



Spring 3-1-1994

NoDak Bancorporation v. Clarke and Lewis v. Clark: Squeezing Out "Squeeze-Out" Mergers Under the National Bank Act

Thomas W. Maddi

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Banking and Finance Law Commons](#)

Recommended Citation

Thomas W. Maddi, *NoDak Bancorporation v. Clarke and Lewis v. Clark: Squeezing Out "Squeeze-Out" Mergers Under the National Bank Act*, 51 Wash. & Lee L. Rev. 763 (1994).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol51/iss2/15>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

*NoDak Bancorporation v. Clarke and Lewis v. Clark: Squeezing Out "Squeeze-Out" Mergers Under the National Bank Act**

I. Introduction

The United States Court of Appeals for the Eighth Circuit recently held in *NoDak Bancorporation v Clarke*¹ that a merger in which the majority shareholders forced the minority shareholders of an acquired bank to accept only cash in exchange for their shares was permissible under the National Bank Act.² The Eighth Circuit's *NoDak* opinion directly conflicts

* The author would like to express his appreciation to Professor David Millon and Jim Lake for their assistance in the development of this Note.

1. 998 F.2d 1416 (8th Cir. 1993).

2. See *NoDak Bancorp. v Clarke*, 998 F.2d 1416, 1420 (8th Cir. 1993) (holding that Comptroller had authority under National Bank Act to approve squeeze-out merger). The merger at issue in *NoDak* involved the Liberty National Bank and Trust Company of Dickinson (Liberty). *Id.* at 1417 Liberty had operated as a national bank in North Dakota since 1916. *Id.* Prior to the merger, the plaintiff, NoDak Bancorporation (NoDak) owned 21% of Liberty's outstanding shares, and the majority shareholder, Dickinson Bancorporation (Dickinson), owned 73%. *Id.* Under the merger plan, Liberty merged with an interim bank, the New Liberty National Bank (New Liberty). *Id.* at 1418. New Liberty was a wholly owned subsidiary of Dickinson created for the sole purpose of facilitating the merger. *Id.* The resulting bank also would be a wholly owned subsidiary of Dickinson, because NoDak and the other minority shareholders of original Liberty could exchange their shares only for cash, which would leave Dickinson as the sole shareholder of the postmerger Liberty bank. *Id.*

Liberty sought approval for the merger plan from the Comptroller of the Currency, as required by the National Bank Act. 12 U.S.C. § 215a(a) (1988). The Comptroller approved the plan over NoDak's objections. *NoDak Bancorp.*, 998 F.2d at 1418. Adopting the rationale and holding in *Lewis v Clark*, 911 F.2d 1558 (11th Cir. 1990) (per curiam), the United States District Court for the District of North Dakota held that the Comptroller lacked authority to approve the merger plan because it froze out the minority shareholders. *Id.* The United States Court of Appeals for the Eighth Circuit, after analyzing the statute, the federal regulations, and the case law interpreting the statute, held that the National Bank Act permitted the merger in question, and that the Comptroller therefore had authority to approve the transaction. *Id.* at 1419.

with the decision of the United States Court of Appeals for the Eleventh Circuit in *Lewis v Clark*.³ In *Lewis*, the Eleventh Circuit held that without express statutory authority, the Comptroller of the Currency (Comptroller) had no authority to approve a merger that required shareholders holding stock of equal standing to take different forms of consideration.⁴ At present, the Eighth and Eleventh Circuits are the only courts that have addressed whether the National Bank Act grants the Comptroller authority to approve these "squeeze-out" mergers involving national banks.⁵ The Office of the Comptroller of the Currency has indicated that the Comptroller will continue to approve squeeze-out mergers outside the Eleventh Circuit.⁶ Consequently, the issue of squeeze-out mergers under the National Bank Act may confront other courts in the future.

The *Lewis* and *NoDak* courts approached the question of whether squeeze-out mergers⁷ are permissible as a matter of statutory interpretation

3. 911 F.2d 1558 (11th Cir. 1990). The Comptroller's name is Robert L. Clarke, not "Clark" as it appears in the case citation. The mistake first appeared in the district court opinion. *Lewis v. Clark*, No. TCA 87-40135-MMP (N.D. Fla. Apr. 4, 1989), *rev'd and remanded*, 911 F.2d 1558 (11th Cir. 1990) (per curiam).

4. *Lewis v Clark*, 911 F.2d 1558, 1560 (11th Cir. 1990) (per curiam). In *Lewis*, the United States Court of Appeals for the Eleventh Circuit considered whether the Comptroller had authority under § 215a of the National Bank Act to approve the merger of Lewis State Bank into the closely held First Florida Bank, N.A. *Id.* at 1560. The majority shareholder, First Florida Banks, Inc., a bank holding company, owned 99.34% of Lewis State's stock, while the plaintiff, owned less than 1%. *Id.* at 1559. Lewis State Bank was one of 12 subsidiary banks that First Florida Banks, Inc. merged into First Florida Bank, N.A. *Id.* at 1560. Under the terms of the merger, the minority shareholders were to receive cash for their shares, and the majority would receive stock in the merged bank. *Id.* According to the Eleventh Circuit, § 215a did not expressly permit disparate treatment of stockholders of the same class of stock. *Id.* Although the statute did not prohibit squeeze-out mergers, the court reasoned that owners of the same class of stock should not receive different treatment unless Congress specifically authorized such treatment. *Id.* at 1561. Consequently, the Eleventh Circuit held that the Comptroller did not have authority to approve the squeeze-out merger under § 215a. *Id.*

5. *NoDak Bancorp.*, 998 F.2d at 1424.

6. See O.C.C. Interpretive Letter, 1992 WL 486327, at *3 (O.C.C. Oct. 2, 1992) (indicating that O.C.C. would not object to proposed cash-out consolidation of multibank holding company's Colorado-based national bank subsidiaries).

7 The term "squeeze-out merger" describes a transaction that forces minority shareholders to surrender their stock in a corporation to the controlling majority in

of the National Bank Act.⁸ By framing the issue as a question of the Comptroller's authority under the statute to approve such a merger, the courts avoided the significant policy issues underlying the question of whether the government should permit such mergers in the context of national banks. This Note analyzes the policy considerations behind allowing majority shareholders in national banks to employ squeeze-out mergers to divest minority shareholders of their equity. The Note begins with a review of the treatment of squeeze-out mergers in the general corporate context under state law, with a focus on the different New York and Delaware approaches.⁹ The Note then discusses current and traditional justifications and criticisms regarding squeeze-out mergers involving nonbank corporations.¹⁰

After exploring these general issues, the Note turns to squeeze-out mergers that involve national banks, beginning with an analysis of the reasoning in the *NoDak* and *Lewis* opinions.¹¹ A review of the conflict

exchange for cash or some nonequity instrument. Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978). The most common form of squeeze-out involves the merger of a corporation into its existing parent or a shell corporation that the controlling shareholders have formed solely for that purpose. *Id.* In *Schreiber v Burlington N., Inc.*, 472 U.S. 1 (1985), the U.S. Supreme Court stated: "A 'squeeze-out' merger occurs when Corporation A, which holds a controlling interest in Corporation B, uses its control to merge B into itself or into a wholly owned subsidiary. The minority shareholders in Corporation B are, in effect, forced to sell their stock." *Id.* at 3 n.1. Courts and commentators also refer to "squeeze-out" mergers as "take-out," "freeze-out," or "cash-out" mergers. Richard A. Booth, *The New Law of Freeze-Out Mergers*, 49 MO. L. REV. 517, 517 n.2 (1984).

8. See 12 U.S.C. § 215a (1988) (providing procedural requirements for merger of national banks or state banks into national banks). Section 215a(a) grants the Comptroller the authority to approve mergers under the Act: "One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association." *Id.* § 215a(a) (emphasis added).

9. See *infra* notes 17-52 and accompanying text (contrasting treatment of squeeze-out mergers by Delaware and New York courts).

10. See *infra* notes 53-71 and accompanying text (discussing justifications and criticisms commentators have offered regarding squeeze-out mergers).

11. See *infra* notes 72-113 and accompanying text (discussing *Lewis* and *NoDak* opinions).

between the Eighth and Eleventh Circuits follows.¹² The Note then analyzes the scope of the National Bank Act, focusing on the legislative history and the legal context in which Congress originally enacted and subsequently amended the provisions governing national bank consolidations.¹³ The Note concludes that the legislative history and the prevailing legal assumptions concerning the rights of minority shareholders indicate that Congress did not intend to authorize squeeze-out mergers under the National Bank Act.¹⁴ In addition, the Note argues that the Comptroller's endorsement of squeeze-out mergers is not only inconsistent with the National Bank Act, but also fails to promote the federal policy of encouraging beneficial consolidations in the banking industry.¹⁵ Finally, the Note recommends that if Congress does decide to authorize squeeze-out mergers under the National Bank Act, Congress should require that such transactions satisfy a business purpose test defined by the regulatory objectives that the consolidation policy seeks to promote.¹⁶

II. Squeeze-Out Mergers in the General Corporate Context

State courts have long struggled with the propriety of squeeze-out mergers.¹⁷ Because of the significance of Delaware's corporate law, many state courts and legislatures have followed Delaware's example in the development of their laws governing squeeze-out mergers.¹⁸ A notable

12. See *infra* notes 114-19 and accompanying text (analyzing *NoDak* court's rejection of *Lewis* decision).

13. See *infra* notes 124-80 and accompanying text (discussing legal assumptions and legislative history of National Bank Act's merger and consolidation provisions).

14. See *infra* notes 181-85 and accompanying text (concluding that Congress did not intend to authorize squeeze-out mergers under National Bank Act).

15. See *infra* notes 206-20 and accompanying text (arguing that allowing national banks to engage in squeeze-out mergers will not advance regulatory objectives of federal banking agencies).

16. See *infra* notes 221-30 and accompanying text (discussing suggested business purpose test for squeeze-out mergers involving national banks).

17. See Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV 624, 626-80 (1981) (providing historical account of judicial responses to take-out schemes, including squeeze-out mergers).

18. See 1 F HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 5:04, at 26-27 (2d ed. 1985 & Supp. 1993) (discussing treatment of squeeze-out mergers in Delaware).

exception to this pattern is New York, which takes a very different approach to squeeze-out mergers.¹⁹

A. Squeeze-Out Mergers Under Delaware Corporate Law

The treatment of squeeze-out mergers under Delaware law has varied over time. In the context of parent-subsidary mergers, Delaware courts have long applied a "fairness test."²⁰ Under this test, a court carefully scrutinizes the fairness of a transaction that the minority shareholders believe to be tainted with self-dealing and price inadequacy.²¹ In 1957, the Delaware legislature enacted a short-form merger statute applicable to ninety-percent owned subsidiaries.²² Initial minority shareholder challenges to squeeze-out mergers under the Delaware short-form merger statute met with little success.²³ These decisions clearly established the exclusivity of the appraisal remedy for dissenting minority shareholders.²⁴

19. See *infra* notes 45-52 and accompanying text (discussing treatment of squeeze-out mergers under New York law).

20. See *Sterling v Mayflower Hotel Corp.*, 93 A.2d 107, 109-10 (Del. 1952) (holding that majority shareholder bore burden of establishing entire fairness of merger because majority shareholder stood on both sides of transaction).

21. *Id.* at 110.

22. Act of June 5, 1957, ch. 121, sec. 6, § 253(a), 51 Del. Laws 186, 188 (current version at DEL. CODE ANN. tit. 8, § 253(a) (1991)).

23. See *Stauffer v Standard Brands Inc.*, 187 A.2d 78, 80 (Del. 1962) (holding that purpose of short-form merger statute was to provide parent corporation with means of eliminating minority shareholders' interest in enterprise), *overruled by* *Roland Int'l Corp. v Najjar*, 407 A.2d 1032 (Del. 1979), *overruled by* *Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Coyne v Park & Tilford Distillers Corp.*, 154 A.2d 893, 895-96 (Del. 1959) (rejecting argument that § 253 of Delaware Code did not authorize take-out mergers on grounds that § 253 clearly authorizes use of cash as sole consideration in short form mergers). *But see* *Weiss*, *supra* note 17, at 648-49 (suggesting that principal purpose of short-form merger statutes and statutes authorizing cash as consideration in mergers was to provide corporate managers with greater flexibility in structuring corporate combinations and not to authorize them to effect squeeze-out mergers).

24. See *Stauffer*, 187 A.2d at 80 (holding that absent fraud, appraisal was exclusive remedy for minority shareholders disputing valuation of their stock). Most jurisdictions, including Delaware, have "appraisal statutes" or "dissenters' rights statutes" that authorize dissenting shareholders to demand that the corporation purchase their shares at fair value when the corporation merges or consolidates. See 1 O'NEAL & THOMPSON, *supra* note 18, § 5:28, at 168-69 (discussing protection afforded to minority shareholders by statutory right of appraisal). If the shareholders and the corporation fail to reach an agreement as to what

With the rise in popularity of corporate squeeze-outs in the mid-1970s, courts began to question the fairness of forcing a shareholder out of equity participation at any price.²⁵ The Delaware courts responded to this fairness issue by applying the "business purpose" doctrine in a trilogy of cases decided in the late 1970s.²⁶ In *Singer v Magnavox Co.*,²⁷ the Delaware Supreme Court abruptly abandoned its prior adherence to the exclusivity of the appraisal remedy.²⁸ The court concluded that in a parent-subsiary merger, the minority shareholders were entitled to

constitutes a fair price, the statutes provide for judicial appraisal of the shares to determine the purchase price. *Id.* at 169.

