

# FEDERALISM AND COMPANY LAW†

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## INTRODUCTION

Professor Stein's interest in federal aspects of corporation law provided us with the first major study of European efforts to harmonize national legislation. It investigated the conformity of national laws with the Treaty of Rome requirements for the gradual establishment of a common market supported by the free circulation of capital, mobility of workers and establishment of enterprises.<sup>1</sup> One of the work's major accomplishments was its sober reflection on the difficulties of achieving even minimal legal harmonization in the context of an already well-developed set of national legal systems embedded in a differentiated group of legal cultures.<sup>2</sup>

It was and is no wonder that European attention often turned to the American evolutionary experience of almost 200 years, and thus to the institutions that served as the vehicles of that evolution.<sup>3</sup> Both the American doctrines concerning the proper mix of state and federal involvement with private enterprise activity, and the court system that developed those doctrines, often have been looked to as guides to the achievement of some analogous division of powers over enterprise law in Europe. This kind of comparative inquiry is all the more attractive because of the hope that judicial development can escape or at least more successfully confront the political realities that have made the legislative and administrative path to European harmonization more an obstacle course than a road.

This search also is fueled by a persisting sense of an ideological affinity between the two cultures — the sense that a liberal socio-economic theory undergirds the American system, and that this theory is reflected in the American lesson of increased unification or harmonization of enterprise law.<sup>4</sup> At the least, the American vacillations between facilitative and regulatory law, depending upon changing perceptions of appropriate state-

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1. E. STEIN, *HARMONIZATION OF EUROPEAN COMPANY LAWS* (1971).

2. *Id.* at 195-312; *see also*, Buxbaum, Book Review, 70 MICH. L. REV. 1615, 1617 (1972).

3. Two recent major projects evidence this continuing interest: The two-volume work co-edited by Professor Stein, *COURTS AND FREE MARKETS* (T. Sandalow & E. Stein eds. 1982), and the current multi-volume effort of the European University Institute, *EUROPEAN LEGAL INTEGRATION IN LIGHT OF THE AMERICAN FEDERAL EXPERIENCE* directed by Prof. Mauro Cappelletti (forthcoming).

4. On the implications of this general perception of enterprise law, see E. STEIN, *supra* note 1, at 6. I occasionally use "enterprise law" in this paper to suggest, though not rigorously, the German sense of *Unternehmensrecht* as an expanded company law concept that partly "internalizes" certain other relations, primarily employer-employee relations, within the framework of corporation law doctrine.

enterprise relations,<sup>5</sup> seem analogous enough to current and historical European experience to confirm the legitimacy of this interest in the comparative American history.

At the federal level it is, of course, a mistake to read any particular social theory into the American Constitution.<sup>6</sup> Socialism is perfectly constitutional if it is established through purchase rather than command. In that important particular the possible free enterprise "constitutional" underpinning of the original European Economic Community is not analogous to the American situation.<sup>7</sup> Only through the backdoor of the division of powers, as explained below, might that correspondence be asserted. It is, on the other hand, correct that recent American constitutional doctrine evidences a surprising resurgence of strong centralizing forces in the field of enterprise law, and that a good deal of this development can be explained by the substantial though unspoken reliance of its proponents on free enterprise values raised to the constitutional level.

It would be a simplifying and historically dubious reduction to equate state interest in corporation law with interventionist or regulatory policies and federal interest with liberal or facilitative ones. So long as a federal legal system presupposes the continuing involvement of two governments with the same subject, however, it is only the subordinate polity's interest in intervention or regulation that makes for interesting reading. State facilitative policies in an era of national facilitative policies raise no questions, and a state's continuing adherence to laissez faire policies when the national government turns interventionist typically creates no conflict.<sup>8</sup> It is only the opposite case that engenders constitutional problems, and thus it is to this case, currently real, that the following discussion is addressed.

## I. THE CURRENT STATE OF AFFAIRS

Control of the investment and corporate government process, the last bastion of state jurisdiction over the corporate form of enterprise activity, is in danger of crumbling under a powerful but misconceived federal attack. It is a powerful attack in two senses: It has gathered momentum from

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5. This is a reference to the renewed "mixed economy" discussions of recent vintage, which attempt to develop a coherent doctrine for both private and public law aspects of economic law by describing and normatively using today's complex state and free enterprise relationships. For a recent comprehensive and analytical review of the literature and a substantial ordering effort, see H. ASSMANN, *WIRTSCHAFTSRECHT IN DER MIXED ECONOMY* (1980). For both a call to and a warning about the undertaking, see WIETHÖLTER, *SOZIALWISSENSCHAFTLICHE MODELLE IM WIRTSCHAFTSRECHT* (G. Teubner ed.) (forthcoming).

6. It is still instructive to read Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914), reprinted in E. CORWIN, *AMERICAN CONSTITUTIONAL HISTORY* 25 (A. Mason & G. Garvey eds. 1964).

7. On the economic constitution of the European Community, see generally 1 W. FIKENT-SCHER, *WIRTSCHAFTSRECHT* 410-35 (1983). The major sector within which this issue has had instrumental consequences is the antitrust area; see the full discussion in E. MESTMÄCKER, *EUROPÄISCHES WETTBEWERBSRECHT*, Chs. 1 & 2 (1974) (English translation forthcoming).

8. It is, of course, possible that a facilitative state law might indirectly impair the effectuation of a regulatory goal of the federal government (as in its distortion of competition between regulated major and unregulated minor enterprise), but I do not take this to be a serious issue. When it is, it would be a specific problem of interpretation of the preemptive effect of a federal statute under the Supremacy Clause.

supremacy and commerce clause rulings in the noncontroversial areas of movement of goods and money; and it is presently being fueled by a resurgence of a free enterprise, laissez faire policy that brooks no intrusion from the states into what it chooses to leave unencumbered at the federal level. Professor Frankfurter's aphorism — "If Congress chose not to regulate, laissez faire was the regulator"<sup>9</sup> — has more bite in today's climate than when he uttered it in the 1930s.

