satisfying communitarian concerns. See Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP L. 35, 86-87 (1988) (positing reasons for probable failure of current antitakeover legislation in achieving its primary objective of protecting resident nonshareholder interests). To the extent that takeover legislation reaches beyond shareholder protection to allow corporate management to consider certain nonshareholder interests, however, communitarians should embrace it.

commodities.<sup>209</sup> Viewed as such, Commerce Clause challenges to laws regulating securities are appropriate. The market for this article of commerce has an interstate scope.<sup>210</sup> Hence, it should remain free of improper restraints.<sup>211</sup> In another sense, however, corporate entities are "persons,"<sup>212</sup> whose existence and rights depend entirely on state law.<sup>213</sup> These corporate persons may have distinct identities that are stamped by the communities in which they "reside" and that in turn shape their communities.<sup>214</sup> Should the Constitution not allow state protection of these persons from involuntary enslavement to the highest bidder? Granted, this characterization is extreme, but it helps illustrate the competing values underlying Commerce Clause decisions in antitakeover cases.<sup>215</sup>

209. Cf. *CTS*, 481 U.S. at 94 (identifying corporation as commodity traded in market for corporate control).

210. See *supra* note 146 (describing scope of market for corporate control).

211. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (describing Founders' vision of open national market). As Justice Jackson wrote:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

*Id.*

212. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (finding corporation entitled to First Amendment's free speech protection); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (opining that corporation is person entitled to Fourteenth Amendment's equal protection). See generally Morton J. Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (tracing history of development of natural entity theory of corporation). The natural entity theory views a corporation as a natural legal person rather than an artificial creation of the state, or a distinct entity rather than as a "mere aggregation of individuals that ha[s] no separate identity of its own." Millon, *supra* note 207, at 916. The entity thus enjoys "all the freedoms enjoyed by other persons." *Id.* Although Horowitz posited that this theory legitimated releasing corporations from traditional regulation of their activities and a new class of managers from shareholder control, Millon writes that the theory also has a tendency to justify managerial discretion to use corporate resources for nonshareholder interests even at the shareholders' expense. *Id.* at 916-17.

213. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (stating that corporation "owes its existence and attributes to state law").

214. Continuing with the "persona" analogy, Michael Halperin and Steven Bell have written that "[c]orporations often have family trees that are every bit as complicated as human family trees." MICHAEL HALPERIN & STEVEN J. BELL, *RESEARCH GUIDE TO CORPORATE ACQUISITIONS, MERGERS, AND OTHER RESTRUCTURING* 124 (1992). The authors state further that "[a]s corporate genealogists, we are often called on to trace the connections among a corporation's ancestors and in-laws." *Id.*

215. Cf. *Johnson & Millon*, *supra* note 104, at 856 (describing trouble with certain Com-



Emphasizing the Commerce Clause's primary concern, that of preserving interstate comity,<sup>216</sup> provides a solution to these conflicts. The

merce Clause arguments). Johnson and Millon express concerns about arguments "that the dormant commerce clause prevents the states from protecting resident nonshareholders at the expense of nonresident shareholders — that capital markets are quintessentially interstate commerce and the interests of those (shareholders) who participate in those markets are constitutionally preferred over those who deal locally with corporations in other ways." *Id.* The authors suggest that assuming states continue to restrict takeovers, resolution of this doctrinal question will determine the ultimate success or failure of state efforts. *Id.*

Professor Johnson has claimed that state takeover statutes raise the question of whether the entire corporate industry ought to operate within "a narrow and rigid conception of corporate endeavor" that elevates "unfettered capital markets" or whether "some actors are entitled to say 'no' and begin to rechart a different course." Johnson, *supra* note 205, at 1057. He observes that courts and legislatures appear to differ on the basic issue of whose interests they should seek to protect. Johnson, *supra* note 208, at 38. He posits that while courts are using external capital markets to protect shareholders, states are using internal corporate governance mechanisms to protect noninvestors. *Id.* at 39. According to Johnson, state preference of resident noninvestor interests over nonresident shareholders makes sense from the states' political and economic perspectives because residents are the constituents who vote and directly contribute to the states' economies. Johnson, *supra* note 205, at 1054. In denigrating the validity of *Pike* balancing, Justice Scalia's concurring opinion in *CTS* doubted (somewhat sarcastically) the Court's ability to make normative judgments regarding corporations:

[A]n inquiry [under the *Pike* balancing test] is ill suited to the judicial function and should be undertaken rarely if at all. Nothing in the Constitution says that the protection of entrenched management is any less important a "putative local benefit" than the protection of entrenched shareholders, and I do not know what qualifies us to make that judgment — or the related judgment as to how effective the present statute is in achieving one or the other objective — or the ultimate (and most ineffable) judgment as to whether, given importance-level *x*, and effectiveness-level *y*, the worth of the statute is "outweighed" by impact-on-commerce *z*.

*CTS*, 481 U.S. at 95 (Scalia, J., concurring).

216. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 417 (2d ed. 1988) (describing "important doctrinal theme" in Commerce Clause jurisprudence). Professor Tribe writes:

[T]he negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. Although the Court's commerce clause opinions have often employed the language of economics, the decisions have not interpreted the Constitution as establishing the inviolability of the free market.

*Id.*, see also *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2219 (1994) (Scalia, J., concurring) (stating that Court has never held that every state law obstructing national market violates Commerce Clause). Justice Scalia expressed concerns over the majority's opinion in *West Lynn Creamery*, which he felt "canvassed the entire corpus of negative-Commerce-Clause opinions, culled out every free-market snippet of reasoning, and melded them into the

Commerce Clause permits some protectionism.<sup>217</sup> If a state's protection of its corporations does not threaten interstate comity as much as protectionism in other areas, antitakeover laws should withstand constitutional scrutiny

A conciliatory approach proceeds from the premise that corporations are extraordinary units of economic activity. State law creates and regulates most aspects of these commodities/legal persons. Far-reaching policy issues surround these creations. Under such unusual circumstances, state-assisted isolation presents a lesser threat to the federal union than does protection of other, more ordinary articles of commerce that are less dependent on individual state law. A major threat to interstate comity should thus arise only when antitakeover laws favor one set of similarly situated tender offerors over another. Unless the laws jeopardize interstate comity in this manner, the fact that they may represent unsound economic policy is relevant only to the decisions of legislatures, not to the decisions of courts.

This reasoning is consonant with policies invoked in both *CTS* and *WLR Foods*. In *WLR Foods*, for example, Tyson tried to bolster its arguments with the gloss that Virginia's scheme is not only unconstitutional but also works bad economic consequences by encouraging the entrench-

sweeping principle that the Constitution is violated by any state law or regulation that 'artificially encourag[es] in-state production even when the same goods could be produced at lower cost in other States.'" *Id.* at 2219 (alteration in original).

For an examination of the effectiveness of the Commerce Clause in creating an open national market, see *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE: PRINCIPAL PAPER BY EDMUND W. KITCH 7* (A. Dan Tarlock ed., 1981) (arguing that integrated national market of United States has not furthered free trade). In his paper, Professor Kitch asserts that the Supreme Court's decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Exxon Corp. v. Governor of Md.*, 437 U.S. 17 (1978), demonstrate that "a state bent on local protectionism will not need great ingenuity to evade the Court's [Commerce Clause] doctrine." *Id.* at 47. In discussing the Supreme Court's future direction in interpreting the Commerce Clause, then-Professor Scalia commented that the individuals most likely to favor increasing free trade are the same people who favor decreasing judicial activism. *Id.* at 159.

