

1986

# Minnesota's Control Share Acquisition Statute and the Need for New Judicial Analysis of State Takeover Legislation

Lyman Johnson

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Johnson, Lyman (1986) "Minnesota's Control Share Acquisition Statute and the Need for New Judicial Analysis of State Takeover Legislation," *William Mitchell Law Review*: Vol. 12: Iss. 2, Article 1.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol12/iss2/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

# MINNESOTA'S CONTROL SHARE ACQUISITION STATUTE AND THE NEED FOR NEW JUDICIAL ANALYSIS OF STATE TAKEOVER LEGISLATION

LYMAN JOHNSON†

*Conventional wisdom holds that corporate takeovers benefit both shareholders and society in general. In examining the constitutionality of state takeover statutes, numerous courts have uncritically adopted this view of takeovers. As a result, they have consistently invalidated state statutes as burdening interstate commerce, both by depriving shareholders of premiums and supposedly impeding an efficient reallocation of resources. This conventional wisdom has been challenged by recent empirical evidence on the adverse efficiency effects of many mergers. In light of this evidence indicating a divergence of investor and other interests in takeovers, Professor Lyman Johnson argues for revised judicial analysis of takeover legislation which will acknowledge a state's interest in determining how to reconcile investor and noninvestor claims on the modern corporation.*

INTRODUCTION .....	184
I. STATE TAKEOVER REGULATION AFTER <i>MITE</i> .....	190
A. <i>Background</i> .....	190
B. <i>Minnesota's Control Share Acquisition Statute</i> .....	195
1. <i>Overview of the Statute</i> .....	195
2. <i>Rationale for Shareholder Approval</i> .....	197
II. THE CONSTITUTIONALITY OF THE CONTROL SHARE ACQUISITION STATUTE .....	201
A. <i>The Van Dusen Decision</i> .....	201
B. <i>The Stock Price Premium Argument</i> .....	203
C. <i>A Reevaluation of the Efficiency Theory of Takeovers</i> .	204
D. <i>The Benefits of Minnesota's Legislation</i> .....	207
1. <i>Shareholder Protection</i> .....	207
2. <i>Protection of Other Interests</i> .....	208

---

† Assistant Professor of Law, Washington & Lee University School of Law. Mr. Johnson received his B.A. from Carleton College and his J.D. from the University of Minnesota in 1978. Mr. Johnson practiced with the Minneapolis law firm of Stacker & Ravich from 1978 to 1985. Financial support of certain research for this article was generously provided by the Frances Lewis Law Center at Washington & Lee University.

3. Protecting Minnesota's Business Climate .....	212
E. The Federal Policy of Neutrality .....	216
CONCLUSION .....	220

## INTRODUCTION

A critical component of Minnesota's effort to regulate corporate takeover activity—its control share acquisition statute<sup>1</sup>—was recently held to impose an impermissible burden on interstate commerce in *APL Ltd. Partnership v. Van Dusen Air, Inc.*<sup>2</sup> The result is continued uncertainty on the nettlesome question of whether, after *Edgar v. MITE Corp.*,<sup>3</sup> states can play a meaningful role in influencing contests for corporate control.<sup>4</sup> Unfortunately, this uncertainty subsists at a time of increasing concern about the consequences of widespread takeover activity, a concern that challenges conventional wisdom that takeovers are, on the whole, advantageous for investor and other societal interests alike.<sup>5</sup>

---

1. MINN. STAT. § 302A.671. For further sections involving control share acquisitions, see also MINN. STAT. § 302A.011, subds. 37-38 (definitions); *id.* § 302A.449, subd. 7 (proxies in control share acquisition).

2. [Current] FED. SEC. L. REP. (CCH) ¶92,331 (D. Minn. Aug. 19, 1985). While on appeal to the Eighth Circuit, the case was settled. As a result, the Eighth Circuit ordered the district court to vacate its judgment and ordered the appeal dismissed with prejudice.

3. 457 U.S. 624, 640 (1982) (Illinois Business Take-Over Act held to impose an impermissible burden on interstate commerce).

4. In *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 916 (8th Cir. 1984), the Eighth Circuit Court of Appeals upheld the other component of Minnesota's regulatory scheme, the 1984 amendments to chapter 80B of Minnesota Statutes. See Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws 470 (codified at MINN. STAT. §§ 80B.01-.13 (1984)). Chapter 80B, however, is much more limited in scope than the control share acquisition statute in that the former regulates only offers to purchase securities from Minnesota residents. MINN. STAT. § 80B.01, subd. 8. As such, chapter 80B, primarily a disclosure statute, is more narrowly aimed at resident shareholder protection and thus is of limited utility in dealing with the proposed takeover of a corporation owned largely by nonresidents. Even the degree of state regulation upheld in *Cardiff* has been criticized as "local protectionism" because of the statute's potential "stifling" effect on tender offers. Comment, *The Constitutionality of Minnesota's New Corporate Takeover Act: The Cardiff Failure*, 11 WM. MITCHELL L. REV. 853, 884 (1985). The fundamental policy issue is whether it is good or bad to have an "unstifled" market for corporate control, and as reservations about such an unregulated market develop, whether states should be constitutionally disarmed from dealing with any undesirable consequences of frequent takeover activity.

5. Concern about takeover activity extends to possible adverse effects of threatened as well as actual takeovers. See, e.g., Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1221-50 (1984) (comprehensive explication of diseconomies

While Congress has recently begun to show a renewed interest in the "takeover problem,"<sup>6</sup> historically federal takeover policy has had a rather narrow aim—to protect shareholders of target companies. The takeover policies of many states, however, while aimed at protecting their residents as investors, have also sought to protect a much broader array of interests. These interests include businesses, employees, creditors, and communities where corporations are located.<sup>7</sup> Differing in aim

---

associated with frequent takeover activity); Williams, *It's Time for a Takeover Moratorium*, *Fortune*, July 22, 1985, at 133-34 (expression of concern about takeover activity by former Securities and Exchange Commission Chairman). For the views of a long-time critic of hostile takeovers, see generally R. REICH, *THE NEXT AMERICAN FRONTIER* 140-72 (1983).

Concern about the effects of takeovers on the economy and society is evident from the great deal of scholarly attention given to the subject. Some of this commentary is beginning to challenge the widely-accepted view of many academics that takeovers are generally desirable, and is focusing both on possible deleterious consequences of such activity and present inability to fully assess its impact. For example, in November of 1985, Columbia University's Center for Law and Economic Studies held a three day conference on Takeovers and Contests for Corporate Control. Many of the papers presented were noticeably less sanguine about takeovers than much earlier writing on the subject.

There are, of course, a great variety of concerns about the effects of takeover activity—actual and threatened—on persons and groups other than investors. One way to classify many of these misgivings is to separate the concern for the effects on persons whose lives are directly affected by a particular corporation from concerns that are more national in scope. "Stakeholders" in specific corporations such as employees, suppliers, creditors, customers, and local communities fall within the former category. Diversion of credit to unproductive uses, narrow management focus on short run economic performance, inordinate use of debt, and waste of society's resources fall within the latter category. Obviously, the distinction is somewhat artificial. Nonetheless, it serves as a reminder that while there are persons and groups quite interested in the fate of individual corporations, there is also a larger societal concern about the cumulative effects of takeovers. In this Article, the term "noninvestors" will be used to refer to all such interests unless otherwise specified.

6. For example, Congressman Timothy Wirth of Colorado, Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance, House Committee on Energy and Commerce, has held extensive hearings on the subject of corporate takeovers. Indicative of the complexity of the issue is his comment that ". . . the more I know about the issue, the less sure I am about what to do." Phillips, *Congress Responds to Hostile Tender Offers*, *THE BUS. LAW. UPDATE*, September/October 1985, at 3. It appears unlikely that Congress will take action in the near future, particularly since the present Administration is seeking to further reduce federal regulation of merger activity. Bradley, *Hands-off Policy for Mergers: U.S. Seeks to Put It on the Books*, *The Christian Science Monitor*, Jan. 28, 1986, at 19.

7. See generally Warren, *Developments in State Takeover Regulation: MITE and Its After Math*, 40 *BUS. LAW.* 671, 674 n.19 (1985) (states have historically taken "benevolent bureaucracy" approach to takeover regulation). Chapter 80B is prefaced by legislative findings on the pernicious consequences of takeovers, particularly hostile takeovers. 1984 Minn. Laws at 470-71. The interests cited as damaged by such activ-

and method from pro-investor federal policy, such state legislation inevitably faces the question of federal preemption. Seeking to influence the acquisition of corporate stock and thus the flow of capital within the national market, state legislation also encounters the possibility that it improperly regulates interstate commerce.

Beyond these constitutional objections, state takeover policy has sometimes been viewed as deceptive. While purporting to protect various noninvestor interests which vitally depend on the modern corporation,<sup>8</sup> state takeover policies are regarded by some as management-backed stratagems to entrench incumbent (incompetent) management.<sup>9</sup> Whether duplicitous or not, state takeover statutes have played a relatively minor role

---

ity were not merely those of investors, but included employees, communities, customers, suppliers, and businesses themselves. *Id.*; see Comment, *supra* note 4, at 869 n.92. Among the purposes of Chapter 80 B was to "assure that the impacts of takeovers on all affected constituencies are identified and disclosed prior to the consummation of these transactions . . . ." 1984 Minn. Laws at 471.

8. It is increasingly recognized that there are many groups in society that have a strong interest in the activities of major corporations, and that the claims of such groups ought to be considered in corporate decisionmaking. This being the case, there is increasing uneasiness with the following traditional premise:

that the stockholders are the corporation, and [that] undivided loyalty is owed to the stockholders. If the corporation is viewed simply as a collection of capital pooled for the purpose of profits, then the premise is plausible; the sole interest of the corporation is gain for the shareholders. This is the traditional conception of the corporation. There is, however, substantial doubt that this is an adequate conception of the modern business corporation. There is an increasing weight of opinion that the corporation should be viewed as a social and economic institution which has interests other than those of the shareholders that it can and ought to serve.

Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. LAW & SEC. REG. 155, 170 (1982).

Certainly an exclusive focus on shareholder well-being is not essential to economic success, a point made by contrasting American and Japanese attitudes toward corporate priorities:

. . . American culture accepts, even encourages, the breaking of relationships. Economic relationships, which Americans assume to be sharply different from personal relationships, are *supposed* to be broken in order that the "market" may function freely and vigorously . . . . [In Japan], economic enterprises are assumed to exist primarily for the benefit of those who work within them or otherwise depend upon them for their livelihood, as opposed to those who invest capital in them.

Reich, Book Review, 98 HARV. L. REV. 697, 704-05 (1985).

For a recent, provocative challenge to the traditional view that a corporation is an economic institution existing only to bring gain to its shareholders, see White, *How Should We Talk About Corporations? The Languages of Economics and Citizenship*, 94 YALE L. J. 1416 (1985).

9. See, e.g., Comment, *supra* note 4, at 865 n.77; Jacobs, *Anti-Takeover Law Favors Managers Over Shareholders*, Minneapolis Star & Trib., Mar. 10, 1985, at 27A, col. 1.

in preventing hostile battles for corporate control due to their questionable constitutional status.<sup>10</sup> This was reinforced in 1982 when the United States Supreme Court declared unconstitutional the Illinois “anti-takeover” statute, a statute then typical of state regulatory efforts.<sup>11</sup>

Yet, a nagging question remains. Is enough known about the consequences of actual takeovers and the responses engendered in target company management by the threat of possible takeovers to make the following unqualified statements about their social utility?

