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VIRGINIA'S AFFILIATED TRANSACTIONS ARTICLE: THE DEATH OF TWO-TIERED TAKEOVERS IN VIRGINIA?

In February 1985 the Virginia General Assembly enacted a new corporate code to modernize Virginia's corporate law.[1] Virginia's new corporate code, the Virginia Stock Corporation Act (VSCA), contains several provisions to protect Virginia corporations from hostile[2] takeovers.[3] For example, the Affiliated Transactions Article (ATA) of the VSCA restricts the use of front-loaded, or two-tiered, takeovers.[4] By adopting the ATA, Virginia joins several states that recently have enacted takeover statutes.[5] The recent

1. Virginia Stock Corporation Act, VA. CODE ANN. § 13.1-601 to -800 (1985) (VSCA). In 1983 the Virginia General Assembly directed the Virginia Code Commission (Code Commission) to revise chapters 1 and 2 of title 13.1 of the Code of Virginia, the then existing Virginia corporate code, to make the Virginia corporate code clearer, better organized, and more uniform. H.J. Res. 3, 1983 Va. Acts 1243. In January 1985 the Code Commission submitted to the Virginia General Assembly and the Governor the Code Commission's report on the revision of Virginia's corporate law. VA. CODE COMM'N, REPORT ON THE REVISION OF CHAPTERS 1 AND 2 OF TITLE 13 OF THE CODE OF VIRGINIA, H. DOC. No. 13 (1985) [hereinafter CODE COMMISSION REPORT]. The Virginia General Assembly adopted the Code Commission's revisions to Virginia's corporate law and the VSCA became effective on January 1, 1986. VA. CODE ANN. § 13.1-601 to -800 (1985) (VSCA). The Affiliated Transactions Article (ATA) of the VSCA became effective on July 1, 1985. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA). The VSCA closely parallels the provisions of the Revised Model Business Corporation Act (Model Act). *See* VA. CODE ANN. § 13.1-601 to - 800 (1985) (VSCA); REV. MODEL BUSINESS CORP. ACT § 1.01 - 17.06 (1984). Articles 1 through 13, 15 through 18, and Article 20 of the VSCA parallel exactly the Model Act.

2. *See* 1 M. LIPTON & E. STEINBERGER, TAKEOVERS & FREEZOUTS § 1.01[1] (1986). In a hostile takeover attempt a bidder (raider) offers to purchase the stock of a corporation (target company) through an offer to the shareholders of the target company without the approval of the target company's management. *Id.* The raider attempts to purchase enough of the target company's stock to gain control of the corporation. *Id.*

3. *See* VA. CODE ANN. § 13.1-646 (1985) (allowing stock purchase rights plan); *id.* § 13.1-649 (restricting transfer of shares and other securities). Section 13.1-646 of the VSCA permits the board of directors of a Virginia corporation to issue rights to purchase shares of the corporation's stock under terms and conditions approved by the board. *Id.* § 13.1-646. Section 13.1-649 of the VSCA authorizes a Virginia corporation to issue shares and other securities that are not transferable to designated persons or classes of persons. *Id.* § 13.1-649. Section 13.1-649 requires that the restriction on transferrability be for a "reasonable purpose" and prohibits a "manifestly unreasonable" designation of the class of prohibited transferees. *Id.*

4. *Id.* § 13.1-725 to -728 (1985) (ATA); *see* CODE COMMISSION REPORT, *supra* note 1, at 68 (Virginia legislature intended ATA to restrict two-tiered takeovers); *see also infra* notes 12-16 and accompanying text (discussing two-tiered takeover).

5. *See* OHIO REV. CODE ANN. § 1701.831 (Page Supp. 1986) (Ohio's new control share acquisition takeover statute). Ohio was the first state to enact a control share acquisition takeover statute. *See* M. LIPTON & E. STEINBERGER, *supra* note 2, at § 5.02[4][d] (explaining that Ohio was model for control share acquisition statutes). A control share acquisition statute typically requires that shareholders approve certain tender offers before a raider can complete

outpouring of new state takeover legislation is attributable to the increased number of takeover attempts[6] and to the United States Supreme Court's 1982 decision in *Edgar v. Mite Corp.*[7] striking down an Illinois takeover

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the offer. *See* OHIO REV. CODE ANN. § 1701.831 (Page Supp. 1986) (Ohio's control share statute). For example, the Ohio statute governs tender offers in which a raider attempts to acquire greater than 20%, 33.33%, or 50% of the stock of an Ohio corporation. *Id.* If a raider initiates a tender offer for 21% of the stock of an Ohio corporation, for instance, the Ohio statute requires that a quorum of a majority of the shares held by disinterested shareholders of the corporation vote on the tender offer and that a majority of the voted shares approve the offer. *Id.* Minnesota, Hawaii, Wisconsin, and Missouri have enacted post-*Mite* takeover statutes similar to the Ohio statute. *See* MINN. STAT. ANN. § 302A.671 (West 1985 & Supp. 1987) (Minnesota's post-*Mite* control share acquisition takeover statute); WIS. STAT. ANN. § 180.69 (West Supp. 1984-1985) (repealed 1985) (Wisconsin's post-*Mite* control share acquisition takeover statute); HAW. REV. STAT. § 416-171 to -172 (Hawaii's post-*Mite* control share acquisition statute); MO. REV. STAT. § 351.047 (Supp. 1987) (Missouri's post-*Mite* control share acquisition takeover statute).

Pennsylvania's Shareholder Protection Act evidences a second type of post-*Mite* state takeover statute. *See* PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1986) (Pennsylvania post-*Mite* takeover statute). The Pennsylvania statute requires persons acquiring 30% or more of the voting stock of a Pennsylvania corporation to offer to pay other remaining shareholders the fair value of the remaining shares. *Id.* A seperate provision of the Pennsylvania statute inhibits two-tier takeovers by requiring that a majority of the disinterested shareholders of a Pennsylvania corporation approve certain extraordinary transactions, including mergers. *Id.* § 1409.1(C).

The New York legislature has adopted a third type of state takeover statute. *See* N.Y. BUSINESS CORPORATION LAW § 912 (McKinney 1986). The New York statute provides that once a shareholder has acquired more than 20% of the outstanding stock of certain New York corporations, that shareholder may not enter into a business combination with the corporation for five years. *Id.* For example, a raider may obtain more than 20% of a New York corporation's outstanding stock in a tender offer. The raider cannot, however, then approve a second step transaction, such as a merger or share exchange, for a period of five years. *See id.* Moreover, the New York statute requires that after the five-year period expires, a majority of the disinterested shareholders of the corporation must approve the business combination, or the raider must satisfy the New York statute's fair price provision before the business combination can proceed. *Id.*

Maryland was the first state to adopt the fourth common type of post-*Mite* state takeover statute. *See* MD. CORPS. & ASS'NS CODE ANN. § 3-601 to- 3-603 (1985) (Maryland's post-*Mite* takeover statute). Like the VSCA, Maryland's statute imposes supermajority voting requirements on the second step of two-tiered transactions. *Id.* § 3-602; *see* VA. CODE ANN. § 13.1-726 (1985) (VSCA's supermajority voting requirement provision). Connecticut, Kentucky, and Michigan enacted post-*Mite* takeover statutes similar to the Maryland statute. *See* 1984 Conn. Acts § 84-431 (Reg. Sess.) (Connecticut's post-*Mite* takeover statute); KY. REV. STAT. ANN. § 271A.39 to- 271A.399 (Baldwin 1981 & Supp. 1986) (Kentucky's post-*Mite* takeover statute); MICH COMP. LAWS ANN. § 450.1775 to- 1784 (West Supp. 1987) (Michigan's post-*Mite* takeover statute). Although Wisconsin enacted a control share acquisition statute after *Mite*, the Wisconsin takeover statute also contained a supermajority provision similar to the Maryland takeover statute. *See* WIS. STAT. ANN. § 180.725 (West Supp. 1986) (supermajority provision in Wisconsin's post-*Mite* takeover statute).

6. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 1.01 (discussing increased incidence of takeover activity); BUS. WK., Mar. 4, 1985, at 80 (discussing increased numbers of takeover attempts); Wall St. J., Jan. 1, 1986, at 6B, col.1 (discussing corporate takeover activity in 1985).

7. 457 U.S. 624 (1982).

statute as violating the Commerce Clause of the United States Constitution.[8] Since *Mite*, state legislatures have attempted to draft new takeover legislation that avoids the constitutional problems in the Illinois statute.[9] Although federal courts have ruled on the constitutionality of several of the post-*Mite* state takeover statutes,[10] the courts have not considered the constitutionality of a takeover statute that was similar to the ATA.

The ATA restricts a corporate raider's ability to complete a two-tiered, or front-loaded, takeover of a Virginia corporation.[11] In a two-tiered takeover, a raider initiates a cash tender offer for a controlling block of a target company's outstanding shares.[12] After acquiring a majority of the outstanding shares, the raider generally approves a second transaction in which the target corporation merges with a shell corporation set up by the raider.[13] As a result of the merger, the remaining minority shareholders of the target corporation must exchange their shares of the target corporation's stock for stock in the newly formed corporation or other securities.[14] The value of the securities or the stock in the shell corporation, however, generally is substantially less than the cash offered in the original tender offer.[15] A two-

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8. *See Mite*, 457 U.S. at 643; *supra* notes 44-83 and accompanying text (discussing *Mite*) ; U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause). The Commerce Clause of the United States Constitution provides that Congress shall have the power to regulate commerce among the several states. U.S. CONST. art. I, § 8, cl. 3.

9. *See supra* note 5 and accompanying text (noting various new state takeover statutes).

10. *See infra* note 84 (discussing appellate court holdings on constitutionality of post-*Mite* takeover statutes); *infra* notees 85-124 and accompanying text (discussing *CTS* decision).

11. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); *see also supra* note 4 and accompanying text (Virginia legislature intended ATA to restrict two-tiered takeovers).

12. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 1.07[4][c] (describing mechanics of two-tiered takeovers); Scriggins & Clark, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266, 266-67 (1984) (describing operation of two-tiered takeovers).

13. *See* 1 M. LIPTON & E. STEINBERGER, supra note 2, at § 1.07[4][c] (second step of two-tiered takeover generally is merger of target corporation into shell corporation); Scriggins & Clark, *supra* note 12, at 266 (same).

14. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 1.07[4][c] (explaining raider's ability to force remaining shareholders to exchange securities of target company for securities of shell corporation); Scriggins & Clark, *supra* note 12, at 266 (same).

15. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 1.07[4][c] (securities of shell corporation generally have less value than securities in target company). Several recent two-tiered takeovers illustrate the discrepancy between the price raiders offer for a target company's stock in the first-step of the takeover and the consideration the target company's shareholders receive for the company's stock in the second-stage. *Id.* The DuPont Corp. (Dupont) used the two-tiered approach successfully to acquire Conoco, Inc. (Conoco). *Id.* Dupont paid $98 cash for 45% of Conoco's stock in the tender offer phase of the two-tiered takeover. *Id.* After the original tender offer, DuPont offered to the remaining Conoco shareholders 1.7 shares of DuPont stock with a market value on the date of the bid of $77.56 and a market value on the date of exchange of $72.68, in exchange for one share of Conoco stock. *Id.* Similarly, Allegheny International Inc. (Allegheny) used the two-tier technique successfully to acquire Sunbeam Corporation (Sunbeam). *Id.* Allegheny offered $41 cash for 50% of Sunbeam's stock in the original tender offer. *Id.* In the second step of the transaction, Allegheny offered to the remaining minority shareholders of Sunbeam stock in new Allegheny International Corporation worth $29 per share. *Id.*; *see also* Scriggins & Clark, *supra* note 12, at 266-67 (securities of shell corporation generally have less value than securities in target company).

tiered takeover, therefore, coerces shareholders of the target corporation into tendering in the first stage of the takeover when the value of the shareholder's stock is at a premium.[16]

The ATA provides that two-thirds of the disinterested holders of the voting stock of a Virginia corporation must approve any "affiliated transaction" between the corporation and an "interested shareholder" in that corporation.[17] Under the ATA, an interested shareholder is any person

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16. *See* 1 F.H. O'NEAL & R. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 5:26(A) (1986) (discussing coercion inherent in two-tiered takeover). An element of coercion is inherent in a two-tiered takeover because shareholders of the target company recognize that the raider will offer a higher price for the target company's stock in the first step of the takeover than the price offered in the second step merger of the target with the raider's shell company. *Id.* The price discrepancy between the first step and the second step of a two-tiered takeover, in effect, whipsaws or hurries individual shareholders of the target company into tendering their shares in the first step of the takeover. *Id.* Individual shareholders fear that, if they do not tender immediately, enough other shareholders will accept the raider's offer to enable the raider to approve a second-step merger and pay remaining shareholders of the target company less consideration than shareholders who tendered immediately. *Id.* If shareholders of the target company did not tender during the first stage of a two-tiered takeover, the shareholders could force the raider to pay a higher price for the target company's stock in the initial tender offer. *Id.* Because shareholders cannot coordinate their actions, however, a raider can pay less to acquire a target company. *Id. See also* Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF. L. REV. 1073, 1118 (1983) (discussing coercion inherent in two-tiered takeovers); Brudney & Chirlestein, *A Restatement of Corporate Freezouts*, 87 YALE L. REV. 1354, 1360-62 (1978) (same); Greene & Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. PA. L. REV. 647, 679 (1984) (same); Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964, 1966 (1984) (same).

The Securities and Exchange Commission (SEC) recently adopted a regulation intended to curb the coercive nature of two-tier takeover bids. *See* 17 C.F.R. § 240.14d-8 (1983) (Rule 14d-8) (SEC's regulation on two-tiered takeovers). Rule 14d-8 provides that a raider must accept, on a pro rata basis, shares tendered for the duration of a tender offer. *Id.* Prior to Rule 14d-8, a raider had to accept pro rata only those shares tendered within 10 calendar days of the offer's commencement. *See* 15 U.S.C. § 78n(d)(6) (1981). The SEC enacted Rule 14d-8 to provide all shareholders of a target company time to tender the shareholders stock. *See* Comment, *The Front-End Loaded, Two-Tiered Tender Offer*, 78 NW. U. L. REV. 811, 812-14 (1983) (discussing Rule 14d-8 and its effect on two-tiered bids).

17. VA. CODE ANN. § 13.1-726 (1985) (voting requirements for affiliated transactions). The requirement under the ATA that 2/3 of the disinterested shareholders of a Virginia corporation must approve any affiliated transaction applies in addition to, not in lieu of, other voting provisions in the VSCA. *See id.* § 13.1-718 (VSCA's voting provision governing mergers outside ATA); Murphy, *The New Virginia Stock Corporation Act: A Primer*, 20 U. RICH. L. REV. 67,125 (1985) (ATA's 2/3 voting requirement applies in addition to other voting provisions in VSCA). For example, if a Delaware corporation owned 51% of a Virginia corporation's stock and wanted to merge the Virginia corporation into the Delaware corporation, § 13.1-718 of the VSCA would require that 2/3 of the Virginia corporation's voting stock approve the transaction, including the 51% owned by the Delaware corporation. *See* VA. CODE ANN. § 13.1-718 (1985) (VSCA voting provision on mergers and share exchanges); Murphy, *supra*, at 125 (giving example of merger provisions of VSCA). In addition to the VSCA's requirment that 2/3 of the shares entitled to vote under § 13.1-718 of the VSCA approve the merger, the ATA would require that 2/3 of the disinterested 49% also approve the transaction. VA. CODE ANN. § 13.1-718 (1985) (VSCA voting provision on mergers and share exchanges). *See id.* § 13.1-726 (ATA's voting provisions for certain mergers and similar transactions).

beneficially owning more than ten percent of a Virginia corporation's outstanding stock.[18] The ATA defines an affiliated transaction to include any merger of a Virginia corporation with an interested shareholder, or any share exchange in which an interested shareholder acquires one or more classes or series of voting stock of the corporation.[19] This aspect of the definition of affiliated transaction hinders the second step of a typical two-tiered takeover in which a raider attempts to merge the target corporation with a shell corporation.[20] The definition hinders the second step of a two-tiered takeover because the ATA requires that two-thirds of a target company's disinterested shareholders approve a merger with an interested shareholder, as opposed to the VSCA's usual requirement that two-thirds of all shareholders approve mergers or similar transactions with a noninterested shareholder.[21]

In addition to mergers with interested shareholders and certain share exchanges, the ATA's definition of affiliated transaction includes any sale, lease, exchange, mortgage, pledge, transfer, or other disposition of a Virginia corporation's assets to an interested shareholder.[22] The ATA limits coverage under this aspect of the definition to transactions that are out of the ordinary course of the corporation's business and that dispose of five percent or more of the corporation's assets during any twelve-month period.[23] This definitional provision prevents a raider from approving a transaction designed to squeeze the target company's minority shareholders out of the corporation without first obtaining approval for the transaction from two-thirds of the disinterested shareholders.[24] For example, without

18. *Id.* § 13.1-725 (defining interested shareholder). An interested shareholder under the ATA is any person beneficially owning more than 10% of a Virginia corporation's outstanding stock, except the corporation, the corporation's subsidiaries, or the corporation's employee stock ownership and benefit plans. *Id.* Under the ATA, a person is a beneficial owner of voting shares to which such person and such person and such person's affiliates and associates, individually or in the aggregate, have or share directly or indirectly voting power or investment power or the right to acquire voting or investment power. *Id.* The ATA's definition of beneficial owner prohibits a shareholder of a Virginia corporation from setting up related but separate entities to avoid application of the ATA. *See* Goolsby & Whitson, *Virginia's New Corporate Code*, 19 REV. SEC. & COMMODITIES REG. 147, 148 (1986)) (ATA's definition of beneficial owner prevents shareholder from avoiding application of ATA).

19. VA. CODE ANN. § 13.1-725 (1985).

20. *See id.* (ATA's definition of affiliated transaction); Scriggins & Clark, *supra* note 12, at 275 (explaining effect of Maryland takeover statute's definition of business combination which parallels ATA's definition of affiliated transaction); *see also supra* note 5 and accompanying text (ATA parallels Maryland's takeover statute, which imposes supermajority voting requirements on mergers and similar transactions).

21. *See* VA. CODE ANN. § 13.1-726 (1985) (ATA's 2/3 voting requirement for affiliated transactions); *id.* § 13.1-718 (VSCA's requirement that 2/3 of all shareholders must approve mergers with disinterested shareholders).

22. *Id.* § 13.1-725.

23. *Id.*

24. *Id.; see* Scriggins & Clark, *supra* note 12, at 275-76 (explaining effect of provision in Maryland's takeover statute, which, like the ATA, defines a business combination to include any sale, lease, or exchange).

the ATA, a raider could buy all of a target company's assets, liquidate the assets, and thus leave no corporation in which shareholders can hold stock.[25]

The ATA's definition of affiliated transaction similarly includes a sale or other disposition by a Virginia corporation to an interested shareholder of more than five percent of the voting shares of the corporation.[26] The ATA determines whether the sale or other disposition meets the definition's five percent requirement by aggregating all transactions occurring during any twelve-month period.[27] After acquiring control of a Virginia corporation, therefore, a raider cannot attempt to first offer for sale and then buy the corporation's authorized but unissued stock without the approval of two-thirds of the corporation's disinterested shareholders.[28] Accordingly, the ATA restricts a raider's ability to obtain two-thirds of a Virginia corporation's stock by buying previously unissued stock of the corporation.[29] Although owning two-thirds of a Virginia corporation's stock does not permit an interested shareholder to approve an affiliated transaction, the interested shareholder can sell the stock to a third party ally who then might vote to approve the affiliated transaction.[30]

The ATA contains several exceptions to the requirement that two-thirds of the disinterested shareholders of a Virginia corporation must approve any affiliated transaction.[31] For example, the ATA provides that approval of an affiliated transaction by a majority of the disinterested directors of a Virginia corporation preempts the need for an affirmative vote of two-thirds of the corporation's disinterested shareholders.[32] This exception allows

25. *See* Scriggins & Clark, *supra* note 12, at 275 (explaining effect of provision in Maryland's takeover statute, which, like the ATA, defines business combination to include any sale, lease, or exchange).

26. VA. CODE ANN. § 13.1-725 (1985). The definition under the ATA of affiliated transaction also includes the reclassification of securities or any corporate reorganization that increases by more than five percent the percentage of stock held by an interested shareholder who was not an interested shareholder for at least five years prior to the transaction. *Id.* The definition of affiliated transaction additionally includes the dissolution of a Virginia corporation if an interested shareholder proposes the dissolution. *Id.*

27. *Id.*

28. *See id.* § 13.1-726 (2/3 of corporation's disinterested shareholders must approve affiliated transactions); Scriggins & Clark, *supra* note 12, at 276 (explaining effects of provision in Maryland's takeover statute, which, like the ATA's definition of affiliated transaction, defines business combination to include sale or other disposition of a Maryland corporation's assets).