217 *Cf.* Regan, *supra* note 100, at 1872 (contrasting permissible and impermissible protectionist purposes). As Regan phrases the distinction:

A purpose to protect [in-state] workers and suppliers *at the expense of [out-of state persons]* is impermissible, but a statute which was motivated by a *general* belief that takeovers leading to corporate removals are unacceptably disruptive of established economic relations, and which was limited to [in-state] corporations simply because those were the only corporations the [state] legislature had power to regulate, would be perfectly permissible so far as the dormant commerce clause is concerned.

*Id.*

ment of inefficient corporate management.<sup>218</sup> The *WLR Foods* court, however, declined to factor the economic wisdom of Virginia's antitakeover scheme into its constitutional analysis.<sup>219</sup> Judge Michael did not hide the principles behind his repudiation of Tyson's argument: reluctance to interfere with what the court perceived to be a state legislative function.<sup>220</sup> As Judge Michael stated in his final decision in the *WLR* case, "All of [the] rulings [in this case] share one dominant theme — the court's refusal to usurp the power of Virginia's legislature."<sup>221</sup> Similarly, the Supreme Court in *CTS* recognized the importance of a state's interest in regulating and defining the attributes of its corporations.<sup>222</sup> The Court stated that such activity offends neither Congress nor the Commerce Clause.<sup>223</sup>

The solution to fitting multistatute antitakeover schemes more comfortably into existing Commerce Clause cases, therefore, begins by accepting that corporate control is a special commodity. Courts should then test antitakeover laws only under *CTS*'s facial neutrality standard rather than *Carbone* and *West Lynn Creamery*'s indirect discrimination criteria. Finally, courts can weigh the statutes under the *Pike* balancing test as traditionally applied, which mandates that courts uphold the laws unless their burden *clearly* exceeds their putative local benefits.<sup>224</sup> Any bal-

218. See Tyson Memorandum, *supra* note 123, at 38 (alleging that Virginia antitakeover scheme protects entrenched management by removing incentives to improve performance and maintain high stock prices).

219. See *WLR Foods, Inc. v. Tyson Foods, Inc.*, 869 F. Supp. 419, 424 (W.D. Va. 1994) (stating that constitutionality of Virginia's antitakeover scheme does not depend on its economic wisdom). Judge Michael's statements echo Justice Scalia's more biting words in his concurring opinion in *CTS*: "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." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring).

220. *WLR Foods*, 869 F. Supp. at 424 (declaring that remedy for overly broad antitakeover laws lies not with court but with Virginia legislature because legislature is better equipped to weigh policy considerations).

221. *Id.*

222. *CTS*, 481 U.S. at 94.

223. *Id.*

224. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* Court recognized protection and enhancement of the reputation of Arizona cantaloupe growers (which in turn maximized financial return to local industry) as a legitimate state interest. *Id.* at 143. A key fact in *Pike*, however, was that the regulation would require a company to build an unneeded \$200,000 packing plant in Arizona. *Id.* at 145. Even though the regulation at issue in *Pike* served an arguable — albeit tenuous — legitimate local interest, the Court would not tolerate

ancing,<sup>225</sup> however, should again account for the Commerce Clause's primary goal of maintaining interstate comity and for the special state interests surrounding corporations.

*D. The Secondary Application Problem: Fashioning a Remedy for Unconstitutional Antitakeover Schemes*

If the *WLR Foods* court had found Virginia's antitakeover scheme unconstitutional, it would have faced the most complicated practical issue in the case: how to remedy the situation. Tyson asked for relief but proposed no precise solution. Judge Michael wrote that the court could not simply strike down the offending legislation because, unlike the Massachusetts pricing order, the Virginia statutes maintain independent applications.<sup>226</sup> A court would instead have to enjoin the particular unconstitutional uses of those statutes.<sup>227</sup> This process would force courts to engage in fine, even arbitrary, line drawing between gradations of constitutionality. Courts would have to ask whether unconstitutionality begins with the first, second, third, or fourth law, or whether it began with a combination of the first and third, second and fourth, first and second, and so forth.