The attack is misconceived for two reasons that are in fact related to the reasons for its bite. On the level of subject matter, the same blurring of investment protection law and internal affairs law that has converted rule 10b-5 into the federal common law of corporations<sup>10</sup> makes it difficult to stop the preemptive slaughter of state securities regulation law from spreading to state corporation law. Blue sky law currently is in jeopardy, and the first whiffs of smoke already have reached the inner sanctum of traditional state corporation codes.<sup>11</sup> The attack is further misguided because it cannot be carried out rationally. A laissez faire policy may still affect the direct regulation of tangible interstate enterprise activity (the production and distribution of goods and services) in a rational if debatable way. It becomes irrational when it has to filter through the enterprise and the enterprise's physical transactions to reach the interior layers of shareholder investment and governance transactions (which themselves then only indirectly guide the enterprise's commercial transactions).<sup>12</sup> Justice White's enshrinement in the Constitution of one arguable version of an efficiency hypothesis involving hostile tender offers, in *Edgar v. MITE Corp.*,<sup>13</sup> may be questionable; but his preliminary assumption that the commerce clause should bear directly on stock transactions, just as it does on transactions in goods and services, can still be discussed. When a similar direct relationship is postulated concerning elements of the internal affairs of a corporation, however, the commerce clause becomes a blunt weapon that destroys a state's right to control the relations among owners and between owners and managers in a random and erratic fashion, and leaves not federal order but chaos in its wake.<sup>14</sup>

This is the situation we are in danger of approaching. Not three months

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9. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 100 (1937).

10. See Fleischer, "Federal Corporation Law": *An Assessment*, 78 HARV. L. REV. 1146 (1965); Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

11. See the cases cited in notes 16 & 17 *infra*.

12. This is what might be called the "Princess and the Pea" problem — an exorbitant finding of impact through too many diffusing layers of action and causation. See Buxbaum, *The Application of California Corporation Law to Pseudo-Foreign Corporations*, 4 CEB CALIF. BUS. L. REP. 109, 112 (1983).

13. See *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982), discussed in the text immediately following.

14. The only escape from this attack so far suggested is itself suspect — the contractarian argument that "private acts" permitted but not required by state corporation law or doctrine cannot be reached by the negative commerce clause but only by the preemptive reach of a federal statute under the supremacy clause. See *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983) (Winter, J.), *cert. denied*, 104 S. Ct. 1326 (1984), and its further discussion at note 63 *infra*.

after *Edgar v. MITE*,<sup>15</sup> a federal appellate court casually invalidated major elements of Michigan's blue sky regulations,<sup>16</sup> and several times in recent months quite ordinary elements of state corporation statutes have come under serious commerce clause and supremacy clause attack.<sup>17</sup> With the startling Supreme Court decision in *Southland Corp. v. Keating*,<sup>18</sup> concerning the preemptive effect of the Federal Arbitration Act under the supremacy clause, several other components of state statutory and judicial regulation of corporate internal affairs now are vulnerable. We can expect supremacy and commerce clause challenges to these provisions to surge in the near future.

## II. DOCTRINAL DEVELOPMENT

In this situation it is worthwhile once more to embark on what by common consensus has always been a vain task — the effort to find a theoretical, or doctrinal, or even only rhetorical frame of reference and of constraint for what has always been accepted, or condemned, or hailed as the political discretion of the Supreme Court in the wielding of the commerce clause and to a slightly lesser extent the supremacy clause.<sup>19</sup>

At the outset it is important to recall why that discretion is inherent and intractable, and why the search for principled constraint is so modest in its expectations. Our particular form of federalism, our particular system of

15. 457 U.S. 624 (1982).

16. *Martin Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); see also *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir. 1983) (striking down Virginia's Take-Over Bid Disclosure Act); *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522 (D. Md. 1982); cf. *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 692 F.2d 814 (1st Cir. 1982) (using federal common law of corporations to restrain application of company by-law designed to prevent hostile takeovers). For even farther-reaching implications, see *Partee v. San Diego Chargers Football Co.*, 34 Cal. App. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983). But see *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029 (1st Cir. 1982); *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Compare *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (New Jersey statute tolling limitation period for an action against a foreign corporation that is not represented in the state by anyone upon whom process may be served does not violate Equal Protection Clause) with *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) (similar tolling provision violates commerce clause), *aff'd on rehearing*, 96 N.J. 419, 476 A.2d 763 (1984).

17. See, e.g., *North Star Intl. v. Arizona Corp. Commn.*, 720 F. 2d 578 (9th Cir. 1983) (preemption argument); *Trans World Corp. v. Odyssey Partners*, 561 F. Supp. 1311 (S.D.N.Y. 1983) (preemption argument); *Valtz v. Penta Inv. Corp.*, 139 Cal. App. 3d 803, 188 Cal. Rptr. 922 (1983); *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982); cf. *People v. Florentino*, 116 Misc. 2d 692, 456 N.Y.S. 2d 638 (N.Y. Crim. Ct. 1982) (upholding antifraud provision of New York "insider trading" statute in criminal code).

Advocates of these attacks are not lacking. See, e.g., *Dunne, Derivative Suits Against BHCs — Sticky Wicket?*, 100 BANKING L.J. 675, 675 (1983); cf. *Golar v. Daniels & Bell, Inc.*, 533 F. Supp. 1021 (S.D.N.Y. 1982) (asserting that shareholder derivative suits are matter of state law).

18. 104 S. Ct. 852 (1984).

19. Compare F. FRANKFURTER, *supra* note 9, at 63-65 (arguing that Chief Justice Taney settled issues based on his own "economic and political outlook" rather than available legal theories) with POWELL, *TAXATION OF THINGS IN TRANSIT* (pt. 4), 7 VA. L. REV. 497, 526 (1921), reprinted in 5 ASSN. OF AM. LAW SCHOOLS, *SELECTED ESSAYS IN CONSTITUTIONAL LAW* 315, 337 (1938) (attempting to find a coherent legal framework for the Court's commerce clause decisions). See generally Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

biparty rather than multiparty political organization, our (resultant) particular form of presidential rather than cabinet executive structure, our particular form of bicameralism, our particular economic resource base and our particular social history and structure — in short, our particular situation — all combined long ago to assure that the Supreme Court early was tendered and early accepted the role of a policy formulator in the most diverse areas of public concern, with the facilitation and control of interstate commerce and private enterprise high among them. One historian recently has labeled the structure of the entire period to 1900 as “the state of courts and parties.”<sup>20</sup> Most historians of all periods and leanings have expounded on the “distinctive path of American jurisprudence that established a peculiarly aggressive posture in the courts,”<sup>21</sup> that treated judicial decisions “as equally responsible with legislation for governing society.”<sup>22</sup>