The available evidence, however, is that mergers and acquisitions increase national wealth. They improve efficiency, transfer scarce resources to higher valued uses, and stimulate effective corporate management. They also help recapitalize firms so that their financial structures are more in line with prevailing market conditions.<sup>12</sup>

To date, such pronouncements could be made because many proponents of the evidence on which such statements are grounded—so-called “stock price” evidence<sup>13</sup>—have made a critical assumption. They have assumed that stock market prices are a “reliable barometer” of a takeover’s benefit for society and that a net positive change in the value of an acquirer’s and a target’s shares indicates that “the transaction creates

---

10. See Warren, *supra* note 7, at 678 n.52, 679 n.57 (collection of cases in which state takeover statutes were challenged on constitutional grounds).

11. Edgar v. MITE Corp., 457 U.S. 624, 646 (1982).

12. Economic Report Of The President, transmitted to Congress together with the Annual Report of the Council of Economic Advisors, February, 1985, at 196 [hereinafter cited as 1985 Economic Report]. The 1985 Economic Report argued that additional regulation of takeovers was unnecessary:

To the extent government regulations impose costs on bidders, or reduce a bidder’s chances for success, fewer takeover attempts will be made. This tends to insulate corporate managements from the competitive pressures of the external market for corporate control. Stockholders, as a group, will also suffer as a result of excessive regulation because it reduces the chance to earn takeover premiums.

*Id.* at 191.

13. *Id.* at 196-98. See also Address entitled, *Tender Offers: The Arguments and the Evidence* by Charles C. Cox, Commissioner of the Securities and Exchange Commission, to the 1985 National Conference of the American Society of Corporate Secretaries (June 1, 1985) (copy of address on file at the William Mitchell Law Review office) (a pro-takeover presentation summarizing results of recent SEC study of stock price performance in 228 tender offers); see generally Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983) (summary of evidence).

wealth and is beneficial.”<sup>14</sup> It is clear from the stock price evidence that takeovers do lead to substantial increases in a target company’s stock price and to lesser increases in the acquirer’s stock price, thereby benefiting shareholders. If such stock price evidence can also be viewed as a proxy measure of the consequences of takeovers for society at large, then it can be concluded that the interests of society and those of shareholders coincide and that each gains from takeover activity. Having these commendable consequences, the argument goes, takeovers should be encouraged, not deterred, by public policy.<sup>15</sup>

This interpretation of stock market price evidence has not failed to find its way into judicial thinking. Indeed, it was precisely this line of economic reasoning that the courts in *MITE* and *Van Dusen* adopted in finding the Illinois and Minnesota takeover statutes to impose unconstitutional burdens on interstate commerce. The effects on interstate commerce of such regulation were succinctly described by the Supreme Court:

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.<sup>16</sup>

Recent anecdotal and direct empirical evidence has now challenged the claims made for the stock price evidence.<sup>17</sup> In effect, the new evidence calls into question the assumption that the existence of stock price increases in corporate takeovers

---

14. 1985 Economic Report, *supra* note 12, at 197. The report states: “Stock market prices thereby provide a reliable barometer of the likely consequences of takeover transactions. If the aggregate net change in the value of acquirers’ and targets’ shares is positive as a result of a takeover, then the transaction creates wealth and is beneficial.” *Id.*

15. In spite of this positive view of takeovers, some financial economists candidly acknowledge uncertainty as to the reasons for the claimed wealth increases. Professor Bradley stated the following in proceedings before the Securities and Exchange Commission: “The point is that it’s taken us this time to get to this point in the aggregate data, and that’s exactly what we want to do, find out exactly where those synergies are coming from.” *Securities and Exchange Commission Proceedings: Economic Forum on Tender Offers* (Feb. 20, 1985) (statement by Professor Bradley) (copy on file at the William Mitchell Law Review office).

16. *MITE*, 457 U.S. at 643 (emphasis added) (cited in *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,192; *Icahn v. Blunt*, 612 F. Supp. 1400, 1416 (W.D. Mo. 1985)).

17. See *infra* notes 92-97 and accompanying text. The 1985 Economic Report of the President acknowledged that stock price evidence was only a “barometer” of the

implies efficiency gains in the use of society's resources. If the new evidence is correct, or if it at least raises some doubt as to whether we are sufficiently informed to authoritatively endorse corporate takeovers, then judicial opinions that rely on an efficiency theory of takeovers to analyze the "burden" on interstate commerce of state takeover legislation may be fundamentally flawed. State legislation that "burdens" commerce by reducing takeover activity may not impair society's desire for an efficient use of resources as certain commentators and courts have thought. The effects of state takeover legislation on interstate commerce may be less than, or at least different from, those described in *MITE* and *Van Dusen*. The chief identifiable effect may simply be that, by possibly curbing takeover activity, state legislation reduces the opportunity for investors to receive premiums for their stock. If one believes that corporations exist for the sole purpose of providing takeover premiums for shareholders, invalidating such statutes outcome may not be a particularly disturbing outcome. If one takes a broader view of the corporation's role in modern society, preventing states from protecting noninvestor interests is troubling and must be regarded as the unfortunate product of an analysis that is too shallow and simple to deal with the complexities and unknowns of the takeover phenomenon.

This Article first briefly describes the post-*MITE* efforts of certain states to utilize their corporate statutes as a means of regulating corporate takeovers. Next, the approach of one such statute—Minnesota's control share acquisition statute—will be outlined. Finally, the reasoning of *Van Dusen* will be examined through an elaboration of the ideas raised in this introduction. It will be suggested that judicial reliance on stock price evidence as the basis for commerce clause analysis may be unwarranted in light of challenges to the efficiency claims of that evidence. Failure to employ more refined analysis means that takeovers will proceed unchecked by state legislation, not because of any confidence that society as a whole is well served by them, but because they produce premiums for investors. As

---

consequences of takeovers and that, ideally, more direct evidence would be examined. 1985 Economic Report, *supra* note 12, at 196-97.

The more direct evidence suggests that the takeover phenomenon is more complex than is acknowledged by proponents of stock price evidence. While very appealing to judges seeking "scientific" solutions to the questions raised by state takeover legislation, relying on stock price evidence may mislead more than guide.



such, utilization of an efficiency theory of takeovers to analyze state takeover legislation will, perhaps unwittingly, create a pro-investor, pro-takeover bias. Conversely, adoption of a less wooden, more inclusive analysis may mean that some state legislation, motivated to curb perceived adverse consequences of takeovers to important noninvestor interests, is more likely to be upheld.

## I. STATE TAKEOVER REGULATION AFTER *MITE*

### A. Background

Unlike federal policy which is aimed exclusively at shareholder protection, state laws regulating takeover activity often have broader purposes. While citing investor protection as at least one of their aims, state legislation also seeks to protect business entities and their dependents such as employees and local communities.<sup>18</sup> The states' fear, whether well-founded or not,<sup>19</sup> is that if takeovers lead to plant closings and employee layoffs,<sup>20</sup> then the consequences might be more severe to a

---

18. See Warren, *supra* note 7, at 674 & n.19. Having protection of local interests as a goal, pre-*MITE* statutes were often criticized as unconstitutional. See Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213, 241-53 (1977); Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 15-32 (1976); but see Boehm, *State Interests and Interstate Commerce: A Look at the Theoretical Underpinnings of Takeover Legislation*, 36 WASH. & LEE L. REV. 733, 741-46 (1979)(states have economic interest in regulating corporations situated in that state).

19. This is an issue on which there is very little direct evidence. "[T]here is no decisive statistical data available to show whether this wave [of mergers], and the previous wave, have been good, bad, or indifferent for the economy, for society, for workers." M. GREEN & J. BERRY, *THE CHALLENGE OF HIDDEN PROFITS: REDUCING CORPORATE BUREAUCRACY AND WASTE* 215 (1985). See Address by A. A. Sommer, Jr., former SEC Commissioner, 1984 George M. Ferris Lecture, Trinity College, Hartford, Conn. (Nov. 19, 1984). (copy of address on file at the William Mitchell Law Review office). Even the SEC Advisory Committee on Tender Offers noted the lack of direct, conclusive evidence on the effects of hostile takeovers. "After considerable study, discussion and consideration of commentators' views, the Committee finds that there is insufficient basis for concluding that takeovers are either per se beneficial or detrimental to the economy or the securities markets in general, or to issuers or their shareholders, specifically." SECURITIES AND EXCHANGE COMMISSION ADVISORY COMMITTEE ON TENDER OFFERS, REPORT OF RECOMMENDATIONS, at xvii (July 8, 1983)[hereinafter cited as SEC ADVISORY REPORT] (copy on file at the William Mitchell Law Review office). Such evidence as does exist, for example on plant closings, appears not to have isolated takeovers as a factor. See, e.g., R. Schmenner, *Aspects of Industrial Plant Closings*, reprinted in *THE IMPACT OF THE MODERN CORPORATION* 191 (B. Block, et al. eds. 1984).

20. See Act of Apr. 25, 1984, ch. 488 §§ 1, 2, 1984 Minn. Laws 470-71 (legislative intent). This is of particular concern with the increasingly common "bust-up" take-

state's residents and economy than would a loss by shareholders (many of whom may live out of state) of a stock premium.

While pre-*MITE* statutes and regulations varied in their methods of regulation,<sup>21</sup> many of them followed certain patterns. The statutes often required disclosures beyond those imposed by the federal Williams Act,<sup>22</sup> sometimes well in advance of the commencement of the tender offer.<sup>23</sup> Furthermore, state administrators were often authorized to hold hearings and to prevent an offer from proceeding if it was believed to be unfair or deficient in its disclosures.<sup>24</sup> While state regulations held many possibilities for stopping or delaying a tender offer that were undoubtedly favored by target management and opposed by bidders,<sup>25</sup> they were almost routinely declared unconstitutional.<sup>26</sup>

In 1982, the Supreme Court struck down the Illinois Business Take-Over Act<sup>27</sup> as unconstitutional under the commerce clause because it imposed burdens on interstate commerce that were excessive in light of the local interests the Act purported to further.<sup>28</sup> Since that decision, many other state statutes have also been declared unconstitutional.<sup>29</sup> Given state

---

overs in which an acquisition is financed by selling off pieces of the acquired company.

21. See Warren, *supra* note 7, at 676-79; see also Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky or Corporation Law Concepts?*, 7 CORP. L. REV. 3, 6-10 (1984).

22. See, e.g., GA. CODE ANN. § 14-6-2(b) (1982 & Supp. 1985); ME. REV. STAT. ANN. tit. 13, § 803(2) (1964 & Supp. 1985-86).

23. See, e.g., N.C. GEN. STAT. § 78B-4(a) (1985) (30 day notice period).

24. See, e.g., MO. ANN. STAT. § 409.515, subd. 1(2) (Vernon 1979).

25. See Langevoort, *supra* note 18, at 238-39; Wilner & Landy, *supra* note 18, at 26. In commenting on the effects of the delay in the battle for Conwed Corp. caused by the disclosure requirements of Minnesota Statutes chapter 80B, F.T. Weyerhouser, Conwed's Chief Executive Officer, stated that "[t]he law has been a great help to us . . ." Inskip, *Efforts to Fight Hostile Business Takeovers*, Minneapolis Star & Trib., Jan. 9, 1985, at 17A, col. 3.

26. For a collection of cases that declared state takeover statutes unconstitutional, see Warren, *supra* note 7, at 678 n.52.