29. *See* VA. CODE ANN. § 13.1-725 (1985) (ATA's definition of affiliated transaction restricts sale of Virginia corporation's voting stock).

30. *See id.* § 13.1-726 (requiring that 2/3 of disinterested shareholders approve affiliated transactions). Acquiring 2/3 of a Virginia corporation's voting stock does not allow a raider to approve an affiliated transaction because only the votes of disinterested shareholders count in the decision to approve an affiliated transaction. *Id.*

31. *See infra* notes 32-41 and accompanying text (discussing exceptions in ATA to 2/3 voting requirement).

32. VA. CODE ANN. § 13.1-727 (1985). The ATA defines a disinterested director as any member of the board of directors of a Virginia corporation who was a board member before

a board of directors to avoid any application of the statute to an unintended situation.[33] For example, the disinterested director exception allows a board of directors of a Virginia corporation to approve a friendly[34] acquisition of the corporation through a tender offer and merger, or merger alone, without triggering the ATA's disinterested shareholder voting rules.[35]

In addition to the ATA's disinterested director exception, the ATA exempts from the two-thirds voting requirement any interested shareholder complying with the ATA's fair price exception.[36] The ATA's fair price exception requires that, to escape the two-thirds voting requirement, a raider must pay the shareholders of each class or series of voting stock who did not tender in the first phase of a two-tiered takeover the fair value of their shares.[37] The ATA's fair price exception ensures that shareholders receive

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the later of January 1, 1985 or the determination date. *Id.* § 13.1-725. The ATA defines determination date as the date a shareholder of a Virginia corporation becomes an interested shareholder. *Id.*; *see supra* note 18 and accompanying text (ATA's definition of interested shareholder). Additionally, the ATA provides that any member of the board of directors elected with the approval of a majority of the disinterested directors then on the board is a disinterested director. VA. CODE ANN. § 13.1-725 (1985). A Virginia corporation can opt out of the ATA's definition of disinterested director by so stating in the corporation's articles of incorporation. *Id.*

33. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (disinterested director exception prevents application of ATA to unintended situations).

34. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 1.01[2] (describing friendly takeover). In a friendly takeover a raider and a target company's management negotiate the final terms of the takeover offer, including the amount and nature of the consideration paid to shareholders of the target company. *Id.*

35. *See* VA. CODE. ANN. § 13.1-726 (1985) (ATA's 2/3 disinterested shareholder voting requirement for affiliated transactions); *id.* § 13.1-727 (ATA's disinterested director exception to 2/3 disinterested shareholder voting requirement); *see also* Murphy, *supra* note 17, at 126 & n.154 (noting that ATA's disinterested director exception allows directors to escape special voting requirements in typical friendly mergers).

36. *See* VA. CODE ANN. § 13.1-727 (1985) (fair price exception to ATA's 2/3 voting requirement).

37. *See id.* (ATA's fair value exception to ATA's 2/3 voting requirement). Prior to invoking the ATA's fair price exception, an interested shareholder must comply with certain procedural requirements intended to prevent self-dealing or manipulation of the market price of the corporation's shares. *Id.*; *see* Goolsby & Whitson, *supra* note 18, at 149 (explaining ATA's procedural prerequisites to invoking fair price exception). The ATA's fair price exception only applies to a target corporation that has paid or has not reduced the rate of periodic dividends since the interested shareholder became an interested shareholder. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (application of ATA's fair price exception depends on rate of target corporation's dividend payments). In addition, to qualify for the ATA's fair price exception, the interested shareholder must not have obtained beneficial ownership of any additional voting shares since becoming an interested shareholder. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (application of ATA's fair price exception dependent on whether interested shareholder obtained beneficial ownership of additional voting shares). The ATA also provides that to qualify for the fair price exception, the interested shareholder must not have received any loans or other financial assistance or tax advantage from the corporation since becoming an interested shareholder. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (application of ATA's fair price exception dependent on whether interested shareholder received loans or

either the same dollar value as the interested shareholder paid for other shares of the same class during the two-year period preceding the first public announcement of the proposed affiliated transaction, or the fair value of the shares on the date the affiliated transaction is announced to the public.[38]

The ATA also exempts from the two-thirds voting requirement any affiliated transaction with an interested shareholder who already owns ninety percent of a Virginia corporation's outstanding voting shares or who has held eighty percent of the outstanding voting shares for at least five years.[39]

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other financial assistance). The ATA additionally requires that shareholders of the target company receive a proxy or information statement describing the affiliated transaction 25 days before consummating the affiliated transaction. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (under ATA interested shareholder required to prepare an information statement for shareholders of the target company). The ATA allows a majority of a target company's disinterested directors to forego these procedural requirements by so stating in the company's articles of incorporation. VA. CODE ANN. § 13.1-727 (1985); *see* Goolsby & Whitson, *supra* note 18, at 149 (target company's disinterested directors can opt out of ATA's procedural requirements).

38. *See* VA. CODE ANN. § 13.1-727 (1985) (defining fair value under ATA). The ATA specifically defines fair value for shares other than preferred shares as an amount at least equal to the greater of: (a) the highest per share price paid by the interested shareholder in acquiring voting shares during the two-year period (Preannouncement Period) before the date of the first public announcement of the proposed affiliated transaction (Announcement Date) or, if greater, in the transaction in which it became an interested shareholder; or (b) the fair market value per share on the Announcement Date or, if greater, on the date on which such person became an interested shareholder (Determination Date); or (c) the fair market value calculated under clause (b) times the highest premium the interested shareholder has paid in acquiring any voting shares in the Preannouncement Period. *Id.* The commentary on the Code Commission Report proposing the VSCA offers a helpful example of the application of the fair value provision. *See* CODE COMMISSION REPORT, *supra* note 1, at 69-70 (comments of the Virginia Bar Association/Virginia State Bar Title 13.1 Joint Bar Committee on Code Commission Report). The commentary on the Code Commission Report provided an example of how the ATA's fair value provision works. *Id.* at 70. The Code Commission's example assumed that an interested shareholder paid cash for nonpreference voting shares of a Virginia corporation. *Id.* The highest price paid by the interested shareholder during the Preannouncement Period was $35 per share, and the fair market value of the voting shares on the date of the interested shareholder's first purchase, on the Determination Date, and on the Announcement Date was $30, $32, and $40, respectively. *Id.* According to the Code Commission's example, the ATA's fair value exception would entitle the remaining shareholders of the target corporation to the amount per share in cash equal to the highest of: (a) $35 (the highest price paid); (b) $40 (fair market value on the Announcement Date); or (c) $46.67 (fair market value on the Announcement Date of $40 times a premium of 1.17, calculated by dividing $35 by $30). *Id.*; *see* VA. CODE ANN. § 13.1-727 (1985) (ATA's fair value exception). Accordingly, under the Code Commission's example, a raider must pay $46.67 to the shareholders of the target corporation to escape the ATA's 2/3 voting requirement. CODE COMMISSION REPORT, *supra* note 1, at 69-70; *see* VA. CODE ANN. § 13.1-726 (1985) (ATA's 2/3 voting requirement).

39. VA. CODE ANN. § 13.1-727 (1985) (allowing exception to 2/3 voting requirement for 90% and 80% shareholders). In drafting the ATA's 90% and 80% exception to the 2/3 voting requirement, the Virginia General Assembly may have realized that even if a raider's tender offer for the stock of a target company is well-priced, not every shareholder of the target company will tender. *See id.* (allowing exception to 2/3 voting requirement for 90% and 80%

The two-thirds voting requirement is similarly inapplicable, under the ATA, to any Virginia corporation with less than three hundred shareholders of record over the last three years, or to any investment company registered under the Investment Company Act of 1940.[40] Moreover, any Virginia corporation can opt out of coverage under the ATA by so providing in the corporation's articles of incorporation.[41]

Courts have not addressed the constitutionality of the ATA's restriction on a corporate raider's ability to complete the second step of a two-tiered takeover. The United States Supreme Court's decision in *Edgar v. Mite Corp.*,[42] however, is the benchmark for determining the constitutionality of a state takeover statute.[43] In *Mite* the United States Supreme Court considered the constitutionality of Illinois' takeover statute.[44] The Illinois statute required that a raider who offered to acquire more than five percent of a target company's stock register the tender offer with the Illinois Secretary of State.[45] The Illinois statute defined a target company as a corporation in which shareholders located in Illinois owned ten percent of the stock subject to a takeover offer.[46] The Illinois statute further provided that a tender offer became registered twenty days after the filing of a registration statement with the Secretary of State.[47] Additionally, if a majority of the target company's outside directors or shareholders owning ten percent of the stock subject to the offer requested a hearing, the Illinois statute required the Secretary to hold a hearing.[48] During the twenty-day period between the filing of the registration statement and the actual registration of the tender

shareholders); Goolsby & Whitson, *supra* note 18, at 150 (well-priced tender offer does not draw all shares into tender offer pool). Because a well-priced tender offer may not draw all shares into the tender offer pool, the ATA provides that a raider who acquires 90% or who holds 80% of a target company's stock for five years is entitled to complete the acquisition without complying with the 2/3 voting requirement. *See* VA. CODE ANN. § 13.1-727 (1985) (ATA's 90% and 80% exception to 2/3 voting requirement); Goolsby & Whitson, *supra* note 18, at 150 (explaining unfairness of applying ATA's 2/3 voting requirement to 90% or 80% shareholders).

40. VA. CODE ANN. § 13.1-727 (1985); *see* 15 U.S.C. § 80a-1 to b-21 (1984) (Investment Company Act of 1940).

41. VA. CODE ANN. § 13.1-728 (1985). The ATA permits a Virginia corporation to escape the ATA's coverage if 2/3 of the disinterested shareholders of the corporation approve an amendment to the corporation's articles of incorporation providing that the ATA is inapplicable to that corporation. *Id.*

42. 457 U.S. 624 (1982).

43. *See infra* notes 44-83 and accompanying text (discussing *Mite*).

44. *Id.*; *see* ILL. REV. STAT. ch. 121.5, para. 137.51 to- 137.70 (1979) (repealed 1983) (Illinois takeover statute in *Mite*).

45. *Edgar v. Mite Corp.*, 457 U.S. 624, 626-27 (1982); *see* ILL. REV. STAT. ch. 121.5, para. 137.54.A (1979) (repealed 1983) (tender offer registration requirement).

