COMMENT

The Virginia Take-Over-Bid Disclosure Act After *Edgar v. Mite Corp.*

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Introduction

The use of the tender offer[1] as a means of acquiring corporate control was unregulated by both the states and the federal government prior to 1968. Virginia was the first state to regulate these practices,[2] and the federal government followed four months later with the passage of the Williams Act.[3] Subsequently, thirty-seven additional states enacted similar takeover legislation.[4] The constitutionality of these state statutes has

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1. "Tender offer" has been defined as

> [a]n offer to purchase shares made by one company direct to the stockholders of another company, sometimes subject to a minimum and/or maximum that the offeror will accept, communicated to the shareholders by means of newspaper advertisements and (if the offeror can obtain the shareholders list, which is not often unless it is a friendly tender) by a general mailing to the entire list of shareholders, with a view to acquiring control of the second company.

BLACK'S LAW DICTIONARY 1316 (5th ed. 1979). The terms "takeover bid" and "tender offer" are synonymous and are used interchangeably. Although left undefined by Congress, the term "tender offer" has been described by the Securities Exchange Commission (SEC) as a request or invitation for tenders and means "one or more offers to purchase, or solicitations of offers to sell, securities of a single class . . . ." *Proposed Amendments to Tender Offer Rules*, SEC Act Release No. 6159, Exchange Act Release No. 16385 [1979-1980 Transfer Binder] FED SEC. L. REP. (CCH) para. 82,374. *See also* E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 70 (1973).

2. VA. CODE §§ 13.1-528 to -540 (1984) (effective March 5, 1968).

3. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981)). The Williams Act became effective on July 29, 1968. It added sections 13(d)-(e) and 14(d)-(f) to the 1934 Securities Exchange Act. For the Act's legislative history, see *Hearings on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 4 (1968); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967).

4. ALASKA STAT. §§ 45.57.010-.120 (Supp. 1978); ARK. STAT. ANN. §§ 67-1264 to -.14 (Supp. 1983); COLO. REV. STAT. §§ 11.51.5-101 to -108 (Supp. 1983); CONN. GEN. STAT. §§ 36-456 to -468 (Supp. 1984); DEL. CODE ANN. tit. 8, § 203 (West Supp. 1981); FLA. STAT. ANN. §§ 517.35-.363 (West Supp. 1978) *(repealed by* 1979 FLA. LAWS 381 § 13); GA. CODE

been questioned by commentators[5] and has been flatly denied by many courts.[6]

ANN. §§ 22-1901 to -1915 (Supp. 1984); HAWAII REV. STAT. §§ 417E-1 to -15 (Supp. 1983); IDAHO CODE §§ 30-1501, 03, 05, 07, 08 (Supp. 1979) (*repealed* 1979); ILL. ANN. STAT. ch. 121 1/2, §§ 137.51-.70 (Smith-Hurd Supp. 1983-84) (*repealed by* P.A. 83-365, § 1, eff. Sept. 14, 1983); IND. CODE §§ 23-2-3.1 to -.11 (1984); IOWA CODE ANN. §§ 502.102, .211-.215 (West Supp. 1984-85); KAN. STAT. ANN. §§ 17-1276 to -1285 (Supp. 1983); KY. REV. STAT. §§ 292.560-.991 (Supp. 1982) (*repealed* 1982); LA. REV. STAT. ANN. §§ 51:1500-:1512 (West Supp. 1984); ME. REV. STAT. ANN. tit. 13, §§ 801-817 (Supp. 1983-84); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 110C, §§ 1-13 (West Supp. 1984-85); MICH. COMP. LAWS ANN. §§ 451.902-917 (West Supp. 1984-85); MINN. STAT. ANN. §§ 80B.01-.13 (West Supp. 1984); MISS. CODE ANN. §§ 75-72-101 to -121 (Supp. 1984); MO. ANN. STAT. §§ 409.500-.565 (Vernon Supp. 1984); NEB. REV. STAT. §§ 21-2418 to -2430 (1983); NEV. REV. STAT. §§ 78.376-.3778 (1979); N.H. REV. STAT. ANN. §§ 421-A:1-:15 (Supp. 1983); N.J. STAT. ANN. §§ 49:5-1 to -19 (West Supp. 1984-85); N.Y. BUS. CORP. LAW §§ 1600-14 (McKinney Supp. 1983-84); N.C. GEN. STAT. §§ 78B-1 to -11 (Supp. 1984); OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1983); OKLA. STAT. ANN. tit. 71, §§ 415-450 (West Supp. 1983-84); PA. STAT. ANN. tit. 70, §§ 71-85 (Purdon Supp. 1984-85); S.C. CODE ANN. §§ 35-2-10 to -130 (Law. Co-op. Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 47-32-1 to -47 (1983); TENN. CODE ANN. §§ 48-2101 to -2114 (Supp. 1983); Tex. Administrative Guidelines for Minimum Standards in Tender Offers §§ 065.15.00.100-.800, *reprinted in* [1979] 3 BLUE SKY L. REP. (CCH) paras. 55, 671-55, 682; UTAH CODE ANN. §§ 61-4-1 to -13 (1978) (*repealed by* 1983 UTAH LAWS ch. 335, § 3); WIS. STAT. ANN. §§ 552.01-25 (West Special Pamphlet 1983).

For a list of statutes that have been held unconstitutional, see *infra* note 6.

5. *See, e.g,* Aranow & Einhorn, *State Securities Regulation of Tender Offers,* 46 N.Y.U. L. REV. 767 (1971); Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency,* 62 CORNELL L. REV. 213 (1977); Wilner & Landy, *The Tender Trap: State Takeover Statutues and Their Constitutionality,* 45 FORDHAM L. REV. 1 (1976); Comment, *State Regulation of Tender Offers: How Much is Constitutional?,* 33 BAYLOR L. REV. 656 (1981); Note, *State Takeover Statutes Under Attack—Casualties in the Battle for Corporate Control*—MITE Corp. v. Dixon, 30 DE PAUL L. REV. 989 (1981); Note, *State Regulation of Tender Offers for Insurance Companies After* Edgar v. MITE, 51 FORDHAM L. REV. 943 (1983); Note, *Corporate Battles for Control*—Edgar v. MITE *and the Constitutionality of State Takeover Legislation—The Continuing Saga,* 26 HOW. L.J. 1425 (1983) [hereinafter cited as *Corporate Battles for Control*]; Comment, *Challenges to State Takeover Laws: Preemption and the Commerce Clause,* 64 MARQ. L. REV. 657 (1981); Note, *The Validity of State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-*Kidwell *Federal Decisions,* 38 WASH. & LEE L. REV. 1025 (1981). *But cf.* Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation,* 36 WASH. & LEE L. REV. 733 (1979).

6. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) (Missouri); Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979) (Idaho); Seagram & Sons, Inc. v. Marley, [1981-1982 Transfer Binder] FED SEC. L. REP. (CCH) ¶ 98,246 (W.D. Okla. July 17, 1981) (Oklahoma); Natomas Co. v. Bryan, 512 F. Supp. 191 (D. Nev. 1981) (Nevada); Crane Co. v. Lam, 509 F. Supp. 782 (E.D. Pa. 1981) (Pennsylvania); Kennecott Corp. v. Smith, 507 F. Supp. 1206 (D.N.J. 1981) (New Jersey); Canadian Pacific Enterprises, Inc. v. Krouse, 506 F. Supp. 1192 (S.D. Ohio 1981) (Ohio); Hi-Shear Indus., Inc. v. Neiditz, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,805 (D. Conn. Dec. 16, 1980) (Connecticut); Hi-Shear Indus., Inc. v. Campbell, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804 (D.S.C. Dec. 4, 1980) (South Carolina); Brascan Ltd. v. Lassiter, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,247 (E.D. La. Apr. 30, 1979) (Louisi-

In 1982 the Supreme Court finally addressed the issue in *Edgar v. MITE Corp.*[7] It held that Illinois' takeover statute was an unconstitutional burden upon interstate commerce.[8] Armed with this holding and the rationale behind it, tender offerors will be attacking these statutes with greater frequency and greater success in the future.[9]

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ana); Dart Indus., Inc. v. Conrad, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware); Esmark, Inc. v. Strode, 639 S.W.2d 768 (Ky. 1982) (Kentucky); Kelly *ex rel.* McLaughlin v. Beta-X Corp. [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,897 (Mich. Ct. App. Jan. 12, 1981) (Michigan); Eure v. Grand Metropolitan Ltd., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,694 (N.C. Sup. Ct. Apr. 18, 1980) (North Carolina). *Contra* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) (Minnesota); AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929 (S.D. Ohio 1979); Wylain, Inc. v. TRE Corp., 412 A.2d 338 (Del. 1980); Sharon Steel Corp. v. Whaland, 433 A.2d 1250 (N.H. 1981) (New Hampshire) (*vacated and remanded for consideration in light of* Edgar v. MITE Corp., 457 U.S. 624 (1982)).

While numerous statutes have been held unconstitutional by federal district courts, most remain in force. *See supra* note 4. Decisions by federal district courts and circuit courts of appeals "owe no obedience to the decisions of their counterparts in other districts, nor to the decisions of the courts of appeals in other circuits." 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.402 [1] (2d ed. 1984) (footnotes omitted). Thus, state legislation may remain in force until that state's highest court, or the United States Supreme Court, finds it unconstitutional. *See, e.g.*, Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425, 1431 (10th Cir. 1983), and Seagram & Sons, Inc. v. Marley, [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,246 (W.D. Okla. July 17, 1981) (both striking down Oklahoma Act).

Five of the statutes listed above (Del., Idaho, La., Mich., and Nev.) were held unconstitutional based on a traditional Supremacy Clause preemption analysis. *See infra* note 46. The laws were found to obstruct "the accomplishment and execution of the full purposes and objectives of Congress" as outlined in the Williams Act. Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

However, seven statutes (Conn., Mo., N.J., N.C., Ohio, Pa., and S.C.) were specifically preempted by the recent SEC Rule 14d-2(b). 17 C.F.R. § 240.14d-2(b)(1980). This rule sets up a direct conflict between the Williams Act and state takeover laws by requiring an offeror to commence or withdraw its offer within five business days of any public announcement regarding the offer's material terms. Most state takeover acts demand pre-offer announcements that contain information which will trigger Rule 14d-2(b). *See, e.g.*, VA. CODE § 13.1-531 (1984). When the state law pre-offer waiting period exceeds five days and the announcement has triggered Rule 14d-2(b), federal law requires an offeror to act before the state law permits such action. Since compliance with both federal and state law becomes impossible, preemption is found.

Arguably, the Virginia Act discussed in this Comment would also be preempted by 14d-2(b) under the rationale outlined above. *But cf.* Note, *Kneeling to the SEC Rules: The Virginia Takeover Act and SEC Rule 14d-2(b)*, 22 WM. & MARY L. REV. 487 (1981).

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

8. *Id.* at 646. U.S. CONST. art. I § 8, cl. 3 provides: "The Congress shall have power . . . to regulate commerce . . . among the several States . . . ." Although SEC Rule 14d-2(b), discussed *supra* note 6, has been used to strike down state takeover laws, it was not in effect at the time of MITE's initial tender offer. Therefore, it was not an issue before the Court. This Comment examines the constitutionality of the Virginia Act under the Commerce Clause analysis actually used in *MITE*.

9. At least two circuit courts and one state supreme court have used *MITE* to strike down state takeover legislation. *See* Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425, 1431 (10th Cir. 1983) (Oklahoma Act invalid after *MITE*); National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1133 (8th Cir. 1982) (Missouri Act invalid after *MITE*); Esmark, Inc. v.

This Comment will examine the very first state takeover statute, Virginia's Take-Over-Bid Disclosure Act,[10] ("Virginia Act") to determine whether it meets the Commerce Clause requirements identified in *MITE*. First, the pertinent provisions of the Williams Act and the original Virginia Act will be outlined. A discussion of the changes in the Virginia Act prior to *MITE* will follow. Next, the *MITE* Court's Commerce Clause analysis of the similar Illinois statute will be discussed. Finally, the Virginia Act will be scrutinized to determine whether it meets the *MITE* requirements.

I. The Williams Act

As the cash tender offer gained popularity as a means to acquire corporate control in the late 1960's, concern mounted over the lack of adequate investor information disclosed by the offeror. Congress responded with the Williams Act,[11] an amendment to the 1934 Securities Exchange Act.

The thrust of the Williams Act—full and fair disclosure for the protection of investors[12]—is clearly evident from its general provisions. For

Strode, 639 S.W.2d 768, 770 (Ky. 1982) (Kentucky Act invalid after *MITE*). *But see* Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906 (8th Cir. 1984) (upholding Minnesota Act against both preemption and Commerce Clause challenges after *MITE*).

Other courts have recognized that *MITE* undermines the validity of state takeover statutes previously considered constitutional. *See, e.g.*, Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029, 1040 (1st Cir. 1982) (upholding Massachusetts Act against preemption challenge, but remanding for consideration of Act's effects on interstate commerce in light of *MITE*); Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982) (granting preliminary injunction against enforcement of Michigan Act because petitioners showed a likelihood of success on the merits in proving the Michigan Act unconstitutional after *MITE*).

10. VA. CODE §§ 13.1-528 to -540 (1984) (effective Mar. 5, 1968).

11. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981)).