25. See Booth, *supra* note 7, at 518-19 (describing reasons for development of business purpose rule in Delaware).

26. See *Roland Int'l Corp. v Najjar*, 407 A.2d 1032, 1036-37 (Del. 1979) (applying *Singer* business purpose test to short-form merger through which parent owning 97.6% of subsidiary attempted to eliminate 329 public shareholders), *overruled by Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Singer v Magnavox Co.*, 380 A.2d 969, 976-78 (Del. 1977) (holding that merger for sole purpose of squeezing out minority was breach of fiduciary duty), *overruled by Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Tanzer v International Gen. Indus.*, 379 A.2d 1121, 1123-24 (Del. 1977) (applying *Singer* business purpose test to parent-subsiary merger), *overruled by Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983).

27 380 A.2d 969 (Del. 1977).

28. *Singer v. Magnavox Co.*, 380 A.2d 969, 977 (Del. 1977), *overruled by Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983). In *Singer*, the Delaware Supreme Court considered whether majority shareholders violated their fiduciary obligation to minority shareholders by carrying out a corporate merger for the sole purpose of freezing out the minority shareholders on a cash-out basis. *Id.* at 972. The merger involved Magnavox and T.M.C. Development Corporation, a wholly owned subsidiary of North American Philips Corporation, which recently had acquired a controlling interest in Magnavox through a cash tender offer. *Id.* at 971. According to the *Singer* court, the majority had a fiduciary duty to the minority with respect to the minority's stock ownership. *Id.* at 976. Moreover, the majority could not meet this duty by merely relegating the minority to the statutory appraisal proceeding because, as the *Singer* court noted, investors have a legitimate interest in the form, as well as the value, of their investments. *Id.* at 977-78. The *Singer* court cited a number of decisions in which the Delaware Supreme Court had held that the use of corporate power to perpetuate control violated the controlling shareholder's fiduciary duty. *Id.* at 979-80. The court stated that by analogy, the "use of corporate power solely to eliminate the minority is a violation of that duty." *Id.* at 980. Consequently, the *Singer* court held that a merger for the sole purpose of squeezing out a minority shareholder constituted a breach of the majority's fiduciary duty. *Id.*

judicial scrutiny of the merger terms to determine their fairness.²⁹ If the terms were not fair, the reviewing court should provide the minority appropriate equitable relief.³⁰ More significantly, the court held that the majority cannot satisfy the fairness test merely by demonstrating that the merger price was fair.³¹ The court, stating that purpose was also relevant, explained that a majority shareholder could not effectuate a merger "for the sole purpose of eliminating a minority on a cash-out basis."³² In order to state a claim for unfairness under *Singer*, the plaintiff had to allege the lack of a legitimate business purpose for the squeeze-out merger, the inadequacy of the price offered to the minority shareholders, and the minority's inability to veto the transaction.³³ However, the Delaware Supreme Court in *Singer* did not indicate what would constitute a valid business purpose for the elimination of the minority shareholders' interest.³⁴

29 *Id.* at 977

30. *Id.*

31. *Id.* at 977-78.

32. *Id.* at 978.

33. *See Harman v Masoneilan Int'l, Inc.*, 442 A.2d 487, 496 (Del. 1982) (describing essential elements of *Singer* fairness claim).

34. *Singer*, 380 A.2d at 980. Although the *Singer* decision was silent as to what benefits would constitute a valid business purpose, the Delaware Supreme Court soon provided a partial answer to that question in *Tanzer v International Gen. Indus.*, 379 A.2d 1121 (Del. 1977), *overruled by Weinberger v UOP, Inc.* 457 A.2d 701 (Del. 1983). In *Tanzer*, the Delaware Supreme Court upheld the court of chancery's denial of injunctive relief against a parent corporation that had cashed out the minority shareholders of a subsidiary corporation in order to facilitate the parent corporation's ability to borrow. *Id.* at 1125. In holding that a freeze-out merger between a parent corporation and its subsidiary for the sole benefit of the parent did not violate the *Singer* business purpose rule, the Delaware Supreme Court accepted the court of chancery's conclusion that the purpose of the merger was to "facilitate long term debt financing by [the parent corporation]" and that such a purpose was a "legitimate and present and compelling business reason" to freeze out the minority. *Id.* at 1124.

This was not the case with the merger at issue in *Young v Valhi, Inc.*, 382 A.2d 1372 (Del. Ch. 1978). In *Young*, the court of chancery determined after an evidentiary hearing that the purpose of the merger was simply to eliminate the minority shareholders "by whatever means as might be found to be workable." *Id.* at 1378. The *Young* court considered the validity of a proposed merger of a subsidiary, Valhi, Inc., into its parent, Contran Corporation. *Id.* at 1373. Contran claimed two business purposes for the merger: first, to realize tax savings by allowing Contran to offset continuing tax losses against Valhi's recent gains from the sale of a portion of its business; and second, to avoid future conflicts

Whatever potential force the business purpose test may have had, subsequent decisions severely limited the significance of the test. Shortly after the Delaware Supreme Court decided *Singer*, the court held that the business purpose need not be that of the subsidiary; a merger effected solely to advance economic objectives of the parent satisfied the *Singer* business purpose rule.³⁵ Of course, this holding largely negated the efficacy of the business purpose test: Few (if any) parent corporations would even propose a venture from which they did not expect to benefit economically.³⁶

Weakened from the start, the *Singer* standard came to its final demise in the Delaware Supreme Court's decision in *Weinberger v UOP, Inc.*,³⁷ which signaled the end of the business purpose test in Delaware.³⁸ In

of interest between Contran and Valhi that would exist if they were to operate in the same general lines of business. *Id.* at 1376-77. The court found both of these purported purposes unconvincing. First, the merger would have resulted in tax savings of only \$150,000 (approximately \$.34 per share), which Contran could have achieved by other means. *Id.* at 1377. Moreover, the court found the possibility of future conflicts of interest "somewhat contrived" because Contran was essentially a holding company, over 90% of the assets of which consisted of Valhi's common stock, and because past conflicts of interest between Valhi and Contran had been minimal. *Id.* The court of chancery considered the proposed merger in *Young* the "prototype" of the mergers that the Delaware Supreme Court sought to prevent in the *Singer* and *Tanzer* decisions and thus granted injunctive relief to the minority shareholders. *Id.* at 1378.

See generally Allen M. Terrell, Jr. & Alesia Ranney-Marinelli, *What Constitutes a Valid Purpose for a Merger?*, 51 TEMP. L.Q. 852 (1978), for a further discussion of business purpose as construed in Delaware and other jurisdictions.

35. See *Tanzer*, 379 A.2d at 1123-24 (holding that parent company did not breach its fiduciary duty as majority stockholder in subsidiary by effecting merger primarily to advance its own business purpose).

36. See Booth, *supra* note 7, at 527 (arguing that Delaware courts severely limited business purpose test by recognizing business purpose of parent corporation).

37. 457 A.2d 701 (Del. 1983).

38. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (holding that business purpose requirement would no longer apply in context of parent-subsidiary mergers). In *Weinberger*, the Supreme Court of Delaware considered the applicability of the business purpose rule to squeeze-out mergers in the parent-subsidiary context. *Id.* at 703-04. According to the *Weinberger* court, the requirement of a business purpose represented a departure from prior case law. *Id.* at 715. The *Weinberger* court concluded that with the availability of the traditional fairness test, the expanded appraisal remedy, and the broad scope of equitable relief, the business purpose requirement of *Singer* and its progeny did not afford minority shareholders any additional meaningful protection. *Id.* Consequently, the *Weinberger* court held that the business purpose requirement was no longer in force or effect

Weinberger, the court reviewed a squeeze-out merger by a parent corporation that was a majority shareholder of a subsidiary.³⁹ The plaintiffs, representing minority shareholders who opposed the cashing out of their interest in the subsidiary, attacked the validity of the transaction and sought to set aside the merger.⁴⁰ The court found for the plaintiffs because the transaction did not meet the requirements of fair dealing and fair price.⁴¹ More importantly, however, the *Weinberger* court eliminated the *Singer* trilogy's business purpose requirement.⁴² *Weinberger* replaced the business purpose rule with a requirement of fair dealing. In eliminating the business purpose rule, *Weinberger* liberalized the appraisal remedy and held that in ordinary circumstances, a minority shareholder's right to an appraisal should be the exclusive remedy in squeeze-out cases.⁴³ The *Weinberger* court preserved the power of courts of equity to fashion appropriate relief only in cases of fraud, misrepresentation, self-dealing, waste, and overreaching.⁴⁴

with respect to parent-subsiidiary mergers. *Id.*

39. *Id.* at 703.

40. *Id.*

41. *Id.* at 711.

42. *Id.* at 715.

43. *Id.* at 714.

44. *Id.* Delaware courts may exercise the equitable powers of relief that the Delaware Supreme Court preserved in *Weinberger*, even in cases not involving fraud or deception. See *Rabkin v Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104-05 (Del. 1985) (rejecting trial court's interpretation of *Weinberger* as mandating appraisal as sole remedy for minority shareholders who do not allege nondisclosure or misrepresentation by majority shareholders). In *Rabkin*, the Delaware Supreme Court considered the exclusivity of the appraisal remedy in a cash-out merger. *Id.* at 1100. An assertion of procedural unfairness affecting the offer price was the essential basis of the minority shareholders' claims. *Id.* The *Rabkin* plaintiffs claimed that the terms of the proposed merger were grossly inadequate because the majority shareholder unfairly manipulated the timing of the merger to avoid a contract provision that would have required the majority to pay the minority a higher price. *Id.* at 1103. The trial court dismissed the plaintiffs' complaint on the ground that a minority shareholder's sole remedy under *Weinberger* was an appraisal absent claims of fraud or deception. *Id.* The Delaware Supreme Court, rejecting the trial court's "narrow" interpretation of *Weinberger*, noted that the *Weinberger* court had indicated that the timing, structure, negotiation, and disclosure of a cash-out merger each had a bearing on the issue of procedural fairness. *Id.* at 1104. The *Rabkin* court, focusing on the majority shareholder's delay in effecting the squeeze-out until after the expiration of the contract provision, reasoned that the alleged unfair manipulation by the majority suggested a type of overreaching that went beyond the issue of fair price. *Id.* at 1107. Noting *Weinberger*'s recognition of the limitations of an

Thus, minority shareholders of Delaware corporations again found themselves at the mercy of the appraisal process.

B. Squeeze-Out Mergers Under New York Corporate Law

Unlike Delaware, the New York courts continue to require that squeeze-out mergers have an independent bona fide business purpose, in addition to the requirements of fair dealing and fair price.⁴⁵ In *Alpert v 28 Williams Street Corp.*,⁴⁶ the New York Court of Appeals established the standard for judicial review of the legitimacy of squeeze-out mergers in New York.⁴⁷ Under this analysis, a reviewing court should consider the merger as a whole to determine whether the transaction involved "fraud, illegality, or self-dealing," whether the minority shareholders received fair treatment,

appraisal under such circumstances, the *Rabkin* court concluded that the trial court should not have dismissed the plaintiffs' procedural fairness claims on the grounds of the exclusivity of the appraisal remedy *Id.*

45. See *Alpert v 28 Williams St. Corp.*, 473 N.E.2d 19, 27-28 (N.Y. 1984) (holding that fair dealing and fair price alone would not render squeeze-out merger acceptable).

46. 473 N.E.2d 19 (N.Y. 1984).

47. See *Alpert v 28 Williams St. Corp.*, 473 N.E.2d 19, 27-28 (N.Y. 1984) (holding that court in equitable action to review squeeze-out merger should examine transaction as whole for fair dealing, fair price, and existence of independent corporate purpose for merger). In *Alpert*, the New York Court of Appeals considered a corporate transaction that forcibly eliminated minority shareholders by means of a "two-step" merger. *Id.* at 24. A two-step merger involves acquisition of a target corporation by an outside investor who first purchases a majority interest in the target corporation. *Id.* at 22. The investor then uses this newly acquired control to merge the target corporation with a second corporation already under the investor's control, contingent upon the squeezing out of the minority shareholders by a forced cash-out of the minority's shares. *Id.* The *Alpert* court noted that "the potential for self-dealing requires careful scrutiny of the transaction" in instances in which majority shareholders have an interest on both sides of a merger. *Id.* at 26. Moreover, the *Alpert* court stated that the majority had a fiduciary duty to treat all shareholders equally *Id.* at 27-28. Thus, the court reasoned that fair dealing and fair price alone would not render the merger valid. *Id.* at 27

However, the *Alpert* court recognized that the majority shareholders had an overriding managerial duty that required them to act for the benefit and welfare of the corporation and the shareholders as a whole. *Id.* at 28. Thus, the court concluded that the advancement of a general corporate interest in the context of a squeeze-out merger would justify disparate treatment of the minority shareholders. *Id.* According to the court, the capital considerations driving the merger at issue were valid business objectives. *Id.* at 29. Consequently, the *Alpert* court concluded that the majority shareholders acted with a legitimate business purpose, and the court therefore upheld the merger. *Id.*

and whether any independent corporate purpose for the merger existed.⁴⁸ Under the *Alpert* standard, a merger must be for the benefit of the corporation.⁴⁹ The *Alpert* court explained that what distinguished a proper corporate purpose from an improper one was whether the removal of the minority shareholders advanced the goal of conferring some general benefit upon the corporation, such as improving the structure of management or increasing the corporation's capital.⁵⁰ According to the court, a merger for the sole purpose of reducing the number of profit sharers would not constitute a proper corporate purpose.⁵¹ But the standard that *Alpert* produced does not require that a legitimate squeeze-out merger with a bona fide business purpose represent the only or even the best means of achieving the corporate objective.⁵²

III. Criticism and Defense of Squeeze-Out Mergers

A. Justifying Squeeze-Out Mergers

Under nineteenth-century corporate law, courts had little tolerance for transactions designed to force minority shareholders to surrender their ownership interest in a corporation.⁵³ This approach reflected the view that each individual shareholder had vested rights in the corporation, which the others could not alter or extinguish without the shareholder's consent.⁵⁴

48. *Id.* at 28.