27. ILL. REV. STAT. ch. 121 1/2, § 137.51-.70 (1981) (repealed 1983).

28. *MITE*, 457 U.S. at 646. Four Justices (White, Powell, Stevens, and O'Connor) and Chief Justice Burger reached this conclusion. *Id.* at 642-43, 646, 654-55. Three Justices (White, Stevens, and O'Connor) and Chief Justice Burger also found the statute to directly regulate interstate commerce. *Id.* at 642, 655. Two Justices (White and Blackmun) and Chief Justice Burger found the Illinois statute to be preempted by federal takeover law. *Id.* at 639. The *MITE* decision has been extensively reviewed. For an excellent summary of the Supreme Court's analysis of the Illinois Statute, see Comment, *supra* note 4, at 859-65.

29. See *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425, 1431 (10th Cir.

aims of retaining businesses as independent entities and protecting those interests that rely on the continuation of management-formulated operating policies, aims that are quite different from federal takeover policy, the legal question facing state legislatures was whether *MITE* left any meaningful room for states to accomplish their aims.<sup>30</sup>

Particularly encouraging for continued, if narrowed, state involvement in regulating corporate takeovers were statements in the concurring opinions of Justices Powell and Stevens. Joining in Justice White's indirect burden on commerce analysis of the Illinois Act, Justice Powell stated that he favored this position because its "reasoning leaves some room for state regulation of tender offers."<sup>31</sup> He acknowledged the importance of corporations to the "general public interest" and recognized that significant disruption to state and local economies can occur upon the relocation of corporate headquarters.<sup>32</sup> Moreover, he agreed with Justice Stevens that "the Williams Act's neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include, but often are broader than those of incumbent management."<sup>33</sup> Although he did not elaborate, Justice Powell obviously recognized that federal policy was a little narrow in not addressing the interests of those persons who, while not investors, clearly have a significant stake in corporate activities.

---

1983) (Oklahoma Statute violates commerce clause); *Telvest v. Bradshaw*, 697 F.2d 576, 582 (4th Cir. 1983) (Virginia Statute violates commerce clause); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1134-35 (8th Cir. 1982) (Missouri Statute violates commerce and supremacy clauses); *Mesa Partners II v. Unocal Corp.*, [Current] FED. SEC. L. RPT. (CCH) ¶ 92,244, at 91,728 (W.D. Okl. 1985) (Oklahoma's Energy Resource Conservation Act violates commerce clause); *Iahn v. Blunt*, 612 F. Supp. at 1420 (Missouri control share acquisition statute as applied to foreign corporation violates commerce and supremacy clauses); *L.P. Acquisition Co. v. Tyson*, [Current] FED. SEC. L. RPT. (CCH) ¶ 92,271, at 91,876, 91,879 (6th Cir. 1985) (Michigan Statute applied to corporation not having securities registered under federal securities law does not violate commerce clause but was preempted). *Sharon Steel Corp. v. Whaland*, 466 A.2d 919, 922 (N.H. 1983) (New Hampshire Statute violates commerce clause). *But see Cardiff*, 751 F.2d at 914; *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1038-40 (1st Cir. 1982) (Massachusetts Statute not preempted; case remanded for commerce clause determination).

30. *See Profusek & Gompf, supra* note 21, at 20; Warren, *supra* note 7, at 694.

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

32. *Id.* *See Boehm, supra* note 18, at 741-46 ("vitality and attractiveness of life in the community" are important motivations for state regulation).

33. *MITE*, 457 U.S. at 646-47 (Powell, J., concurring).

Certain states<sup>34</sup> have seized on the perceived “window”<sup>35</sup> for permissible regulation and have turned to their state corporate laws as a constitutionally “safe” means of regulating certain facets of a takeover.<sup>36</sup> The rationale for using corporate laws as an avenue of regulating takeovers stems, in part, from the notion that states can govern the “internal affairs” of a corporation formed under its laws—i.e., “domestic” corporations.<sup>37</sup> Thus, if a state’s corporate statutes could be brought to bear on certain aspects of the takeover process, states could again constitutionally regulate in this area. While the Supreme Court in *MITE* intimated some general disaffection for the “internal affairs” argument in the takeover setting, it ultimately rejected the defense simply because the Illinois legislation applied to foreign as well as domestic corporations.<sup>38</sup>

The post-*MITE* strategy in Ohio,<sup>39</sup> Maryland,<sup>40</sup> Wisconsin,<sup>41</sup>

34. See *infra* notes 39-42 and accompanying text.

35. 12 Wis. Sec. Bulletin, No. 1, at 2 (Jan., 1984) (“[I]t is clear that there is a ‘window’ in the regulation of take-over offers through which states can exercise jurisdiction . . .”).

36. One commentator, while cautioning that the SEC Advisory Committee on Tender Offers and the Commission itself did not have such post-*MITE* state regulations in mind, concludes that “the Advisory Committee and the SEC have rejected any role for the states in the direct regulation of *tender offers*, while preserving most of the states’ abilities to regulate other phases of the takeover process through the substantive internal affairs provisions of their general corporation statutes.” Sargent, *Do the Second-Generation State Takeover Statutes Violate the Commerce Clause?*, 8 CORP. L. REV. 3, 4 & n.5 (1985); but see SEC ADVISORY REPORT *supra* note 19, at 34-35 (Committee Recommendation 33).

37. *Cort v. Ash*, 422 U.S. 66, 84 (1975). The Court stated that “corporations are creatures of state law [and] . . . except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.” *Id.*

38. *MITE*, 457 U.S. at 645-46. Illinois obviously could not defend regulation of foreign corporations under the “internal affairs” doctrine.

39. OHIO REV. CODE ANN. § 1701.823 (Page 1985). Ohio’s Statute requires target shareholder approval of a bidder’s acquisition of controlling blocks of target company stock. See *id.* § 1701.831. Minnesota’s control share acquisition statute is modeled after this approach.

40. MD. CORPS. & ASS’NS CODE ANN. §§ 3-601 to -603 (1985). Maryland’s Statute imposes super-majority voting requirements and “fair price” provisions on business combinations.

41. In 1984, Wisconsin amended its existing takeover law and its corporate statutes. WIS. STAT. ANN. §§ 552.01-.25 (West 1985 Special Pamphlet); WIS. STAT. ANN. §§ 180.01-.995 (West 1957 & Supp. 1985-86). Wisconsin’s Corporate Take-Over Law was amended to apply only to companies (1) having no securities registered under the Securities Exchange Act of 1934; or (2) having fifty-one percent of their stock held by Wisconsin residents; or (3) having at least thirty-three percent of their stock held by Wisconsin residents, having their principal office in Wisconsin, and

and Pennsylvania,<sup>42</sup> as well as of other states adopting one or more of their approaches, is to take better advantage of the "internal affairs" argument by more explicitly involving their corporate statutes in the takeover process. These four states each take a different approach to this shared objective, and each of the statutes is receiving the critical attention of commentators.<sup>43</sup>

After describing the operation of the "control share acquisition" approach of Ohio, as modified and adopted in Minnesota, the first decision considering Minnesota's approach,<sup>44</sup> *Van Dusen*, will be examined. The decision held that Minnesota's approach to state takeover regulation was unconstitutional. Beyond that immediate result, the decision's "burden" on commerce analysis relied on conclusions about the societal

having business or operation with a substantial economic effect on Wisconsin. WIS. STAT. ANN. § 552.05(7)(a)-(c). Wisconsin amended its corporate statutes to include a control share acquisition and fair price provision that are somewhat different than those of Ohio and Maryland. WIS. STAT. ANN. §§ 180.69, 725.

42. See 15 PA. CONS. STAT. ANN. §§ 1408(B), 1409.1(C)(1)-(3), 1910 (Purdon Supp. 1985). Pennsylvania's corporate statute was amended to authorize directors and officers to consider the interests of various noninvestors when determining the best interests of a Pennsylvania corporation, to restrict voting rights of interested shareholders in certain transactions such as a merger, and to provide a right of redemption to disinterested shareholders upon a purchaser's acquisition of thirty percent of a corporation's stock.

43. See Krieder, *Fortress Without Foundation? Ohio Takeover Act II*, 52 U. CIN. L. REV. 108 (1983); Newlin & Gilmer, *The Pennsylvania Shareholder Protection Act: A New State Approach to Deflecting Corporate Takeover Bids*, 40 BUS. LAW 111 (1984); Profusek & Gompf, *supra* note 21, at 20-41; Sargent, *supra* note 36, at 8-12; Scriggins & Clarke, *Takeovers and the 1983 Maryland Fair Price Legislation*, 43 MD. L. REV. 266 (1984); Sell, *A Critical Analysis of a New Approach to State Takeover Legislation After MITE*, 23 WASHBURN L. J. reprinted in 27 CORP. PRAC. COMM. 95 (1985) (analyzing Pennsylvania Statute); Warren, *supra* note 7, at 694-700; Note, *Second Generation State Takeover Legislation: Maryland Takes a New Tack*, 83 MICH. L. REV. 433 (1984).

The ultimate end of an analysis of these statutes should not be simply to conclude that they are or are not constitutional. Rather, the important question is what such constitutional analysis implies for the ability of the state to devise any means, corporate statutes or otherwise, of providing what states perceive as missing from federal takeover policy—consideration of the importance to noninvestor claimants on the modern corporation of not having that institution experience severe disruption or being required to operate under an excessive threat of such disruption.

44. Two earlier opinions have also dealt with control share acquisition statutes. In *Ceic Holding Co. v. Cincinnati Equitable Co.*, No. C-1-84-1587 (S.D. Ohio 1984), an Ohio federal district court denied a request for a temporary restraining order against Ohio's statute in a very brief opinion. In June, 1985, Missouri's control share acquisition statute was hastily made applicable to certain *foreign* corporations to aid in TWA's resistance to Carl Icahn's takeover attempt. It was held that this provision violated both the commerce and supremacy clauses. *Icahn*, 612 F. Supp. at 1417-18, 1420 (W.D. Mo. 1985).

effects of takeovers that are largely drawn from the now-challenged stock price evidence. Consequently, *Van Dusen* indicates that other state efforts to regulate takeovers through corporate statutes may also fail unless a new judicial analysis of such legislation is adopted.

## B. Minnesota's Control Share Acquisition Statute

### 1. Overview of the Statute

Although Minnesota's control share acquisition statute is modeled after Ohio's, it contains certain significant differences. For example, unless otherwise provided in the articles of incorporation or in bylaws approved by the shareholders, acquisitions of stock are *not* subject to Minnesota's statute.<sup>45</sup>

Assuming coverage has been elected, the heart of the statute is that any "control share acquisition" of an "issuing public corporation" by an "acquiring person" can be made only with the prior approval of its shareholders in accordance with specified procedures.<sup>46</sup> Shares purchased by an acquiring person without complying with the statute will be denied voting rights and will be deemed nontransferable for one year after acquisition.<sup>47</sup> Furthermore, during that one year period, the corporation will have the option to call the shares for redemption at the purchase price.<sup>48</sup> The provisions of the statute may be enforced by an acquiring person, the issuing public corporation, or by shareholders of an issuing public corporation.<sup>49</sup>

A "control share acquisition" is defined as an acquisition<sup>50</sup> of shares of an "issuing public corporation"<sup>51</sup> that results in an

45. This change to an "opt in" statute from Ohio's "opt out" approach was made in 1985. See Act of June 24, 1985, ch. 5, § 19, 1985 Minn. Laws 1638.

46. MINN. STAT. § 302A.671, subd. 4 (Supp. 1985).

47. *Id.*, subd. 1(b).

48. *Id.* It is not altogether clear, but presumably the corporation could purchase less than all of the shares acquired in violation of the statute.

49. *Id.*, subd. 5.