The vacuum typically produced by our federal institutional structure, with its guarantee of recurrent internal congressional as well as congressional-executive impasses, has been particularly marked, as just noted, in the formal field of interstate commerce and in the substantive field of governmental regulation of the enterprise economy.<sup>23</sup> The early invention of the concept of the negative commerce clause<sup>24</sup> by definition impelled the Supreme Court to enact its own vetoes of preemption against state legislation. That each judicial veto is subject to legislative override in the form of (mythical) congressional statutes, which would use the commerce clause in order to free states to go on and regulate the particular subject matter, does not contradict but rather confirms this characterization.<sup>25</sup> With this powerful concept once in place, the Supreme Court for 150 years has been able, at times one would say condemned, to step forward with its version of preemptive legislation whenever, in a given economic situation, congressional inaction resulted in a substantial vacuum. At times, as during the struggle to develop a national transportation-regulatory structure in the late nineteenth century, this occurred often enough to take on the consistency of a legislative program.<sup>26</sup>

That same period, however, saw the development of a less necessary and therefore less salutary line of judicial legislation, this time with a partial constitutional underpinning, which continues to have consequences to this day. The efforts of states to control enterprise activity — particularly in the railroad sector — led to the Court’s protection of enterprise property and activity on substantive due process grounds. That doctrine’s develop-

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20. S. SKOWRONEK, *BUILDING A NEW AMERICAN STATE* 24 (1982); *see also id.* at 24-35, 41-42 and *passim*.

21. *Id.* at 28.

22. S. SKOWRONEK, *supra* note 20, at 28 (quoting M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 30 (1977)).

23. Professor Corwin’s famous attack on the early New Deal Supreme Court decisions, while intended for a different purpose, amply demonstrates this historical reality. *See* E. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936).

24. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

25. *See* Monaghan, *supra* note 19, at 10-11; Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 454 (1982).

26. S. SKOWRONEK, *supra* note 20, at 150-60.

ment is well known and needs no additional comment,<sup>27</sup> but its connection with the commerce clause division of powers problems deserves comment. What survived of Justice Field's triumph<sup>28</sup> is not only the standing of the corporation to protest its own expropriation and the self-evident rule that the due process clause contains a minimal "compensation for takings" standard, but also the continued validity of "substantive due process" limits on governmental regulation of corporations. While these limits were dismantled at the federal level with the demise of the substantive due process concept as such,<sup>29</sup> they survived to block state regulation in the dress of the negative commerce clause. In other words, this aspect of current Supreme Court doctrine, reflected in *MITE*<sup>30</sup> and *Keating*,<sup>31</sup> is the fruit of a historical situation much more contingent than the situation which produced the more traditional negative commerce clause jurisprudence in the physical stream of commerce transaction field.

How much more a fruit of ideological than of institutional judicial imperatives it is can clearly be seen in the concurrent apotheosis of the corporation as a political actor promulgated in the first amendment cases from *Buckley*<sup>32</sup> through *Bellotti*<sup>33</sup> to *City of Berkeley*.<sup>34</sup> These and the "commercial free speech" cases<sup>35</sup> indeed have such a close connection to the original Fields starting line in *Santa Clara*<sup>36</sup> that some commentators have been moved to speak of them as a revival of a *Lochner*-like<sup>37</sup> substantive due process doctrine in the area of property rights.<sup>38</sup> I suggest that the Frankfurter aphorism takes on a less inevitable tone once we separate those two strands of the negative commerce clause jurisprudence.

### III. A SEARCH FOR DOCTRINAL COHERENCE

On this hypothesis about the different origin of the flow of commerce and the enterprise control jurisprudence, we can inquire whether social sci-

27. See, in lieu of detailed citations, McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975).

28. Which began, paradoxically, with his failure to carry the Court past standing to substance in *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

29. See, e.g., McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

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

31. *Southland Stores v. Keating*, 104 S. Ct. 852 (1984).

32. *Buckley v. Valeo*, 424 U.S. 1 (1976).

33. *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

34. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

35. See, e.g., *Bolger v. Youngs Drugs Prods. Corp.*, 103 S. Ct. 2875 (1983).

36. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

37. *Lochner v. New York*, 198 U.S. 45 (1905).

38. Cf. Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1855 (1981) (arguing that like *Lochner*, "*Buckley* and *Bellotti* provide the basic precedents for a judicial defense of the exercise of corporate power in the realm of politics").

Indeed, we have the beginning of a totally anthropomorphic view of the corporation, with legal consequences across the private law spectrum, in the libel case of *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983) (Posner, J.).

ence theory provides arguments suggesting that centralizing rulemaking is more appropriate in the former than in the latter situation. The following discussion is intended as a beginning search for a doctrinal framework, supplemented by a brief look at the relevance of that search to the current situation of the European Community and to its struggle for a federal enterprise law that might coexist with still predominant national legislation. It is not a discussion from which to predict American case law developments. Even as a critique, it suggests little more than the inevitability of continuing discretionary judicial lawmaking, but at least it should also suggest the desirability of a less ideological underpinning of that discretion.

#### A. *Public Finance Theory*

One major impulse may come from public finance literature, which, following Musgrave,<sup>39</sup> typically categorizes the fiscal functions of states as supportive of allocative, distributive or stabilizing goals and evaluates the appropriate roles of state and federal fiscal sovereigns, respectively, within each goal/function.

The concept of stabilization is associated with such goals as full employment, factor and commodity price stability and the like; that of (re)distribution with such functions as progressive taxation, income-based public service provisioning and so forth. In general, these two types of functions are best carried out at the central level of government, assuming that the mobility of resources will defeat these goals either by their escape or by their burdensome influx. A progressive state income tax may be defeated by the withdrawal of capital, a progressive welfare program by the influx of needy persons.

The allocative function, however, is another matter. This pertains not to allocative efficiency as such, but to the providing of social goods that in a sense comprise the infrastructure of a market economy but cannot easily be provided in a private supply-demand context because, as social (public) goods, they call forth free rider and other externalities distortions. These goods are best provided by that political unit which corresponds most closely to the benefit area within which each common good would be enjoyed: fire companies by municipal government, clean water by the regional (watershed) government, defense forces by the central government.

Discretionary judgment usually is needed to make not only the "area" determinations in the case of allocative functions, but also the "intensity" or "local values" determinations in the case of distributive (and to a lesser degree in the case of stabilizing) functions. As a result, the basic purpose of the fiscal federalism studies associated with this approach is not the global one of correlating the appropriate division of powers along the axis of these three governmental functions per se. Rather, it is the more modest though instrumentally more important one of considering division of powers problems separately within each functional category, on the hypothesis (fairly supported by more detailed studies) that these division of powers

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39. For the most accessible statement of the Musgrave theory of fiscal federalism, see R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* (2d ed. 1976) [hereinafter cited as R. MUSGRAVE & P. MUSGRAVE], especially chapters 1, 29 & 30. The following textual discussion borrows substantially from this reference.

issues cluster better and yield better policy conclusions when studied separately by function than when studied in undifferentiated fashion.<sup>40</sup>

Most governmental regulation, of course, partakes of more than one of these goals or functions — an initial difficulty which compounds our problem of correlating any given regulation with appropriate commerce clause or supremacy clause determinations concerning its legitimacy. This multivariuousness of functions or goals may be especially marked in the type of regulation under discussion here — the company law or enterprise law rules of a state jurisdiction. Nevertheless, a first try at categorizing such legislation along the three axes should help to determine the utility of this approach.