49. *Id.*

50. *Id.* The *Alpert* court stated that the purpose of the merger at issue was to enable the corporation to attract additional capital to effect needed building repairs and that the needed outside capital would have been available only through a merger that eliminated the minority's interest. *Id.* at 29. Consequently, the court concluded that a bona fide business purpose to facilitate a general corporate interest of obtaining increased capital justified the exclusion of the minority shareholders from the merger. *Id.*

51. *Id.* at 28.

52. *Id.*

53. See Elliott J. Weiss, *Balancing Interests In Cash-Out Mergers: The Promise of Weinberger v UOP, Inc.*, 8 DEL. J. CORP. L. 1, 2 (1983) (describing early vested rights cases).

54. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 134 (1991) (noting difficulty of forcing out shareholders at common law); 1 O'NEAL & THOMPSON, *supra* note 18, § 5:03, at 11 & n.4 (describing common-law theory of vested rights).

The rule of shareholder unanimity created the potential for serious holdout problems⁵⁵ and impeded economic progress by frustrating many efficient corporate transactions.⁵⁶ These problems prompted many state legislatures to enact statutes authorizing corporations to engage in a variety of activities without unanimous shareholder approval.⁵⁷ Following the lead of these liberalizing statutes, courts eventually abandoned the notion of vested rights.⁵⁸

Modern courts and commentators have offered various justifications for liberalizing the treatment of squeeze-out mergers. The *Weinberger* court recognized that price is often the principal consideration in a squeeze-out merger.⁵⁹ With this emphasis on the fairness of the cash-out price, the *Weinberger* court's faith in the appraisal process as the proper remedy to assure fair valuation for equity should come as no surprise.⁶⁰ Moreover, given the often divergent investment interests of the majority and minority shareholders, a squeeze-out merger effected at a fair or premium price may benefit both groups.⁶¹ A similar argument suggests that if minority shareholders create pressure for short-term profitability at the expense of the long-term prosperity of the enterprise, prudent management dictates the

55. See *Windhurst v. Central Leather Co.*, 138 A. 772, 775 (N.J. Ch. 1927) (involving plaintiff who bought shares for purpose of commencing suit or compelling majority shareholders to buy out stock at price that plaintiff set); *In re Timmis*, 93 N.E. 522, 523 (N.Y. 1910) (noting that requirement of shareholder unanimity gave dissenting shareholders power to extract holdout price from majority shareholders).

56. See *Weiss*, *supra* note 17, at 629 (noting that requirement of unanimous consent for fundamental changes in corporate structure created potential for tyranny by minority).

57. See *id.* (describing liberalizing statutes that authorized corporations to carry out various fundamental transactions upon consent of majority or supramajority of shareholders).

58. See 1 O'NEAL & THOMPSON, *supra* note 18, § 5:03, at 17 n.5 (noting that Delaware courts virtually abandoned vested rights theory after its high point in 1930s); *Weiss*, *supra* note 17, at 629-57 (describing historical liberalization of law relevant to take-out mergers prior to *Singer*).

59. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

60. See *id.* at 714 (stating that courts ordinarily should confine minority shareholders remedy to appraisal).

61. See Arthur M. Borden, *Going Private—Old Tort, New Tort or No Tort?*, 49 N.Y.U. L. REV 987, 1015 (1974) (suggesting that majority shareholders generally have long-term, business-oriented investment objectives, whereas minority shareholders invest for short-term, market-performance-oriented objectives).

elimination of the minority⁶² Furthermore, a squeeze-out is an effective way for the majority to expel troublesome minority shareholders without running the risk of minority holdouts.⁶³ These arguments comport with legislative efforts to accommodate corporate flexibility through liberalization of the state merger statutes.⁶⁴ Finally, cost savings attainable through the elimination of minority shareholders may justify squeeze-out mergers in some circumstances.⁶⁵

B. Criticism of Squeeze-Out Mergers

Despite the arguments offered to justify squeeze-out mergers, the long-standing judicial intolerance of these transactions is not without merit. Notwithstanding the apparently inequitable treatment of the minority shareholders, some critics argue that the substantial opportunity for abuse by the majority requires a per se prohibition on such transactions.⁶⁶ The fact that self-interested majority shareholders set the cash-out price raises serious questions about whether the minority will receive fair value for its shares.⁶⁷ Moreover, the accessibility of the appraisal remedy, regardless of how liberal, does not always provide adequate protection.⁶⁸ Even if a minority

62. *Id.* at 1007

63. See James Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV L. REV 1189, 1196 (1964) (noting that courts have recognized that business purposes justify elimination of minority shareholders seeking to use their veto power to exact improper concessions from majority).

64. See Borden, *supra* note 61, at 1025-27 (arguing that short-form merger statutes represent substantive determination that squeeze-outs are socially desirable transactions when they involve statutorily prescribed percentage of shares, and that such statutes reflect legislative policy to expand corporate options—and, thus, to enhance economic development—at expense of basic shareholder rights).

65. See *id.* at 1007-08 (arguing that elimination of minority shareholders would save administrative costs and managerial resources directed toward disclosure requirements, shareholder relations, auditing, and legal matters).

66. See *id.* at 1020 (concluding that squeeze-outs should rarely, if ever, be permissible in closely held corporations); Brudney & Chirelstein, *supra* note 7, at 1367-70 (recommending prohibition of "going private" mergers).

67. See Borden, *supra* note 61, at 1019-20 (explaining that price problem is more aggravated in context of close corporation because of additional difficulty in estimating fair cash-out price in absence of market price).

68. See 1 O'NEAL & THOMPSON, *supra* note 18, § 5:31 (discussing procedural difficulties and costs associated with asserting appraisal rights); Vorenberg, *supra* note 63,

shareholder receives a fair price for the shareholder's stock, "fairness" encompasses more than a fair price; the shareholder also has an interest in the *form* of the shareholder's investment.⁶⁹ A squeeze-out merger not only deprives a minority shareholder of the investment form, but also may subject the shareholder to unanticipated tax liabilities.⁷⁰ Also, majority shareholders typically attempt squeeze-outs at a time when business is about to improve or is improving and thus deny the minority an opportunity to share in future profits.⁷¹

IV The Conflict over Squeeze-Out Mergers Under the National Bank Act

A. The Eleventh Circuit's Reasoning in Lewis v Clark

Although the legitimacy of squeeze-out mergers under state corporation law has received a considerable amount of judicial scrutiny, *Lewis v Clark*⁷² was the first case to address the issue in the context of national banks. The transaction at issue in *Lewis* involved a merger between Lewis State Bank (Lewis State) and First Florida Bank, N.A. (First Florida). Under the terms of the merger, the Lewis State minority shareholders received cash for their shares, while the majority shareholders received stock in the surviving bank.⁷³ Both banks were subsidiaries of First Florida Banks, Inc. (First Florida Banks), a bank holding company that owned over

at 1201 (suggesting that even best appraisal procedures fail adequately to protect minority shareholders because steps required to exercise appraisal rights inevitably involve delay, uncertainty, and unrecoverable expenses).

69. See *Singer v Magnavox Co.*, 380 A.2d 969, 977-78 (Del. 1977) (recognizing that investors have legitimate interest in form as well as value of investments), *overruled by* *Weinberger v UOP, Inc.*, 497 A.2d 701 (Del. 1983); Victor Brudney, *A Note On "Going Private,"* 61 VA. L. REV 1019, 1023 (1975) (noting that even if minority shareholder receives fair value for stock, shareholder still faces cost and risk of locating comparable investment).

70. See *Vorenberg*, *supra* note 63, at 1203 (arguing that most significant consequence to displaced shareholder often is impact of federal capital gains tax upon any appreciation in stock value).

71. See *Borden*, *supra* note 61, at 1020 (suggesting that minority shareholders, particularly those in close corporations, often are not market-oriented investors, but are seeking, and should be able to enjoy, long-term benefits).

72. 911 F.2d 1558 (11th Cir. 1990).

73. *Lewis v Clark*, 911 F.2d 1558, 1560 (11th Cir. 1990) (*per curiam*).

ninety-nine percent of Lewis State's stock.⁷⁴ First Florida Banks initiated the merger as part of a larger plan to merge the holding company's twelve subsidiary banks into the company's lead bank, First Florida.⁷⁵ The plaintiffs, minority shareholders of Lewis State stock, opposed the transaction and sought judicial review of the Comptroller's approval of the merger and appraisal of their stock.⁷⁶ The United States District Court for the Northern District of Florida upheld the merger and entered a final order affirming the Comptroller's actions.⁷⁷

The appellees in *Lewis*—the Comptroller and First Florida—argued that section 215a of the National Bank Act permits the use of cash as consideration in mergers.⁷⁸ The appellees further argued that the statute does not contain any provisions that explicitly prohibit squeeze-out mergers.⁷⁹ The United States Court of Appeals for the Eleventh Circuit dismissed both of these arguments.⁸⁰ The court stated that although section 215a allows for the use of cash in a merger, the statute does not expressly permit stockholders of the same class to receive different treatment.⁸¹ The court reasoned that while the statute does not expressly prohibit squeeze-out mergers, the statute also does not specifically allow for the disparate treatment of owners of the same class of stock.⁸² The court concluded that

74. *Id.* at 1559-60.

75. *Id.* at 1560.

76. *Id.*

77. *Id.* In sustaining the *Lewis* merger, the district court relied upon *Beloff v Consolidated Edison Co.*, 87 N.E.2d 561 (N.Y. 1949) and *Grimes v Donaldson, Lufkin & Jenrette, Inc.*, 392 F. Supp. 1393 (N.D. Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975). *Lewis*, 911 F.2d at 1560. The Eleventh Circuit distinguished both of these cases because they involved publicly traded corporations. *Id.* Accordingly, the *Lewis* court concluded that these decisions were not applicable to the merger of Lewis State into the closely held First Florida. *Id.*

78. *Id.*, see 12 U.S.C. § 215a(a)(3) (1988) (requiring merger agreement to specify stock and cash amounts). Section 215a(a)(3) states that the merger agreement shall "specify the amount of stock (if any) to be allocated, and *cash* (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association." *Id.* (emphasis added).

79. *Lewis*, 911 F.2d at 1561.

80. *Id.* at 1560-61.

81. *Id.*

82. *Id.*

the absence of an explicit congressional endorsement constituted an effective prohibition of such discriminatory practices.⁸³

The Eleventh Circuit also addressed the argument that minority and majority shareholders were not similarly situated and, therefore, were not entitled to equal treatment.⁸⁴ The court observed that this argument ignored the "longstanding equity tradition of protection of minority shareholders in American jurisprudence."⁸⁵ The court concluded that because the legislative history does not expressly reject that tradition, Congress did not intend for the statute to depart from this tradition.⁸⁶ Consequently, the *Lewis* court held that the Comptroller did not have the authority under the statute to approve the merger.⁸⁷

*B. The Eighth Circuit's Reasoning in
NoDak Bancorporation v Clarke*

The plaintiff in *NoDak Bancorporation v Clarke*,⁸⁸ NoDak Bancorporation (NoDak), was a minority shareholder in Liberty National Bank and Trust Company of Dickinson (Liberty).⁸⁹ The majority stockholder of Liberty, Dickinson Bancorporation, Inc. (Dickinson), proposed a merger between Liberty and New Liberty National Bank (New Liberty).⁹⁰ New Liberty was a wholly owned subsidiary of Dickinson created for the sole purpose of facilitating the transaction.⁹¹ The terms of the merger called for NoDak and the other minority shareholders to exchange their shares of Liberty for cash, leaving Dickinson as the sole shareholder of the newly merged bank.⁹² NoDak objected to this cash-out plan, arguing that the proposed merger lacked a legitimate business purpose, constituted a breach of fiduciary duty, and squeezed out the minority shareholders for less than

83. *Id.* at 1561.

84. *Id.*

85. *Id.* (citing *Southern Pac. Co. v Bogert*, 250 U.S. 483 (1919)).

86. *Id.*

87. *Id.*

88. 998 F.2d 1416 (8th Cir. 1993).

89. *NoDak Bancorp. v Clarke*, 998 F.2d 1416, 1417 (8th Cir. 1993).

90. *Id.* at 1417-18.

91. *Id.* at 1418.