50. Note that *offers* to purchase are not regulated, only the actual *acquisition* of stock. MINN. STAT. § 302A.011, subd. 38 (1984). Furthermore, all acquisitions—whether by tender offer, open market purchase, or privately negotiated purchase—are covered, subject to limited exceptions. The most significant of the exceptions are acquisitions directly from the issuing public corporation (thus preserving the stock "lock-up" as a defensive tactic) and transactions to which the issuing public corporation has agreed and is itself a party as with a merger, exchange, or sale of substantially all assets. See *id.*

51. An "issuing public corporation" is defined as (1) being a corporation incorporated under Minnesota law (not foreign corporations, however substantial their

acquiring person's percentage of voting power in the election of directors extending into any of the following ranges:

- (1) at least 20 percent, but less than 33-1/3 percent;
- (2) at least 33-1/3 percent, but less than or equal to 50 percent;
- (3) over 50 percent.<sup>52</sup>

Acquisitions of stock resulting in a change of ownership *within* any of the ranges are not covered, only transactions leading to movement *into* one of the ranges. For example, a change of ownership from twenty-one percent to thirty-two percent would not be covered, while a change from thirty-two percent to thirty-four percent would be covered. Thus, some relatively major purchases will fall outside the statute while some fairly small purchases will be covered.

Any person proposing to make a control share acquisition<sup>53</sup> is required to deliver to the issuing public corporation an "information statement" containing specified information.<sup>54</sup> Among the information to be included in the statement, and this is central to the legislature's concern about the adverse effects of hostile takeovers on various important interests,<sup>55</sup> are the terms of the proposed acquisition. Such terms include any plans to liquidate ("break up") the corporation, change the location of its principal executive office or a material portion of its business activities, materially alter management or employment policies or relationships with communities, suppliers or customers, and such other objective facts as would be substantially likely to affect a shareholder's vote on the proposed control share acquisition.<sup>56</sup>

A special meeting of shareholders of the issuing public corporation must be called within five days after receipt of the information statement for the purpose of voting on the proposed control share acquisition.<sup>57</sup> The meeting must be held no later

---

Minnesota operations), (2) having at least 50 shareholders (who need not be Minnesota residents), and (3) having either its principal place of business located in Minnesota or which owns or controls assets in Minnesota having a fair market value of at least \$1,000,000. MINN. STAT. §§ 302A.011, subd. 8, subd. 39 (1984 & Supp. 1985).

52. MINN. STAT. § 302A.671, subd. 2 (Supp. 1985).

53. Such a person is an "acquiring person." MINN. STAT. § 302A.011, subd. 37.

54. *Id.* § 302A.671, subd. 2.

55. *See* Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws at 470-71.

56. MINN. STAT. § 302A.671, subd. 2(e).

57. *Id.* § 302A.671, subd. 3.

than fifty-five days after receipt of the information statement, unless the acquiring person agrees otherwise, and no sooner than thirty days after receipt if the acquiring person so requests in writing.<sup>58</sup> Notice of the meeting must be given within twenty-five days after receipt of the information statement.<sup>59</sup> The notice must include a copy of the information statement and a statement by the board of directors of the issuing public corporation as to its position on the proposed acquisition.<sup>60</sup>

To this point, the requirements of the statute are a mere prologue. The critical element is the vote of shareholders on the proposed control share acquisition. The acquiring person may consummate the proposed control share acquisition only if (1) the acquisition is approved by the affirmative vote of the holders of a majority of the voting power of all shares entitled to vote,<sup>61</sup> and (2) the proposed control share acquisition is consummated within 180 days after shareholder approval.<sup>62</sup> Consequently, the crux of the statute is that a shareholder of an issuing public corporation cannot act alone in deciding whether to sell his stock to an acquiring person, but must first receive the approval of fellow shareholders in the manner specified.

## 2. *Rationale for Shareholder Approval*

Essentially, a control share acquisition statute is premised on the view that a tender offer, or substantial open market or privately negotiated purchase, is but one means of transferring ownership or control of a corporation's assets.<sup>63</sup> Since other methods of transfer, such as a merger or sale of all or substan-

---

58. *Id.*

59. *Id.*

60. *Id.* Target company management must indicate that it favors, opposes, is neutral toward, or is unable to take a position on the proposed acquisition. *Id.*

61. Shares owned by the acquiring person prior to the proposed acquisition may be voted. MINN. STAT. § 302A.671, subd. 4.

62. *Id.* A class or series of shares is entitled to vote on the proposed acquisition as a class or series if any provision of the acquisition would, if contained in a proposed amendment to the articles, entitle the class or series to vote as a class or series. *Id.*

63. See, e.g., Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 116 (1979); Steinbrink, *Management's Response to the Takeover Attempt*, 28 CASE W. RES. L. REV. 882, 892 (1978). For a critique of this view to the extent it implies a role for target company management in tender offers, see Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 848-52 (1981).



tially all corporate assets, usually require shareholder approval, the argument goes, so should a transfer by means of a stock sale.<sup>64</sup> Furthermore, the argument continues, conditioning a transfer of corporate assets on shareholder approval is a proper exercise of a state's authority to regulate the "internal affairs" of corporations organized under its laws.<sup>65</sup> While arguments in defense of the statute will be dealt with later,<sup>66</sup> several points about such a view of the statute are best made at this juncture.

First, the analogy to mergers and sales of assets is hardly perfect since these transactions involve corporate parties, while tender offers involve only shareholders of the target company, not the company itself.<sup>67</sup> Nonetheless, there is considerable merit to the analogy when it is remembered that every acquisition of a corporation, whatever its form, has as its objective the control of corporate assets. Yet in the modern public corporation, characterized by a separation of ownership and management, the shareholder-owners have basically relinquished control over corporate assets to hired management.<sup>68</sup> This is fine except for what Professor Lowenstein calls one "small" fact: for historical reasons, nowhere in modern corpo-

---

64. See, e.g., Steinbrink, *supra* note 63, at 907; see also Comment, *supra* note 4, at 888 n.206.

65. See, e.g., Comment, *supra* note 4, at 888 n.206.

66. *Infra* notes 102-36 and accompanying text.

67. Judge Rosenbaum, in *Van Dusen* emphasized this distinction. *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,191-192. He relied on dictum in *MITE* that begs the issue in *Van Dusen*: Is restricting transfer of stock an appropriate exercise of state authority to regulate corporations? Trying to distinguish things "corporate" from things "shareholder" in this manner is contrary to corporate reality and ignores the breadth of corporate statutes. Such statutes not only regulate the *corporate* entity itself, they also prescribe rules for its governance system and its capital structure, all of which involve *shareholders*. See *infra* text accompanying notes 102-11.

68. Professor Lowenstein, reaching back to Berle and Means' classic work (A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed. 1968)), makes this point and develops its implications for takeovers. Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 259-68 (1983).

Needless to say, the allocation of power in the modern corporation has reduced the "say" of shareholders in public corporations in a way that is still extremely troubling for corporate governance. Much writing on corporate takeovers has dealt with the takeover's purported function in disciplining management on behalf of shareholders and with formulating proper standards of behavior for management facing a takeover. Little, if anything, has been written about the basic issue of whether heightened allegiance to shareholder interests is the proper objective for corporate behavior in a takeover.

rate statutes is it stated that management has the right, as it does in merger or sale of assets transactions, to prevent third parties from acquiring corporate assets not by proceeding directly to purchase those assets from the corporation, but by purchasing corporate stock from the owners and thereby obtaining control over the assets.<sup>69</sup>

As indicated, however, it is the assets of the *corporation*, not the stock of the *shareholders*, the acquisition of which is but an intermediate step in acquiring control of the assets, that the tender offer phenomenon is all about. As such, there is a “crack” in modern corporate statutes which allows shareholders, acting without involvement by the board of directors, to sell corporate assets simply by selling their stock in a tender offer. In a sense, Minnesota’s control share acquisition statute might be viewed as an attempt to deal with that “crack” by at least formalizing and subjecting to deliberative, collective shareholder action the decision to transfer corporate assets.<sup>70</sup>

Second, Minnesota was clearly concerned about the effects of takeovers on local economic and social interests,<sup>71</sup> yet subjects the fate of those interests to a shareholder vote, thereby evincing a belief that the “owners” of a corporation must decide whether a tender offer should succeed. On its face, submitting to investors the question of whether a particular takeover should proceed may appear to be “shareholder democracy” in action, but it is a curious way of trying to protect noninvestor interests.

Third, it is not clear that shareholders actually care about the same interests that the Minnesota Legislature was con-

---

69. Lowenstein, *supra* note 68, at 263-64.

70. A more direct approach to accomplishing deliberative corporate action might be, as with mergers and asset sales, to require board approval of a tender offer. While this may strike some as too great an infringement on a shareholder’s “right” to alienate his stock, viewing a tender offer as essentially a means of obtaining corporate assets might logically lead to the participation of management. It is interesting to note that the “poison pill” defense, recently upheld by the Delaware Supreme Court, and now being implemented by many corporations, in effect may require third parties seeking control of a corporation to obtain the approval of the target company board. *Moran v. Household Int’l, Inc.* [Current] FED. SEC. L. RPTER. (CCH) ¶ 92,371, at 92,341 (Del. S. Ct. 1985). Thus, that defensive tactic also fills the “crack” in modern corporate statutes.

71. Act of Apr. 25, 1984, ch. 488, 1984 Minn. Laws at 470-71; *Cavdiff*, 751 F.2d at 906.

cerned about.<sup>72</sup> Assuming shareholders care, they may have no particular inclination or competence to assess how the interests of employees, creditors, and communities should affect their decisions to sell or hold stock, particularly since their function is to provide capital, not manage corporate affairs.<sup>73</sup> If they lack such inclination or competence, or if they simply do not care about such factors in making investment decisions, is shareholder approval any more than a meaningless, but innocuous requirement? Perhaps there is an unspoken belief underlying the statute that, notwithstanding the apparent deference to shareholders, the very procedure of submitting a tender offer for approval will lessen the offer's likelihood of success by affording target management additional time to implement defensive measures or by simply discouraging an offeror who wishes to consummate a takeover very quickly. Having that effect, requiring shareholder approval may indeed serve as a kind of foil for protecting noninvestor interests.

Fourth, it thus becomes clearer that there is a certain irony to requiring shareholder approval as a means of regulating takeovers when most stock price evidence shows that takeovers significantly enhance investor wealth.<sup>74</sup> In short, notwithstanding formal deference to shareholders, the reality is that the additional step of seeking their consent may actually harm shareholders, all to the good, perhaps, of other corporate constituencies. On the other hand, if the whole procedure is simply a means of providing target management additional time to respond to the takeover offer<sup>75</sup> so that an even higher premium can be obtained for shareholders, and a graceful exit arranged for management,<sup>76</sup> then the noninvestor interests cited

---

72. See Comment, *supra* note 4, at 885 & n.191 (authority to the effect that shareholders might be primarily concerned about the financial aspects of a tender offer).

73. See Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 U.C.L.A. L. REV. 343, 416 (1981) ("even assuming that shareholders are interested in playing a more meaningful role in corporate affairs, we cannot expect them to control the social aspects of corporate power").

74. *Supra* note 13. This is the potential "stifling" or "chilling" effect on tender offers that many commentators and courts consider undesirable. See, e.g., *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982) Comment, *supra* note 4, at 882-86; Note, *supra* note 43, at 457. As indicated, *supra*, notes 4 & 5, there is growing concern about the desirability of an "unstifled" market for corporate control.

75. *Supra* note 25.

76. Ultimately, in *Cardiff*, the offer was increased by seven dollars per share and

by the legislature are not necessarily protected at all. Reciting a concern for those interests may have been a screen to accomplish other ends.