Underlying this effort is the realization that the factors of economic activity, both human and material, possess varying degrees of mobility that both limit and incite regulatory activity at the state level.<sup>41</sup>

Economic policies of stabilization, allocation and distribution require resources that in a free enterprise system are provided by a mix of voluntary private household surplus allocations and by involuntary allocations through fiscal measures. Even the latter, of course, are only available if private household resources stay within the territorially limited control of that sovereign. In short, the ability of a subordinate sovereign in a federal system to achieve any of these three functions/goals in a specific form is qualitatively more constrained than the analogous power of the superior sovereign (which itself, at the international level, is hardly unconstrained).<sup>42</sup> This systemic, political constraint provides the context for the legal system. In this context, it should be the constitutional function of the federal judiciary to prevent a state from being able to inhibit factor mobility excessively, that is, from being able to act extraterritorially.

This issue need not be posed, however, as if the three functions themselves enjoy constitutional status, or put another way, as if any one of the three functions should enjoy constitutional primacy over the other two. Rather, the three together comprise the power of any government to achieve its goals vis-à-vis private economic activity. In addition, a federal system of government presupposes a certain degree of internal mobility of private economic resources but can hardly guarantee full, frictionless mobility. While making a prison out of part of its territory may be the exclusive prerogative of the highest authority within a given legal system, subject to constitutional limits, even lesser authorities have some power that arises legitimately from unequal distribution of resources. Finally, at least at the interstate level, mobility of capital (if not of human) resources is not a primary constitutional right of those factors' providers, but a secondary benefit derived from the constitutional embodiment of the political institutions of federalism.<sup>43</sup> The only primary right enjoyed by these wealth holders is the

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40. *Id.* at 613-14.

41. *Id.* at 626-27; *see also* W. OATES, *FISCAL FEDERALISM* 7-11 (1972).

42. The goals of the smaller jurisdictional unit are more easily defeated not only by the mobility of persons and capital away from its reach, but also by the distortions in allocative efficiency that result from benefit spillovers (free rider problems) and cost externalities. That a mild form of these goal constraints exists even at the international level seems clear.

43. *Cf.* J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175 (1980)



one that also constrains federal actions, such as efforts to imprison resources, that rise to the level of due process or equal protection violations.

### B. State Regulation

These preliminary comments set the stage for consideration of actual state regulation. Within the specific constitutional context of federalism, the stabilization goals are probably the most difficult for the subordinate state polity to achieve.<sup>44</sup> Certainly the price stability component thereof is an elusive goal for a state that cannot ban the inflow or outflow of products and services. Nevertheless, even here some state control is achievable and familiar; witness only primary commodity price stabilization schemes and *Nebbia v. New York*.<sup>45</sup> These, however, are most clearly acceptable when limited to products generated locally. The same state that can forbid its own milk producers from selling below a certain floor price encounters a good deal more difficulty when it seeks to prevent milk produced elsewhere from entering the state to sell at a market price.<sup>46</sup>

This is an example of a state pursuing a stabilization goal, possibly combined with an income distribution goal, despite the fact that from a federal (economic) perspective it thereby has distorted the resource allocation process. Nevertheless, so long as the state cannot also forbid disinvestment or migration, the consequences of this distortion (in allocative terms) are constitutionally acceptable.<sup>47</sup> Indeed, in actual constitutional jurisprudence even tighter controls have been accepted; for example, court approval of mandatory disinvestment of foreign as well as domestic ownership of local resources so long as no actual uncompensated expropriation occurred.<sup>48</sup>

Similar illustrations could be provided as to the full employment (or labor market) component of the stabilization function. In the specific context of company law or enterprise law norms, however, it is the other two functions that are more relevant. A current and much-debated problem —

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(proposing that constitutional issues involving the political institutions of federalism should be treated as nonjusticiable political questions). For the purpose of this paper, recurring, even recent, debates concerning the nature of the interests to be considered in the use of commerce clause considerations (political representation of foreign interests in local decisionmaking, etc.) are not critical. See the discussions in Eule, *supra* note 25, at 460-68; Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. REV. 125; Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

44. R. MUSGRAVE & P. MUSGRAVE, *supra* note 39, at 624.

45. 291 U.S. 502 (1934).

46. This line stems from *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Cf., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949), and *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964). The well-known evaluation in Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 234-37 (1957) is pertinent to the "factor mobility" approach here attempted. See also the somewhat similar brief formulation in Maltz, *How Much Regulation Is Too Much — An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 64-65 (1981).

47. See Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POLY. 127 (1982).

48. See *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945) (disinvestment of farmlands by foreign as well as by domestic corporations under compulsion of state law). While the commerce clause implications were not at issue, that is not relevant in the present context since I do not deny the application of some commerce clause test, simply not of an automatic one.

the control of hostile takeover bids — provides an appropriate example with which to test the public finance classification approach.

A takeover of one enterprise by another can be accomplished in various ways. A friendly takeover can be achieved by a collective decision of the majority of the target company shareholders to enter into a statutory merger or sale of assets transaction, pursuant to which shares (or cash) of the bidder are accepted in exchange for the transfer either of the shareholders' stock (in the target company) or the target's actual assets to the bidder.<sup>49</sup> It can also be achieved by a direct cash or share exchange offer, made to each target company shareholder individually and individually accepted or rejected.<sup>50</sup> Since under long-standing, though troublesome, state statutory provisions directors have a gatekeeper function over "their" shareholders' consideration of a collective statutory merger or sale-of-assets transaction,<sup>51</sup> a hostile takeover cannot be accomplished by this route but only by the second, voluntary share exchange approach.

Either a friendly or a hostile takeover bid made by means of the voluntary share exchange approach may, of course, intentionally or unintentionally result in the offeror obtaining partial, but not total, ownership of the target company. In that event the offeror may at the outset declare its intention to follow up its first-stage ownership entry with a second-stage full statutory merger or sale of assets transaction, one which because of its substantial ownership position it may then be in a good position to achieve, even without the consent of the remaining outside shareholders.<sup>52</sup> Especially in the case of an announced second-stage plan (nowadays often exacerbated by the further warning that the price offered then may be lower than the tender offer price),<sup>53</sup> shareholders of the target company are under pressure to tender their shares at once.