46. *Mite*, 457 U.S. at 627; *see* ILL. REV. STAT. ch. 121.5, para. 137.52-10 (1979) (repealed 1983) (defining target company).

47. *Mite*, 457 U.S. at 627; *see* ILL. REV. STAT. ch. 121.5, para 137.54E (1979) (repealed 1983) (profiding when registration occurs).

48. *Mite*, 457 U.S. at 627; *see* ILL. REV. STAT. ch. 121.5, para 137.57.A (1979) (repealed 1983) (Secretary must call hearing at request of minority of outside directors of certain Illinois shareholders).

offer, the Illinois statute also allowed the Secretary of State to call a hearing to adjudicate the fairness of the offer.[49] The Illinois statute permitted the Secretary of State to veto an offer the Secretary considered unfair to protect the shareholders of the target company.[50]

In *Mite*, Mite Corporation (Mite), a Delaware corporation with principal offices in Connecticut, initiated a cash tender offer for all outstanding shares of Chicago Rivet & Machine Company (Chicago Rivet), an Illinois corporation, by filing a Schedule 14D-1 with the Securities and Exchange Commission (SEC) in compliance with the Williams Act.[51] Mite did not register its takeover offer with the Illinois Secretary of State, however, and thus failed to comply with the Illinois statute.[52] Mite subsequently filed a complaint in the United States District Court for the Northern District of Illinois seeking a declaratory judgement that the Williams Act pre-empted the Illinois statute and that the statute violated the Commerce Clause of the United States Constitution.[53] Additionally, Mite sought a preliminary

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49. *Mite*, 457 U.S. at 627; *see* ILL. REV. STAT. ch. 121.1, para. 137.57.A (1979) (repealed 1983) (providing Secretary with power to call hearing on fairness of offer).

50. *Mite*, 457 U.S. at 627, *see* ILL. REV. STAT. ch. 121.5, para. 137.57.E (1979) (repealed 1983) (allowing Secretary to deny registration for unfair tender offer).

51. *Mite*, 457 U.S. at 627. *See* 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981) (Williams Act). In *Mite*, Mite's Schedule 14D-1 indicated that Mite's offering price for all outstanding shares of Chicago Rivet was $28 per share, which was four dollars above the prevailing market price. *Mite*, 457 U.S. at 627-28.

In 1968 Congress enacted the Williams Act, which added §§ 13(d), 13(e), and 14(d)-(f) to the Securities Exchange Act of 1934 ('34 Act). *See* Pub. L. No.90-439, 82 Stat. 454-57 (1968) (Williams Act amendment to Securities Exchange Act of 1934). Sections 14(d) and 14(e) of the '34 Act impose regulations on tender offers. *See* 15 U.S.C. § 78n(d) (1981) (§ 14 of '34 Act). Section 14(d)(1) of the '34 Act requires a raider seeking to obtain more than five percent of any class of equity security through a tender offer first to file a Schedule 14D-1 with the Securities and Exchange Commission. *Id.* A Schedule 14D-1 is a statement requiring disclosure of material information on the bidder and the bid, including the number of shares the offeror is seeking and the price the offeror will pay for the shares, and requiring disclosure of other information if the information is material to a decision on the tender offer by the target's shareholders. *Id.* Section 14(d)(1) also requires an offeror to publish or send a statement of the relevant facts contained in the Schedule 14D-1 to the target company's shareholders. *Id.* The Williams Act requires that tender offers remain open for not less than 20 business days. 17 C.F.R. 240.14e-1(a) (1987). The Williams Act permits investors who tender their shares to withdraw the shares during the first 15 days of the offer or at any time after 60 days from the commencement of the offer if the offeror has not yet purchased them. 15 U.S.C. § 78n(d)(5) (1981). If a tender offer is for less than all of the outstanding shares of a target company, and the target company's shareholders tender more than the requested shares, the Williams Act requires the offeror to purchase the shares on a pro rata basis. *Id.* § 78n(d)(6).

In addition to imposing requirements on tender offers, § 14(d) of the '34 Act requires that an offeror disclose any plans for a second-step transaction involving the target company in the offeror's Schedule 14d-1. *Id.* § 78n(d). In addition, § 14(e) of the '34 Act proscribes material misstatements, misleading omissions, and fraudulent or manipulative acts in connection with any tender offer regardless of whether the offeror will obtain ownership in more than five percent of the target company's stock. *Id.* § 78n(e).

52. *Mite*, 457 U.S. at 628.

53. *Id.*

injunction prohibiting the Illinois Secretary of State from enforcing the Illinois statute against Mite.[54] The district court enjoined the Illinois Secretary of State from enforcing the Illinois statute against Mite's tender offer for the shares of Chicago Rivet.[55] The district court later found that the Williams Act pre-empted the Illinois statute and that the statute violated the Commerce Clause.[56] The United States Court of Appeals for the Seventh Circuit upheld the district court's Williams Act and Commerce Clause holdings.[57] The Illinois Secretary of State appealed the Seventh Circuit's ruling to the United States Supreme Court.[58]

In considering the constitutionality of the Illinois statute, the Supreme Court in *Mite* first examined whether the Illinois statute frustrated the objectives of the Williams Act and, therefore, violated the Supremacy Clause of the United States Constitution.[59] The Supreme Court in *Mite* noted that Congress drafted the Williams Act to protect investors by requiring raiders to furnish detailed tender offer information to the SEC, the target company,

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54. *Id.* In *Mite,* Chicago Rivet responded to Mite's request for a preliminary injunction by bringing suit in Pennsylvania, where Chicago Rivet conducted business, to enjoin Mite's tender offer. *Id.* Chicago Rivet argued that Mite's tender offer violated Pennsylvania's takeover statute. *Id.*; *see* PA. STAT. ANN. tit. 70, § 71 to- 85 (Purdon Supp. 1986). In addition to filing suit in Pennsylvania state court, Chicago Rivet filed a complaint with the Pennsylvania Securities Commission (Commission) requesting that the Commission enforce Pennsylvania's takeover statute against Mite. *Mite,* 457 U.S. at 628 & n.3. The Commission rejected Chicago Rivet's request and, subsequently, the United States District Court for the Western District of Pennsylvania, to which Mite had removed the state court action, denied Chicago Rivet's request for an injunction. *Id.*

55. *Mite,* 457 U.S. at 629. In *Mite,* after the Illinois district court enjoined the Illinois Secretary of State from enforcing the Illinois statute against Mite, Mite published the tender offer for $28 per share in the Wall Street Journal. *Id.*; *see* Wall St. J., Feb. 5, 1979, at 3. On the same day, Chicago Rivet offered $30 per share for 40% of Chicago Rivet's outstanding stock. *Mite,* 457 U.S. at 629.

56. *Mite,* 457 U.S. at 629. After the Illinois district court entered final judgement against Chicago Rivet and the Illinois Secretary of State in *Mite,* Mite and Chicago Rivet entered into an agreement withdrawing Mite's tender offer and Chicago Rivet's tender offer for its own stock, and allowing Mite 30 days to examine Chicago Rivet's books and records. *Id.* The agreement provided that Mite either would tender an offer of $31 per share, which Chicago Rivet would not oppose, or that Mite would tender no offer. *Id.* at 629-30. Mite decided not to make a tender offer. *Id.* at 630.

57. *Id.*; *see Mite Corp v. Dixon,* 633 F.2d 486 (7th Cir. 1980) (Seventh Circuit's decision). In addition to upholding the district court's Supremacy Clause and Commerce Clause holdings, the United States Court of Appeals for the Seventh Circuit in *Mite* found that the case was not moot even though Mite decided ultimately not to make a tender offer for the shares of Chicago Rivet. *Id.* The Seventh Circuit explained that reversing the district court's judgement would expose Mite to civil and criminal liability because Mite violated the Illinois Act by making the tender offer and, therefore, the case was not moot. *Id.* The United States Supreme Court agreed with the Seventh Circuit that the case was not moot. *Id.*

58. *See Mite,* 457 U.S. at 624 (1982) (Supreme Court's decision in *Mite*); *see infra* notes 59-83 and accompanying text (discussing Supreme Court's decision in *Mite*).

59. *Mite,* 457 U.S. at 630; *see* U.S. CONST. art. VI, cl. 2 (federal constitution and statutes are supreme law of land).

and the shareholders of the target company.[60] The Supreme Court in *Mite* recognized that Congress intended the Williams Act to protect investors without favoring either the target company's management or the raider.[61] Three Justices of the Court in *Mite* found, however, that the Illinois statute's twenty-day preregistration notification requirement, a provision not found in the Williams Act, violated the Supremacy Clause.[62] The three Justices found that unlike the Williams Act, the Illinois statute's twenty-day registration period unduly favored management of target companies over raiders by permitting a target company time to defeat a tender offer.[63] Additionally, the three Justices maintained that, by allowing the Secretary of State to veto a tender offer that the Secretary considered unfair, the Illinois statute upset the Williams Act's policy of allowing investors freedom to accept or reject tender offers.[64] The three Justices found, therefore, that the Illinois statute violated the Supremacy Clause.[65]

After considering the Supremacy Clause issue, the Supreme Court in *Mite* considered whether the Illinois statute was constitutional under the Commerce Clause of the United States Constitution.[66] The Supreme Court in *Mite* articulated two distinct parts to its Commerce Clause analysis.[67] The Court in *Mite* first considered whether the Illinois statute violated the Commerce Clause by directly regulating interstate commerce.[68] The Court explained that Mite was a Delaware corporation and that, accordingly, Mite's tender offer to Chicago Rivet's shareholders located in Illinois and across the country, if accepted, constituted an interstate transaction.[69] Four Justices of the Supreme Court in *Mite* found that the Illinois statute prevented Mite from consummating the company's tender offer to non-Illinois shareholders of Chicago Rivet.[70] The four Justices held that by

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60. *Mite*, 457 U.S. at 632; *see supra* note 51 and accompanying text (explaining provisions of Williams Act governing tender offers).

61. *Mite*, 457 U.S. at 633.

62. *Id.* 634-36; *see* ILL. REV. STAT. ch. 121.5, para. 137.54.E (1979) (repealed 1983) (20-day registration for tender offers).

63. *Mite*, 457 U.S. at 635; *see* ILL REV. STAT. ch. 121.5, para 137.54.E (1979) (20-day registration requirement for tender offers).