These objections reveal the statute's extraordinary ambivalence about its aims and about the proper ends of corporate behavior. Is the statute aimed at safeguarding shareholders or at assuring that important noninvestor interests are protected from hostile takeovers?<sup>77</sup> Whoever the intended beneficiaries of the legislation, regulating takeovers under the guise of governing a corporation's "internal affairs" stretches corporate statutes to fulfill social policy in a way that inevitably exposes those statutes to constitutional scrutiny.

## II. THE CONSTITUTIONALITY OF THE CONTROL SHARE ACQUISITION STATUTE

### A. *The Van Dusen Decision*

The facts of the *Van Dusen* case are very simple. As of August 2, 1985, APL Limited Partnership, a Delaware limited partnership, had purchased eighteen percent of the stock of Van Dusen Air Inc. on the open market. Van Dusen was an "issuing public corporation" and APL's purchases placed it just under the twenty percent range which would trigger operation of the control share acquisition statute.<sup>78</sup> Rather than comply with the statute, APL commenced an action seeking a declaration, *inter alia*, that the statute violated both the commerce and supremacy clauses. Judge Rosenbaum held that the statute violated the commerce clause.<sup>79</sup>

Although he somewhat confusingly refers to "direct burdens" on interstate commerce in his opinion,<sup>80</sup> it is clear that Judge Rosenbaum did not analyze the statute as a "direct"

---

the board of Conwed Corp., the target, recommended that shareholders tender their stock. St. Anthony, *Conwed Board Votes to Accept Higher Bid*, Minneapolis Star & Trib., Feb. 9, 1985, at 1A, col. 1. One might ask: What happened to the concern for noninvestor interests "found" by the legislature to suffer in takeovers? See *supra* note 4.

77. This ambivalence of aim will be discussed again. *Infra* notes 112-13 and accompanying text. An issue that will continue to remain central to all discussions of corporate law is that of determining what we expect of, and how we even talk about, the modern corporate institution. See, e.g., White, *supra* note 8, at 1416.

78. MINN. STAT. § 302A.011, subd. 38; *Id.* § 302A.671, subd. 1.

79. As a result, Judge Rosenbaum did not address the supremacy clause claim. *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,193 n.7.

80. *Id.* at 91,192-193.

burden on commerce, but rather applied a balancing test under which the legislation's burden on interstate commerce is weighed against the local benefits of regulation.<sup>81</sup> Using the balancing test, Judge Rosenbaum held that the control share acquisition statute imposed substantial burdens on interstate commerce that were excessive in relation to the local benefits.<sup>82</sup> By restricting the right of nonresidents to purchase and sell stock in Minnesota corporations, he found the control share statute to have the same effects on interstate commerce as the Illinois statute struck down in *MITE*. Those effects are: (1) "preventing VDAI [Van Dusen Air Inc., the target company] shareholders from receiving a premium for their stock;"<sup>83</sup> (2) "insulating incumbent management by making control share acquisitions more difficult thereby reducing the incentive for incumbent management to perform well;"<sup>84</sup> and (3) impeding "the reallocation of economic resources."<sup>85</sup>

---

81. The distinction between the "direct" and "indirect" analysis is best seen in language from two Supreme Court opinions. *Compare* *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) ("[A] state statute which by its necessary operation *directly* interferes with or burdens such [interstate] commerce is a prohibited regulation and invalid, *regardless of the purpose with which it was enacted*") (emphasis added) *with* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly 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*") (emphasis added).

Thus, if a state statute *directly* burdens commerce, the purpose for doing so, however good, is irrelevant. The direct-indirect distinction in commerce clause analysis has been criticized as "misleadingly precise," L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-5, at 326 (1978), and as "masking the important policy question: To what extent does the state regulation actually impede interstate commerce, and what are the state justifications for so doing?" Sargent, *supra* note 36, at 14.

In *MITE*, the direct-indirect distinction was referred to, but only four Justices found the Illinois Statute to be a direct restraint on commerce while five Justices found the statute to fail the balancing test of *Pike*. The arguments advanced by Justice White in finding the Illinois Statute to be a direct restraint on commerce apply as well to a merger of corporations governed by the corporate law of a state other than the state in which shareholders reside. Certainly state corporate regulation of such a merger (across state lines, having shareholders in several states, and utilizing the facilities of interstate commerce) is not thereby a direct restraint on interstate commerce. In spite of being subject to criticism, the direct-indirect distinction retains vitality. Nonetheless, only the balancing test of *Pike* is able to capture the complex economic and political issues raised by state takeover regulation. *But see* *Leahn*, 612 F. Supp. at 1415 (Missouri control share acquisition statute covering foreign corporations is a direct restraint on commerce).

82. *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 91,192-193.

83. *Id.* at 92,192.

84. *Id.*

85. *Id.*

The outcome in *Van Dusen* reveals the almost certain fate of the control share acquisition approach to takeover regulation given the commerce clause analysis of state takeover legislation employed in *MITE* and followed in later decisions. The commerce clause analysis of *MITE*, *Van Dusen*, and other decisions has uncritically adopted the efficiency claims for takeovers made by proponents of the stock price evidence.<sup>86</sup>

### B. *The Stock Price Premium Argument*

All of the purported effects on interstate commerce cited in *Van Dusen* are drawn directly from *MITE* and, like *MITE*, *Van Dusen* assumes that the statute under review actually has those effects and that they are objectionable.<sup>87</sup> The basis for this conclusion in *MITE*, and hence in *Van Dusen*, is the reasoning of certain proponents of the "efficient capital market" hypothesis and several studies showing significant stock price increases resulting from takeovers.<sup>88</sup> The relationship among the efficient capital market hypothesis, stock price movements in takeovers, and the efficiency implications of takeovers has been described as follows:

In fact, the stock price change is the best measure of the takeover's future impact on the organization. The vast scientific evidence on the theory of efficient markets indicates that, in the absence of inside information, a security's market price represents the best available estimate of its true value. The evidence shows that market prices incorporate all current public information about future cash flows and the value of individual assets in an unbiased way. Stock prices change, of course, in response to new information about individual assets. Because *market prices are efficient*, however, the new information is equally likely to cause them to decrease or increase, after allowing for normal returns. *Positive stock price changes then, indicate a rise in the total profitability of the merged companies.* Furthermore, because evidence indicates it does not come from the acquisition of market power, this *increased profitability must be from the com-*

---

86. See *supra* note 13.

87. See *MITE*, 457 U.S. at 643; see also *supra*, text accompanying note 16. *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,192.

88. For a useful collection of materials on the efficient capital market hypothesis, see R. HAMILTON, CORPORATION FINANCE 185-212 (1984). Evidence suggesting a need to modify the hypothesis is increasing. See Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1425 n.55 (1985).

pany's improved productivity.<sup>89</sup>

In short, since capital markets are assumed to be efficient, the market price of a target company's stock will reflect management's competence in utilizing corporate assets. A stock price that is depressed in comparison to underlying asset value reflects poor management and the misuse of available resources. A premium offer, above the market price, signifies that the offeror will utilize corporate assets more efficiently and profitably than incumbent management. Such an outcome, the argument goes, is advantageous to shareholders who receive a premium and is advantageous to society which obtains a better use of scarce resources.

Proponents of this theory have examined stock price movements in completed takeovers and found substantial increases in target company prices and lesser increases in acquiring company prices. As a result, they have concluded that, consistent with theory, takeovers serve the commendable functions of providing shareholders with premiums, disciplining inefficient management, and redeploying economic resources.<sup>90</sup>

### C. *A Reevaluation of the Efficiency Theory of Takeovers*

The line of reasoning adopted in *MITE* and *Van Dusen* depends critically on the assumption that, consistent with the efficient capital market hypothesis, the stock price evidence is precisely what the 1985 Economic Report claimed it to be—"a reliable barometer of the likely consequences of takeover transactions."<sup>91</sup> Recent anecdotal<sup>92</sup> and empirical evidence raises serious doubts about this assumption and the resulting conclusion that corporate acquisitions typically lead to more productive, efficient businesses. In short, such evidence suggests that the existence of stock price increases and wealth gains for shareholders may not necessarily indicate efficiency gains from corporate combinations.

---

89. Jensen, *Takeovers: Folklore and Science*, HARV. BUS. REV. 109, 113 (Nov.-Dec. 1984) (emphasis added). See *supra* text accompanying note 12. See also Jarrell & Bradley, *The Economic Effects of Federal and State Regulation of Cash Tender Offers*, 23 J. L. & ECON. 371, 380-81 (1980).

90. See *supra* notes 12-13 and accompanying text.

91. 1985 Economic Report, *supra* note 12, at 197.

92. See *Do Mergers Really Work?*, BUS. WK., June 3, 1985, at 88.

Professor F.M. Scherer and Mr. David Ravenscraft<sup>93</sup> have assembled substantial direct evidence on mergers showing that acquired companies during the 1960's and early 1970's were, on average, highly profitable before being acquired and that, after being acquired, often experienced a decline in profitability.<sup>94</sup> In addition, Professors Herman and Lowenstein, having examined fifty-six hostile tender offers initiated between 1975 and 1983, found a significant decline in the acquired company's post-merger financial performance, and conclude that hostile takeovers do not necessarily lead to efficiency gains.<sup>95</sup> These studies, along with post-aquisition market share declines observed by Professor Mueller,<sup>96</sup> raise substantial doubts as to whether only inefficiently managed companies are acquisition targets. They also raise a serious question as to whether acquirers are serving larger societal interests by seeking to buy attractive targets and then, for whatever reasons, perhaps mismanaging or "breaking up" what may have been well-run businesses.<sup>97</sup>

---

93. Professor Scherer is a Professor of Economics at Swarthmore College and Mr. Ravenscraft is with the Bureau of Economics, Federal Trade Commission.

94. See generally D. Ravenscraft & F.M. Scherer, *The Profitability of Mergers* (Dec., 1985)(working paper)(copy on file at William Mitchell Law Review office). The findings of Ravenscraft and Scherer are expected to be published in 1986. Ravenscraft and Scherer examined more than five thousand mergers and acquisitions of all kinds covering a twenty-seven year period, utilizing data from the FTC's "Line of Business" survey. They conclude that their findings are "difficult to reconcile with the conjecture that mergers turned out on average to be profit-increasing and efficiency-enhancing" and suggest that present efficiency claims for mergers should be "accorded appropriate skepticism." *Id* at 34, 37. While the Ravenscraft-Scherer findings run counter to the claims of those who rely on stock price evidence, they are in line with much earlier work which also found few efficiency gains from mergers.

95. See Herman & Lowenstein, *The Efficiency Effects of Hostile Takeovers: An Empirical Study* (a study in proceedings of Columbia University's Center for Law and Economic Studies' Conference on Takeovers and Contests for Corporate Control) 19-26 (Nov., 1985) (unpublished manuscript).

96. See Mueller, *Mergers and Market Share*, 67 REV. ECON. & STAT. 259 (1985) (substantial 1950-72 declines in market share experienced by acquired businesses as compared to control group companies).