Although Congress gave primary enforcement authority of the Williams Act to the SEC, lower courts have interpreted the Act to allow private actions for both damages and injunctive relief. *See, e.g.*, Gulf & W. Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 699 (2d Cir. 1973) (injunction); Wellman v. Dickinson, 475 F. Supp. 783, 816 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2nd Cir. 1982) (injunction); *In re* Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig., 467 F. Supp. 227, 241-43 (W.D. Tex. 1979) (damages); Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349, 1368-69 (N.D. Tex. 1979) (damages). *See also* Note, *Securities Law: Implied Causes of Action Under Section 14(e) of the Williams Act*, 66 MINN. L. REV. 865 (1982). *But see* Comment, *An Implied Private Right of Action Under the Williams Act: Tradition vs. Economic Reality*, 77 NW. U.L. REV. 316 (1982) (recommending that courts not imply a private cause of action under the Williams Act for incumbent management against a tender offeror).

12. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2; S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1968).

example, any person[13] who acquires beneficial ownership of five percent or more of any registered equity security[14] must disclose detailed information[15] to the issuer, the SEC, and all the exchanges upon which the security is traded.

This information includes: the background and identity of the purchaser;[16] the source and amount of funds or other consideration used in making the purchase;[17] whether the purchaser plans to acquire control of the issuer and, if so, what major changes it contemplates making if this control is obtained;[18] and any information regarding contracts, arrangements, or understandings with other persons respecting the issuer's securities.[19]

The Williams Act also contains additional requirements designed to protect investors in the target company.[20] For instance, if an offeree-investor deposits his securities pursuant to the tender offer, he may withdraw them at any time up to seven days or after sixty days from the first published invitation, as long as they have not been purchased by the offeror.[21] If the offer is for a number of shares less than the total shares outstanding of a particular class, but more than that number are tendered within ten days of the initial offer, the offeror is bound to buy the additional shares pro rata (according to the number deposited by each offeree).[22] Finally, if the offeror increases the consideration it will pay for shares after some security holders have tendered, the offeror must pay that increased premium to all the tenderors.[23]

13. "Person" is defined as "an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization." 17 C.F.R. § 240.14d-1(b) (1983).

14. A "registered equity security" for purposes of the Williams Act is the equity security of any company with assets exceeding $1,000,000 and 500 or more stockholders of record. 15 U.S.C. § 78l(g)(1)(B) (Supp. 1983). The $1,000,000 figure was changed to $3,000,000 by rule. 17 C.F.R. § 240.12g-1 (1983) (effective Apr. 21, 1982).

15. 15 U.S.C. § 78m(d) (1983).

16. *Id.* § 78m(d)(1)A.

17. *Id.* § 78m(d)(1)B.

18. *Id.* § 78m(d)(1)C.

19. *Id.* § 78m(d)(1)E. This section of the Act allows the SEC to permit a person to file a "bare" statement, if it finds that "such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer . . . ." *Id.* § 78m(d)(5). A "bare statement" lists only the purchaser's name and the number of shares acquired, rather than the detailed information set forth in the text. *See supra* text accompanying notes 16-19.

20. *See* 15 U.S.C. § 78n(d) (1982).

21. *Id.* § 78n(d)(5). The seven day period was extended by SEC rule to 15 business days. 17 C.F.R. § 240.14d-7(a)(1) (1983) (effective Dec. 6, 1979). This provision permits offerees to withdraw their tendered shares without penalty if the shares have not been purchased by the offeror.

22. 15 U.S.C. § 78n(d)(6). This provision ensures that shareholders who wait a short period of time before tendering will not be completely excluded from the offer.

23. *Id.* § 78n(d)(7).

II. The Virginia Act

As noted earlier, the state of Virginia was the first governmental entity to regulate tender offers.[24] Like the Williams Act, Virginia's Take-Over-Bid Disclosure Act[25] is designed to require "fair, full and effective disclosure to offerees of all information material to a decision to accept or reject a take-over bid."[26] Unlike the Williams Act, however, the Virginia Act compels this disclosure *prior* to the tender invitation rather than simultaneous with it.[27]

As originally passed in 1968, the Virginia Act provided extensive protection to shareholders in target corporations that were both incorporated *and* doing business in the state.[28] A tender offeror had to provide a "deposit time period" of at least twenty-one days and not more than thirty-five days from the date of the initial invitation for shareholders to deposit their shares.[29] Once deposited, the shares could be withdrawn by the tenderor at any time within twenty-one days of the initial invitation.[30]

The disclosure/hearing section of the Virginia Act afforded more substantive protection.[31] It prevented a tender offer from proceeding unless the offeror filed a detailed statement with the State Corporation Commission (SCC) at least twenty days prior to the public invitation. This statement required much of the same information that the Williams Act called for, including: the identity and business background of the purchaser; the source and amount of the tender consideration; the offeror's plans if control was obtained through the offer; and the details of any contracts, arrangements, or understandings respecting the offeree company's securities.[32] The Virginia Act also demanded an exhaustive description of the offeror's business activities, pending legal disputes, property holdings, capital structure, and officer and director

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24. *See supra* text accompanying note 2.

25. VA. CODE §§ 13.1-528 to -540 (1984).

26. *Id.* § 13.1-528. The purpose of the Virginia Act is to "protect the interests of offerees, investors, and the public . . . ." *Id.*

27. *Id.* § 13.1-531. *See also Legislative Developments*, 12 U. RICH. L. REV. 749, 750 (1978).

Another difference between the Virginia Act and the Williams Act is their enforcement methods. The Virginia Act specifically provides for a private cause of action. VA. CODE § 13.1-535 to -39 (1984). Although several courts have implied a private cause of action under the Williams Act, it contains no specific provision. *See supra* note 11.

28. VA. CODE § 13.1-529(e) (1978).

29. *Id.* § 13.1-530(a).

30. *Id.* § 13.1-530(b). This subsection of the Virginia Act also has two provisions that are similar to sections 78n(d)(6) and (7) of the Williams Act. *See id.* § 13.1-530(c) to (d); *see supra* text accompanying notes 22-23.

31. VA. CODE § 13.1-531(a)-(d).

32. *Id.* § 13.1-531(b)(i),(iii),(iv),(vi). For a discussion of similar provisions in the Williams Act, see *supra* text accompanying notes 16-23.

qualifications.[33]

Even if an offeror satisfied all of these requirements, the offer could still be stalled by the Act's hearing provisons.[34] Within ten days of the offeror's filing, the SCC could order a hearing to adjudicate the fairness and effectiveness of the proposed disclosure.[35] The offeree company could also request a hearing within the same ten day period, although the decision to call the hearing remained at the SCC's discretion.[36] If a hearing were ordered, it could commence anytime within forty days of the offeror's original filing.[37] The SCC had to rule on the propriety of the disclosure "within twenty-five days of the conclusion of the hearing and the filing of the post-hearing briefs."[38]

III. Changes in the Virginia Act Prior to *Edgar v. MITE*

The preceding outlines of the Virginia Act and Williams Act indicate that Virginia originally went beyond the federal government in the effort to protect shareholders of target corporations. Not only was disclosure required before the offer, but the detail of the disclosure was substantially more exhaustive.[39] Also, Virginia provided for review of the disclosure by means of a hearing, a procedure notably absent from the federal law.