92. *Id.*

fair value.⁹³ The Comptroller considered NoDak's objections, but ultimately approved the proposed merger.⁹⁴ NoDak filed suit in the United States District Court for the District of North Dakota, alleging that the Comptroller's approval of the cash-out merger violated section 215a.⁹⁵

The appellants in *NoDak*—the Comptroller, Liberty, and Dickinson—argued that section 215a(a)(3) of the National Bank Act,⁹⁶ which specifically mentions both stock and cash as acceptable forms of payment, indicates that the statute permits minority squeeze-out mergers.⁹⁷ According to the appellants, if a purchaser under the National Bank Act can give cash in exchange for a target bank's stock, then the statute clearly anticipates squeeze-out mergers.⁹⁸ Conversely, NoDak argued that section 215a(a)(3) does not specifically allow an acquiring bank to differentiate between shareholders of the same class of stock by giving stock in exchange for some of the acquired shares while giving cash in exchange for other shares.⁹⁹ NoDak further asserted that squeeze-out mergers were inconsistent with the auction provision of section 215a(d).¹⁰⁰ Finally, NoDak argued that the overriding purpose of section 215a is to protect minority shareholders' rights and that a squeeze-out merger represents an inherently unfair abuse of those rights, contrary to the legislative intent.¹⁰¹

93. *Id.*

94. *Id.*

95. *Id.*

96. See 12 U.S.C. § 215a(a)(3) (1988) (describing information that merger agreement must include). Section 215a(a)(3) requires that a merger agreement specify "the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association." *Id.*

97. *NoDak Bancorp.*, 998 F.2d at 1419.

98. *Id.*

99. *Id.*

100. *Id.*, see 12 U.S.C. § 215a(d) (1988) (providing for public auction of stock originally allocated for dissenting shareholders). Section 215a(d) provides for the public auction of the shares that "would have been delivered to such dissenting shareholders had they not requested payment." *Id.* NoDak argued that this language gives the dissenting shareholders the right to bid at auction on the stock that they would have received instead of cash. *NoDak Bancorp.*, 998 F.2d at 1420. NoDak asserted that the statute does not permit the forcible cashing out of the dissenting shareholders, because the dissenters always have the right to buy their stock back at auction. *Id.*

101. *Id.* at 1419-20.

The United States Court of Appeals for the Eighth Circuit, in assessing these two conflicting interpretations, focused on the specific language found in section 215a.¹⁰² The court reasoned that the text of section 215a(a)¹⁰³ indicates that a specific merger plan may be acceptable even without explicit statutory approval.¹⁰⁴ Recognizing that the statute does not specifically address squeeze-out mergers, the court analyzed the Comptroller's interpretation of the statute under traditional administrative law principles.¹⁰⁵ The court concluded that the plain language of section 215a(a)(3) supports the Comptroller's view that the statute anticipates a merger involving the use of stock as consideration for some shares and cash as consideration for others.¹⁰⁶

The Eighth Circuit also reasoned that regulations, legislative history, and case law supported its interpretation.¹⁰⁷ The court noted that the regulations governing national bank mergers clearly do not anticipate that

102. *Id.* at 1419.

103. 12 U.S.C. § 215a(a) (1988). Section 215a(a) reads in part: "One or more national banking associations or one or more State banks, with approval of the Comptroller, under an agreement *not inconsistent with this subchapter*, may merge into a national banking association located within the same State, under the charter of the receiving association." *Id.* (emphasis added).

104. *NoDak Bancorp.*, 998 F.2d at 1419. In concluding that section 215a(a) permits approval of merger plans not explicitly authorized, the *NoDak* court read the double negative in the statutory language to mean that the statute allowed any type of merger agreement "not inconsistent with this subchapter." *Id.* (quoting 12 U.S.C. §215a(a) (1988)). According to the *NoDak* court, a merger is acceptable under section 215a(a), so long as the merger complies with the technical requirements of the statute. *Id.*

105. *Id.* at 1420; *see* *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that court should defer to agency interpretation that is reasonable within meaning of statute when statute is ambiguous).

106. *NoDak Bancorp.*, 998 F.2d at 1420. The *NoDak* court argued that the plain language of section 215a(a) gave no indication that the statute forbids an acquiring bank from giving the minority shareholders cash alone. *Id.* Moreover, the *NoDak* court reasoned that section 215a(a)(3) clearly contemplates the use of both cash and stock and does not proscribe using both forms of consideration in combination. *Id.* Finally, the *NoDak* court stated that the placement of the words "stock" and "cash" in the same sentence—each followed by the parenthetical phrase "(if any)"—supported an interpretation that the statute permits the exchange of stock for some of the acquired shares and cash for others. *Id.* Thus, the court concluded that a merger that combined stock and cash consideration to freeze out minority shareholders is not inconsistent with the plain language of the statute. *Id.*

107. *Id.*

minority shareholders have vested rights to retain an equity interest in the resultant bank.¹⁰⁸ In addition, the court concluded that by promulgating regulations designed to expedite a bank holding company's attainment of 100% ownership of a national bank,¹⁰⁹ the Comptroller effectively

108. *Id.* at 1421, *see* 12 C.F.R. § 5.33 (1992) (providing evaluative factors for approval of proposed mergers and consolidations of national banks). The regulation states: "A merger which would not have a substantially adverse effect on competition and which would be beneficial to the merging banks and to the public normally will be approved." *Id.* § 5.33(b)(1). The regulation lists six factors that the Comptroller will consider in evaluating a merger application:

- (i) The effect of the transaction upon competition;
- (ii) The convenience and needs of the community to be served;
- (iii) The financial history of the merging banks;
- (iv) The condition of the merging banks, including capital, management and earnings prospects;
- (v) The existence of insider transactions; and
- (vi) The adequacy of disclosure of the terms of the merger.

Id. § 5.33(b)(2).

As the *NoDak* court observed, these factors do not include consideration of any vested rights that minority shareholders might have to retain their shares in the resulting corporation. *NoDak Bancorp.*, 998 F.2d at 1421. In fact, the regulation gives very little consideration to the rights of shareholders at all, but rather focuses almost exclusively on the potential effects that the proposed merger will have on competition and convenience. *See* 12 C.F.R. § 5.33(b)(2)-(5) (1992) (describing methods of determining magnitude of potential anticompetitive effects and of measuring those effects against improved convenience and needs resulting from proposed merger). The only reference to minority shareholders appears in a section of the regulation titled "Policy on treatment of minority shareholders in mergers and consolidations," which the Comptroller reserved for future use. *Id.* § 5.33(c).

109. *See* 12 C.F.R. § 5.21 (1992) (authorizing organization of interim national banks). The regulation states in part:

This section applies to applications to organize an interim national bank. An interim national bank is a new national bank which is organized solely to facilitate the creation of a bank holding company or the acquisition of 100 percent of the voting shares of an existing bank. It is always part of a proposed two-step process wherein the interim national bank, prior to commencing business, will be a party to a merger or consolidation with an existing bank.

Id. § 5.21(a). The Comptroller, noting that it is extremely difficult for a holding company to acquire 100% of a bank's stock through a straight tender offer, announced that the purpose of this rule is to "eliminate duplication and delay in charter applications filed solely to facilitate the creation of a new bank holding company or the acquisition of 100% of the outstanding voting shares of an existing bank." 46 Fed. Reg. 16,661, 16,661 (1981).

sanctioned the use of squeeze-out mergers.¹¹⁰ The court stated that the Comptroller's interpretation of the statute was not inconsistent with the legislative history,¹¹¹ which did not contain any specific statements about squeeze-out mergers, but did reveal Congress's desire to facilitate national bank mergers and consolidations.¹¹² The court concluded that Congress deemed the section 215a(c) appraisal process adequate protection for minority shareholders under these circumstances.¹¹³

110. *NoDak Bancorp.*, 998 F.2d at 1421. The *NoDak* court reasoned that the Comptroller, by simplifying the use of interim bank mergers to facilitate the acquisition of 100% ownership of a national bank while explicitly refusing to prohibit interim bank mergers that involve a freeze-out, effectively endorsed such transactions. *Id.*

111. *Id.* at 1422-23; see S. REP. NO. 730, 86th Cong., 1st Sess. 6 (1959), reprinted in 1959 U.S.C.C.A.N. 2232, 2237 (stating that purpose of 1959 Amendment was to improve procedural and technical provisions governing consolidation and merger of national banks); H.R. REP. NO. 2421, 82d Cong., 2d Sess. 2 (1952), reprinted in 1952 U.S.C.C.A.N. 2133, 2134 (declaring that purpose of amendment relating to dissenting shareholders was to bring National Bank Act into parity with state statutes); H.R. REP. NO. 408, 65th Cong., 2d Sess. 1 (1918) (stating that purpose of 1918 Act was to simplify consolidation of national banks by removing necessity of liquidation). The *NoDak* court viewed the 1918 Act, and the subsequent amendments in 1952 and 1959, as demonstrating Congress's desire to facilitate mergers and consolidations of national banks. *NoDak Bancorp.*, 998 F.2d at 1422. The court reasoned that to interpret the National Bank Act to permit squeeze-out mergers would only further these legislative efforts to promote bank consolidations. *Id.* at 1422-23.

112. See *id.* at 1422 (concluding that congressional efforts to simplify procedural requirements for mergers and consolidations demonstrated desire to encourage bank consolidations).

113. See *id.* at 1423 (noting that § 215a(c) appraisal provision is statute's only mandatory provision relating to treatment of dissenting shareholders); see also *Bloomington Nat'l Bank v Telfer*, 699 F. Supp. 190, 194 (S.D. Ind. 1988) (holding that reorganization structured to eliminate minority shareholders without affording them appraisal rights violated National Bank Act), *aff'd*, 916 F.2d 1305 (7th Cir. 1990). The *NoDak* court reasoned that the *Telfer* decision supported the court's conclusion that Congress sought to protect minority shareholders through the appraisal provisions. *NoDak Bancorp.*, 998 F.2d at 1424. In holding that a reverse stock split designed to freeze out minority shareholders without appraisal rights violated the statute, the *Telfer* court observed:

Other sections of the National Bank Act make it clear that Congress is concerned with protecting the interests of minority shareholders in a bank and that when minority shareholders are in a position to be eliminated, Congress intends for them to have appraisal rights. See 12 U.S.C. §§ 214a-215a. As reflected in *Beerly v. Department of the Treasury*, 768 F.2d 942 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010, 106 S.Ct. 1184, 89 L. Ed.2d 301 (1986), and in *Nehring v. First DeKalb Bancshares, Inc.*, 692 F.2d 1138 (7th Cir.

C. *The Eighth and Eleventh Circuit Split*

The *NoDak* majority strongly disagreed with the Eleventh Circuit's reasoning in *Lewis*.¹¹⁴ According to the *NoDak* court, the *Lewis* court improperly framed the inquiry by focusing on whether the statute explicitly authorizes squeeze-out mergers, rather than considering whether squeeze-outs are inconsistent with the National Bank Act.¹¹⁵ The Eighth Circuit rejected the Eleventh Circuit's conclusion that minority shareholders were entitled to equal treatment absent a specific congressional decision to the contrary.¹¹⁶ The Eighth Circuit reasoned that Congress would have prohibited squeeze-out mergers in the statute or through an amendment if it intended to do so.¹¹⁷ In *Lewis*, the Eleventh Circuit concluded that Congress did not intend for the statute to depart from the "longstanding equity tradition of protection of minority shareholders in American jurisprudence."¹¹⁸ In contrast, the *NoDak* court, "embrac[ing] the modern view" of squeeze-out mergers, rejected what the court considered "an outmoded view of merger law"¹¹⁹

1982), these sections of the Act provide a way for a national bank that wants to become a wholly-owned subsidiary of a holding company to do so and cash out minority shareholders in full compliance with the law. However, a restructuring pursuant to 12 U.S.C. § 215a requires that dissenters have appraisal rights.

Telfer, 699 F. Supp. at 194 (footnote omitted). The *NoDak* court pointed to this language from the *Telfer* decision to reinforce the court's conclusion that squeeze-out mergers are entirely permissible, as long as the minority shareholders are able to pursue their full statutory appraisal rights. *NoDak Bancorp.*, 998 F.2d at 1424-25.

114. See *NoDak Bancorp.*, 998 F.2d at 1423-24 (suggesting *Lewis* court's opinion reflects "strained reading" of National Bank Act).

115. *Id.* at 1423.

116. *Id.*

117. *Id.*

118. *Lewis v. Clark*, 911 F.2d 1558, 1561 (11th Cir. 1990) (per curiam).

119. *NoDak Bancorp. v. Clarke*, 998 F.2d 1416, 1424 (8th Cir. 1993). While the majority opinion in *NoDak* criticized the *Lewis* court for its "outmoded view" of squeeze-out mergers, the dissent in *NoDak* argued that the majority should have considered Congress's intent at the time of the National Bank Act's enactment—looking to the long-standing tradition of protecting minority rights that prevailed at that time—rather than determining what Congress might do today given the modern view of shareholder rights. *Id.* at 1425 (Heaney, J., dissenting). Judge Heaney reasoned that if Congress intended to reject this tradition and allow freeze outs, it would have done so expressly. *Id.* at 1426. Judge Heaney asserted that

V *The Limited Scope of the National Bank Act*

Both the Eighth and Eleventh Circuits' opinions placed substantial emphasis on congressional intent regarding the rights of minority shareholders under the merger provisions of the National Bank Act.¹²⁰ The *Lewis* court suggested that when Congress originally enacted the National Bank Act section governing bank mergers and consolidations in 1918,¹²¹ it made assumptions about certain core premises of then-existing state corporate law.¹²² As the *NoDak* court observed, however, the laws governing corporations have undergone substantial changes since 1918.¹²³ Consequently, understanding how these legal developments may have affected the assumptions Congress made in amending the National Bank Act in 1959 requires an understanding of the legal environments that existed when Congress acted in 1918 and 1959.