97. Professor Scherer recently criticized the stock price evidence and the claims made for its takeover implications by, for example, the 1985 Economic Report. At the same time he also raised the possibility that "it is the stock market, not management of the target firm, which has erred and needs disciplining." *Hearings Before the House Comm. on Energy and Commerce, and the Subcomm. on Telecommunications, Consumer Protection, and Finance*, 99th Cong., 1st Sess. at 4 (1985) (testimony of Prof. F.M. Scherer) (copy on file at William Mitchell Law Review office). Even Professor Jensen, a well-known defender of takeovers, has acknowledged some problems with the available stock price evidence:



Evidence of the type gathered by these recent studies has potentially profound implications for both corporate governance and the commerce clause analysis of state takeover regulation. First, since it appears that many companies which experienced stock price increases when purchased were not poorly managed prior to acquisition, depressed stock prices may not reflect a governance or efficiency "problem" that needs remedying, or at least one that will necessarily be remedied through a change in control.<sup>98</sup> Indeed, post-acquisition evidence, empirical and anecdotal, indicates that certain corporations may fare more poorly after being acquired. Second, if the less efficient use of corporate resources is not a social good to be encouraged, the claim that takeovers are good for shareholder wealth, good for corporate governance, and good for society at large may not be true.<sup>99</sup> While takeovers may undeniably be good for selling shareholders who obtain premiums, they do not necessarily serve a meaningful governance function, do not necessarily serve society's interest in moving resources to more efficient uses, and do not necessarily serve local or other noninvestor interests that may be adversely affected by the less efficient, but altered, utilization of a corporation's resources. As such, a pro-takeover stance rooted in the stock price evidence may be unable to claim advancement of society's efficiency concerns as a defense of takeovers and as a reason for opposing their regulation. Instead, such a position may have to rest on shareholder gains; specifically, monetary gains obtained through the payment of premiums, not necessarily the addition of a beneficial governance mechanism.

In light of the Ravenscraft-Scherer and Herman-Lowenstein findings, the reliance of *MITE* and *Van Dusen* on the efficiency theory of hostile takeovers for their "burden" on commerce clause analysis may be misplaced. If stock price evidence is not a "reliable barometer" of efficiency outcomes, then, in effect, Minnesota's statute has a deleterious effect on interstate com-

---

. . . Several studies show indications of systematic reductions in the stock prices of bidding firms in the year following the event. These post-outcome negative abnormal returns are unsettling because they are inconsistent with market efficiency and suggest that changes in stock price during takeovers overestimate the future efficiency gains from mergers . . . . Explanation of these post-event negative abnormal returns is currently an unsettled issue.

Jensen & Ruback, *supra* note 13, at 20-22.

98. See *supra* note 84 and accompanying text.

99. See *supra* notes 16, 83-85 and accompanying text.

merce simply because of potential premium losses to shareholders. That is a considerably less substantial effect than those posited in *MITE* and *Van Dusen* and raises the question of whether such an effect is a "burden" on commerce "clearly excessive in relation to the putative local benefits . . ." <sup>100</sup> This question requires consideration of the benefits of the legislation.

#### D. *The Benefits of Minnesota's Legislation*

##### 1. *Shareholder Protection*

Against the claimed burden on commerce, Minnesota advanced the benefits of the control share acquisition statute as being (1) the protection of shareholders in Minnesota corporations, and (2) the protection of the state's business climate. In addition, the state defended the statute as a valid exercise of a state's authority to regulate the "internal affairs" of corporations formed under its laws.

The first argument was quickly disposed of by Judge Rosenbaum as legitimate in the abstract, but not thereby authorizing "protection" of nonresident shareholders as was the effect of Minnesota's statute.<sup>101</sup> The state's defense of the statute as benefiting shareholders is somewhat ironic. In the name of protecting shareholders, the question of whether shareholders may sell their stock must be submitted to a shareholder vote even though doing so may deter or even thwart a takeover proposal offering a significant premium. In spite of this, there is a very real sense in which Minnesota shareholders of a Minnesota corporation might be protected by the statute's applicability to nonresident transactions.

Recall that a takeover, while cast in the form of a *stock* acquisition, is ultimately aimed at obtaining control over corporate *assets* and, perhaps, redeploying them. A Minnesota resident who does not wish to tender stock because he agrees with present corporate policies and/or thinks the offer price is too low, yet who does not want to remain a shareholder in a possibly restructured company or be "squeezed out" later, faces a ma-

---

100. This is the balancing test of *Pike*, 397 U.S. at 142.

101. See *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,191. For example, the proposed sale of stock in a Minnesota corporation by a California resident to a New York resident, if a "control share acquisition," would be governed by the Minnesota statute. See MINN. STAT. § 302A.011, subd. 38-39.

for change in his investment. Is his only choice to tender or hold or, confronted with an event that may fundamentally alter his investment to the same extent as a merger or asset sale, should he also be entitled to vote on whether the transaction will even take place? Minnesota might persuasively claim to have an interest in providing resident investors with a voice in potentially major changes in management or fundamental corporate policy.<sup>102</sup> While this argument might be more convincing if confined to situations where Minnesota residents owned sufficient stock to block a change in control, the point is that Minnesota has an interest in providing its residents with a voice in control contests, not simply in assuring them a veto power.<sup>103</sup>

Moreover, since coverage under the statute is elective by shareholder action, such an election might represent a desire by shareholders to act in a more coordinated, collective manner when presented with an offer. In effect, the statute amounts to a pact among shareholders that none can sell unless a majority approves. Each shareholder grants fellow shareholders the right to disapprove a proposed transfer in exchange for obtaining the right to disapprove proposed transfers by fellow shareholders. One possible reason for giving up the right to make stock disposition decisions is the belief that individual shareholders are unable to negotiate with an offeror and that the requirement of deliberative shareholder approval may ultimately lead to a better offer. Whether bargaining away rights in this manner is prudent for the individual shareholder is unknown, but presumably that decision would be made at the time coverage under the statute is voted on.

## 2. *Protection of Other Interests*

There is still another argument in defense of the statute, one that gets closer to an important aim of the legislation. Rather than defending the statute as an effort to “protect” shareholders, it might be defended in exactly the opposite manner—as a

---

102. This argument focuses on protecting shareholders who do not want a change in management or corporate policy at the expense of preventing other shareholders from selling their stock and departing from the corporation. For another argument that the statute protects resident investors, see *infra* notes 121-23 and accompanying text.

103. Perhaps the statute should, however, require a minimum level of stock ownership—e.g., 10%—by Minnesota residents to make this argument meaningful.

limitation on shareholders imposed to further other interests. The question then becomes whether shareholders, wherever they reside, have an absolute "right" to sell their stock in interstate transactions unhindered by the laws of the state under which the issuing corporation is organized. If that "right" is *assumed* to unalterably exist in some pristine condition, then a control share acquisition statute, which limits that "right" in an effort to protect noninvestor interests,<sup>104</sup> is improper "regulation" of interstate stock transfers. This is true because, by definition, stock is inherently transferable without approval by fellow shareholders.

The issue, however, is whether the state under which the issuing corporation was organized may itself determine the nature and attendant rights of that species of property called corporate stock. Specifically, just as state corporate law may define a share of corporate stock by conferring on it just one vote,<sup>105</sup> certain inspection rights,<sup>106</sup> and otherwise giving it content, may that law not also delimit stock by allowing its transfer only upon compliance with certain procedures? Provided the restrictions are reasonable, state law has long allowed prohibitions on "free" transferability of stock.<sup>107</sup> The fact that such traditional share transfer restrictions are contained in articles, bylaws, or shareholder agreements, rather than directly imposed by corporate statute as is a control share acquisition provision, does not detract from the point that state law often constitutionally defines and "regulates" stock and its transfer. Corporate statutes do not simply regulate the entity itself, but prescribe the governance relationships *within* the corporation and the nature and extent of the shareholders' claim on the corporation. Furthermore, if the control share provision is optional rather than mandatory, as in Minnesota, the distinction from other share transfer restriction provisions is eliminated.<sup>108</sup>

---

104. *See, e.g.*, 1984 Minn. Laws at 470-71.

105. MINN. STAT. § 302A.445, subd. 3.

106. *Id.* § 302A.461.

107. It could hardly be contended that a corporate statute allowing restrictions on transferability—e.g., MINN. STAT. § 302A.429—is a burden on interstate commerce because it might lead to the requirement of certain approvals for transferring stock in a Minnesota corporation from a Florida resident to a California resident.

108. In *Moran*, [Current] FED. SEC. L. REP. (CCH) ¶ 92,371, a section of Delaware's corporate statute pursuant to which a "poison pill" rights plan had been enacted by the Household board of directors was challenged on commerce and

While the reasons for more traditional share transfer restrictions—e.g., maintaining share ownership among a limited number of business associates—may be absent in the publicly held corporation, there may be other, equally compelling reasons for restricting transfer. For example, given modern business needs and the allocation of responsibility between management and investors, it might be argued that shareholders' "collective capital ought to be committed indefinitely"<sup>109</sup> to the enterprise. If shareholders desire liquidity, it may be sought in the trading market, rather than through an *en masse* transfer of stock to a buyer seeking access to corporate assets. A tender offer gives shareholders the right not only to liquidate their stock, but also to sell corporate assets without management approval. That "right" may alter the desired allocation of power between management and shareholders "because it gives to investors with a characteristically short-term focus the power to turn the assets into cash without notice."<sup>110</sup> Such a reallocation of control over corporate assets from management to shareholders may, and often does, have "seriously disruptive consequences" for the business itself and for those dependent on the corporation.<sup>111</sup>

---

supremacy clause grounds under *MITE*. The Delaware Supreme Court rejected that argument, stating that it did "not read the analysis in *Edgar* as applicable to the actions of private parties. The fact that directors of a corporation act pursuant to a state statute provides an insufficient nexus to the state for there to be state action which may violate the Commerce Clause or Supremacy Clause." *Id.* at 92,344. Likewise, electing coverage under a control share acquisition statute would seem to be "private" action notwithstanding the fact that such action adopts a ready-made, state-drawn provision.

109. Lowenstein, *supra* note 68, at 259.

110. *Id.* at 262.

111. The phrase is Professor Lowenstein's. *Id.* For a sampling of concerns about the feverish takeover activity which results from "free dealing" in corporations by shareholder transfers of stock, see *supra* note 5.

One concern in particular has received considerable attention—the increased use of debt, both to finance takeovers and to defend against them as with a leveraged buy-out or repurchase of stock. Heavy debt may significantly weaken a business, as has happened to many combatants in takeover battles (e.g., Martin Marietta, CBS, Phillips Petroleum). See Rohatyn, *Junk Bonds and Other Securities Swill*, Wall St. J., Apr. 18, 1985, at 28, col. 1 (describing dangers of excessive debt, including the effects on employees and communities of a corporation having to sell off assets to service debt).

Another concern is the defensive measure of selling substantial assets to render a target unattractive—the "crown jewels" tactic. A recent example is Union Carbide's plan to sell its consumer products division. Carbide's Chairman has admitted the tactic is destructive. "I don't think it's good for the country and I don't think it's good for Carbide." Isikoff & Vise, *Carbide Plans Sale of Unit As Defense*, Wash. Post, Jan. 3, 1986, at A1, col. 1, A8, col. 1. The planned sale has also alarmed attorneys who

Much the same argument can be made under the “internal affairs” doctrine, a defense of the statute that was also made by the State of Minnesota and rejected in *Van Dusen*. While it might be said, as Judge Rosenbaum did in *Van Dusen*, that a control share acquisition statute does not govern internal corporate affairs, only transfers by *shareholders*, the issue is whether state law can define stock rights so that the question of transfer of stock (and thus, possibly, of an entire corporation) is not solely between the proposed seller and buyer, but requires other action as well. A state may be reluctant to defend takeover legislation in this manner—i.e., as *limiting* shareholder rights—rather than, as is often the case, advancing such legislation as *protecting* investors. Nonetheless, such a defense has certain advantages. First, it is closer to the truth of what is being done; namely, limiting shareholder rights in aid of other goals. Second, such honesty requires the statute’s defenders to confront the ambivalence noted earlier.<sup>112</sup> Perhaps the potential adverseness of investor and noninvestor interests in a takeover should be acknowledged, rather than insincerely arguing that the statute is good for investors and others alike. Investors often desire the resulting premiums, while little is known about how other interests fare.<sup>113</sup> Admittedly, put that way, a control share acquisition statute may be a strange creature in subjecting an investor’s right to obtain a takeover premium to the consent of other investors, all to protect noninvestor interests.