Virginia's extensive provisions were typical of state tender offer statutes.[40] Many of these new state laws took effect in the early 1970's, and before long they came under heavy attack. Often, the challenges

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33. The pertinent provision required:

> [c]omplete information on the organization and operations of offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's capital stock and of its long-term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general character of the principal physical properties of the offeror and its subsidiaries, a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their property is the subject, a brief description of the business done and projected by the offeror and its subsidiaries and the general development of such business over the past five years, the names of all directors and executive officers together with biographical summaries of each for the preceeding five years to date, and the approximate amount of any material interest, direct or indirect, of any of the directors or officers in any material transaction during the past three years, or in any proposed material transactions to which the offeror or any of its subsidiaries was or is to be a party.

VA. CODE § 13.1-531(b)(vii) (1978).

34. *Id.* § 13.1-531(a)(i),(ii),(iii); § 13.1-534(b).

35. *Id.* § 13.1-531(a)(iii).

36. *Id.* § 13.1-531(a)(ii).

37. *Id.* § 13.1-534(b).

38. *Id.*

39. *See supra* text accompanying note 33.

40. *See, e.g.,* HAWAII REV. STAT. §§ 417E-1 to -11 (Supp. 1976). For a list of state takeover legislation, see *supra* note 4.

were based on federal preemption via the Supremacy Clause,[41] and less frequently on violations of the Commerce Clause.[42] The first major casualty was the Idaho takeover statute. In *Great Western United Corp. v. Kidwell*,[43] the Fifth Circuit held the legislation invalid on both preemption and Commerce Clause grounds. In analyzing the preemption issue, the *Kidwell* court determined that Congress intended the Williams Act to provide neutral regulation that favored neither a target nor an offeror.[44] Because the Idaho Act required advance disclosures and potential pre-offer hearings, it "favored" the target at the expense of the offeror.[45] The Fifth Circuit viewed this favoritism as contrary to congressional intent and detrimental to congressional objectives.[46] Hence, the statute was preempted.

In its Commerce Clause analysis, the *Kidwell* court utilized a test set forth in *Pike v. Bruce Church, Inc.*[47] In *Pike*, a unanimous Supreme Court outlined criteria for determining the constitutionality of state stat-

41. U.S. CONST. art. VI, cl. 2. "The supremacy clause mandates that federal law overrides, i.e. preempts, any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292 (2d ed. 1983). *See infra* note 46 (discussing traditional Supremacy Clause preemption analysis).

42. U.S. CONST. art I, § 8, cl. 3. *See, e.g.*, Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), discussed *infra* at notes 43-49 and accompanying text.

Historically, Commerce Clause analysis has permitted states to legislate for the protection of their citizens as a function of their police powers. "In the exercise of [their police] power, the states and their instrumentalities may act, in many areas of interstate commerce . . . concurrently with the federal government." Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960) (citing, *inter alia*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851); The Minnesota Rate Cases, 230 U.S. 352 (1913)). But "[t]he basic limitations upon local legislative power in [the Commerce Clause] area are clear enough. . . . Evenhanded local regulation . . . is valid unless . . . unduly burdensome on . . . interstate commerce. *Id.* at 443 (citing, *inter alia*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)).

Commerce Clause challenges to state tender offer legislation contend that the laws reach beyond the legitimate exercise of local police power and unduly burden interstate commerce. *See infra* notes 47-49, 63-73 and accompanying text.

43. 577 F.2d 1256 (5th Cir. 1978), *rev'd on grounds of improper venue sub nom.* Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

44. 577 F.2d at 1276-81. This neutrality was referred to as a "market approach". *Id.* at 1276.

45. For a discussion of how hearing provisions favor target corporations at the expense of offerors, see *infra* notes 96-100 and accompanying text.

46. The traditional standard followed in preemption cases "is 'to determine whether, under the circumstances of [the] particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Jones v. Rath Packing Co., 430 U.S. 519, 526 (1976) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Congress may specifically preempt a field of regulation by drafting a statutory provision that explicitly prohibits parallel state action. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292 (2d ed. 1983).

47. 397 U.S. 137, 142 (1970). The *Pike* test was also used by the Court in *MITE*. *See infra* text accompanying notes 64-65.

utes that affect interstate commerce: "[When] the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[48]

Applying this test to the Idaho Act, the *Kidwell* court found the local public benefits of "encouraging good corporate citizenship" and "protecting resident shareholders" insufficient to justify halting a multi-million dollar interstate commerce transaction.[49]

In the wake of *Kidwell*, several other state takeover statutes were held unconstitutional.[50] The Virginia Legislature responded to these decisions in 1979 by making minor changes in its takeover act. The legislature deleted the requirement fixing a time limit of not less than twenty-one days from the first invitation for deposit of shares pursuant to a tender offer.[51] It also reduced the time allotted a depositing shareholder to withdraw his shares from twenty-one days to seven days and permitted withdrawal of any unpurchased shares after sixty days.[52] Perhaps most significantly, the exhaustive "personal" disclosure requirements were repealed,[53] and SEC Schedule 14D-1 was permitted to substitute for the general disclosure required by the Virginia Act.[54] All of these amendments made the Virginia Act more consistent with the requirements of the Williams Act.

It is important to note that the Virginia Legislature made only one significant change in the hearing provisions of the Virginia Act: the rescission of the extensive personal disclosure subsection.[55] Thus, the most burdensome sections of the Virginia Act from a Commerce Clause standpoint—the hearing provisions—are still in their original form.

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48. 397 U.S. at 142 (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)).

49. 577 F.2d at 1282-86. Although the local public interest in "encouraging good corporate citizenship" was legitimate, the circuit court found no evidence indicating that it had more than nominal weight. *Id.* at 1286. The local interest in "protecting resident shareholders" was also legitimate, but was undercut since many of the target company's shareholders were non-residents. *Id.* at 1283-85.

50. *See supra* note 6.

51. *See supra* text accompanying note 29.

52. VA. CODE § 13.1-531(b) (1984).

53. *See supra* note 33 and accompanying text.

54. *See supra* text accompanying note 32. Not all of the amendments were designed to prevent conflicts with federal law. A 1980 amendment to the Virginia Act required additional disclosure if the offeror intended to change control of the target company. VA. CODE § 13.1-529(b)(iii) (1981). This provision was declared unconstitutional as a violation of the Commerce Clause in Telvest, Inc. v. Bradshaw, 547 F. Supp. 791 (E.D. Va. 1982), *aff'd*, 697 F.2d 576 (4th Cir. 1983) and was subsequently deleted from the code by a 1983 amendment. *See infra* text accompanying notes 79-84.

55. *See supra* note 33.