The preexisting market price by definition had not been one causing them to offer their shares for sale. Furthermore, and for our purposes even more significant, a simple increase in the stock market's price for their shares to the level of the tender offer also might not have triggered a decision to sell. It is only the placing of this higher price in the wrapping of an actual tender offer carrying this soft, coercive overtone that may have been the triggering cause of their decision to tender.

This description introduces a question of policy, i.e., whether a state might wish to regulate the hostile tender offer process in order to control untoward aspects of this investor coercion. I have emphasized the coercive element in order to suggest a point overlooked or misunderstood in the ac-

49. See generally R. JENNINGS & R. BUXBAUM, *CORPORATIONS — CASES AND MATERIALS* 1014-16 (5th ed. 1979).

50. *Id.*

51. See M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 225-26 (1976).

52. See the succinct review in R. JENNINGS & H. MARSH, *SECURITIES REGULATION — CASES AND MATERIALS* 626-31 (5th ed. 1982).

53. This is the so-called "front-end loaded, two-tier offer," now the subject of SEC regulatory concern, see 17 C.F.R. § 240.14d-8 (1983), and the extensive discussion in the SEC Advisory Committee on Tender Offers, *Report of Recommendations*, Fed. Sec. L. Rep. (CCH) Extra Edition No. 1028, at 24 (July 15, 1983). But see *Radol v. Thomas*, 534 F. Supp. 1302 (S.D. Ohio 1982) (two-stage plan not too coercive).

tual Supreme Court opinion dealing with these statutes;<sup>54</sup> namely, that such a coercive effect may itself run counter to the efficient allocation of resources otherwise (arguably) inherent in control transfers, and that therefore state regulation of this coercive element may support rather than contradict the efficiency consideration. There is, of course, a coercive component even in the statutory merger case, and a complete analysis of appropriate state regulation needs to take the mentioned directors' gatekeeping function,<sup>55</sup> the role of the appraisal remedy (there as well as at the second stage of the takeover bid)<sup>56</sup> and yet other considerations, such as the expectation of majoritarian decisionmaking, into account. These, however, are different classification and prudential problems; on the authority of *Buck v. Bell*<sup>57</sup> I am not obliged to deal with them in order to proceed with this analysis of the division of powers problem.

It should also be pointed out that since the Court's opinion in *Edgar v. MITE* did not find that the Williams Act<sup>58</sup> preempted this kind of state control under the supremacy clause,<sup>59</sup> the constitutional issue in doctrinal terms revolves solely around the negative commerce clause. This suggests, on the one hand, that the Supreme Court enjoys maximum discretion to approve or condemn state regulations, but on the other — and indeed because of this — that it should not roll out its heavier commerce clause artillery to shoot at just any fly sitting on a bearing wall.

Under what circumstances would a state statute subjecting the tender offer to some regulatory scrutiny of only the investor coercion issue become suspect as an effort to inhibit the mobility of capital resources into or from the state? It seems clear that this would depend upon a combination of its Musgravean categorization and the formal, territorial claim such a law made. A law subjecting only target enterprises incorporated there to this review should be acceptable, since shareholders by a simple act of will can reincorporate in another jurisdiction and thus escape this control. The only other major contender for a jurisdictional hook, given the investor focus of this regulation, would be the residence of shareholders. If the statute permitted regulation only if, for example, the majority of the investors (by share value rather than by number) were local residents, there should again be no cause for objection.<sup>60</sup> The stock market permits shareholders resident elsewhere, who may place some value on the absence of control, to offer a premium for the shares held by residents of the regulating state. Thus, little inhibition on the mobility of resources would result from this situation. If, on the other hand, the state claimed the right to regulate so

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

55. See Eisenberg, *supra* note 51 and accompanying text.

56. *Id.* at 69-84; Buxbaum, *The Dissenter's Appraisal Remedy*, 23 UCLA L. REV. 1229, 1249-52 (1976).

57. 274 U.S. 200 (1927).

58. Act of July 29, 1968, 15 U.S.C. §§ 78m(d)-(e), 78 n(d)-(f) (1982).

59. That portion of Justice White's opinion dealing with preemption failed to gain the support of a majority of the Court.

60. This is the method employed, for example, by Cal. Corp. Code § 2115 (Deering 1977), which applies certain substantive sections of the code to the internal affairs of corporations not incorporated in California. See the discussion of this section in *Wilson v. Louisiana-Pacific Resources, Inc.*, 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (1982).

long as a single shareholder resided there, investors everywhere would be hostage to this claim and a substantial, indirect barrier to the interstate mobility of resources would be created.<sup>61</sup> While in the long run disinvestment in even the exorbitantly regulating state could occur, the difference in degree between the two situations is sufficiently large to justify a negative reaction to that level of control.

The approach of the Court in *Edgar v. MITE*, to cast the issue directly in economic efficiency terms and to make that concept the entire surrogate for the appropriate analysis, is badly misconceived. Accepting for the moment the validity of its underlying assumptions — that control changes by means of takeover bids categorically foster the efficient allocation of resources, and that the efficient allocation of resources is *primus inter pares* so far as state regulation of economic activity is concerned — the opinion fails to honor the state's claim that its regulation, too, supports or at least does not undercut this goal. In my judgment, the Court fails to honor the state policy because it fails to focus on the issue that the explicitly federal aspect of the problem raises, i.e., the mobility of resources. From this example, at least, one might conclude that the Musgravean categorization of state goals and functions, because it rests directly on the resource mobility substratum of federal politics, provides a cleaner and more direct approach to the doctrinal clarification of the constitutional problem than does the traditional political and discretionary approach, and does so without sacrificing the political judgment that underlies and justifies the Court's traditional balancing exercise.

Since even friendly takeover bids, whose acceptance is urged by the target's board of directors, may have these coercive characteristics, the preceding analysis can apply to them without further qualifications. More important is the fact that the analysis also applies when the state regulation is avowedly in the service of the goal of income redistribution or stabilization of employment or prices, at the cost of rather than in support of the goal of efficient allocation of resources. In the context of state tender offer regulation, this is best illustrated by a hypothetical state statute that avowedly reviews such offers from the perspective of protection of workplace quality or of at least some aspects of workplace preservation.<sup>62</sup> This is a goal that pits all shareholders, as investors, against another class of factor providers, the employees. It is a goal not contemplated by the Williams Act,<sup>63</sup> which at least so far as its own sphere of influence is concerned as-

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61. This is also the kind of case which the theory of fiscal federalism would assign to be handled by the federal government, because a state otherwise could impose significant externalities on other states. See W. OATES, *supra* note 41, at 46-47.