Third, however, odd the manner of regulation, honesty as to what interests are being protected focuses the constitutional question more clearly. The issue is not simply whether a state can “reach out” to regulate stock transfers outside its borders (as though once physically out of the state of incorporation the

---

represent Bhopal tort victims. *Id.* At the same time, the struggle with GAF Corp. has been described as “a boon for shareholders” because the quasi-liquidation and threatened takeover have sent Carbide’s stock price soaring. Stewart & Hertzberg, *Carbide Holders Are Clear-Cut Victors In Battle to Thwart GAF Takeover Bid*, Wall St. J., Jan. 6, 1986, at 2, col. 3. Thus, what is good for investors in a corporation may not be good for other persons and groups in society. Such “inconvenient” facts are not easily accommodated in the simple economic models of many takeover proponents.

112. See *supra* notes 71-77 and accompanying text. The state and target company management have raised, but not resolved, the question of whether the statute is designed to protect noninvestor interests or whether reciting such interests is simply a foil to gain time for management to better serve its own or investor interests.

113. See *supra* note 19.

stock is presumptively “free” of regulation).<sup>114</sup> Rather, having identified what it perceives as significant costs of struggles for corporate control,<sup>115</sup> may the State of Minnesota act on that concern by restricting the rights content of stock issued by Minnesota corporations? Specifically, can the transfer of such stock be conditioned on receiving consents in addition to the consent of its holder?

In short, a control share acquisition statute, while defensible as a legitimate means of protecting a state’s investors, ultimately rests more honestly and securely on a state’s ability to determine that corporations formed under its laws, and having a significant presence in the state (and thus an important impact on its residents), do not exist solely to attract premiums for investors, but may also serve noninvestor interests even if doing so is detrimental to investors. That leads to Minnesota’s final defense of the statute.

### 3. *Protecting Minnesota’s Business Climate*

The state claimed that the statute helps protect Minnesota’s business climate.<sup>116</sup> Judge Rosenbaum responded to this defense in two ways. First, he suggested that it was a “questionable assumption that a person who acquires 20% of the voting stock of a corporation . . . is likely to engage in activity that is deleterious to Minnesota’s business climate, such as moving the corporate headquarters or base of operations outside of Minnesota.”<sup>117</sup> While that statement is literally true as to any particular acquirer, even the 1985 Economic Report acknowledges that public policy “should not, however, be based on the outcomes of individual transactions . . . . Public policy therefore must be based on aggregate trends describing the consequences of takeovers as a whole.”<sup>118</sup> There is indeed great

---

114. Former SEC Commissioner, A. A. Sommer, Jr., has pointed out the implications of asserting that state law must yield—i.e., cannot “reach out”—because tender offers take place in a national, interstate market. “The justification, that tender offers take place in a ‘national securities market,’ could be used to justify a range of federal regulation of corporations’ internal affairs that is all but limitless. Virtually every-thing of any moment that a publicly held company does affects its stock and ‘transac-tions that take place in a national securities market.’” Sommer, *Whatever Happened to State Law?*, 16 REV. SEC. REG. 833, 839 (1983).

115. 1984 Minn. Laws at 470-71.

116. *Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,191.

117. *Id.*

118. See 1985 Economic Report, *supra* note 12, at 196.

concern over the aggregate consequences of frequent takeover activity.<sup>119</sup> Particularly disturbing are the increasingly common “bust-up” takeovers in which an acquisition is financed by selling off pieces of the acquired company and the practice of burdening corporations with substantial debt, either as a result of, or to ward off a takeover. Although the frequency and consequences of these trends are not subject to precise measurement or statistical verification, the concerns are very real and are the proper subject of public policy.

Moreover, Judge Rosenbaum’s response ignores one of the major problems in the takeover debate—the lack of conclusive evidence as to whether, overall, important noninvestor interests are served or damaged by widespread takeover activity. While many concerns about excessive takeover activity have been expressed, it is not authoritatively known that takeovers are adverse to important state and national interests.<sup>120</sup> Neither, however, is it conclusively known that rapid, costly transfers of corporate control are beneficial to the entire field of relationships in which a corporation is involved.<sup>121</sup> Until more decisive evidence is obtained on the implications of take-

---

119. See *supra* notes 5, 6, and 111.

120. The important findings of the Ravenscraft-Scherer and Herman-Lowenstein studies certainly suggest this as to efficiency considerations, however. See *supra* notes 94-95.

121. Proponents of the stock price evidence have made that claim, but it has been seriously challenged by more direct evidence. Furthermore, even the SEC’s Advisory Committee on Tender Offers could not conclude that takeovers are beneficial or detrimental to the economy. See SEC ADVISORY REPORT, *supra* note 19, at xvii. The need to resolve that basic question is increasingly being recognized:

[A]s indicated above, the Advisory Committee found that it could not conclude that tender offers were either good or bad for the economy or securities markets or for issuers or their shareholders. With that foundation, the Advisory Committee went on to conclude that takeovers and related activities are a “valid method of capital allocation” so long as they are conducted fairly and that they should be neither promoted nor deterred by the regulatory scheme. We think it is important that further efforts be made to resolve the fundamental question on which the Advisory Committee found itself unable to reach a conclusion.

Letter from American Bar Ass’n Section of Corporation, Banking and Business Law to Hon. Timothy Wirth, Mar. 12, 1984 (quoted in A. B. A., SECTION OF CORP., BANKING AND BUSINESS LAW, REPORT TO THE ABA HOUSE OF DELEGATES, at 14 (Feb. 1985)) (on file at the William Mitchell Law Review office). Congressman Wirth has acknowledged the lack of conclusive answers on the takeover phenomenon:

I am willing to revisit the question—which the SEC and the Administration apparently feel they have sufficiently put to rest—of whether hostile takeovers are good or bad and whether they should be permitted at all. Too many thoughtful leaders of the business community have suggested the harmful impact of takeovers for me to accept without question the SEC’s



overs for such concerns and interests, public policy might prudently seek to deter a phenomenon not fully understood or easily assessed. Such caution is especially tolerable, and sensible, when it is recalled that the "burden" of such policy on interstate commerce may not result in any great loss of efficiency in the redeployment of economic resources, but merely in the denial of shareholder premiums.

Judge Rosenbaum's second response to Minnesota's "business climate" argument was that the business climate was not protected because the statute does not assure a corporation's continued presence in the state.<sup>122</sup> That is, Van Dusen Air, as with any target company, remains at liberty to move out of Minnesota at any time, free of Minnesota's interference.

Judge Rosenbaum's concern might be answered in the following manner: transactions for control of significant corporations are taking place with increasing frequency and, once undertaken, proceed with great speed. Responsibility for directing corporate activities has been allocated to the board of directors.<sup>123</sup> There is a need for management to respond to a takeover attempt in a deliberative, informed manner.<sup>124</sup> A response of this type requires time. The control share acquisition statute, while ultimately referring to shareholders the fate of the proposed takeover provides, in the interim and as an additional benefit, much needed time for management to formulate a response to the offer. This time might be utilized by management, the group having the most information about a target company's affairs, to serve as a bargaining agent for shareholders seeking a higher price through an "auction" of

---

conclusion that tender offers are invariably a "valid method of capital allocation."

Letter from Hon. Timothy E. Wirth, Chairman, Subcommittee on Telecommunications, Consumer Protection and Fin., to Paul H. Elicker, Chairman of the Corporate Fin., Management and Competition Comm. of the Nat'l Ass'n of Manuf., Oct. 1, 1984, at 5 (quoted in A. B. A. SECTION OF CORP., BANKING AND BUSINESS LAW, REPORT TO THE ABA HOUSE OF DELEGATES, at 14-15).

122. *Van Dusen* [Current] FED. SEC. L. REP. (CCH) at 92,191.

123. See MINN. STAT. § 302A.201, subd. 1. See generally Lowenstein, *supra* note 68, at 259-62. Courts have consistently upheld board action in response to hostile takeover attempts. See *Moran*, [Current] FED. SEC. L. REP. (CCH) at 92,347 (collecting cases). But see, *MacAndrews & Forbes Holdings Inc. v. Revlon, Inc.* [Current] FED. SEC. L. REP. (CCH) ¶ 92, 333 (Del. Ch. Ct. 1985), *aff'd.*, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, [Current] FED. SEC. L. REP. (CCH) ¶ 92,357 (Del. 1985).

124. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

the company,<sup>125</sup> or might be used to preserve the company as an independent entity in a manner determined by target management.<sup>126</sup> Although the statute does not directly tie a corporation to Minnesota, the state might trust that management, if given sufficient time to respond to a takeover attempt in a manner consistent with the demands of its fiduciary position, will retain a sense of obligation to the business and to those dependent on it. As a result, the additional time will allow consideration of the various interests Minnesota was concerned about in enacting the statute.<sup>127</sup>

There is something to be said for this position only if one believes three things: that corporations facing takeovers should respond in a socially responsible manner, not simply for investor gain; that management is the appropriate mechanism for producing such behavior; and that providing time for corporate management to react to a takeover attempt is a necessary condition for such behavior. While these propositions go to the very heart of management—shareholder relations and raise difficult questions about the proper aims of corporate behavior, a state might well believe that in making business decisions senior management of socially and economically significant corporations should and will consider a variety of interests. Specifically, that management will view its obligations as extending to others than just shareholders and, therefore, in Professor White's terminology, seek to behave as good

---

125. Some commentators have proposed that the appropriate management response to a takeover is to, in effect, initiate an "auction" for the target. See Weiss, *Economic Analysis, Corporate Law, and the ALL Corporate Governance Project*, 70 CORNELL L. REV. 1, 26-32 (1984). See also, Lowenstein, *supra* note 68, at 322-23. That is a controversial position, not shared by this author. This contention presumes that control contests are beneficial for society or, if not, that corporations should be managed to provide premiums for investors. Nonetheless, the position presupposes sufficient time for management to successfully adopt the auction strategy. Moreover, it is another argument that the statute, by introducing delay, is beneficial for shareholders.

126. This is consistent with the prevailing judicial view of management's fiduciary duty in a takeover—i.e., that management is to act in the best interests of the "company," not just for shareholders, and that doing so may entail acting to consider "all corporate constituencies." This point was made very clear in the Chancery Court opinion in *Moran*: "[Defensive] actions by a target board, if taken to protect all corporate constituencies . . . have been consistently approved under the business judgment rule." *Moran*, 490 A.2d at 1079. As indicated, the interests of shareholders and noninvestors may diverge rather than coincide. Thus, the question of what interests management ought to serve in a takeover is a central concern for corporate governance. See *infra* note 111.

127. See 1984 Minn. Laws at 470-71.

corporate "citizens."<sup>128</sup> Holding this belief, that other interests should and would be considered by management in fulfilling its legal and perhaps ethical duties, does not necessarily mean that Minnesota wanted to prevent corporations from making their own economic decisions. Indeed, the State of Minnesota would surely be wrong to believe that it is in a better position to decide what is good for Van Dusen Air or any other corporation than its management. Minnesota legislators might simply believe that if corporate decisionmakers are expected to behave responsibly and to take adequate account of the diverse claims on the target company, then they need sufficient time to formulate a response to a takeover offer.