64. *Mite*, 457 U.S. at 639-40. Comprising the plurality on the Supremacy Clause issue, Justices White, Burger, and Blackmun found that the Illinois statute violated the Supremacy Clause. *Id.* Justices Powell and Stevens found that the Williams Act policy of neutrality did not prohibit state legislation designed to specially protect incumbent management. *Id.* at 646-47, 655. Justices Powell and Stevens found, therefore, that the Illinois statute did not violate the Supremacy Clause. *Id.* Justice O'Connor found that the Illinois takeover statute violated the Commerce Clause of the United States Constitution and did not reach the Supremacy Clause issue. *Id.* at 655. Justices Marshall, Brennan, and Rehnquist dissented from the Court's entire opinion. *Id.* at 655-66.

65. *Id.* at 634-40.

66. *Id.* at 640; *see* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate interstate commerce).

67. *Mite*, 457 U.S. at 640.

68. *Id.* at 641-43; *see* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

69. *Mite*, 457 U.S. at 641-42.

70. *Id.* at 642.

preventing Mite from completing interstate tender offers, the Illinois statute placed a direct burden on interstate commerce and violated the Commerce Clause.[71]

The Supreme Court in *Mite* explained that even if the Illinois statute did not directly burden interstate commerce, under the second prong of the Court's Commerce Clause analysis the Illinois statute may have placed an impermissible indirect burden on interstate commerce.[72] The Court noted that indirect state regulation of interstate commerce is constitutional only if the burden on commerce is not excessive in relation to the local interests that the state statute serves.[73] The Secretary of State of Illinois argued that the Illinois statute furthered two legitimate local interests.[74] The Secretary claimed that the Illinois statute protected Illinois shareholders and regulated the internal affairs of companies incorporated in Illinois.[75] The Supreme Court in *Mite* explained, however, that the Illinois statute protected nonresident shareholders and, although Illinois had an interest in protecting resident shareholders, the state had no legitimate interest in protecting nonresidents.[76] Moreover, the Supreme Court in *Mite* found that the Illinois statute's twenty-day registration period did not provide more protection for Illinois shareholders than the protection provided by the Williams Act and did not increase, therefore, the shareholder's ability to make informed decisions.[77] The Court in *Mite* also rejected the Secretary of State's argument that the Illinois statute permissibly regulated the internal affairs of Illinois corporations.[78] The Court explained that tender offers generally involve

71. *Id.* Justices White, Burger, Stevens, and O'Connor found in *Mite* that the Illinois statute directly burdened interstate commerce. *Id.* at 625.

72. *Id.* at 643.

73. *Id.* The Supreme Court in *Mite* followed the Court's decision in *Pike v. Bruce Church, Inc.* to formulate the second prong of the *Mite* Court's Commerce Clause test. *Id.*; *see* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (formulating two-part test to determine constitutionality of state regulation of interstate commerce).

74. *Mite*, 457 U.S. at 644; *see infra* text accompanying note 75 (describing Secretary's argument supporting Illinois statute).

75. *Mite*, 457 U.S. at 644.

76. *Id.* In addition to finding that the Illinois statute protected nonresident shareholders, the Supreme Court in *Mite* noted that the Illinois statute exempted an Illinois corporation's acquisition of the corporation's own shares from coverage. *Id.* The Supreme Court in *Mite* noted the inconsistency in allowing Chicago Rivet potentially to harm resident shareholders by making a tender offer for its own shares without complying with the Illinois statute, yet requiring other offerors to comply with the statute. *Id.*

77. *Id.* at 644-45. The Supreme Court in *Mite* noted that the disclosures that the Illinois statute required and the timing provisions of the Illinois statute, which went beyond the disclosures and timing provisions of the Williams Act, did not enhance substantially a shareholder's ability to make informed decisions. *Id.* at 645. *See* ILL. REV. STAT., ch. 121.5, para 137.54.E, 137.59.C, 137.59.D, 137.59.E (1979) (repealed 1983) (20-day registration, withdrawal, proration, and equal consideration rights requirements); 15 U.S.C. § 78n(d)(5), to -(d)(7) (1981) (Williams Act provisions governing withdrawal, proration, and equal consideration rights); 17 C.F.R. 240.14e-1(a) (1981) (Williams Act provision requiring tender offers to remain open for 20 days).

78. *Mite*, 457 U.S. at 645.

transfers of stock from stockholders to a third party.[79] The Court maintained that because tender offers involve parties from outside the corporation, tender offers do not involve only the target company's internal affairs.[80] The Supreme Court in *Mite* also noted that the Illinois statute regulated tender offers for any corporation in which Illinois residents held ten percent of the outstanding shares.[81] The Court in *Mite* found that because the Illinois statute potentially applied to companies incorporated in another state, the Secretary's internal affairs argument was untenable.[82] A majority of the Supreme Court in *Mite* held, therefore, that the Illinois statute excessively burdened interstate commerce in relation to the local interests served by the statute and thus was unconstitutional under the Commerce Clause.[83]

In response to *Mite* many state legislatures drafted new corporate takeover statutes.[84] The United States Supreme Court recently has ruled on the

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79. *Id.*

80. *Id.* The internal affairs of a corporation are the relations between shareholders, directors, and officers of the corporation, as opposed to external affairs, which pertain to transactions between the corporation and the rest of the world. *See* Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3, 16-17 (1985) (explaining internal affairs doctrine).

81. *Mite*, 457 U.S. at 645.

82. *Id.* at 645-46.

83. *Id.* at 646. Although Justice Powell concurred in *Mite* with the holding that the Illinois statute was unconstitutional under the second part of the Court's Commerce Clause analysis, Justice Powell concurred because he felt the holding allowed some state regulation of tender offers. *Id.*

84. *See supra* note 5 and accompanying text (noting new state takeover legislation). In *Cardiff Acquisitions, Inc. v. Hatch* the United States Court of Appeals for the Eighth Circuit considered the constitutionality of Minnesota's takeover statute. Cardiff Acquisitons, Inc v. Hatch, 751 F.2d 906 (8th Cir. 1984); *see* MINN. STAT. 80B.01 to- B.13 (1986) (Minnesota takeover statute). In *Cardiff* the Minnesota statute governed any tender offer to purchase stock of a target company from Minnesota residents, which offer would allow the offeror to own more than 10% of any class of stock of the target company. MINN. STAT. § 80B.01(8) (1986). If Minnesota shareholders owned 20% of a corporation's stock and the corporation had "substantial assets" in Minnesota, the Minnesota statute classified the corporation as a target company. *Id.* § 80B.01(9). The Minnesota statute required that prior to commencing a tender offer, an offeror must file a registration statement detailing information about the tender offer with the Minnesota Commissioner of Commerce (Commissioner). *Id.* § 80B.03(2), (6). The Minnesota statute required an offeror to include in the registration statement information on the effect of a takeover on the target company's operations, employees, suppliers, customers, and the community at large. *Id.* § 80B.03(6)(c). Under the Minnesota statute, the Commissioner had three days after the filing of the registration statement to suspend the tender offer for Minnesota residents if the registration statement was insufficient. *Id.* § 80B.03(4)(a). The Minnesota statute provided that within 10 calendar days of the suspension of the registration statement, the Commissioner must hold a hearing on whether to veto permanently the tender offer. *Id.* § 80B.03(5). The statute further required the Commissioner to determine the ultimate propriety of the tender offer within three calendar days of the hearing, but no more than 16 days after the initial suspension. *Id.*

In *Cardiff*, Cardiff Acquisitions, Inc. and Cardiff Equities Corporation (Cardiff) initiated a tender offer for all outstanding shares of Conwed Corp. *See* Cardiff Acquisitions, Inc. v.

constitutionality of one new state takeover statute. In *Dynamics Corp. of*

Hatch, 597 F. Supp. 1493, 1495 (D. Minn. 1984) (district court opinion). On the same day Cardiff initiated the tender offer, Cardiff also filed a complaint with the United States District Court for the District of Minnesota requesting injunctive relief to prevent the Commissioner from enforcing the Minnesota statute against Cardiff. *Cardiff*, 751 F.2d at 908. The district court held that the Minnesota statute did not violate either the Supremacy or the Commerce Clause and dismissed Cardiff's request for injunctive relief. *Id.* Cardiff appealed the district court's ruling to the United States Court of Appeals for the Eighth Circuit. *Id.*

On appeal the Eighth Circuit first considered whether the Minnesota statute violated the Commerce Clause under *Mite*. *Id.* at 909; *Mite*, 457 U.S. at 640-46. In determining whether the Minnesota statute violated the Commerce Clause under *Mite*, the *Cardiff* court noted that, unlike the Illinois statute in *Mite*, the Minnesota statute did not provide for a preregistration filing period or require the Commissioner in certain circumstances to call a hearing on the fairness of a tender offer. *Cardiff*, 751 F.2d at 910; *see supra* notes 66-83 and accompanying text (discussing Commerce Clause holding in *Mite*). Additionally, the Eighth Circuit noted that, although the Illinois statute in *Mite* potentially governed tender offers from nonresident raiders to out-of-state shareholders, the Minnesota statute in *Cardiff* only suspended tender offers to Minnesota Residents. *Cardiff*, 751 F.2d at 911; *see* MINN. STAT. § 80B.01(8) (1986) (Minnesota statute only applies to Minnesota residents); *supra* notes 45-50 and accompanying text (dicussing Illinois statute in *Mite*). The Eighth Circuit recognized that, moreover, the Minnesota statute, unlike the Illinois statute in *Mite*, did not permit the Commissioner to call a hearing and decide on the substantive fairness of a tender offer. *Cardiff*, 751 F.2d at 911; *see* MINN. STAT. § 80B.01 to -.13 (1986) (no provision in Minnesota statute allowing commissioner to decide on substantive fairness of tender offer); *supra* notes 45-50 and accompanying text (discussing Illinois statute in *Mite*). The Eighth Circuit found, therefore, that the Minnesota statute interjected no delay into the tender offer process and did not unduly favor target management over a raider. *Cardiff*, 751 F.2d at 910-11. The Eighth Circuit held, accordingly, that the Minnesota statute did not place an excessive burden on interstate commerce and, therefore, did not violate the Commerce Clause. *Id.* 910-12.