A. *The 1918 Act*

Under the common-law theory of vested rights, shareholder unanimity was a prerequisite to fundamental changes in a corporation.¹²⁴ This

no indication existed that Congress intended to abandon this tradition. *Id.* at 1425. According to the dissent, the *NoDak* majority disregarded this tradition because of an "unjustified obeisance to the Chicago School of Economics." *Id.*

120. See *NoDak Bancorp.*, 998 F.2d at 1422 (stating that Congress's desire to facilitate national bank mergers supported court's interpretation of National Bank Act); *Lewis*, 911 F.2d at 1561 (concluding that legislative history did not demonstrate congressional intent to abandon long-standing equity tradition of protecting minority shareholders).

121. Act of Nov 7, 1918, ch. 209, 40 Stat. 1043 (current version at 12 U.S.C. § 215a (1988)).

122. See *Lewis*, 911 F.2d at 1561 (recognizing long-standing equity tradition of protecting minority shareholders).

123. See *NoDak Bancorp.*, 998 F.2d at 1423-24 (discussing movement in corporate law away from vested rights tradition to modern view of allowing squeeze-out mergers); *Coleman v Taub*, 638 F.2d 628, 634 n.6 (3d Cir. 1981) (observing obsolescence of common-law rule that entitled each minority shareholder power to veto merger); see also *supra* notes 53-58 and accompanying text (discussing abandonment of vested rights theory under state corporate law).

124. See, e.g., *Voeller v Neilston Warehouse Co.*, 311 U.S. 531, 535 n.6 (1941) (noting common-law shareholder unanimity requirement for fundamental corporate changes); *Geddes v Anaconda Copper Mining Co.*, 254 U.S. 590, 595-96 (1921) (stating that to allow majority shareholders to authorize sale of nonfailing corporation would defeat implied

principle could apply to something as simple as expanding the business of the corporation, as *Kean v Johnson*¹²⁵ illustrates.¹²⁶ In *Kean*, a corporation's majority shareholders attempted to expand the business beyond the company's chartered purpose by selling the company's assets to another corporation in exchange for stock.¹²⁷ The minority shareholders challenged the transaction on the ground that the sale required their consent.¹²⁸

contract among shareholders to pursue purpose for which corporation was chartered); *Kean v Johnson*, 9 N.J. Eq. 401, 418-20 (Ch. 1853) (enjoining sale of corporation's assets when real purpose was to amend corporation's articles, which required unanimous shareholder approval); see also Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420, 420 (1930) (explaining that unanimous consent of shareholders was necessary in most jurisdictions for sale of all assets of solvent corporation, for consolidation or merger, or for change in nature of business or financial structure); Weiss, *supra* note 17, at 626-27 (noting that at common law, shareholders had right to retain their stock interests and veto any fundamental change in corporation's business or charter).

125. 9 N.J. Eq. 401 (Ch. 1853).

126. See *Kean v. Johnson*, 9 N.J. Eq. 401, 418-19 (Ch. 1853) (enjoining sale of assets when real purpose was to amend corporation's articles). In *Kean*, the court considered whether the sale of a corporation's assets was valid without the consent of the minority shareholders. *Id.* at 406. The minority shareholders owned shares in a company chartered to operate a railroad between two cities. *Id.* at 402. In an attempt to extend the company's operations, the majority shareholders arranged to sell the assets of the company to a second company that the majority shareholders also controlled, which had the right to operate a railroad to a third city. *Id.* at 403. Under the terms of the sale, the second company would pay for the corporate assets in stock. *Id.* The court concluded that the majority shareholders did not have the right to force the sale of a successful corporation's assets merely because the majority wanted to place its investment in another venture. *Id.* at 412-14. The *Kean* court observed:

There is nothing, I think, therefore, in principle or authority, to shake the conclusion already arrived at, that the sale of this road by the [company], at a time when its affairs were eminently prosperous, did affect the rights of its stockholders; that they had the right to retain their investment where it was, and as it was, and that their rights are not satisfied by a payment to them of their proportion in the proceeds of such sale.

Id. at 418. The court also suggested that the real purpose behind the transaction was effectively to amend the company's articles of incorporation. *Id.* at 418-19. The court noted that such a change required the unanimous approval of the shareholders, which the majority had not obtained. *Id.* at 419-20. Consequently, the court enjoined the proposed sale, granting relief to the minority shareholders. *Id.* at 424.

127 *Id.* at 403.

128. *Id.* at 404.

The court, enjoining the sale, concluded that the majority shareholders did not have the right to force the sale of an ongoing corporation because such a sale would deny the minority shareholders the right to retain their investment in the corporation.¹²⁹ The court also considered the sale unfair because the transaction would have effectively amended the articles of the corporation, which required the consent of all shareholders.¹³⁰

By 1918, most jurisdictions had retreated from the vested rights theory, enacting statutes that authorized corporations to execute a variety of fundamental transactions without the unanimous consent of shareholders.¹³¹ Under many of these statutes, shareholders who did not want to participate in the reorganized corporation had the right to have the corporation appraise and purchase their shares. But like the National Bank Act, none of these state statutes expressly authorized the elimination of minority shareholders from an ongoing concern.¹³² Consequently, judicial hostility toward the use of these statutory powers to squeeze out minority shareholders continued.¹³³

One common form of abuse that courts sought to redress during the period leading up to the 1918 Act involved squeeze outs by dissolution.¹³⁴ For example, *Southern Pacific Co. v Bogert*¹³⁵ involved a squeeze-out

129. *Id.* at 418, 424.

130. *Id.* at 418-19.

131. See Weiss, *supra* note 17, at 629 (stating that state statutes authorized corporations to carry out asset sales, mergers, consolidations, and voluntary liquidations upon approval of majority or supramajority of corporations' shareholders).

132. See 1 O'NEAL & THOMPSON, *supra* note 18, § 5:03, at 13 (discussing development of merger statutes during early part of twentieth century).

133. Weiss, *supra* note 17, at 629.

134. See *Ervin v Oregon Ry & Navigation Co.*, 27 F 625, 635 (C.C.S.D.N.Y 1886) (granting minority shareholders lien on property appropriated by majority shareholders through dissolution sale); *In re Paine*, 166 N.W 1036, 1038-39 (Mich. 1918) (denying petition for judicial dissolution when majority's goal was to drive out minority shareholders by forced sale of their investment); *Kavanaugh v. Kavanaugh Knitting Co.*, 123 N.E. 148, 152 (N.Y 1919) (granting cause of action to minority shareholder squeezed out by majority's dissolution of closely held corporation); *Theis v Spokane Falls Gaslight Co.*, 74 P 1004, 1007 (Wash. 1904) (enjoining fraudulent dissolution by majority that would have deprived minority shareholders of their interest in corporation); see also Borden, *supra* note 61, at 990-93 (stating that courts widely condemned dissolutions with squeeze-out motive on basis of vested rights, fraud, fairness of price, and fiduciary duty).

135. 250 U.S. 483 (1919).

scheme in which the controlling shareholders approved a voluntary dissolution of the corporation and then purchased all of the corporate assets through a newly formed company to the exclusion of the minority shareholders.¹³⁶ The United States Supreme Court, granting the minority shareholders relief, held that the majority's fiduciary relationship with the minority prohibited the majority from denying the minority an opportunity to participate in the "fruits" of the sale of the corporation's assets.¹³⁷ In order to best ensure the minority's continued participation, the Supreme Court required the majority to offer the minority a stock interest in the new corporation.¹³⁸ In setting aside similar transactions, other courts intervened to enforce the fiduciary obligations of controlling shareholders,¹³⁹

136. *Southern Pac. Co. v Bogert*, 250 U.S. 483, 486 (1919). In *Bogert*, the U.S. Supreme Court considered the validity of a reorganization plan involving the Houston & Texas Central Railway Company (H & T Railway) under which the majority shareholder, Southern Pacific Company (Southern Pacific), caused the corporation to dissolve voluntarily. *Id.* at 486. Southern Pacific acquired the assets of the dissolved corporation through a newly formed company, Houston & Texas Central Railroad Company (H & T Railroad). *Id.* Southern Pacific received all of H & T Railroad's stock, and the minority shareholders of the old H & T Railway received nothing. *Id.* The Supreme Court, upholding the district court's decree, declared that Southern Pacific held shares in the H & T Railroad in trust for the minority shareholders because the reorganization plan had unfairly excluded the minority from receiving shares in the new company. *Id.* at 491-92. The *Bogert* Court explained that Southern Pacific, as the majority shareholder, had a fiduciary duty to distribute the fruits of its control on equal terms among the minority, even absent proof of fraud or mismanagement. *Id.* at 492.

137. *Id.* at 487-88. In upholding the minority shareholders' challenge to the take-out plan, the *Bogert* Court observed:

The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.

Id. (citing *Menier v Hooper's Tel. Works*, 9 L.R. Ch. 350, 353-54 (Ch. App. 1874) (holding that majority shareholders may not authorize corporate action that benefits them to detriment of minority shareholders)).

138. *See id.* at 493-94 (concluding that mere accounting and compensation in damages was not sufficient remedy, but allowing defendant to raise remedy issue on remand).

139. *See Ervin v Oregon Ry & Navigation Co.*, 27 F. 625, 632 (C.C.S.D.N.Y. 1886) (holding that majority violated fiduciary duty to minority by excluding minority from

to prevent the fraudulent use of the dissolution statutes,¹⁴⁰ or to protect minority shareholders' right to participate in the profits of an ongoing business.¹⁴¹ The underlying theme of these dissolution cases was the inequity of the majority's attempt to eliminate the minority from an ongoing corporation.¹⁴²

In contrast to these dissolution squeeze-out schemes, the use of squeeze-out mergers did not present a problem to courts during the period preceding the 1918 Act. Squeeze-out mergers were not an issue for the courts because the merger and consolidation statutes that were in place at that time generally required that the shareholders in the participating corporations receive shares in the surviving corporation.¹⁴³ Moreover, none of the then-existing merger statutes specifically authorized cash as an acceptable form of consideration in a merger.¹⁴⁴ Therefore, a transaction similar to the mergers involved in the *Lewis* and *NoDak* cases would not have been possible under the various state statutory regimes that existed before the 1918 Act.

participation in "fruits" of dissolution sale).

140. See *Theis v Spokane Falls Gaslight Co.*, 74 P 1004, 1006 (Wash. 1904) (stating that dissolution for purpose of continuance of business by another corporation without minority participation practically constituted fraud upon minority).

141. See *Kavanaugh v Kavanaugh Knitting Co.*, 123 N.E. 148, 152 (N.Y. 1919) (finding that majority acted in bad faith by dissolving corporation in order to free itself from minority interference or participation).

142. The *Theis* court described the inherent unfairness of the majority's treatment of the minority under these dissolution take-out schemes:

If the enterprise fails, [the minority shareholders] bear their proportion of the losses. If, on the other hand, it succeeds, as soon as it passes the experimental stage, and the opportunity is presented to finally reap the reward of a judicious investment, they are coolly ejected from the corporation by a majority of the stockholders, who appropriate to themselves the accruing profits.

Theis, 74 P at 1007

143. See *Coyne v Park & Tilford Distillers Corp.*, 154 A.2d 893, 895 (Del. 1959) (observing that early Delaware statute did not permit payment of cash for shares surrendered in merger or consolidation); *Weiss*, *supra* note 17, at 630 (discussing early statutes governing mergers and consolidations).

144. See *Weiss*, *supra* note 17, at 632 (identifying Florida as first state to enact cash merger statute by revising its general corporation law in 1925 to include cash among list of permissible forms of consideration).

The text and the legislative history of the 1918 Act reflected this legal environment. Similar to the prevailing state corporate statutes governing mergers, the 1918 Act did not specify cash as an acceptable form of consideration.¹⁴⁵ The 1918 Act allowed for consolidation "on such terms and conditions as may be lawfully agreed upon" by directors and shareholders of the consolidating banks.¹⁴⁶ Given the legal climate in which Congress drafted this statute, Congress likely did not intend to allow a consolidation agreement that forcibly eliminated the minority shareholders from participation in the consolidated bank.¹⁴⁷ To the contrary, Congress merely responded to the consolidation issue as it existed in 1918.

The legislative history of the 1918 Act indicates that Congress intended to simplify consolidation of national banks.¹⁴⁸ Prior to the 1918 Act, for two national banks to consolidate, one of the banks had to subject

145. See Act of Nov 7, 1918, ch. 209, § 1, 40 Stat. 1043, 1043 (current version at 12 U.S.C. § 215a (1988)) (authorizing Comptroller to approve consolidation of two or more national banks under "lawfully agreed upon" terms). The Act stated in part:

That any two or more national banking associations may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, *on such terms and conditions as may be lawfully agreed upon* by a majority of the board of directors of each association proposing to consolidate.