IV. *Edgar v. MITE Corp.*

The Supreme Court finally addressed the constitutionality of a state takeover statute in *Edgar v. MITE Corp.*[56] The law at issue was Illinois' Business Takeover Act[57] which, although similar to the Virginia Act, had some significantly broader provisions.[58]

In *MITE,* a Delaware corporation with its principal place of business in Connecticut initiated a cash tender offer for all the outstanding shares of Chicago Rivet & Machine Co., an Illinois corporation. MITE complied with the Williams Act requirements but did not file the preliminary statements required by Illinois law.[59] Instead, it sought an injunction and a declaratory judgment from the Federal District Court for the Northern District of Illinois that the state law was preempted by the Williams Act and that the Illinois law violated the Commerce Clause. The district court ruled in MITE's favor on both points. The Seventh Circuit Court of Appeals affirmed[60] and Illinois appealed.[61] Writing for a five to four majority,[62] Justice White concluded that the Illinois law was unconstitutional since it impermissably burdened interstate commerce.[63] The Court applied the test from *Pike v. Bruce Church, Inc.*[64]

56. 457 U.S. 624 (1982). It is interesting to note that the Virginia Attorney General filed an *amicus* brief urging the Court to uphold the Illinois law. *Id.* at 626 n.*.

57. ILL. ANN. STAT. ch. 121 1/2, ¶ 137-.51-.70. (Smith-Hurd Supp. 1979).

58. For example, the Virginia Act applies only to corporations incorporated *and* doing business in Virginia. VA. CODE § 13.1-529(e) (1984). The Illinois Act applied to *any* corporation if at least 10% of its shareholders were Illinois residents, or if any two of the following three conditions existed:

> (1) the corporation had its principal executive office in Illinois; (2) the corporation was incorporated in Illinois; (3) the corporation had at least 10% of its stated capital and paid-in surplus represented within the state.

ILL. ANN. STAT. ch. 121 1/2, ¶ 137.51-70 (Smith-Hurd Supp. 1979).

Additionally, after a hearing in Illinois, a tender offer could be blocked merely if the state believed the offer was *substantively unfair. Id.* at ¶ 137.57 E (1979). The Virginia standard prevents tender offers only if there has been "failure to provide full and fair disclosure." VA. CODE § 13.1-531(a)(iii). *See also supra* note 35 and accompanying text.

59. Like Virginia, Illinois required pre-offer filings 20 days before a public invitation could take effect. During this time a decision was made by the state whether or not to hold a hearing on the proposed takeover. ILL. ANN. STAT. ch. 121 1/2, ¶ 137.57 A (Smith-Hurd Supp. 1979).

60. MITE Corp. v. Dixon, 633 F.2d 486 (1980).

61. 451 U.S. 968 (1981) (probable jurisdiction noted).

62. White wrote a five part opinion, but the majority embraced only three of the parts. The actual majority opinion of the Court is comprised of sections I, II, and V-B of White's decision. The latter part, section V-B, analyzed the statute under the Commerce Clause.

63. 457 U.S. at 646. Justice White also found that under the Supremacy Clause, the Williams Act preempted the Illinois law. Stressing Congress' intention to make tender offer regulation neutral (benefitting neither offeror nor offeree management), he found that three provisions of the Illinois law stood "as obstacles to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 634.

The objectionable provisions of the Illinois law were: (1) the 20 day pre-invitation notification period; (2) the hearing provisions; and (3) the provision allowing Illinois to pass on the substantive fairness of the offer. White believed that the first two provisions gave inordinate

Under this test, state laws aimed at legitimate local interests are upheld even when they affect interstate commerce *unless* the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[65]

Illinois argued that two local benefits justified the Act: (1) Illinois' right to protect resident security holders; and (2) Illinois' interest in regulating the internal affairs[66] of companies incorporated under Illinois law. The Court admitted that the first justification was "plainly a legitimate state objective."[67] However, it warned that no state has a legitimate interest in protecting nonresident shareholders.[68] The local interest in se-

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time to the offeree's incumbent management. Since the target could use this time to formulate defensive plans, these provisions favored the target at the expense of the offeror. The latter provision permitted the state to supplant investors' substantive decisions regarding tender offers. *Id.* at 635-40.

Only Chief Justice Burger and Justice Blackmun accepted this preemption analysis.

64. 397 U.S. 137, 142 (1970).

65. *See supra* text accompanying notes 47-48. If there is a legitimate local purpose for the state regulation, then "the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

The *Pike* test refined a "weighing and balancing of interests" test adopted in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). While the *Southern Pacific* Court weighed the state's police power interest (in regulating train lengths) against the national interest (in economic and efficient railway transportation services), the *Pike* Court clarified the weight that each interest should be given. Under the *Pike* rule, state legislation may affect interstate commerce, but the burden it imposes cannot be "clearly excessive" in relation to the state's local benefits. *Pike*, 397 U.S. at 142.

Courts have utilized the *Southern Pacific* test in Commerce Clause cases for the past 40 years. *See, e.g.*, Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm'n, 461 U.S. 375 (1983); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949). However, since the basic test involves a weighing and balancing of state and national interests, the results of each challenge are fact specific. Consequently, there has been some uncertainty and unpredictability in Commerce Clause cases. *Compare* Hunt v. Washington State Advertising Comm'n, 432 U.S. 333 (1977) (striking down state law that discriminated against out of state apple growers) *and* Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) (striking down state law that prohibited investment advisory services owned by out of state banks) *with* Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (upholding state law that prohibited many out of state oil producers from operating local retail service stations).

66. The states' interest in regulating the internal affairs of companies incorporated under their laws has long been recognized. "Corporations owe their existence to state law and draw all of their powers from it. The states are the source of law creating corporations organized in them and the principal source of law creating the rights and duties of the corporation to its shareholders and others." Profusek & Gompf, *State Takeover Legislation After* MITE, *Standing Pat, Blue Sky, or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 29 (1984) (citing, *inter alia*, Head v. Providence Ins. Co., 1 U.S. (2 Cranch) 127, 167 (1804) and Roberts v. Northern Pac. R.R., 158 U.S. 1, 24 (1885)).

67. 457 U.S. at 644.