After determining that the Minnesota statute did not violate the Commerce Clause, the Eighth Circuit considered whether the Minnesota statute violated the Supremacy Clause. *Cardiff*, 751 F.2d at 912; *see* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). Cardiff, the raider, argued that the Minnesota statute conflicted with the Williams Act and, therefore, violated the Supremacy Clause by empowering the Commissioner to suspend tender offers for an inadequate disclosure statement. *Cardiff*, 751 F.2d at 913. The Eighth Circuit found that the Minnesota statute and the Williams Act required disclosure of the same information and, therefore, that the Minnesota statute did not conflict with the Williams Act. *Id.* at 913-14. The *Cardiff* court did note that, unlike the Williams Act, the Minnesota statute required disclosure of the effect of a takeover. *Id.* at 914; *see* MINN. STAT. § 80B.03(6)(c) (1986) (requiring disclosure of effect of takeover). The *Cardiff* court found, however, that requiring disclosure of the effect of a takeover offer supported the Williams Act's policy of protecting a shareholder in a tender offer. *Cardiff*, 751 F.2d at 914. The *Cardiff* court held, therefore, that the Minnesota statute did not violate the Supremacy Clause. *Id.*

In addition to the Eighth Circuit in *Cardiff*, the United States Court of Appeals for the Sixth Circuit has considered the constitutionality of a post-*Mite* state takeover statute. *See* Fleet Aerospace Corp. v. Holderman, 796 F.2d 135, 139 (6th Cir. 1986). *Fleet Aerospace* involved the constitutionality of Ohio's control share acquisition takeover statute. *Id.*; *see supra* note 5 and accompanying text (discussing provisions of Ohio's takeover statute). In *Fleet Aerospace*, Fleet Aerospace Corp. (Fleet) initiated a tender offer for all outstanding shares of Aeronca, Inc. (Aeronca). *Fleet Aerospace*, 796 F.2d at 136. Fleet subsequently filed a complaint with the district court of the Southern District of Ohio requesting that the court enjoin the enforcement against Fleet of Ohio's control share acquisition statute. *Id.* Fleet claimed that the Ohio statute violated the Commerce Clause and the Supremacy Clause of the

America v. CTS Corp.[85] the United States Supreme Court considered the constitutionality of Indiana's post-*Mite* takeover statute.[86] The Indiana statute protected certain target company's from "control share acquisitions."[87] Indiana's takeover statute defined a control share acquisition as an acquisition that would give an acquiror atleast twenty percent, thirty three and one-third percent, or fifty percent of a target company's stock.[88] The statute applied only to Indiana corporations with more than 100 shareholders and whose principal place of business, principal office, or substantial assets were in Indiana.[89] Additionally, the statute required that ten percent, or ten-thousand, of a corporation's shareholders had to reside in Indiana before the statute applied to the corporation.[90] The Indiana

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United States Constitution. *Id.*

In determining the propriety of Fleet's request for injunctive relief, the district court in *Fleet Aerospace* first considered whether the Ohio statute violated the Supremacy Clause. *Fleet Aerospace Corp. v. Holderman*, 637 F.Supp. 742 (S.D. Ohio 1986). The district court found that the Ohio statute delayed the time when an offeror could begin to purchase tendered shares of a target company beyond the time frame of the Williams Act. *Id.* at 756-57. The district court also found that the Ohio statute's provision requiring that shareholders approve any tender offer favored incumbent management of the target company because offerors would not undertake a costly, time consumming proxy fight to ensure the success of a tender offer. *Id.* at 757-58; *see* OHIO REV. CODE ANN. § 1701.831(A) (Page Supp. 1986) (shareholder authorization requirement). Additionally, the district court recognized that by requiring all shareholders of a target company to vote on a tender offer, the Ohio statute conflicted with the Williams Act's policy of allowing an individual investor to decide whether to sell the investor's stock. *Fleet Aerospace*, 637 F. Supp. at 758-59. The district court held, accordingly, that the Ohio statute violated the Supremacy Clause of the United States Constitution. *Id.* at 759; *see* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

After determining that the Ohio statute violated the Supremacy Clause, the district court in *Fleet Aerospace* considered whether the Ohio statute violated the Commerce Clause. *Fleet Aerospace*, 637 F. Supp. at 759. The district court noted that the Ohio statute potentially applied to tender offers not involving a single Ohio resident. *Id.* The district court found, therefore, that the Ohio staute directly regulated interstate commerce and violated the Commerce Clause. *Id.* at 761. The district court also held that under *Mite*, the Ohio statute placed an excessive indirect burden on interstate commerce in relation to the interests the statute served. *Id.* at 761-64; *see supra* notes 72-83 and accompanying text (discussing second prong of *Mite*'s Commerce Clause holding). The district court held that because the Ohio statute placed an excessive indirect burden on interstate commerce, the statute violated the Commerce Clause under the second prong of *Mite*'s Commerce Clause test. *Fleet Aerospace*, 637 F. Supp. at 761-64; *see supra* notes 72-83 and accompanying text (discussing second prong of *Mite*'s Commerce Clause holding). On appeal the Sixth Circuit summarily adopted the district court's reasoning and concluded that the Ohio statute violated the Commerce Clause and the Supremacy Clause of the United States Constitution. *See* Fleet Aerospace Corp. v. Holderman, 796 F.2d 135, 138-39 (6th Cir. 1986).

85. 107 S.Ct. 1637 (1987).

86. *Id.* at 1641-42; *see* IND. CODE 23-1-17-1 to 23-1-54-2 (Supp. 1987) (Indiana Business Corporation Law).

87. IND. CODE § 23-1-42-1 (Supp. 1987); *See supra* note 5 (describing control share acquisition statutes).

88. IND. CODE 23-1-42-1 (Supp. 1987) (Indiana statute's definition of control share).

89. *Id.* 23-1-42-4(a) (Supp. 1987).

90. *Id.*

statute provided that if the acquisition was a control share acquisition and if the acquiror filed an information statement with the target company, the target company's management had fifty days after the acquiror filed the information statement to hold a shareholder meeting to determine whether the acquiror's stock would carry voting rights.[91] The Indiana statute required an affirmative vote by a majority of all shares and a majority of all disinterested shares of the target company prior to giving voting rights to the acquiror.[92] Dynamics Corporation of America (Dynamics), which already owned 9.6 percent of CTS Corporation's (CTS) common stock, initiated a tender offer for the stock of CTS that would have increased Dynamic's holdings of CTS stock to 27.5 percent.[93] Dynamics filed suit in the United States District Court for the Northern District of Illinois to enjoin enforcement of the Indiana statute against Dynamics.[94] The district court held that the Indiana statute violated the Supremacy Clause and the Commerce Clause of the United States Constitution.[95] CTS appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit.[96] The Seventh Circuit also held that the Indiana statute violated the Supremacy Clause and the Commerce Clause.[97] CTS appealed the Seventh Circuit's decision to the United States Supreme Court.

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91. *Id.* § 23-1-42-9.

92. *Id.*

93. *CTS*, 107 S.Ct. at 1642.

94. *Id.*

95. *Id.*; *see Dynamics Corp of America v. CTS Corp.*, 637 F. Supp 389, 406 (N.D. Ill. 1986)(district court decision).

96. *CTS*, 107 S.Ct. at 1643.

97. *CTS*, 794 F.2d at 252; *see supra* notes 87-92 and accompanying text (discussion of Indiana statute). On appeal the Seventh Circuit in *CTS* noted that Indiana's takeover statute required a raider to hold a tender offer open for fifty days, as opposed to twenty-eight days under the Williams Act. *CTS*, 794 F.2d at 251; IND. CODE § 23-1-42-7 (Supp. 1987); 17 C.F.R. 240.14e-1(a) (1987) (regulations implementing the Williams Act that provide for timing of tender offers). The Seventh Circuit reasoned that if Congress enacted the Williams Act to curb hostile takeovers, then state takeover provisions that impose greater burdens on hostile takeovers than the Williams Act, like the Indiana statute's fifty-day requirement, would not conflict with the Williams Act. *CTS*, 794 F.2d at 262. The *CTS* court recognized, however, that Congress intended the Williams Act to evenhandedly protect raiders and management. *Id.* The *CTS* court found that because the Indiana statute, unlike the Williams Act, imposed a delay in the tender offer process and put an acquiror at the mercy of a target company's disinterested shareholders, the Indiana statute favored a target companies management and upset the balance of the Williams Act. *Id.* at 262-63. The *CTS* court held, therefore, that the Indiana statute violated the Supremacy Clause of the United States Constitution. *Id.*; U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

After determining that the Indiana statute violated the Supremacy Clause, the *CTS* court employed the second part of the Supreme Court's Commerce Clause analysis in *Mite* to determine whether the Indiana statute also violated the Commerce Clause by imposing an excessive indirect burden on interstate commerce. *CTS*, 794 F.2d at 263; *see Mite*, 457 U.S. at 643-46 (second prong of *Mite*'s Commerce Clause holding); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *supra* notes 72-83 and accompanying text (discussing second prong of *Mite*'s Commerce Clause holding). The *CTS* court first considered Indiana's interest in

On appeal the Supreme Court in *CTS* first considered whether the Indiana statute conflicted with the Williams Act and thus violated the Supremacy Clause of the United States Constitution.[98] The Supreme Court in *CTS* noted that the Indiana statute required the management of a target company to hold a shareholders' meeting within fifty days after the commencement of a tender offer to determine whether an acquiror's shares will carry voting rights.[99] The Court in *CTS* recognized that because an offeror may not purchase shares until the offeror is certain that the shares will carry voting rights, the Indiana statute potentially could delay the consummation of a tender offer beyond the twenty-day period in the Williams Act.[100] The Supreme Court in *CTS* found, however, that the Indiana statutes' fifty-day provision only delayed an offeror's ability to vote newly acquired stock and did not actually prevent an offeror from purchasing shares of the target company's stock once federal law permitted the purchase.[101] Accordingly, the Court in *CTS* found that the Indiana statute did not conflict with the Williams Act.[102] Additionally, the Supreme Court in *CTS* noted that the Court in *Mite* had found that a state takeover statute should not unreasonably delay a takeover bid.[103] The Court in *CTS* explained that even if the Indiana statute imposed a delay beyond the timing provisions

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regulating tender offers. *CTS*, 794 F.2d at 263. The Seventh Circuit acknowledged that CTS Corp. (CTS) could invoke the Indiana statute if a small fraction of CTS shareholders lived in Indiana, but the Seventh Circuit noted that a vast majority of CTS and Dynamics shareholders resided outside Indiana. *Id.* The Seventh Circuit found that Indiana had no interest in protecting nonresident shareholders of an Indiana corporation from a tender offer. *Id.* The Seventh Circuit found that because many CTS shareholders resided outside Indiana, the Indiana statute improperly impaired Dynamics'ability to transact the tender offer with nonresidents. *Id.* at 263-64. Additionally, the Seventh Circuit noted that CTS presented no evidence that a takeover by Dynamics would reduce the value of CTS or that Indiana residents would benefit from the statute. *Id.* at 264. The *CTS* court found, therefore, that the Indiana statute imposed an excessive indirect burden on interstate commerce. *Id.*

After considering whether the Indiana statute imposed an excessive indirect burden on interstate commerce, the Seventh Circuit considered whether the Indiana statute avoided Commerce Clause problems by permissibly regulating the internal affairs of CTS, as opposed to regulating interstate transactions. *Id.* The Seventh Circuit explained that Indiana had broad power to regulate the internal affairs of Indiana corporations even if Indiana's regulation hindered takeover bids. *Id.* The Seventh Circuit suggested, for example, that Indiana permissibly could establish cumulative voting for the boards of directors of Indiana corporations even though cumulative voting discouraged takeover bids. *Id.* The *CTS* court found, however, that Indiana's statute directly and intentionally affected the interstate market in securities, as opposed to regulating an Indiana corporation's internal affairs. *Id.* The *CTS* court concluded that because the Indiana statute affected the interstate market in securities and imposed an excessive indirect burden on this interstate commerce, the statute violated the Commerce Clause of the United States Constitution. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

98. *CTS*, 107 S.Ct. at 1644.