Id. (emphasis added).

146. *Id.*

147. See *supra* notes 124-42 and accompanying text (discussing judicial hostility toward take-out schemes prior to 1918 Act).

148. See H.R. REP. NO. 408, *supra* note 111, at 1 (stating that purpose of bill was to simplify consolidation of national banks by removing necessity of liquidation). The House Report for the 1918 Act reads in part:

This bill has but one object, and that is to simplify the consolidation of existing national banks. Under existing law if such consolidation is desired, it is necessary for one of the banks to surrender its charter, and go through the process of liquidation. It is the purpose of this bill to remove the necessity of liquidation and permit the consolidation to take place upon the affirmative vote of the stockholders of each association, such consolidation being permitted under the charter of either of the existing banks. Proper provision is made by the proposed law to protect any dissenting stockholder in either corporation, who does not desire to be connected with the consolidated bank.

Id.

itself to liquidation.¹⁴⁹ This requirement sometimes obstructed beneficial consolidations if neither bank was willing to suffer the indignity of being absorbed by the other.¹⁵⁰ In response to this perceived problem, Congress drafted the 1918 Act to allow for consolidations on equal terms and thereby facilitate useful combinations between national banks.¹⁵¹ In seeking to remove this impediment to beneficial consolidations, however, Congress did not address the important and distinct policy questions associated with the contemporary legal environment surrounding squeeze-out mergers.¹⁵² Given the prevalent assumptions about the rights of minority shareholders in the period surrounding the 1918 Act¹⁵³ and the absence of state merger statutes authorizing cash as consideration in mergers,¹⁵⁴ Congress almost certainly would not have considered squeeze-out mergers an acceptable method for facilitating consolidation of national banks.

B. The 1959 Amendment

The *Lewis* court concluded that by not expressly rejecting the "longstanding equity tradition of protection of minority shareholders" when enacting the 1959 Amendment, Congress intended that the statute not depart from that tradition.¹⁵⁵ This conclusion suggests that congressional assumptions about the rights of minority shareholders remained constant during the interim between the 1918 Act and the 1959 Amendment. But, this view fails to consider some of the fundamental developments in corporate law that occurred during this period.

149. *Id.*

150. See S. REP. NO. 377, 65th Cong., 2d Sess. 2 (1918) ("[I]t has happened that banks which might be advantageously brought together are kept apart from pride or unwillingness of one or the other to be absorbed.").

151. See S. REP. NO. 406, 65th Cong., 2d Sess. 1 (1918) ("This bill has the obvious advantage of permitting the consolidation without compelling one bank to be absorbed by another.").

152. See *infra* notes 191-97 and accompanying text (discussing escalating consolidation trend in banking industry during 1980s and 1990s).

153. See *supra* notes 124-42 and accompanying text (discussing judicial hostility toward transactions designed to squeeze out minority shareholders).

154. See *supra* notes 143-45 and accompanying text (discussing pre-1918 state merger and consolidation statutes).

155. *Lewis v Clark*, 911 F.2d 1558, 1561 (11th Cir. 1990) (per curiam).

The most significant development was the enactment in some jurisdictions of merger statutes that authorized the use of cash as a form of consideration in a merger.¹⁵⁶ While these cash merger statutes did not explicitly authorize squeeze-out mergers,¹⁵⁷ majority shareholders soon

156. See Weiss, *supra* note 17, at 632 (discussing development of first cash merger statutes). In 1925, Florida became the first state to revise its general corporation law to authorize the use of cash as consideration in a merger or consolidation. Act of June 1, 1925, 1925 Fla. Laws ch. 10096, § 36, at 119, 135 (current version at FLA. STAT. ANN. § 607.1101 (West 1993)). By 1931, lawmakers in Arkansas, California, and Ohio also had enacted cash merger statutes. See Act of Apr. 1, 1931, Act 255, ch. 1, § 61, 1931 Ark. Acts 795, 861 (current version at ARK. CODE ANN. § 4-26-1001 (Michie 1991)); General Corp. Law, ch. 862, § 361(1), 1931 Cal. Stat. 1762, 1809 (current version at CAL. CORP. CODE § 1101(d) (West 1990)); General Corp. Act, § 8623-67(a), 1927 Ohio Laws 9, 36 (current version at OHIO REV. CODE ANN. § 1701.78(B)(6) (Baldwin Supp. 1993)). In 1936, New York enacted a cash short-form merger statute applicable to gas and electric companies that owned 95% or more of their subsidiary's stock. Act of May 28, 1936, ch. 778, sec. 1, § 85(1), 1936 N.Y. Laws 1658, 1658 (current version at N.Y. BUS. CORP. LAW § 905(a)(3) (McKinney Supp. 1994)). A short-form merger statute typically authorizes a company that owns 90% or more of the stock of another company to merge the two corporations upon the approval of the acquiring company's board of directors. See WILLIAM L. CARY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 1120 (6th ed. 1988) (describing short-form merger statutes). New York later extended its short-form merger statute to include all corporations. Act of Apr. 22, 1949, ch. 762, sec. 1, § 85(1), 1949 N.Y. Laws 1707, 1707 (current version at N.Y. BUS. CORP. LAW § 905(a)(3) (McKinney Supp. 1994)). In 1957, Delaware adopted a short-form merger statute permitting cash as merger consideration, modeled after the New York law. Act of June 5, 1957, ch. 121, sec. 6, § 253(a), 51 Del. Laws 186, 188 (current version at DEL. CODE ANN. tit. 8, § 253(a) (1991)).

157 See Weiss, *supra* note 17, at 632-33 (discussing early cash merger statutes). Although the cash merger statutes did not expressly authorize squeeze-out mergers, these statutes are susceptible to varying interpretations. *Id.* One possible interpretation is that these statutes authorize the use of cash only if all or a majority of a corporation's shareholders are prepared to accept cash in exchange for their stock. *Id.* at 633. However, it is also arguable that allowing the use of cash as the sole consideration for a merger serves the purpose of authorizing squeeze-outs of minority shareholders because most mergers contemplate the survival of one of the merging corporations. *Id.* Some commentators have supported the second interpretation and argued that these cash merger statutes reflect a social policy that prefers corporate flexibility and corporate democracy over notions of vested rights. See *id.* (citing Borden, *supra* note 61, at 1026). Professor Weiss argued that this position ignores the relevant legal and business contexts in which the state legislatures enacted these statutes. *Id.* Noting the judicial hostility towards squeeze-out schemes, Weiss indicated that contemporary legal opinion did not consider the legislatures to have authorized squeeze outs by these statutes. *Id.* Weiss argued that the real purpose of the cash merger statutes was

recognized the potential of these statutes to provide an effective means of eliminating minority shareholders through cash-out mergers.¹⁵⁸

The courts varied in their responses to squeeze-out mergers attempted under these new statutes. For example, the New York Court of Appeals upheld a squeeze-out merger under the state's short-form merger statute¹⁵⁹ by interpreting the statute to authorize such transactions.¹⁶⁰ In rejecting the minority shareholders' vested-rights claim, the court concluded that the shareholders had only the right to the fair value of their investment and that the right to appraisal afforded them adequate protection.¹⁶¹

The opinion of the New York Court of Appeals was consistent with an earlier Delaware Supreme Court decision that allowed a parent-subsidiary merger structured to eliminate accumulated and unpaid dividends on the corporation's preferred stock.¹⁶² The Delaware Supreme Court stated that a single shareholder could not block a fair and equitable merger that complied with the statutory requirements of the Delaware merger statute.¹⁶³ According to the court, the dissenting shareholder's only remedy was an appraisal.¹⁶⁴

These decisions suggest a significant change in the judicial attitude toward the rights of minority shareholders. However, except for one other case,¹⁶⁵ state courts generally upheld minority shareholder challenges to

to provide corporate managers with more flexibility in structuring clearly permissible transactions. *Id.* at 637 The statutes achieved this goal by removing artificial legal barriers that made ordinary mergers riskier and more complicated. *Id.* at 637-38.

158. See Russell M. Robinson, II, *Elimination of Minority Shareholders*, 61 N.C. L. REV. 515, 517 (1983) (discussing early responses to cash merger statutes).

159. See Act of May 28, 1936, ch. 778, sec. 1, § 85(1), 1936 N.Y. Laws 1658, 1658 (authorizing short-form mergers by public utility companies) (current version at N.Y. BUS. CORP. LAW § 905(a)(3) (McKinney Supp. 1994)).

160. See *Beloff v Consolidated Edison Co.*, 87 N.E.2d 561, 565 (N.Y. 1949) (stating that legislature enacted statute to facilitate mergers which would simplify complex structures of public utility holding companies).

161. *Id.* at 564-65.

162. See *Federal United Corp. v Havender*, 11 A.2d 331, 337 (Del. 1940) (stating that language of merger statute did not qualify or restrict corporations' power to merge).

163. *Id.* at 342.

164. *Id.* at 343.

165. See *Matteson v Ziebarth*, 242 P.2d 1025, 1036-37 (Wash. 1952) (rejecting minority shareholder's challenge to squeeze-out merger that majority shareholders effected

squeeze-out transactions in the period leading up to the 1959 Amendment.¹⁶⁶ The real shift in the judiciary's fundamental view toward minority shareholders and the propriety of squeeze-out mergers did not come until after Congress had drafted the 1959 Amendment.¹⁶⁷ Squeeze-out mergers had not been an issue for most corporations or minority shareholders before this time for the simple reason that widespread adoption of cash

to recoup their investments from failing corporation). *Matteson* involved a claim for damages by a minority shareholder who had attempted to block a proposed sale of all of the stock of a failing corporation in order to secure payment of an unjustified premium for his shares. *Id.* at 1029. After the minority shareholder refused to agree to the sale, the majority shareholders formed a new company, transferred their shares to that company, and then merged the two companies. *Id.* at 1029-30. Under the merger agreement, the new company offered callable preferred stock in exchange for the stock of the old company, effectively squeezing out the minority shareholder from equity participation in the surviving corporation. *Id.* at 1030, 1034. The court upheld the merger, stating that the statute allowed a merger of corporations formed for any lawful purpose. *Id.* at 1031. The court indicated that the majority shareholders had formed the new company for the lawful purpose of carrying out the sale of the corporation. *Id.* According to the court, this transaction was essential to the corporation's survival. *Id.* at 1034.

Given the unique situation presented in *Matteson*, commentators have not read this case as sanctioning squeeze-out mergers in general. See Borden, *supra* note 61, at 996 (suggesting that real significance of *Matteson* is that decision helped to focus inquiry on reasons behind squeeze-out mergers); Vorenberg, *supra* note 63, at 1196 (suggesting that *Matteson* court viewed merger as necessary step in beneficial sale of financially troubled company); Weiss, *supra* note 17, at 646 (arguing that *Matteson* presented situation in which court of equity might be justifiably hesitant to intervene).

166. See *In re San Joaquin Light & Power Corp.*, 127 P.2d 29, 35-36 (Cal. Dist. Ct. App. 1942) (enjoining dissolution take-out scheme by relying on established principle that controlling shareholders could not use dissolution statute to eliminate minority shareholders from ongoing business); *Eisenberg v Central Zone Property Corp.*, 115 N.E.2d 652, 655, 657 (N.Y. 1953) (recognizing claim for injunction of series of complex transactions involving conversion of minority shareholders' stock in New York corporation into certificates issued by voting trust of Delaware corporation); see also Weiss, *supra* note 17, at 646 (noting that state courts only approved one other squeeze-out merger during 1940s and 1950s).

167. See *Stauffer v Standard Brands, Inc.*, 187 A.2d 78, 80 (Del. 1962) (holding that Delaware short-form merger statute authorized squeeze-out mergers), *overruled by* *Roland Int'l Corp. v Najjar*, 407 A.2d 1032 (Del. 1979), *overruled by* *Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Coyne v. Park & Tilford Distillers Corp.*, 154 A.2d 893, 896-97 (Del. 1959) (same); *David J. Greene & Co. v Schenley Indus., Inc.*, 281 A.2d 30, 35 (Del. Ch. 1971) (interpreting Delaware long-form merger statute as allowing squeeze-out mergers); *Willcox v Stern*, 219 N.E.2d 401, 404 (N.Y. 1966) (upholding squeeze-out merger under New York short-form merger statute).

as permissible consideration in long-form mergers did not occur until the 1960s.¹⁶⁸ No reason exists to believe that Congress in enacting the 1959 Amendment anticipated the change in judicial philosophy or intended to reject the traditional assumptions about minority shareholders.