68. *Id.* At this point, White challenged Illinois' assertion that the "legislative purpose" of the act was protection of resident investors. He noted that the Illinois Act exempts a com-

curing adequate time and information for Illinois sharehold examine the merits of a tender offer was already protected by th liams Act; the extra disclosures required by Illinois law afforded only "speculative" additional protection.[69] These factors indicate the "putative local benefit" was minimal.[70]

As for Illinois' second contention that the act regulated or internal affairs of corporations organized under its laws, the Cou missed this claim as being without foundation. Because the Illinc applied to *any* corporation if ten percent of its outstanding share held by Illinois residents,[71] the Act could apply to out of state cc tions doing business in other states.[72]

In sum, neither of the reasons put forth by Illinois were subst Perhaps most importantly, the hearing provisions of the Act could nationwide tender offer while Illinois adjudicated the fairness of th toward its resident shareholders. Thus the Court concluded that tl den on interstate commerce was excessive when compared with th benefits; indeed, "Illinois [had] the power to determine whether a offer [could] proceed *anywhere.*"[73]

The *MITE* Commerce Clause analysis has been described a simplistic"[74] because "[e]ven if state takeover laws can be demon shown to cause delay in the consumation of tender offers, the qu should be whether such delay operates to the benefit or detrim shareholders. That issue cannot be resolved in the abstract—it is tially a factual question."[75]

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pany's acquisition of its own shares from coverage. *Id.* Therefore, a target compa make a "counter-tender offer" (technically referred to as an issuer-tender) for its o without complying with the Illinois Act. *Id.* White intimated that if the real purpo Illinois Act was to protect resident investors, then issuer-tenders would not have empted. Theoretically, investors are threatened by unfair nondisclosure in *any* ten regardless of who makes it. Thus, the Illinois Act actually protected incumbent mar rather than resident shareholders.

Unlike both the Illinois Act and the Virginia Act, the Williams Act does no issuer-tenders. 17 C.F.R. 240.13e-1 (1984).

69. 457 U.S. at 644-45. *But see* Manne, *Cash Tender Offers for Shares—A Reply man Cohen*, 1967 DUKE L.J. 231; Shipman, *Some Thoughts About the Role of State Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970) (both co tors criticize the Williams Act for not affording investors enough time to make a decision).

70. 457 U.S. at 646.

71. ILL. ANN. STAT. ch. 121 1/2, ¶ 137.52-10 (Smith-Hurd Supp. 1979).

72. 457 U.S. at 645. The Court also found another problem with the "interna justification. Since tender offers "contemplate transfers of stock by stockholders t party and do not themselves implicate the internal affairs of the target company," the affairs justification is inapposite. *Id.*

73. *Id.* at 643 (emphasis added).

74. Profusek & Gompf, *supra* note 66, at 18.

75. *Id.*

It is clear that the *MITE* Court believed inordinate delay was detrimental to shareholders.[76] The difficulty with the opinion is that the Court applied a vague and subjective legal standard without articulating its reasoning. The *Pike* test requires weighing and balancing legitimate local interests against burdens on interstate commerce.[77] Yet the *MITE* Court never specifically indicated how much regulation was *too* much. In other words, the Court never designated when otherwise legitimate regulation became an excessive burden on interstate commerce.

V. The Constitutionality of the Virginia Act After *Edgar v. MITE*

In the year following *MITE*, the Virginia Legislature made a significant change in the Virginia Act:[78] Virginia rescinded a provision that had been held to violate the Commerce Clause in *Telvest, Inc. v. Bradshaw*.[79] The unconstitutional provision forced offerors who bought on the open market and who intended to change the control of the target company to disclose information similar to that required in a formal tender offer.[80]

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76. *See infra* text accompanying note 102.

77. *See supra* note 65.

78. *See* VA. CODE § 13.1-529(b)(iii) (1984).

79. 547 F. Supp. 791 (E.D. Va. 1982), *aff'd*, 697 F.2d 576 (4th Cir. 1983). *See also supra* note 54.

In addition to this change, the Virginia Legislature amended the Act to prohibit certain takeover bids. If the offeror had purchased more than two percent of the outstanding shares of a company within the prior two years, it was prohibited from making a tender offer for less than all of the outstanding shares of that company. VA. CODE § 13.1-530(a)(i) (1984).

80. As originally written, the provision exempted certain offers from the Act's disclosure requirements. The italicized portion of the provision reprinted below was held unconstitutional in *Telvest* and repealed by amendment:

> An offer to purchase shares to be effected by a registered broker-dealer on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commissions, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell shares of the offeree company; *provided, however, that this exemption shall not apply to any such offer made by a person who intends to change the control of the offeree company unless such person shall have filed with the Commission and with the registered agent of the offeree company a statement setting forth the purpose of such change, the method of carrying out such intention and such other information as the Commission may require as necessary in the public interest or for the protection of investors; and any person who, at the time he makes such offer, owns in excess of ten per centum of any class of the equity securities of the offeree company and has purchased more than one per centum of such class during the twelve-month period preceding such offer shall be presumed to have such intention unless the Commission determines otherwise* . . . .

VA. CODE § 13.1-529(b)(iii) (1984).

The unconstitutional proviso had been designed to regulate "creeping" tender offers. *See infra* note 83.

Utilizing the *MITE* Commerce Clause analysis, the District Court found that this particular section of the Virginia Act had just as great an application to out-of-state transactions as did the invalid Illinois Act.[81] In addition, removing a major purchaser from the market because of failure to qualify for the exemption disrupted the stock price and deprived shareholders of the opportunity to sell to a willing buyer.[82]

Virginia's interest in protecting resident shareholders from the alleged unfairness of unregulated "creeping" tender offers[83] was balanced against these burdens on interstate commerce. But because the proviso did not protect *Virginia* shareholders exclusively, and the burdens on interstate commerce were substantial, the burdens were "excessive in relation to the local benefits."[84]

Beside the challenge in *Telvest*, no other attack has been levied against the Virginia Act since *MITE*. Essentially, the Act remains in its original form. Most notably, the hearing provisions remain virtually unchanged.[85]

An evaluation of the Virginia Act in light of *Edgar v. MITE* must focus on the *Pike* test, since it was the basis for the *MITE* majority opinion. The local interests served by the Virginia Act are similar to those asserted by Illinois in *MITE*: protection of resident shareholders and regulation of the internal affairs of Virginia corporations.[86]

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81. The Virginia provision

> purports to cover open market purchases, wherever made, even if the transaction crosses state lines or takes place entirely outside Virginia, and even if neither party to the transaction has any ties to Virginia other than owning stock in a company that is incorporated in Virginia and does business in Virginia.

547 F. Supp. at 797. *Cf.* ILL. ANN. STAT. ch. 121 1/2 ¶ 137.52-10 (Smith-Hurd Supp. 1979).

82. 547 F. Supp. at 797.

83. A "creeping" tender offer has been defined as

> an acquisition strategy where, by achieving a substantial position in a company through open market purchases, an acquiring company can achieve a blocking position which enables them to purchase the remaining shares by tender or exchange offer at a cost that would be substantially less than if a formal tender offer had been made earlier.

547 F. Supp. at 798 (citing post-trial brief of the State of Virginia, at 15).

84. For discussion of this test, see *supra* notes 48, 65 and accompanying text.

In affirming, the court of appeals noted that the Williams Act accords investors similar protections against so-called creeping tender offers, since it requires disclosure when an open market purchaser acquires *five* percent of an equity security. The Virginia proviso was not triggered until a purchaser had acquired *ten* percent of an equity security. *Compare* 15 U.S.C. § 78m(d)(1) (1983) *with* VA. CODE § 13.1-529(b)(iii) (1980).