99. *Id.* at 1646-47.

100. *Id.* at 1647; *see* 17 C.F.R. 240.14e-1(a) (1987) (regulations implementing the Williams Act provide that tender offer must remain open for atleast 20 business days).

101. *CTS*, 107 S.Ct. at 1647.

102. *Id.*

103. *Id.*; *Mite*, 457 U.S. at 639.

in the Williams Act, the statute only would conflict with the Williams Act if the delay was indefinite and unreasonable.[104]

In addition to finding that the Indiana statutes' fifty-day provision did not conflict with the Williams Act, the Supreme Court in *CTS* advanced certain policy reasons for upholding the statute against a Supremacy Clause attack.[105] The Court in *CTS* explained that many state corporate laws limit or delay an offeror's ability to exercise power after the offeror successfully has completed a tender offer.[106] The Court in *CTS* recognized that the courts never have questioned the constitutionality of many of these state statutes that delay an offeror's ability to exercise power after a tender offer.[107] Accordingly, the Supreme Court in *CTS* noted that the Williams Act does not preempt a state takeover statute, like the Indiana statute, merely because the statute delays or limits an offeror's ability to exercise voting power.[108]

After determining that the Indiana statute did not violate the Supremacy Clause, the Supreme Court in *CTS* considered whether the statute violated the Commerce Clause.[109] The Court in *CTS* noted that the Seventh Circuit found that the statute violated the Commerce Clause because the statute hindered tender offers.[110] The Court in *CTS* rejected the Seventh Circuit's finding that the statute hindered tender offers.[111] The Court explained that every state has enacted laws intended to regulate corporate governance but which incidentally affect interstate commerce.[112] The Court in *CTS* explained that states enact laws that regulate corporations to protect shareholders of the corporation and to promote the state's interest in a stable relationship among the persons involved in the corporation.[113] The Court noted, for example, that state corporate laws typically require that a higher percentage

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104. *CTS*, 107 S.Ct. at 1647.

105. *Id.*

106. *Id.*

107. *Id.* at 1648.

108. *Id.*

109. *Id.*

110. *Id.* at 1648; *see supra* note 97 (discussion of the seventh circuit's holding in *CTS*).

111. *CTS*, 107 S.Ct. at 1648-52. The Court in *CTS* first noted that the courts have closely scrutinized state statutes, under the Commerce Clause, that directly discriminate against interstate commerce. *Id.* at 1648. The Court in *CTS* recognized, however, that because the Indiana statute did not impede interstate business more than local business, the statute did not directly discriminate against interstate commerce. *Id.* Similarly, the Court found that the Indiana statute did not impose a greater burden on out-of-state offerors than offerors who resided in Indiana and thus did not discriminate against interstate commerce. *Id.*

The Court in *CTS* also noted that the courts generally have declared state statutes unconstitutional when the statute adversely affected interstate commerce by subjecting an activity to inconsistent regulation. *Id.* The Court noted, however, that under the Indiana statute, the law of only one state would apply to a corporation. *Id.* Because the law of only one state would apply to a corporation under the Indiana statute, the Court in *CTS* found that the statute did not inconsistently regulate a corporation. *Id.*

112. *Id.* at 1649-50.

113. *Id.* at 1650.

of a corporation's shareholders approve a merger as compared to other transactions.[114] State corporate laws also frequently require a corporation to buy a minority shareholder's stock at the stock's fair market value if the shareholder disagrees with a corporate decision and wishes to sell the stock.[115] The Supreme Court in *CTS* explained that the merger and minority shareholder provisions found in most state corporate laws inhibit a corporation from undertaking certain transactions, yet the courts have not found that those provisions violate the Commerce Clause.[116] Accordingly, the Court in *CTS* recognized that a state that creates a corporation can prescribe the powers and rights of the corporation.[117] The Court in *CTS* specifically found that the Indiana statute, which protected shareholders of Indiana corporations, appropriately provided the state of Indiana with the power to regulate the corporate governance of Indiana corporations.[118]

After determining that the state of Indiana permissibly could regulate an Indiana corporation's internal affairs, the Supreme Court in *CTS* addressed Dynamic's argument that Indiana had no legitimate interest in protecting nonresident shareholders.[119] The Court in *CTS* found that Indiana had no interest in protecting nonresident shareholders of nonresident corporations.[120] The Court noted, however, that the Indiana statute applied only to corporations incorporated in Indiana.[121] The Court found that Indiana has a substantial interest in protecting all of the shareholders of an Indiana corporation.[122] Additionally, the Supreme Court in *CTS* noted that because the Indiana statute applied only to corporations with a substantial number of shareholders in Indiana, every application of the statute principally would affect Indiana residents.[123] The Supreme Court in *CTS* found, therefore, that the Indiana statute did not violate the Commerce Clause.[124]

The Supreme Court's analysis in *Mite* and *CTS* suggests that the ATA does not violate the Supremacy or Commerce Clauses.[125] Unlike the Illinois statute in *Mite*, the ATA does not conflict with any provision of the Williams Act and thus does not violate the Supremacy Clause.[126] The

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 1650-51.
118. *Id.* at 1651.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1651-52.
124. *Id.* at 1652.
125. *See Mite*, 457 U.S. at 630-46 (Supreme Court's analysis in *Mite*); *CTS*, 107 S.Ct. at 1644-52 (Supreme Court's analysis in *CTS*); U.S. Const. art. VI, cl.2 (Supremacy Clause); U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); *supra* notes 44-124 and accompanying text (discussing *Mite* and *CTS*).
126. *See* Ill. Rev. Stat. ch. 121.5, para. 137.51 (1979) (repealed 1983) (Illinois takeover statute in *Mite*); Va. Code Ann. § 13.1-725 to -728 (1985) (ATA); *see also supra* note 51 (describing pertinent provisions of Williams Act.)

Williams Act interjects full disclosure requirements and rules of fair play into the actual tender offer process to protect shareholders.[127] Conversely, the ATA regulates the second step of a two-tiered transaction, which typically is a merger of a target company with a shell corporation or a share exchange between the target and the shell.[128] To initiate a two-tiered takeover of a Virginia corporation, therefore, a raider's tender offer must comply with the requirements of the Williams Act and not the ATA.[129] After the raider completes the tender offer, however, the ATA then governs the second step of the two-tiered takeover.[130] Because the ATA and the Williams Act do not regulate the same transaction, the ATA does not offend the provisions of the Williams Act and thus does not violate the Supremacy Clause.[131]

In addition to withstanding scrutiny under the Supremacy Clause, the ATA does not violate the Commerce Clause under the first prong of the Supreme Court's Commerce Clause analysis in *Mite*.[132] In *Mite* a plurality of the Supreme Court found that Illinois' takeover statute directly burdened interstate commerce because the statute prevented a raider from completing an interstate tender offer.[133] The plurality in *Mite* found that the Illinois statute's direct burden on interstate commerce violated the Commerce Clause.[134] The ATA, however, regulates mergers, share exchanges, and similar transactions occurring at the second stage of a raider's two-tiered takeover bid, as opposed to the initial tender offer stage.[135] The ATA does not stop an interstate tender offer or any tender offer and, therefore, avoids placing an impermissible direct burden on interstate commerce.[136]

Although the ATA does not directly burden interstate commerce, a raider may be more reluctant to initiate an initial tender offer for stock of a Virginia corporation if the raider must comply with the provisions of the

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127. *See supra* note 51 (describing pertinent provisions of Williams Act).

128. *See supra* notes 17-41 and accompanying text (explaining provisions and purposes of ATA); *supra* notes 12-16 and accompanying text (explaning two-tiered takeovers).

129. *See supra* note 51 (explaining pertinent provisions of Williams Act).

130. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); *supra* notes 17-41 and accompanying text (explaining provisions of ATA).

131. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause); 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981) (Williams Act); VA. CODE ANN. § 13.1-725 to - 728 (1985) (ATA).

132. *See infra* notes 120-147 and accompanying text (discussing ATA under *Mite* Court's Commerce Clause analysis); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

133. *See Mite*, 457 U.S. at 641-43 (finding that Illinois takeover statute placed direct burden on interstate commerce); *supra* notes 67-71 and accompanying text (discussing first part of *Mite* Court's Commerce Clause analysis).

134. *Mite*, 457 U.S. at 643 (plurality in *Mite* found that by directly regulating interstate commerce, Illinois takeover statute violated Commerce Clause); *see supra* notes 70-71 and accompanying text (discussing plurality's holding on first part of *Mite*'s Commerce Clause analysis).

135. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); *supra* notes 19-30 and accompanying text (explaining transactions subject to ATA).

136. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); *supra* notes 19-30 and accompanying text (explaining transactions subject to provisions of ATA).