The *NoDak* court concluded that the legislative history of the 1959 Amendment revealed Congress's intent to facilitate national bank mergers and consolidations.¹⁶⁹ In 1959, Congress amended the National Bank Act to clarify or eliminate ambiguities in the statute.¹⁷⁰ The last significant revision to the banking laws had occurred in 1935.¹⁷¹ In the interim, Congress enacted many new banking laws, but neglected to coordinate these additions and thereby left the banking statutes difficult to reconcile.¹⁷² This problem was evident in the merger and consolidation provisions of the 1918 Act.¹⁷³ In an attempt to address the problem, Congress amended the 1918 Act "to make uniform the provisions relating to these consolidations and mergers and to eliminate certain ambiguities."¹⁷⁴ However, Congress

168. See Weiss, *supra* note 17, at 648 (noting that judicial hostility toward take-out schemes eroded only after state legislatures amended merger statutes, thereby signaling that cash was acceptable consideration in all mergers). New York did not authorize cash under its long-form merger statute until 1961. Business Corporation Law, ch. 855, § 902(a)(3), 1961 N.Y. Laws 2356, 2428 (current version at N.Y. BUS. CORP. LAW § 902(a)(3) (McKinney 1986)). Delaware amended its long-form merger statute to include cash in 1967. General Corporation Law, ch. 50, § 251(b)(4), 56 Del. Laws 151, 206 (1967) (current version at DEL. CODE ANN. tit. 8, § 251(b)(5) (Supp. 1992)). In 1969, New Jersey added provisions authorizing long-form and short-form cash mergers to its corporation law. N.J. STAT. ANN. §§ 14A.10-1(2)(c), -5.1(1) (West Supp. 1993). The Committee on Corporate Laws of the American Bar Association revised the Model Business Corporation Act in 1969 to allow cash, as well. MODEL BUSINESS CORP. ACT § 71(c) (1969). The Committee had previously added an optional short-form cash merger provision in 1959. MODEL BUSINESS CORP. ACT § 68A (1959) (current version at MODEL BUSINESS CORP. ACT § 11.04 (1991)).

169. *NoDak Bancorp. v. Clarke*, 998 F.2d 1416, 1422 (8th Cir. 1993).

170. S. REP. NO. 730, *supra* note 111, at 1 (1959), reprinted in 1959 U.S.C.C.A.N. at 2232.

171. *Id.*, reprinted in 1959 U.S.C.C.A.N. at 2233.

172. *Id.*

173. See H.R. REP. NO. 694, 86th Cong., 1st Sess. 3 (1959) (describing "unjustified" differences in legal requirements under various statutes governing consolidations and mergers of national banks).

174. S. REP. NO. 730, *supra* note 111, at 6, reprinted in 1959 U.S.C.C.A.N. at 2237

intended for the amendment to make only procedural and technical improvements to the consolidation and merger provisions.¹⁷⁵

While Congress clearly sought to simplify and rationalize the procedures for consolidating and merging national banks, the legislative history does not suggest that Congress would have adopted squeeze-out mergers as a means of facilitating this objective.¹⁷⁶ To the contrary, the legislative history states that Congress "did not intend to affect in any way the substantive authority of banks to consolidate or merge, or the substantive authority of the Comptroller of the Currency to review and approve such consolidations and mergers."¹⁷⁷ Given the assumptions underlying the 1918 Act¹⁷⁸ and the judicial hostility toward squeeze-out attempts during

175. *See id.* (stating that committee did not intend for amendment to affect substantive authority of banks to consolidate or merge). The Senate Report states:

Section 20 would amend the act of November 7, 1918 (40 Stat. 1043; 12 U.S.C. 33-34c), which relates to consolidations and mergers of national banks and of State banks with national banks, in order to make uniform the provisions relating to these consolidations and mergers and to eliminate certain ambiguities. It would eliminate differences in the legal requirements for publication, the requirements of notice of shareholders' meetings, the waiving of such notice, the procedure to be followed in determining dissenters' rights, and the payment for the expense of appraisal or reappraisal made by the Comptroller of the Currency. It would also eliminate existing ambiguities as to the length of time a dissenting shareholder may delay before proceeding with an appraisal, the time within which a dissenter's stock must be surrendered, the length of time which must elapse before the Comptroller can be asked to make a reappraisal, and the disposition of the stock of dissenters.

The amendments contained in section 20 of the bill were intended only to improve the procedural and technical provisions relating to consolidations and mergers. The committee did not intend to affect in any way the substantive authority of banks to consolidate or merge, or the substantive authority of the Comptroller of the Currency to review and approve such consolidations and mergers.

Id.

176. *See id.* (stating that Congress intended for amendments to make only technical adjustments to consolidation provisions and did not intend to alter bank's substantive authority to consolidate or merge).

177 *Id.*

178. *See supra* notes 153-55 and accompanying text (concluding that Congress would not have viewed squeeze-out mergers as permissible under 1918 Act).

the period prior to the 1959 Amendment,¹⁷⁹ congressional assumptions about the "substantive authority" of banks to merge did not include a belief that majority shareholders had the power to effect a merger for the sole purpose of eliminating minority shareholders or that the Comptroller possessed the "substantive authority" to approve such a transaction.¹⁸⁰

The legislative history of the 1959 Amendment indicates that Congress never addressed the specific issue of the desirability or undesirability of squeeze-out mergers.¹⁸¹ While Congress may have intended for the procedural and technical improvements to facilitate beneficial consolidations and mergers—as the *NoDak* court suggests—the amendment merely addressed the problems that existed in 1959.¹⁸² To read into the statute a congressional endorsement of squeeze-out mergers simply ignores the narrow objectives of the 1959 Amendment.¹⁸³ Presumably, Congress would have given some indication if it had intended to make broader changes in the existing legal regime. In fact, the legislative history listed the few substantive changes in authority that Congress intended to make, and

179. See *supra* note 166 and accompanying text (stating that courts generally were hostile towards squeeze-out transactions before 1959 Amendment).

180. That Congress did not intend to change the substantive authority under the merger and consolidation provisions of the Act is not surprising given the technical purpose of the 1959 Amendments. See H.R. REP. NO. 694, *supra* note 173, at 1 (stating that Congress designed statute primarily to repeal obsolete provisions and to eliminate existing ambiguities in national banking laws). The House Report indicated that the only new authority added under the 1959 Amendments related to: (1) change of location; (2) liability to the Federal Deposit Insurance Corporation; (3) timing of condition reports; (4) declaration of dividends; (5) receipt of deposits by unregulated corporations; and (6) use of the word "national" in the title of national banks. *Id.*

181. See S. REP. NO. 730, *supra* note 111, at 6, *reprinted in* 1959 U.S.C.C.A.N. at 2237 (stating that Congress intended for 1959 Amendment to affect only technical and procedural provisions governing national bank consolidations and mergers); H.R. REP. NO. 694, *supra* note 173, at 1 (stating that purpose of 1959 Amendments was to clarify and eliminate ambiguities and bring uniformity to merger and consolidation provisions). The *NoDak* court acknowledged that the 1959 Amendment did not address the issue of squeeze-out mergers, observing that "[t]he legislative history contains no direct statements about freeze out mergers, either for or against." *NoDak Bancorp. v. Clarke*, 998 F.2d 1416, 1422 (8th Cir. 1993).

182. See *supra* notes 172-73 (discussing problem of uncoordinated banking statutes).

183. See *supra* notes 174-75 and accompanying text (discussing purposes of 1959 Amendment).

authority to squeeze-out minority shareholders was noticeably absent.¹⁸⁴ Without a clear expression of Congress's intention to depart from contemporary legal assumptions, Congress's silence regarding the propriety of squeeze-out mergers as a method of facilitating bank consolidations indicates an implicit intention to maintain the existing legal framework as to matters not addressed.¹⁸⁵

VI. Policy Considerations

In interpreting the National Bank Act to permit squeeze-out mergers, the *NoDak* court emphasized Congress's desire to facilitate bank consolidations¹⁸⁶ and the Comptroller's endorsement of squeeze-out mergers.¹⁸⁷ The *NoDak* court reasoned that reading the statute to authorize squeeze-out mergers would further the policy of encouraging bank consolidations.¹⁸⁸ This reading not only is inconsistent with the scope of the National Bank Act,¹⁸⁹ but also may be contrary to the regulatory objectives that Congress and federal banking agencies have sought to advance through the consolidation process.¹⁹⁰ Given the current trends in the banking industry, misap-

184. See *supra* note 180 (listing new authority that Congress granted in 1959 Amendment).

185. See Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1917 (1989) (arguing that legislators enact statutes to deal with specific problems and leave matters not addressed in statute unchanged); see also L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. PITT. L. REV. 733, 749 (1987) (noting need to read statutes in relation to problem that legislators sought to address).

186. See *NoDak Bancorp. v. Clarke*, 998 F.2d 1416, 1422 (8th Cir. 1993) (reasoning that interpreting National Bank Act to allow squeeze-out mergers would further Congress's intent to encourage bank consolidations).

187. See *id.* at 1421 (concluding that Comptroller's interpretation of National Bank Act and efforts to facilitate use of interim banks constituted endorsement of squeeze-out mergers); see also *supra* note 6 and accompanying text (discussing Comptroller's intention to continue approving squeeze-out mergers outside Eleventh Circuit).

188. See *NoDak Bancorp.*, 998 F.2d at 1423 (concluding that prohibiting squeeze-out mergers would stifle bank consolidations).

189. See *supra* notes 174-83 and accompanying text (describing limited objectives of 1959 Amendment to National Bank Act).

190. See *infra* note 210 (describing regulatory objectives that federal banking agencies have sought to promote through bank consolidations).

plying the National Bank Act's provisions governing mergers and consolidations could have significant consequences.

The U.S. banking industry¹⁹¹ currently is experiencing a period of rapid change characterized by increasing competition and accelerating consolidation.¹⁹² This consolidation trend began in the 1980s¹⁹³ and has continued to escalate in the 1990s.¹⁹⁴ Market forces¹⁹⁵ and legal changes have facilitated the accelerated pace of bank consolidations.¹⁹⁶ The increasing number and magnitude of recent bank mergers has prompted

191. The banking system in the United States includes state-chartered and nationally chartered commercial banks, bank holding companies, savings and thrift institutions, and credit unions. JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW AND REGULATION* 1 (1992); 1 MICHAEL P. MALLOY, *THE CORPORATE LAW OF BANKS* § 1.2, at 5 (1988). This Note's discussion of the banking industry focuses entirely on commercial banks and bank holding companies.

192. See Rodgin Cohen, *The New Phase of Bank Consolidations: Regulatory Issues and Consideration*, 27 WAKE FOREST L. REV. 63, 63 (1992) (stating that process of bank consolidation has entered new and accelerated phase); Geoffrey P. Miller, *Legal Restrictions on Bank Consolidation: An Economic Analysis*, 77 IOWA L. REV. 1083, 1086 (1992) (stating that banking industry is undergoing consolidation of massive proportions); Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 961 (1992) (arguing that consolidation trend of 1980s and early 1990s represents significant departure from long tradition of decentralized banking in United States).

193. See Wilmarth, *supra* note 192, at 961 (noting that average rate of bank mergers for 1980s doubled rate for 1970s and tripled rate for 1960s).

194. See Miller, *supra* note 192, at 1086-87 (citing figures that indicate that bank merger transactions for 1990 and 1991 totaled more than \$20 billion).

195. See Cohen, *supra* note 192, at 64 (explaining that both failing and healthy banks view mergers as way to improve earnings); Miller, *supra* note 192, at 1088 (arguing that much of merger activity is attributable to expansion of superregional banks into new geographic markets); Wilmarth, *supra* note 192, at 964 (finding primary factor behind consolidation trend to be decline in bank profitability due to intensified competitive pressures resulting from geographic liberalization, greater entry of foreign banks, and encroachment of nonbank competitors).

196. See Miller, *supra* note 192, at 1093 (identifying liberalization of legal restrictions on interstate bank expansion as important factor in recent consolidation trend); Wilmarth, *supra* note 192, at 959 (explaining that enactment of state laws allowing bank holding companies to acquire banks across state lines has facilitated movement toward greater consolidation).

debate over whether the consolidation process will prove beneficial for the banking industry, consumers, and the economy as a whole.¹⁹⁷

Opponents of bank consolidation warn of increasing ownership concentration of banking assets,¹⁹⁸ inefficiency and regulatory costs,¹⁹⁹ enhanced risks and costs of failures,²⁰⁰ and anticompetitive effects.²⁰¹ Proponents welcome consolidation as a means of enhancing competition,²⁰²

197 Cohen, *supra* note 192, at 63. For a recent example of this debate, compare Miller, *supra* note 192, at 1129-31 (arguing for furthering liberalization of laws restricting geographic bank expansion and for allowing market to determine whether interstate branching is beneficial), with Wilmarth, *supra* note 192, at 1081 (arguing against nationwide bank consolidation and for continued regulatory restrictions on interstate branching) and Arthur E. Wilmarth, Jr., *The Potential Risks of Nationwide Consolidation in the Banking Industry: A Reply to Professor Miller*, 77 IOWA L. REV. 1133, 1150 (1992) (arguing that Professor Miller's proposal for unrestricted "market test" of nationwide banking would involve excessive risks).

198. See Peter C. Carstensen, *Public Policy Toward Interstate Bank Mergers: The Case for Concern*, 49 OHIO ST. L.J. 1397, 1427-28 (1989) (arguing that increased aggregate concentration of banking resources would make banks less innovative and less responsive to their role as risk-taking lenders supporting new business for national economic benefit); Wilmarth, *supra* note 192, at 1078 (arguing that highly concentrated banking markets are less competitive and less responsive to needs of consumers and small businesses).

199. See Carstensen, *supra* note 198, at 1415 (arguing that banks become less efficient and generate additional regulatory costs associated with monitoring increasingly complex organizations as they grow in size and spread over wider geographic areas); Wilmarth, *supra* note 192, at 1008-09 (citing studies that show that banks suffer from diseconomies of scale after they reach certain size and that larger banks are not more efficient and would probably be less efficient than midsized banks).