85. Use of the standard federal form, Schedule 14-D, is now acceptable in lieu of the disclosure required under § 13.1-531(b). VA. CODE § 13.1-531(a) (1984). However, the SCC retains authority to require additional disclosure beyond a Schedule 14-D if it is "in the public interest or for the protection of investors." *Id.* § 13.1-531(b1).

86. In general, these two interests are considered the primary justifications for state takeover legislation. *See, e.g.*, AMCA Int'l Corp. v. Krouse, 482 F. Supp. 929, 940-51 (S.D. Ohio

The major difference between the two statutes is Virginia's regulation of the internal affairs of its corporations. The Virginia Act applies only to corporations incorporated under Virginia law *and* doing at least some business in Virginia.[87] The Illinois Act could apply to non-Illinois corporations that conducted business in other states if at least ten percent of the corporation's shareholders were Illinois residents.[88] The Court considered this provision a major fault in the Illinois law. Because the Virginia Act is limited to Virginia corporations doing some business in Virginia, it avoids this infirmity. Therefore, defending Virginia's Act on the ground that it only regulates the internal affairs of Virginia corporations has more validity than the similar assertion by Illinois in *MITE*. Nevertheless, the *MITE* Court warned that since "[t]ender offers contemplate transfers of stock by stockholders to a third party . . . [they] do not themselves implicate the internal affairs of the target company."[89] This caveat suggests that the Court would give no weight to a local interest in "regulating internal affairs" if this issue were raised again.[90]

The other local interest, protection of resident shareholders, would be the primary justification for the Virginia Act if it were faced with a constitutional challenge under the Commerce Clause. It has been argued that the extra time afforded by state takeover statutes is necessary to enable resident investors "to reach an informed decision on the basis of complete and accurate information."[91] But as the *MITE* Court noted, a state "has no legitimate interest in protecting nonresident shareholders."[92] While the hearing provisions of the Virginia Act purportedly protect resident shareholders, they nonetheless *affect* all nonresident shareholders of Virginia corporations. When a hearing is ordered by the Virginia SCC to examine a tender offer, the offer is stayed until the SCC adjudicates the proposed disclosure.[93] Given the time limitations in the Virginia Act's hearing provisions, tender offers could be stayed *nation-*

1979); Langevoort, *supra* note 5, at 220-23, 242; Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687, 690 (1975).

Other state interests have been identified, but courts have not seriously considered them. *See, e.g., Kidwell*, 577 F.2d 1256, 1282 (5th Cir. 1978) (interest in preserving the contribution made by local companies to the quality of life in the communities in which they exist). *Cf.* Boehm, *supra* note 5, at 742-46 (urging recognition of states' economic and regulatory interest in preventing departure of corporate plants and facilities).

87. VA. CODE § 13.1-529(e) (1984). *See supra* text accompanying note 28.

88. 457 U.S. at 645. *See supra* text accompanying notes 71-72.

89. 457 U.S. at 645.

90. This statement by Justice White has been criticized as ignoring "the reality of a state's interest in a corporation that is physically present within it." Profusek & Gompf, *supra* note 66, at 19.

91. Note, *supra* note 6, at 513.

92. 457 U.S. at 644.

93. VA. CODE § 13.1-531(a)(iii) (1984).

wide for *forty-five days* longer than under the Williams Act.[94]

Thus, the potential delay caused by the lengthy hearings creates an undue burden upon interstate commerce.[95] As the Court noted in *MITE*, delay is "the most potent weapon in a tender offer fight."[96] Delay accords the target's incumbent management more time to invoke a panoply of defensive measures. These tactics include the repurchase of the target's stock to raise the market price and make it more expensive for the offeror; issuing new stock to dilute the offeror's position; issuing a "poison pill"[97]; utilizing a "scorched-earth" defense[98]; or implementing a "Pac Man" defense.[99][100]

The delay also affects the market price of the stock. Uncertainty surrounding a stymied tender offer increases the chance for irregular price fluctuations and suspended trading on the national exchanges.[101]

As the Supreme Court noted in *MITE*:

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94. *Id.* § 13.1-534(b). Actually, in such a scenario the offer would be *public* for 65 days because of the 20 day pre-offer filing requirement in § 13.1-531(a). Not only would the market react to the pre-filing, but target management could begin formulating defensive tactics 20 days before the offer even begins.

95. *See, e.g.*, Wilner & Landy, *supra* note 5, at 22. Recently, this issue was addressed by the Sixth Circuit in Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982):

> We find that to the extent that the [Michigan] state statutes confer power on state authorities to interfere with the timing of an interstate tender offer made under the Williams Act, or to compel revision of the solicitation or tender offer as a condition of proceeding, they impose an unconstitutional burden on interstate commerce.

Id. at 565.

96. 457 U.S. at 637 n.12 (citing Langevoort, *supra* note 5, at 238).

97. A "poison pill" is a class of securities convertable upon consummation of any merger or similar transaction into the common stock of the acquiring company. SEC ADVISORY COMMITTEE ON TENDER OFFERS, REPORT OF RECOMMENDATIONS 140-41 (July 8, 1983).

98. The "scorched-earth defense" consists of the target selling its assets or by other means destroying the character of the company. *Id.*

99. A "Pac Man" defense is a tender offer by the target for the securities of the offeror. *Id.*

100. Some of these more common measures, colloquially referred to as "shark repellants," are "fair price" and "super majority" provisions invoked by amendment to a target's articles of incorporation or by-laws. A fair price provision alleviates the danger presented by a "two-tiered" tender offer. In this type of offer, the offeror bids a premium price— usually well above the market price—until a controlling block of stock is obtained. Once in control, the offeror bids a greatly reduced price for the remaining shares. *See* Comment, *The Front-End Loaded, Two-Tiered Tender Offer*, 78 NW. U.L. REV. 811, 812 (1983). Fair price provisions require the offeror to pay equivalent consideration for both the control shares and the remaining shares. Black & Smith, *Antitakeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699, 717-20 (1979).

"Super majority" provisions require more than a simple majority vote—usually 67%—to approve mergers or other actions collateral to takeovers (*e.g.*, amending by-laws or charters; changing board size or tenures of office). *See* Black & Smith, *supra*, at 713-16; Note, *Corporate Battles for Control*, *supra* note 5, at 1481 n.320 (citing Arieff, *Drafting of 'Shark Repellants' Receives Increased Attention*, Legal Times, Feb. 21, 1983, at 1, col. 1).