ATA to complete the second step of a takeover.[137] If the ATA deters raiders from initiating the tender offer stage of a two-tiered takeover, the ATA may impose an indirect burden on interstate commerce under the second prong of the Court's Commerce Clause analysis in *Mite*.[138] Under the Supreme Court's decision in *Mite*, a state takeover statute that indirectly burdens interstate commerce is constitutional only if the indirect burden is not excessive in relation to the state interests that the statute serves.[139] Although the Supreme Court in *CTS* explicitly did not provide that the Court was following the *Mite* two-prong Commerce Clause analysis, the Court in *CTS* considered whether the Indiana statute indirectly hindered, or burdened, interstate commerce and thus followed the *Mite* approach.[140] Accordingly, both *Mite* and *CTS* suggest that a court will examine whether the ATA's indirect burden on interstate commerce is excessive in relation to the state interests that the statute serves.

Virginia corporations provide jobs, create revenue, and generally stimulate the economy in Virginia and, therefore, Virginia has a significant interest in governing the internal affairs of Virginia corporations.[141] The internal affairs of a corporation are the relations between shareholders, directors, and officers of the corporation, as opposed to the corporation's relationship with third parties.[142] The provisions of the ATA permit Virginia to control transactions that could impair substantially the state of the economy in Virginia. For example, the ATA imposes stricter shareholder and director voting requirements for certain mergers, share exchanges, and similar transactions that involve a Virginia corporation.[143] If Virginia could not regulate the internal affairs of Virginia corporations by means such as the voting requirements for certain mergers, a Virginia corporation more easily could approve a merger that might have deleterious economic con-

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137. *See* Goolsby & Whitson, *supra* note 18, at 151 (explaining that ATA may chill tender offers for stock of Virginia corporations).

138. *See id.* (ATA may indirectly burden interstate commerce); *Mite*, 457 U.S. at 643-46 (second prong of *Mite* Court's Commerce Clause analysis).

139. *See Mite*, 457 U.S. at 643; *supra* notes 72-83 and accompanying text (discussing *Mite* Court's analysis of indirect burden on interstate commerce).

140. *CTS*, 107 S.Ct. at 1649-52.

141. *See* Sargent, *supra* note 80, at 16-17 (1985) (discussing why states have significant interest in regulating internal affairs of state corporations). Professor Sargent has suggested that simply because a corporation is incorporated in a particular state does not mean that the state has a significant enough interest to prescribe the laws that the corporation must follow. *Id.* at 22. Professor Sargent has suggested that a state has a significant interest in regulating a corporation's internal affairs only when the local identity of the corporation is great. *Id.* at 22-23. For example, the more localized the corporation's ownership and operations, the more interested the state of incorporation is in regulating the corporation's internal affairs because the corporation provides domestic jobs, employment, and revenues. *Id.*

142. *See* Sargent, *supra* note 80, at 17 (1985) (discussing distinction between external and internal affairs).

143. *See* VA. CODE ANN. § 13.1-726 (1985) (ATA's 2/3 voting requirement for affiliated transactions).

sequences to the state.[144] Because Virginia corporations significantly affect the states' economy, Virginia has a substantial interest in regulating the internal affairs of Virginia corporations through statutes such as the ATA.[145] Additionally, the Supreme Court in *CTS* expressly recognized that because a corporation is a creature of state law and because corporations impact a state's well-being, a state has a significant interest in regulating the internal affairs of corporations incorporated in the state.[146] The Court in *CTS* found, conversely, that a state does not have an interest in regulating the internal affairs of corporations incorporated outside the state.[147] Because the ATA only governs the internal affairs of Virginia corporations, the Commonwealth of Virginia, under the *CTS* rationale, had a significant interest in enacting the ATA.

Even if the Commonwealth of Virginia's interest in regulating the internal affairs of domestic corporations is insignificant, the ATA imposes an insubstantial burden on interstate commerce.[148] The ATA may chill a raider's desire to initiate a tender offer and, therefore, burden certain interstate transactions.[149] However, the ATA merely burdens a tender offer in which a raider attempts to pay a smaller price to shareholders who do not tender than to shareholders who tender in the initial offer.[150] The ATA, therefore, burdens a coercive tender offer, which renders the burden less substantial.[151] Moreover, the ATA imposes no greater burden on interstate commerce then other well-established internal affairs provisions in the VSCA that may hinder interstate commerce.[152] For example, the VSCA provides that a Virginia corporation may stagger the terms for a corporation's board of directors or provide for the "for cause" removal of directors in the company's articles of incorporation.[153] Staggering board terms and requiring for cause removal for a corporation's board of directors might chill a raider's desire to initiate a tender offer for the corporation's stock because

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144. *See* Sargent, *supra* note 80, at 22-23 (state can control its economy by governing internal affairs).

145. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); supra notes 17-30 and accompanying text (describing provisions of ATA); *supra* notes 141-144 and accompanying text (discussing Virginia's interest in regulating Virginia corporations).

146. *CTS*, 107 S.Ct. at 1649-51.

147. *Id.*

148. *See Mite*, 457 U.S. at 643 (second part of *Mite* Commerce Clause analysis considers statute's burden on interstate commerce); *infra* notes 149-154 and accompanying text (discussing ATA's burden on interstate commerce).

149. *See supra* note 125 and accompanying text (ATA may chill raider's desire to initiate takeover for Virginia corporation).

150. *See supra* notes 12-16 and accompanying text (explaining two-tiered takeovers).

151. *See* Scriggins & Clark, *supra* note 12, at 290 (Maryland takeover statute, which is similar to ATA, permissibly burdens coercive second step of two-tiered takeovers).

152. *See* VA. CODE ANN. § 13.1-601 to -800 (1985) (VSCA); *see supra* notes 143-144 and accompanying text (discussing ATA's burden on interstate commerce).

153. *See* VA. CODE ANN. § 13.1-858 (1985) (VSCA's staggered term for board of directors); *Id.* § 13.1-860 (VSCA's for cause removial provision).

after acquiring control of the stock, the raider immediately cannot control the corporation's board.[154] Finding that the ATA unduly burdens interstate commerce, therefore, would necessitate a rethinking of other well-established internal affairs provisions in the VSCA.

Unlike the takeover statute in *Mite* and like the takeover statute in *CTS*,[155] the ATA does not present an insurmountable obstacle to a successful takeover bid.[156] For example, a raider successfully can acquire a Virginia corporation through a two-tiered takeover by enlisting approval for the second step of the takeover from two-thirds of the corporation's remaining disinterested shareholders.[157] A raider may be able to convince the remaining shareholders that a merger enhances the shareholders' position more than operating the corporation as a going entity. A raider also can gain approval for the second transaction of a two-tiered takeover of a Virginia corporation from a majority of the disinterested directors of the corporation.[158] Additionally, a raider successfully can complete a two-tiered takeover of a Virginia corporation by causing the corporation to sell the corporation's assets to a third party ally of the raider.[159] The raider's ally later can transfer the corporation's assets to the raider, who then can liquidate the company and squeeze the remaining shareholders out. A raider can effect the sale of a Virginia corporation's assets to a third party because the ATA only imposes supermajority voting requirements on certain sales of a Virginia

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154. *See* Goolsby & Whitson, *supra* note 18, at 152 (noting that staggered terms and for cause removal burdens interstate commerce). If a corporation's articles of incorporation provide for staggered board terms, then each year the number of vacancies on the board will not be a majority of the total number of board members. *See* 1 M. LIPTON & E. STEINBERGER, *supra* note 2, at § 6.03[2][a]. Because the number of board vacancies each year is low, raiders cannot appoint a majority of the board immediately after a takeover of a corporation. *Id.* In addition to the deterrent effect of staggered board terms, raiders may not initiate a tender offer for the stock of a corporation whose articles of incorporation provide for the cause removal of directors. If a corporation has for cause removal, a raider cannot acquire a majority of the corporation's stock and then force board members off the board. Conversely, with a for cause removal provision, a raider can remove a director from the board only for cause.

155. *See Mite*, 457 U.S. at 626-27 (discussing Illinois takeover statute in *Mite*); *CTS*, 107 S.Ct. at 1644-52 (discussing Indiana takeover statute in *CTS*); ILL. REV. STAT. ch. 121.5, para. 137.51 (1979) (Illinois takeover statute in *Mite*) (repealed 1983); IND. CODE § 23-1-42-1 to -42-13 (Supp. 1987) (Indiana takeover statute in *CTS*).

156. *See* VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA); *infra* notes 157-162 and accompanying text (ATA is not insurmountable obstacle to takeover bid); *supra* notes 44-83 and accompanying text (discussing Illinois takeover statute in *Mite*); *supra* notes 85-124 and accompanying text (discussing Indiana takeover statute in *CTS*).

157. *See* VA. CODE ANN. § 13.1-726 (1985) (ATA's 2/3 voting requirements for affiliated transactions).

158. *See id.* § 13.1-727 (ATA's disinterested directior exception to ATA's two-thirds voting requirement); *supra* notes 32-35 and accompanying text (discussing ATA's disinterested director exception).

159. *See* VA. CODE ANN. § 13.1-725 (1985) (requiring affirmative vote of 2/3 of the disinterested shareholders prior to sale of Virginia corporation's assets to interested shareholder); *supra* notes 22-25 and accompanying text (describing ATA's treatment of sale of assets).

corporation's assets to interested shareholders.[160] After acquiring a controlling block of a Virginia corporation's assets, a raider also could cut the corporation's dividends to persuade the remaining shareholders to approve the second step of the two-tiered takeover.[161] The ATA does not, in effect, impose an impenetrable burden to two-tiered takeovers and, therefore, does not violate the Commerce Clause.[162]

The ATA signals the end of coercive two-tiered takeovers in Virginia.[163] The ATA does not, however, abolish tender offers for the stock of Virginia corporations and thus end hostile takeovers in Virginia.[164] Because the ATA regulates inherently coercive two-tiered takeovers, but does not abolish the tender offer process, the Supreme Court is likely to find the ATA less burdensome than other state takeover statutes and, therefore, constitutional.[165] The Supreme Court's decision in *CTS* enables the states to undertake an active role in the takeover process and the ATA represents Virginia's first move in that direction.

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160. *See* VA. CODE ANN. § 13.1-725 (1985) (prohibiting sale of Virginia corporation's assets to interested shareholders, but not to third parties).

161. *See* Goolsby & Whitson, *supra* note 18, at 152 (explaining that interested shareholder can cut dividends to avoid ATA).

162. *See* U.S. CONST. art. I, § 8, cl.3 (Commerce Clause); VA. CODE ANN. § 13.1-725 to -728 (1985) (ATA).

163. *See supra* notes 12-16 and accompanying text (discussing two-tiered takeovers and the coercive effect of two-tiered takeovers).

164. *See supra* notes 17-30 and accompanying text (explaining ATA's provisions).

165. *Id.*