In effect, Minnesota might have strongly argued that it legislated not to favor management as an end in itself, but as a *means* for allowing management consideration of the noninvestor interests the state thought important in corporate decision-making. Without question, such discretion might be exercised in a manner that serves only management interests or even investor interests, rather than the other noninvestor interests Minnesota also believed to have valid claims on corporations. Such uncertainty of exercise does not make the hoped-for benefits "speculative,"<sup>129</sup> but is the inevitable risk of discretion, whether reposed in corporate management or in any other decisionmaker. The uncertainty can be eliminated only by abolishing discretion and by requiring unswerving allegiance to just one set of claimants on a corporation.

### E. *The Federal Policy of Neutrality*

Does such a defense of the control share acquisition statute against commerce clause attack make the statute vulnerable under the supremacy clause because it conflicts with the federal policy of investor protection and neutrality between target and offeror?<sup>130</sup> If so, then states are constitutionally disabled

---

128. See White, *supra* note 8, at 1418 (suggesting language of "citizenship" as more appropriate for discussing corporate behavior than a language of economics).

129. *Van Dusen* [Current] FED. SEC. L. REP. (CCH) at 92,192.

130. Judge Rosenbaum did not reach the preemption issue. The primary federal law dealing specifically with takeovers, the Williams Act, has as its aim the protection of shareholders. The Williams Act, 82 Stat. 454, codified at 15 U.S.C. §§ 78m(d)-(e) and 78n(d)-(f), added new §§ 13(d), 13(e), and 14(d)-(f) to the Securities Exchange Act of 1934. In enacting the Williams Act, "it is also crystal clear that a major aspect of the [congressional] effort to protect the investor was to avoid favoring either man-

from preserving for corporate management the necessary discretion to do more than remain passive during a takeover by seeking to make corporate decisions acknowledging the importance of the corporation to a wide variety of interests in the state. The policy of neutrality would lead, under this reasoning, to an attack on any state law having the effect of diminishing the likelihood of a takeover as constitutionally deficient because, by delaying the takeover process to enable management to formulate a response that takes account of noninvestor interests, management might not protect those interests<sup>131</sup> or might exercise its discretion to protect noninvestor interests as a mere pretense for protecting its own interests. In either case, the ability to influence the outcome of the takeover will have been "tilted" in management's favor. Thus, any state corporate laws that enable management to prevent out-of-state shareholders from obtaining premiums and allow management to avoid being replaced by the highest bidder, which unquestionably are risks in granting management the discretion to be a "trustee"<sup>132</sup> or to behave as a good "citizen,"<sup>133</sup> becomes constitutionally infirm simply because the Williams Act cannot abide management discretion which, however necessary to protect noninvestor interests, might also favor its holder.

Here it is well to remember Justice Powell's opinion that the

---

agement or the takeover bidder." *MITE*, 457 U.S. at 633. This is the so-called "policy of neutrality." *Id.* Although it is clear that Congress adopted a policy of neutrality, it has been suggested that this was due to a lack of agreement on how to protect shareholders. Boehm, *supra* note 18, at 749-50.

The four tests of preemption are: (1) express congressional intent to exclude state regulation; *see, e.g.*, *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); (2) implied congressional intent to exclude state regulation because of the pervasive scheme of federal regulation; *see, e.g.*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-34 (1973); (3) direct conflict between federal and state regulatory schemes so that compliance with both is physically impossible; *see, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); or (4) state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

It does not appear that Congress sought expressly or implicitly to prohibit state regulation of tender offers. *See MITE*, 457 U.S. at 631. Also, it is not impossible to comply with both Minnesota's statute and federal provisions. The preemption issue is thus whether the statute frustrates the Williams Act objectives in some substantial way.

131. Judge Rosenbaum raised the possibility that Van Dusen Air might abandon Minnesota. *See Van Dusen*, [Current] FED. SEC. L. REP. (CCH) at 92,191.

132. Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). The term is Professor Dodd's.

133. White, *supra* note 8, at 1418. The term is Professor White's.

federal policy of neutrality does not necessarily prohibit state legislation to protect noninvestor interests that "include but often are broader than those of incumbent management."<sup>134</sup> In other words, preserving to management the discretion to protect noninvestor interests by resisting a takeover may not make state takeover legislation infirm, in Justice Powell's view, simply because it may also serve management interests.<sup>135</sup> As has been indicated, it may be that in many takeovers noninvestor interests are more closely aligned with those of management than those of investors. Thus, neutralizing the interests of target company management may sterilize the primary decision-making mechanism of the corporation so that it cannot take account of any but investor claims on the corporation's future. In short, management simply shuts down while shareholders, who may depart from the corporation, and the "market" decide the fate of all others. Obviously, this reflects either a remarkable belief that the interests of investors and others generally coincide—an increasingly dubious conclusion—or simply a belief that corporations faced with a takeover are to be managed purely for investors.

While the policy of neutrality makes sense in a three person world of offeror, shareholder, and target management, it is capable of being made wholly insensitive to the fact that corporations, and contests for their control, substantially affect the lives of others. In addition, the policy is easier to accept if, again, one believes that the often cited stock price evidence is a good "barometer" of the social utility of takeovers. Then, the interests displaced by a takeover in, for example, Minnesota, are one cost of a realignment of resources that, on balance, is good for most interests in society. If, however, that claim for stock price evidence is challenged as untrue or as simply open to serious question as is the import of the Ravenscraft-Scherer and Herman-Lowenstein findings, then the federal policy of neutrality, seeking as it does the protection of shareholders

---

134. *MITE*, 457 U.S. at 647 (Powell, J., concurring). The Supreme Court in *MITE* did not hold the Illinois takeover statute to be preempted by the Williams Act. Only Justices White, Blackmun, and Chief Justice Berger reached that conclusion.

135. *Id.* This view should also be remembered, and may be significant to later Supreme Court review of corporate statutes regulating takeovers, as the factors to be balanced in commerce clause analysis are reassessed. The "burden" of these statutes lightened to be primarily the loss of premiums by investors while the probable benefits of deterring excessive takeover activity receive more attention.

who benefit by takeover-produced premiums, is not necessarily good for most other interests. Such a policy may take inadequate account of the ramifications of corporate behavior for various interests in society. Read too restrictively, the policy may do more than achieve neutrality between bidder and target management. It may also prevent states from deploying corporate management as the mechanism for assuring that a corporation, facing a potentially disruptive takeover, has the opportunity to consider and possibly protect the interests of persons other than investors. Providing consideration for such "others" is the aim of state takeover statutes at their best, however crudely and imperfectly they are presently designed.<sup>136</sup>

Possibly a corporate statute seeking to protect noninvestor interests through more direct bestowal of management discretion is also suspect under a rigid reading of federal policy. For example, Pennsylvania has enacted a statute explicitly authorizing directors and officers, in determining the company's best interests, to consider the effects of any action upon "employees, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors."<sup>137</sup> This statute avoids the ambivalence of the control share acquisition statute and directly empowers, but does not require or guide, management to consider noninvestor interests in formulating corporate behavior.<sup>138</sup> In effect, the Pennsylvania Legislature has decreed that corporations do not exist solely to provide premiums for shareholders and that corporate management is the appropriate mechanism for balancing various claims on a corporation, in a takeover as in operating decisions. Yet, such a statute

---

136. See, e.g., 1984 Minn. Laws at 470-71.

137. 15 PA. CONS. STAT. ANN. § 1408B (Purdon Supp. 1985).

138. The board of directors and officers may be more appropriate mechanisms for considering noninvestor interests than shareholders. Minnesota's control share acquisition statute ostensibly provides that shareholders, who probably do not care about such matters, should decide the fate of the takeover. As indicated, however, Minnesota's statute allows management to play a role in the offer by introducing delay. During the delay management may respond to the takeover in a manner that takes account of other interests. Whether doing so is appropriate management behavior is an important question for corporate governance as well as for preemption analysis. Pennsylvania has answered this affirmatively by statute. Most courts have acquiesced to whatever management has done in a takeover because of the business judgment rule. Minnesota's statute is more tentative, but this Article has argued that it too contemplates an important role for corporate management in a takeover, not just a role for shareholders.

might be infirm because it is state action favoring management. It does not favor management as an end in itself, but it affords management a basis for resisting—i.e., not being “neutral” toward—a takeover that, all noninvestor interests aside, is good for shareholders, the favored group of federal policy. As indicated, however, such an analysis would appear to be too strong a reading of the policy of neutrality for Justices Powell and Stevens, and would be a rather drastic incursion into state power to regulate corporate, not merely shareholder, behavior.

The eventual outcome of the present “proinvestor” reading of the Constitution is, of course, unknown. For those concerned about the influence of corporate behavior on society, it is troubling to see the commerce clause and the national policy of shareholder protection be interpreted as prohibiting state efforts to deal with the effects of takeovers on noninvestor interests. Takeover participants and observers should not forget that reconciling investor desires for premiums with a diversity of other corporate claimants is the fundamental issue raised by the takeover phenomenon and efforts to regulate it.

### CONCLUSION

The appearance of evidence that corporate combinations do not, as claimed in *MITE* and *Van Dusen*, necessarily advance society’s efficiency concerns requires a judicial rethinking of the precise manner in which state takeover legislation “burdens” interstate commerce. If there is at least some doubt as to whether takeovers generally serve society’s desire for an efficient use of resources, or serve to unseat incompetent management, then the primary adverse effect of state legislation that succeeds in curbing takeover activity may simply be the loss of premiums by investors. Such an effect on the capital markets, being interstate in character, is undoubtedly a “burden” on commerce. Yet it is a burden that, standing alone, may weigh less heavily when balanced against legitimate reasons for state concern about widespread takeover activity.

Minnesota’s control share acquisition statute, one state’s expression of concern about contests for corporate control, is ambivalent in aim. Is it a shareholder protection act, or does it seek to protect other interests? This Article has suggested that, while defensible as a shareholder protection measure, the

statute's strongest feature, however inartfully it may have been accomplished, is the attempt to avoid the pre-ordained conclusion that corporations exist solely to provide investors with stock premiums. This attitude toward a corporation's *raison d'être* is particularly significant in light of evidence that the interests of investors and those of society (i.e., efficiency concerns) do not necessarily coincide. In seeking to avoid the purchase and sale of corporations like so much produce in a marketplace, a marketplace that works less efficiently than many will admit, the State of Minnesota has recognized the importance of the modern corporation to numerous noninvestor interests and, at a minimum, has acknowledged uncertainty as to how those interests fare as a result of frequent takeover activity.

The "benefit" aimed at—consideration by some responsible group, whether shareholders or, more properly, management, of competing interests in a takeover fray—is very real. Undoubtedly, entrusting management with such responsibility is not without potentially serious problems and clearly the outcome of doing so in a particular case is uncertain simply because assessing and reconciling various claims on a corporation is a difficult task, one that requires discretion and a certain latitude of action. Such assessing and reconciling is understandably frustrating because it is the method of messy, institutional answers to complex problems rather than an elegant, easy, and "scientific" solution.

This author believes that the benefits of Minnesota's statute outweigh the burden on interstate commerce and, that the statute can coexist with the pro-investor orientation of federal policy. That is not to suggest that individual states have always legislated wisely in this area or that they are better equipped than Congress to deal with the issues raised by takeovers. If, however, states are constitutionally unable to legislate in the takeover area, then, absent a change in federal policy, investors are presently the favored constituency of corporations facing takeovers. That outcome, if constitutionally mandated, might cause concern. Perhaps the need to determine the constitutionality of state legislation such as Minnesota's will prompt persons involved in the takeover debate—members of Congress particularly, but also business people, investors, and others—to focus on the fundamental questions of what inter-



ests we, as a modern society, expect corporations to serve and how, constitutionally, that might be accomplished.