101. Wilner & Landy, *supra* note 5, at 11. *See also* SEC. REG. & L. REP. (BNA) No. 1, at A-12 (June 4, 1969).

> The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.[102]

This analysis demonstrates that the Virginia Act, like the Illinois Act, burdens interstate commerce. Therefore, the only way the Act can pass constitutional muster under *MITE* and the *Pike* test is if this burden is not excessive in relation to the admittedly legitimate local benefit of "shareholder protection."[103] Analyzing a similar provision in the Illinois Act, the *MITE* Court concluded summarily that the Williams Act provides the same substantive protections as the state act and that any additional protection that the state act provided was "speculative."[104] Because investors were already protected by federal law under the Williams Act, the local benefit derived from the state act was minimal when compared with the burdens it imposed on interstate commerce.[105]

This reasoning, while perhaps "too simplistic,"[106] nevertheless applies to the Virginia Act. The Supreme Court has stated that the Williams Act provides sufficient safeguards to enable investors to evaluate tender offers. States may not justify unduly burdensome tender offer regulation on the ground that federal law is inadequate to protect local shareholders; statutes like Virginia's Take-Over-Bid Disclosure Act will fail the *MITE* test.

Conclusion

Virginia's Act purports to protect resident shareholders of Virginia corporations from dangers inherent in the tender offer process. The law, however, affects non-Virginia investors throughout the nation.[107] This

102. 457 U.S. at 643 (citing Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1173-74 (1981); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5, 27-28, 45 (1978); H.R. REP. NO. 94-1373, at 12 (1976)).

103. *See supra* text accompanying notes 48, 65-67. As outlined earlier, the *disclosure* required by the Virginia Act is nearly identical to that required by the Williams Act. *See supra* text accompanying note 32. In fact, an offeror can even substitute a federal Schedule 14-D for the information required by Virginia. *See supra* note 85. Thus, to use the language of the *MITE* Court, the "extra" protection afforded local investors by Virginia disclosure requirements is speculative at best. *MITE*, 457 U.S. at 645.

104. 457 U.S. at 644-45. *See supra* notes 67-73 and accompanying text.

105. *See Pike*, 397 U.S. at 142; *see also supra* notes 65, 69 and accompanying text.

106. Profusek & Gompf, *supra* note 66, at 18 (footnotes omitted). *See also supra* text accompanying notes 74-77.

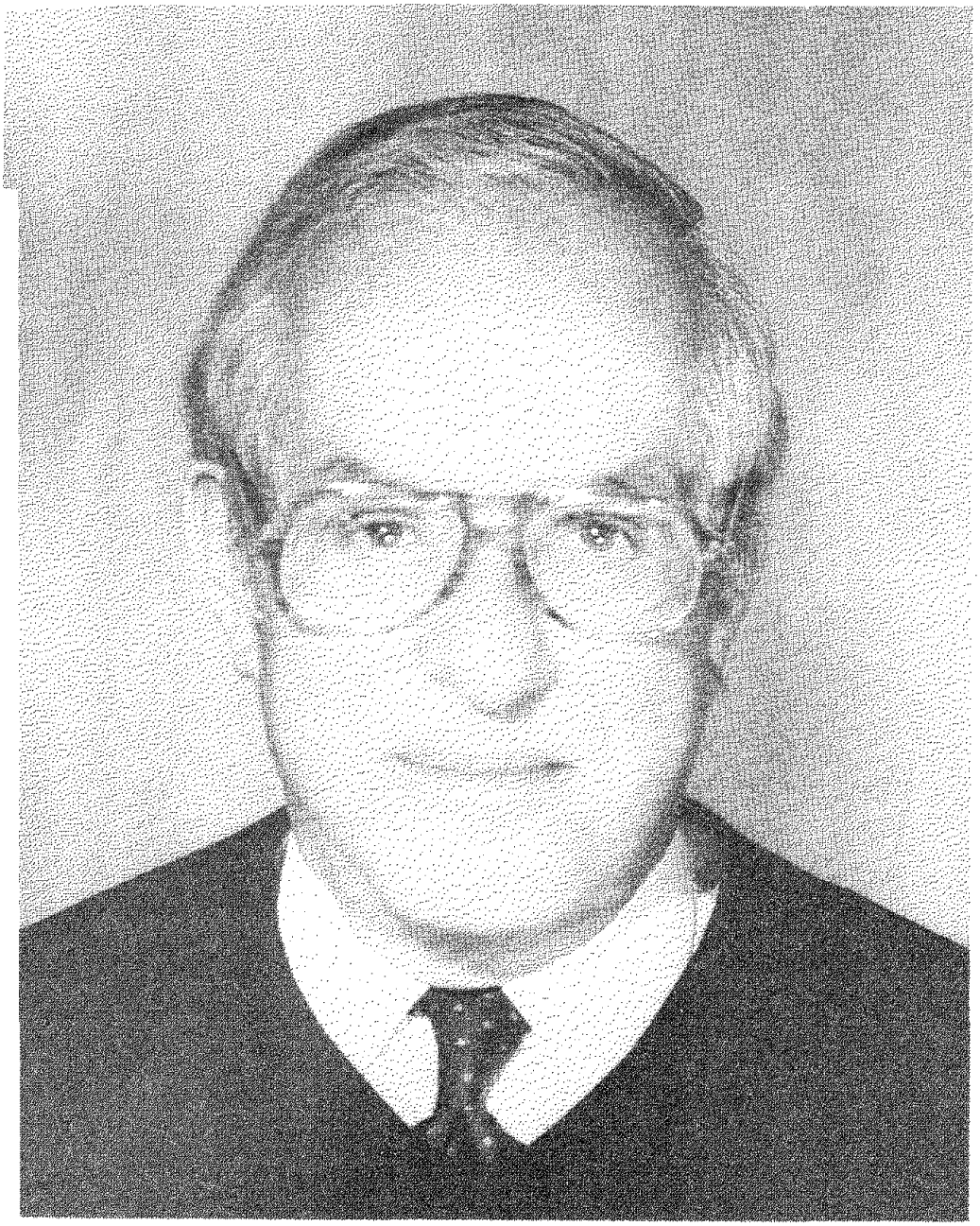
107. *See supra* text accompanying notes 93-95.

effect translates into a burden on interstate commerce.[108] The burden might be acceptable if balanced by strong local interests. But the Virginia Act, like the Illinois Act in *MITE*, fails to offset this burden.

According to the *MITE* rationale, the Virginia Act does not benefit resident shareholders with greater substantive protection than the Williams Act. Both acts require basically the same disclosure,[109] and the hearing provisions afford only speculative extra investor protection.[110] When weighed against the drastic potential for disrupting legitimate nationwide tender offers,[111] the burden of the hearing provisions is excessive in relation to any possible local benefit. As Justice White astutely pointed out, the only group that the hearing provisions really benefit is the incumbent management of the target corporation.[112]

Critical to the *MITE* Court was its belief that the increased risk that the tender offer would fail due to incumbent management's defensive tactics outweighed the possible benefits of delay inherent in Illinois' hearing provisions. Because the hearing provisions in the Virginia Act could create excessive delay, it should share the same fate as the Illinois Act; its putative local benefits are minimal when compared with its interference with interstate commerce.

108. *Id.*
109. *See supra* note 103.
110. *See supra* note 69 and accompanying text.
111. *See supra* text accompanying notes 93-95.
112. *See supra* note 68.



JUSTICE STANLEY MOSK