62. In fact, state tender offer statutes, including the Illinois statute invalidated in *Edgar v. MITE*, have tended to present themselves as having the goal of investor protection. See, e.g., Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 722-27 (1981). See generally *Corporate Battles for Control — Edgar v. MITE and the Constitutionality of State Takeover Legislation — The Continuing Saga*, 26 HOW. L.J. 1425 (1983). On recent state statutory experiments with "voluntary" fair price requirements in tender offer situations, see Steinberg, *State Law Developments: The Pennsylvania Anti-Takeover Legislation*, 12 SEC. REG. L.J. 184 (1984).

63. It is common ground that the goal of the Williams Act, as part of federal securities law generally, is that of full disclosure of information (only). The "free will" assumption of that goal has been used, at least implicitly, to argue that state law could place no impediments in

sumes the primacy of capital over labor providers in the determination of a corporation's mission.

Even in this case, the public finance categorization scheme would be honored, in a constitutional sense, so long as the state choosing this risky policy did not attempt to achieve it in the extraterritorial way I have previously described. Thus if, for example, this law applied only to locally incorporated enterprises, the easy escape of investors from its reach by the act of incorporating elsewhere would make the law as innocuous and as acceptable as the analogous law whose goal is investor protection. The fact that the former statute's goal now can be classified as a redistributive one should make no difference. "*Laissez faire* is the regulator" not because of its primacy in the canon of values but because its rival at the state level claimed too much territorial scope.

A harder question arises when, in analogy to the second jurisdictional claim described in the investor protection case, this workplace enhancement or protection law claimed application whenever the enterprise falls under a "percentage of workplace" test, or under some indirect substitute like a state-specific payroll or sales factor test. In this situation the mobility issue becomes more significant, though not yet automatically dispositive. A board of directors can move a plant or reduce a local workforce without even going to the shareholders for approval,<sup>64</sup> let alone without resorting to a takeover bid to implement a decision to move or reduce local employment. Even here, as a result, the mobility of resources may be sufficiently assured to allow the state regulatory adventure in turn to escape constitutional condemnation.

Is this regulation, however, still too much of a mobility constraint; i.e., is the analogy to the easy shift of investment in the earlier investor protection example still adequate? Both the investor protection and the workplace enhancement or protection regulation might be understood as legitimate so long as markets existed which permitted the disaggregation of an investment in productive facilities in response to that regulatory attempt.<sup>65</sup> In the case of the investor-oriented regulation, that disaggregation is found in the separation of the market for shares from the market for the underlying productive facilities. In the case of workplace-oriented regulation it would only be found in the separation of the (internalized) market for specific facilities from the overall market for an entire enterprise operation. It might well be argued that there is a qualitative difference between these two

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the path of a free shareholder choice as to whether or not to tender stock, e.g., by failing to prevent target company management from placing internal (e.g., defensive) impediments in their path. See *Data Probe Acquisition Corp. v. Datatab, Inc.*, 568 F. Supp. 1538 (S.D.N.Y. 1983). While that decision itself has been reversed, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984), the reversal rests on the implicit contractarian argument that "private acts" engaged in under the state enabling law umbrella cannot be reached by the negative commerce clause and in fact are not preempted by the Williams Act, unless such acts are deceptive rather than overreaching. This approach arguably is compelled by *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), which was extended to sec. 14(e) situations by *Billard v. Rockwell Intl. Corp.*, 683 F.2d 51 (2d Cir. 1982).

64. This would be well within the boilerplate statutory grant of authority over business decisions to the board. See, e.g., MODEL BUSINESS CORP. ACT § 35 (1979).

65. See Winter, *supra* note 47, at 127-30.

types of markets, a difference directly relevant to the factor mobility issue that I have suggested as the appropriate division of powers touchstone. To address the problem in those terms, however, leads us into a yet different, and perhaps central, problem with the Court's use of the negative commerce clause in *Edgar v. MITE*.

That problem lies in the too-easy ascription of "commerce" to the marketability of stock, i.e., to the separation of investment in the passive sense and ownership in the active sense.<sup>66</sup> In other ownership situations a state's constitutional ability to intrude upon the aggregate of negative exclusion rights that go to make up the dominion called "property" in legal terms is basically unquestioned. It can be gathered under the umbrella term "police power" or categorized separately as zoning restrictions, land use controls, minimum price requirements, civil rights legislation or myriad other aspects. All such constraints have implications for the interstate flow of investment capital.

Berkeley may have a severe rent control statute (pretend Berkeley is a state), and that statute may both inhibit the flow of surplus savings into rental housing and lower the market price not only of houses, but of companies whose assets are comprised of Berkeley houses. Yet negative commerce clause challenges will not succeed in this case. Why, then, is a "workplace" check imposed by state law specifically on the takeover bid made for that housing company different? A workplace protection control generally imposed upon all enterprises in a given state, domestic or foreign, and operating directly on a managerial, operational decision to close down a workbench, an assembly line or a plant would suffer no such automatic invalidation. It would, of course, be subject to the balancing test of *Pike v. Bruce Church, Inc.*<sup>67</sup> if it had a significant though inadvertent effect on commerce in goods or services. But that is a far less stringent review than the automatic review implied by the *Edgar v. MITE* statement that a state-imposed delay on the ability of the shareholders to respond to takeover bids interferes with the efficient allocation of resources<sup>68</sup> and thus, in and of itself, interferes with interstate commerce; the latter is a "balancing" test that assigns a zero weight to the state's interest.

There remains, of course, one important difference between direct regulation of the undesired enterprise activity and regulation of the transfer of control over an enterprise, even when the purpose of the latter regulation is only the indirect control of that undesired activity. If the state reasonably fears that the transfer of control might be an occasion for an increase in the undesired activity, it might rationally choose to include that transfer in its list of transactions subject to review, or indeed to make that the sole occasion for such a review. Assuming that focus to be legitimate, what would be the difference in the degree of constraint on the interstate mobility of capital resources that this difference in regulatory focus (not in the regulatory goal) brings with it?

Any argument that there is a difference in the degree of constraint has to

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66. See *MITE*, 457 U.S. at 641-43.

67. 397 U.S. 137 (1970).