The predicament would likely engender inconsistent decisions. Courts facing such a situation are at least slightly more inclined to search for avenues of declaring the challenged statutes constitutional than to face the distasteful alternative. Although these practical considerations would certainly never justify upholding a scheme that is truly unconstitutional, they nonetheless demonstrate why one should not take *West Lynn Creamery's* sweeping dicta strictly at face value.

*V Conclusion*

Although *West Lynn Creamery's* reasoning that a sum of statutes may be more dangerous than its innocuous parts provided an interesting avenue

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the significant burden of this particular form of state-mandated inefficiency. *Id.* By contrast, Virginia's antitakeover laws arguably do not lead to so concrete an example of economic waste. Their burden on interstate commerce thus should not *clearly* exceed their local benefits.

225. If courts followed some authorities' suggestions, they would discard *Pike* balancing altogether. *See supra* notes 100-02 and accompanying text and note 215 (discussing significance of *CTS's* failure to invoke expressly *Pike* balancing and describing Justice Scalia's disparagement of Supreme Court's ability to make *Pike* judgments).

226. *WLR Foods, Inc. v Tyson Foods, Inc.*, 861 F Supp. 1277, 1282 (W.D. Va. 1994).

227. *Id.*

for attacking antitakeover laws in *WLR Foods*, it should ultimately fail to affect takeover litigation seriously. Current antitakeover measures should not run afoul of the Commerce Clause, so long as the schemes on their face treat similarly situated tender offerors equally and satisfy a *Pike* balancing sensitized to the special issues involved.<sup>228</sup> This approach leaves undisturbed the proper roles of state legislatures in determining local economic policy and of the courts in determining constitutionality.<sup>229</sup> If a state does not wish money to be able to buy control of its corporations, *West Lynn Creamery* should not prevent it from achieving that result.

### *Postscript*

Subsequent to this Note's completion in Spring 1995, the Fourth Circuit handed down an opinion affirming on every issue the district court's decision in *WLR Foods*. Like the district court before it, the Fourth Circuit assumed without deciding that *West Lynn Creamery* could apply to unintegrated statutes.<sup>230</sup> In addressing Tyson's Commerce Clause arguments, the Fourth Circuit essentially restated the district court's position. First, the court concluded that the four Virginia statutes do not discriminate because they treat in-state and out-of-state tender offers identically and because they do not hoard a resource since they fail to eliminate completely commerce in corporate control.<sup>231</sup> Second, the court determined that the burden the

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228. See *supra* note 147 and discussion *supra* part IV.C.3 (regarding types of antitakeover schemes covered by this Note and prescribing appropriate methodology for evaluating them under Commerce Clause).

229. See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1694 (1994) (Souter, J., dissenting) (stating that Court is called upon to say whether law at issue violates Commerce Clause, not to judge law's ultimate wisdom); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (observing that Constitution does not require states to subscribe to any particular economic theory and that Court is disinclined to "second-guess the empirical judgments of lawmakers concerning utility of legislation"); *id.* at 96-97 (Scalia, J., concurring) (declaring that state "law can be both economic folly and constitutional"); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 502 (7th Cir.) (claiming that "skepticism" about wisdom of state law does not lead to conclusion that law is unconstitutional), *cert. denied*, 493 U.S. 955 (1989).

230. *WLR Foods, Inc. v. Tyson Foods, Inc.*, No. 95-1039, slip op. at 7 n.2 (4th Cir. Sept. 22, 1995).

231. *Id.* at 13-14.

statutes impose on interstate commerce is not clearly excessive in relation to Virginia's legitimate interest in regulating its corporations.<sup>232</sup> Reportedly, an appeal was "almost certain."<sup>233</sup>

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232. *Id.* at 14.

233. Randolph Goode, *Appellate Court Rejects Tyson Bid*, RICHMOND TIMES-DISPATCH, Sept. 23, 1995, at C1.



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# ARTICLES

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