68. 457 U.S. at 643.

arise from the mechanisms of the capital markets, for that is the only variable open to discussion. The use of stock markets to bring investment to enterprises investing in Berkeley housing among the many investment choices is not the source of distinction. The issue is not whether the Berkeley housing enterprise taps the organized capital markets for its capital requirements and then has its stock listed on the organized secondary market of a major stock exchange, or whether "interstate capital" flows to the enterprise through more private, less organized channels. Either style of interstate capital flow is affected by direct Berkeley regulation of rental returns, yet that effect at most is tested under "balancing" commerce restraint tests,<sup>69</sup> not categorically rejected by a zero weight stratagem. The issue, therefore, must be whether the focus on the control transfer, with its attendant temporary constraint on a particular, admittedly large, buy-sell order match, is a qualitatively more dangerous focus — more significant restraint — than perhaps the more pervasive but also more indirect restraint created by the regulatory rent control disinvestment signal on investment values and therefore on the actual terms of buy-sell order matches.

In the latter case, the same number of participants in the secondary market remain, but the terms being offered will change as a direct consequence of the disinvestment signals. In the former, the number of participants changes because of the removal of a major bidder, and perhaps as a result the terms being offered will change. At most, it seems, the change will be no greater if the takeover bid is blocked than if the regulatory signal operates directly on the price terms in the market. Looked at from the perspective of the "locked-in" current investors — and that should be the only relevant perspective — it is a matter of indifference whether the drop in current market value results from the one or the other event.<sup>70</sup> Only if the focus on the takeover bid was motivated by a state policy not to allow foreign control of local *resources* — i.e., was discriminatory in intent versus interstate resource flows — would and should that policy be more or less automatically discredited. That, however, is not the case in the regulatory scheme posited here.

If this argument, derived from my use of the described public finance method of looking at fiscal federalism, is accepted, it suggests the correct approach: Some interference with factor mobility is inevitable in all state regulation of enterprise activity, and too much interference can be prohibited under negative commerce clause doctrine; but the extreme separation of ownership and control made possible by the stock market is not a ground for premitting the inquiry into how much is too much.

In short, the problem turns out to be not that the Supreme Court claimed too much political discretion in *Edgar v. MITE*, but that it too abruptly and permanently foreclosed the ordinary, prudential use of that discretion in this particular subset of enterprise activity. In contrast, the

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69. That is, under the *Pike* test. See note 67 *supra* and accompanying text. For a recent critical evaluation of the test, and some appreciation of the role of factor mobility to a proper evaluation, see Maltz, *supra* note 46.

70. In Musgrave's terms, the impact on allocative efficiency of both state regulatory actions is roughly equal, as is the degree to which the state is or is not able to externalize certain costs onto actors beyond its boundaries.

Musgravean analysis in its institutional implementation rejects an automatic substitute for judicial/political discretion, and supports rather a call for a more reasoned and articulated use of that discretion.<sup>71</sup>

### C. Public Choice Theory

This way of analyzing the constitutional dimension of the division of powers problem displays an affinity to a species of public choice theory also associated with Musgrave and developed for its more legal as well as public policy implication by Buchanan.<sup>72</sup> This theorem suggests that competition in the provision of law as a species of public good may be more conducive to allocative efficiency than is monopolization of the lawmaking power. As recently adapted by Kitch<sup>73</sup> to the specific problem of the division of powers over economic activity in the American as well as the European federal system, this theory leads to the maximum enablement of state regulatory jurisdiction in the above-described constitutional sense. The only difference in actual result which, in my opinion, lies in the difference between the public finance and public choice focus derives exactly from the understanding of the concept of factor mobility.

This can be tested by considering the recent argument of Winter against the legitimacy of state tender offer regulation, which rests explicitly on the assumption (which he admits would need more demonstration before it should be accepted) that state tender offer laws violate the public choice theorem because they claim extraterritorial effect.<sup>74</sup> Most state corporation law, at least that which claims application only to the locally incorporated entity, is free to make such substantive demands or constraints upon a corporation as it "wishes"; investors can vote with their feet and the exorbitantly regulating state will find itself with no investment to regulate. From the economic efficiency perspective of this branch of the public choice theory, the substantive regulation is irrelevant so long as the mobility of the target of the regulation is preserved.<sup>75</sup>

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71. Under that approach it is, of course, correct that there is a slight externalities-related bias towards the central performance of those functions which are primarily distributive or stabilizing, whereas allocative functions are recommended for that jurisdiction which corresponds in size to the benefit area of the public good in question. See the discussion in the text at note 40 *supra*. The degree to which the tilt has instrumental consequences, however, depends upon the ability of the political unit to externalize certain costs, and this issue is quintessentially a matter of degree, not of kind.

72. See R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* (1959) and its use of the early model of the demand functions for public as versus private goods in Samuelson, *The Pure Theory of Public Expenditure*, 36 *REV. ECON. & STAT.* 387 (1954). These concepts were extensively developed for their public policy and indirectly even their legal implications in J. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968), and it is from this literature that they have made their way into the work of legal scholars like Winter and Kitch, discussed immediately below.

73. Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* (A. Tarlock ed. 1981); see also Kitch, *Regulation, the American Common Market and Public Choice*, 6 *HARV. J. L. & PUB. POLY.* 119 (1982).

74. R. WINTER, *GOVERNMENT AND THE CORPORATION* 43-44 (1978). An earlier version of this part of the book appeared as Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251 (1977).

75. *Id.* at 28-30.



To a doctrinal apologist for either the affirmative or the negative commerce clause doctrine, however, this may not be a sufficient constraint upon the states. What the long run will correct is still unacceptable in the short run of constitutional doctrine as classically stated. But until now this conflict never had to be faced, since constitutional doctrine addressed the problem of direct restraints on factors, and there public choice theory and the doctrine coincided. If the state directly restrained the mobility of goods or of services, its claims had to be tested against the fine mesh of "intentional discrimination" or the coarse mesh of "inadvertent discrimination," but tested they were. In corporation law terms, this was the equivalent of the distinction between regulation that addressed only the foreign entity and that which addressed any entity so long as it had invested in the jurisdiction.<sup>76</sup> While in the very long run even this kind of adventure would be tested by the marketplace (of new investments), under the tenets of the public choice theory as well as those of traditional constitutional doctrine, the medium run allocative distortions it created would be troubling, presumably because of their temporal spillover consequences.

That troubled feeling, however, only led to the door of the analysis. Constitutional doctrine and economic theory alike still called for a balancing test at this stage. Thus, in his paper on public choice theory in corporation law, Winter seems obliged to accept such typical elements of blue sky legislation as applied legal constraints to out-of-state behavior because of its local effects, though the scope of that legislation could not be avoided by the affected enterprise simply through reincorporation elsewhere.<sup>77</sup> Obviously, some chilling effects on sunk investment would occur in this situation, effects which could be overcome only in the long run as new investors heeded the signal and stayed out of the state. Yet these effects were accepted because on some unstated balancing test they were outweighed by the state interest in its regulatory policy.<sup>78</sup>

Why, then, should such balancing considerations not apply to state tender offer legislation? The argument tentatively posed by Winter (and explicitly made subject to further consideration),<sup>79</sup> namely, that the state hereby claimed extraterritorial obedience which no investor anywhere could escape, is only a formal one.<sup>80</sup> It substitutes an absolute consideration for a relative one, and by doing so distorts the message of the public choice theory. Indeed, it turns that theory on its head. Instead of being a call for federal experimentation as a warrant of efficiency through "rule competition" for investors' favor, it essentially would sabotage the competitive game itself and make the states no more than trivial handmaidens —

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76. *Id.* at 44.

77. *Id.* at 28-29.

78. In *Edgar v. MITE Corp.*, 457 U.S. 624, 631, 640 (1983), Justice White accepted state blue sky regulation in part because of the explicit savings clause in §28(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78bb(a), and in part on the basis of an obsolete trio of Supreme Court cases that go off on the definition of interstate commerce. Neither excuse, however, is embraced by Winter, who thus apparently accepts state blue sky legislation on its own terms despite its partial extraterritorial effect.

79. Winter, *supra* note 72, at 42-44.

80. This objection can be most clearly perceived by reading Justice White's opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 641-42 (1983).

private law enabling structures, in the corporate terminology — for just that centralized law making monopoly the public choice approach seeks to avoid. In short, a proper appreciation for the public choice theory should resist, not embrace, this absolutist aspect of *Edgar v. MITE*.<sup>81</sup>

#### IV. THE COMPARATIVE EXPERIENCE

Though at the outset I suggested that comparative practice, too, might provide at least fact patterns to test American attitudes towards the division of powers in enterprise law, it will not provide direct analogues to the foregoing story and critique. In the European Community, exorbitant judicial use of federal preemption or negative commerce clause arguments are hardly the order of the day. On the contrary, an institutionally under-equipped and politically not-yet-legitimate central set of executive organs is struggling to create the acceptance of a modest level of affirmative commerce clause power vis-à-vis recalcitrant Member States.<sup>82</sup> *McCulloch v. Maryland*<sup>83</sup> has been decided, but *Gibbons v. Ogden*<sup>84</sup> still seems some distance in the future.

What is identifiable, and therefore comparatively valuable, however, is the political dimension of the resistance of the Member States to this extension. This is a characteristic not of some unstructured or unprincipled clutching of retained power in crude personal-political or bureaucratic terms, though the shallow and recent nature of the Community's federal roots is, of course, a major factor which expresses itself in these terms. The political dimensions of the problems stem, rather, from much more structural and, for now, much more intractable problems of external reality. The real economic stresses of the current day and recent history are being faced by public intervention in economic processes, not by laissez faire policies.<sup>85</sup> The fiscal weaponry needed for that intervention, however, still re-

81. In Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23 (1983), this economics-of-federalism aspect of public choice theory is applied to the "state action" exemption from the Sherman Act. While the analysis is not directly relevant to the corporation law problems under discussion it, like *MITE*, suffers from an absolutist pretermis- sion of the only interesting issue, the degree of acceptable extraterritoriality of the state's regu- lation. *Id.* at 45-46.

82. On the judicial development of Community supremacy without a specific supremacy clause, see Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INTL. L. 1, 10-16 (1981). See generally Waelbroeck, *The Emergent Doctrine of Community Pre- emption — Consent and Re-delegation*, in 2 COURTS AND FREE MARKETS, *supra* note 3, at 548.

83. 17 U.S. (4 Wheat.) 316 (1819). Compare the essentially analogous development through *N.V. Algemene Transport — en Expeditie Onderneming Van Gend & Loos v. Neder- landse administratie der belastingen* (Netherlands Inland Revenue Administration) (Case No. 26/62), 1963 E. Comm. Ct. J. Rep. 1 (Preliminary Ruling), and *Costa v. ENEL*, (Case No. 6/64), E. Comm. Ct. J. Rep. 585 (Preliminary Ruling). See generally E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAWS AND INSTITUTIONS IN PERSPECTIVE* 182-260 (1976).

84. 22 U.S. (9 Wheat.) 1 (1824). See Matthies, *Rechtsfragen der Stahlkrise im Gemeinsamen Markt*, 18 EuR 318 (1983).

85. For general views on this proposition see *The European Community Past, Present and Future*, 21 J. COMMON MKT. STUD. (1982); cf. Reich, *The Regulatory Crisis: American Ap- proaches in the Light of European Experiences*, 1983 Am. Bar Found. Res. J. 693, 694 (analyz- ing American approaches to regulation from a European perspective).

sides in the individual Member States. Secondly, those stresses arise, or at least are manifested, in the economic relations not of the European Community with external states, but of the individual European states with external states. The recent reaction to the inflow of Japanese autos and steel makes the older reaction to the inflow of Italian refrigerators into France seem like a nostalgic lovers' quarrel.

If the severe problems seem to arise from external sources, and if the response thereto calls for state-internal actions, there is neither opportunity nor tolerance for Community-level involvement in, let alone interference with, the legal structure of those responses. Only in those sectors which at the very beginning were singled out for Community treatment — preeminently the steel sector — are Community responses accepted.<sup>86</sup> Even there massive local sabotaging maneuvers occupy as much time and energy of the central organs as do the details of that Community legislation.<sup>87</sup>

Since the issue, thus, is the scope of the affirmative commerce clause concept, the analogy to the American experience might better be with the period during which the political and the legal consensus for a national economic policy developed, in a "national order" sense<sup>88</sup> — in other words, with the first quarter of this century. On that base, once established, the aggressive and interventionist American federal actions of the Depression Era could find new support. For now, Europe is still struggling to establish the "national order." Whether it can do so in the context of today's nation-states, especially given their highly developed status, is an open question. Until it is resolved, neither social theory nor comparative perception can do more than point out the costs and benefits of any given type of division of legal competence in substantive regimes such as that of enterprise law. They can neither tell whether or when the American type of division will happen nor whether it should.

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86. See the comments on the Treaty of Rome's special sector legal regimes, which were made to correct the overly "nationally oriented" and "interventionist" assumptions of other symposium contributors, by Camps, Comment, 21 J. COMMON MKT. STUD. 190 (1982).

87. See, e.g., E. MESTMÄCKER, *EUROPÄISCHE KARTELLPOLITIK AUF DEM STAHLMARKT* (1983).

88. See R. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at xiii-xiv (1967).