200. See Carstensen, *supra* note 198, at 1417 (arguing that regulators have greater difficulty monitoring large banks for trouble and that bailing large banks out of trouble will be costlier to taxpayers than bailing out smaller banks); Wilmarth *supra* note 192, at 994-95 (asserting that nationwide consolidation would expose taxpayers to greater losses by concentrating bank deposits in small number of nationwide banks, which federal regulators under their "too big to fail" policy would not allow to fail without paying off uninsured depositors).

201. See Carstensen, *supra* note 198, at 1418-21 (arguing that combinations of large banks will result in loss of actual and potential competition and will increase risk of oligopolistic linkages that are harmful to competition); Wilmarth, *supra* note 192, at 1020-22, 1024-28 (arguing that increased concentration of banking markets will lessen competition and that current application of antitrust laws will not restrain consolidation of market power within banking industry).

202. See John P. Danforth, *Merger Economies and Recent Trends in Bank Consolidation*, BANKING POL'Y REP., Oct. 7, 1991, at 1, 9 (arguing that competition within banking

increasing consumer service,²⁰³ and improving the safety and soundness of the banking industry,²⁰⁴ while discounting any social costs attributable to increased concentration of bank ownership.²⁰⁵

Although the question of who ultimately will prevail in this debate is unclear, the federal agencies responsible for supervising U.S. banks²⁰⁶ have strongly endorsed the consolidation process as a means of strengthening the banking system and enhancing bank safety and soundness.²⁰⁷ More-

industry and from foreign banks and nonbank competitors will create difficulty for banking combinations in establishing sustainable market power and will compel banks to pass on substantial portion of any gains in efficiency arising from mergers to banking public); Miller, *supra* note 192, at 1112-13 (arguing that elimination of restrictions on geographic bank expansion would increase competition in banking industry by opening banking markets to entry of potential competitors and thereby deter existing banks from engaging in monopolistic pricing or other anticompetitive behavior).

203. See Danforth, *supra* note 202, at 9 (suggesting that consumers will benefit from efficiency gains that banks achieve from mergers through lower prices and improved services); Miller, *supra* note 192, at 1108-10 (arguing that geographic bank expansion would enhance quality of services provided to customers by providing consumers with convenience of conducting banking transactions away from home and by allowing larger banks to enter local markets and compete on loans and other services).

204. See Miller, *supra* note 192, at 1102-05 (arguing that larger banks are less risky than smaller banks because larger banks can achieve greater geographical diversification in their loan portfolios).

205. See *id.* at 1119, 1121 (arguing that although consolidation increases bank concentration, banking industry in United States is much less concentrated than in other countries and that little evidence exists that large banks presently exert undue political power as compared to smaller banks or other groups).

206. The three federal agencies responsible for the supervision and regulation of banks are: the Board of Governors of the Federal Reserve System (Federal Reserve), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (Comptroller). 1 ALFRED M. POLLARD ET AL., BANKING LAW IN THE UNITED STATES § 4.04, at 4-7 (2d ed. 1992). The Bank Merger Act (BMA) governs bank mergers and the acquisition of assets and assumption of liabilities by banks. 12 U.S.C. § 1828(c) (1988). Under the BMA, the agency that has primary responsibility for the acquiring or surviving bank must approve the transaction. *Id.* § 1828(c)(2). The primary agency is the Comptroller for a national bank, the Federal Reserve for a state bank that is a member of the Federal Reserve System, and the FDIC for a state bank that is not a member of the Federal Reserve System. *Id.* § 1828(c)(2)(A)-(C). Under the Bank Holding Company Act of 1956 (BHCA), the Federal Reserve also must approve the acquisition of a bank by "a company" and the merger of bank holding companies. *Id.* § 1842.

207 See *Bank Mergers: Hearings Before the House Comm. on Banking, Finance and*

over, Congress recently has moved closer to enacting proposed legislation that would allow banks to operate nationwide branch networks.²⁰⁸ Passage of this legislation would likely accelerate the current wave of bank consolidations, as large banks would rush to develop nationwide branch networks.²⁰⁹ However, allowing squeeze-out mergers in the context of national banks might not advance the regulatory objectives that Congress and the federal banking agencies have sought to promote through consolidation.²¹⁰

Urban Affairs, 102d Cong., 1st Sess. 159, 161 (1991) [hereinafter *Bank Mergers Hearings*] (testimony of Robert L. Clarke, Comptroller of the Currency) (stating that consolidations that promote competition can improve safety and soundness of banking industry); *id.* at 183 (testimony of John P. LaWare, Member, Board of Governors of the Federal Reserve System) (arguing that consumers of financial services will benefit from mergers in which more efficient banks are able to convert less efficient banks into low-cost competitors); *Deposit Insurance and Banking Reform Proposals: Hearings Before the House Comm. on the Budget*, 102d Cong., 1st Sess. 104 (1991) (statement of L. William Seidman, Chairman, FDIC, and Chairman, RTC) (stating that removal of interstate banking restrictions would result in decreased risk through diversification and increased competition).

208. See Kenneth H. Bacon, *Nationwide-Bank Bill Picks Up Steam as Even Opponents See Measure Passing*, WALL ST. J., Feb. 25, 1994, at A3 (stating that bankers are confident that Congress will pass law that removes remaining restrictions on interstate branching); Kenneth H. Bacon, *Nationwide Bank Bill Clears Senate Panel*, WALL ST. J., Feb. 24, 1994, at A2 [hereinafter Bacon, *Bill Clears Senate Panel*] (reporting that bill that would allow banks to operate nationwide branch networks cleared Senate Banking Committee and appears headed for passage in current Congress); Albert R. Karr, *House Panel Votes to Give Banks Ability to Form Interstate Branch Networks*, WALL ST. J., Mar. 10, 1994, at A2 (reporting House Banking Committee's approval of legislation allowing banks to operate nationwide branch networks). Both the Senate and the House of Representatives have bills pending that would permit nationwide bank branching. S. 371, 103d Cong., 1st Sess. (1993); H.R. 459, 103d Cong., 1st Sess. (1993).

209. Bacon, *Bill Clears Senate Panel*, *supra* note 208, at A2.

210. In his statement to the House Committee on Banking, Finance and Urban Affairs, the Comptroller indicated that the federal banking agencies have focused on three issues in reviewing proposed bank mergers: the capital adequacy of the resulting bank, the needs and convenience of the public, and the effect on competition. *Bank Mergers Hearings*, *supra* note 207, at 13 (statement of Robert L. Clarke, Comptroller of the Currency). The Comptroller strongly endorsed the consolidation process, stating that beneficial mergers "improve the operating efficiency of the merging banks, and mergers that enable banks to extend the geographic scope of their operations can reduce their exposure to local or regional economic shocks." *Id.* at 14. The Comptroller suggested that such transactions would have the overall effect of improving the safety and soundness of the banking industry by increasing bank profitability and diversification, which would enable banks to become better capitalized and less susceptible to economic downturns. *Id.*

A merger effected for the sole purpose of squeezing out the minority shareholders—thereby transferring value from the minority to the majority shareholders—would do nothing to achieve the significant operating efficiencies or economies of scale that proponents of consolidation claim to be driving the current wave of bank mergers.²¹¹ Merely rearranging the internal ownership interests of a bank would not necessarily have any effect on competition or improve customer service.²¹² Yet proponents of bank mergers attribute such benefits to consolidation.²¹³ No obvious reason exists to explain why a bank could not achieve these same objectives in a merger that did not eliminate the minority shareholders' interests.²¹⁴ Moreover, squeeze-out mergers increase the concentration of banking assets on both the corporate and shareholder levels, magnifying whatever risks that higher concentration may present to the banking system and the public.²¹⁵ Consequently, the Comptroller's misreading of the National Bank Act and

211. See PETER S. ROSE, *THE INTERSTATE BANKING REVOLUTION* 84 (1989) (suggesting that possible motives for interstate bank expansion are increased profitability, gains in efficiency, and diversification); Cohen, *supra* note 192, at 65 (stating that mergers have allowed banks to achieve substantial cost savings by combining operations and eliminating overlapping branches and administrative overhead); Danforth, *supra* note 202, at 8 (arguing that banks have sought to gain increased operating efficiency from rationalization of delivery systems and implementation of improved management practices that are available through merger).

212. See *Bank Mergers Hearings*, *supra* note 207, at 158 (testimony of Robert L. Clarke, Comptroller of the Currency) (stating that transactions in which bank holding company merges two or more subsidiaries to form single bank ordinarily would have no effect on public service or competition because banks involved already are commonly owned before merger).

213. See *supra* notes 202-05 and accompanying text (discussing proponents' arguments in favor of bank consolidation).

214. The *NoDak* court reasoned that disallowing squeeze-out mergers would allow minority shareholders to block an efficient consolidation or merger transaction by refusing to give their consent. *NoDak Bancorp. v. Clarke*, 998 F.2d 1416, 1422-23 (8th Cir. 1993). However, the court clearly overstated the case. Properly reading the National Bank Act to prohibit squeeze-out mergers would not subject all merger plans to a potential minority challenge, but rather only those mergers that would forcibly eliminate the minority from participation in the surviving bank.

215. See *supra* note 198 and accompanying text (describing potential problems associated with increased concentration from consolidation). But see *supra* note 205 and accompanying text (discounting effects of increased concentration resulting from bank consolidations).

endorsement of squeeze-out mergers will do little to advance the regulatory objectives that Congress and the federal banking agencies have sought to promote through consolidation²¹⁶ and may needlessly increase the level of concentration in the banking industry

Congress ultimately must decide whether allowing squeeze-out mergers under the National Bank Act would further the policy of facilitating beneficial bank consolidations. Congress may well choose to adopt an approach similar to that of the *Weinberger* court and rely on the right of appraisal as adequate protection for minority shareholders in a squeeze-out merger.²¹⁷ The *NoDak* court basically endorsed this approach in upholding the Comptroller's authority to approve squeeze-out mergers under the National Bank Act.²¹⁸ However, this approach would do little to further the regulatory objectives that Congress has sought to achieve through consolidation²¹⁹ or to protect minority shareholders' interests.²²⁰

If Congress does decide to permit squeeze-outs under the National Bank Act, Congress should follow the *Alpert* court's approach by applying a business purpose test.²²¹ A business purpose test would provide greater protection to minority shareholders by requiring that the majority shareholders act in the interests of the corporation and not merely in their own self-interest.²²² Some commentators have questioned the efficacy of the busi-

216. See *supra* note 210 (discussing regulatory objectives that federal banking agencies have sought to promote through consolidation).

217. See *Weinberger v UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (relying on appraisal as exclusive remedy for minority shareholders in squeeze-out merger). For a further discussion of *Weinberger*, see *supra* notes 37-44 and accompanying text.

218. See *NoDak Bancorp.*, 998 F.2d at 1423 (concluding that Congress deemed appraisal process adequate protection for minority shareholders in squeeze-out mergers).

219. See *supra* notes 210-16 (concluding that permitting squeeze-out mergers will not necessarily further regulatory objectives attributable to bank consolidation).

220. See *Douglas V Austin & Kim Nigem, Dissenters' Appraisals Revisited*, 106 BANKING L.J. 246, 264-65 (1989) (concluding that appraisal under National Bank Act is expensive, time-consuming, and unlikely to result in dissenters' achieving price significantly higher than merger price; basing conclusion on survey of Comptroller's appraisal valuations over five-year period).

221. See *Alpert v 28 Williams St. Corp.*, 473 N.E.2d 19, 28 (N.Y. 1984) (holding that majority shareholder must demonstrate valid purpose for treating minority shareholders unequally). For a further discussion of *Alpert*, see *supra* notes 45-52 and accompanying text.

222. See *Alpert*, 473 N.E.2d at 28 (requiring squeeze-out mergers to have independent corporate purpose).

ness purpose test as a standard for establishing fairness in a squeeze-out merger.²²³ However, these comments focus predominantly on the Delaware courts' application of the standard before *Weinberger*.²²⁴ The pre-*Weinberger* approach in Delaware recognized the purposes of both the parent and the subsidiary in determining whether the merger had a legitimate business purpose.²²⁵ Congress could avoid this apparent weakness by following the lead of the *Alpert* court, which adopted a more rigorous business purpose test that required an independent corporate objective unrelated to the interests of the controlling shareholders.²²⁶ Moreover, Congress could enact a standard that would not "stifle" beneficial bank consolidations²²⁷ by defining the business purpose test in terms of the regulatory objectives that the federal banking agencies have sought to promote through consolidation.²²⁸ Under this standard, the majority shareholders could squeeze out the minority shareholders for the purpose of advancing one of the regulatory objectives.²²⁹ Such a standard also would avoid the ambiguity concerning what constitutes a legitimate business

223. See Booth, *supra* note 7, at 526 (stating that business purpose test is little more than excuse to allow minority shareholders opportunity to litigate rather than relegating them to appraisal remedy); Robinson, *supra* note 158, at 522 (arguing that business purpose test is mechanical at best because courts do not require controlling shareholders to have compelling purpose for squeezing out minority shareholders); Weiss, *supra* note 17, at 667-71 (noting difficulty of defining what constitutes proper purpose in squeeze-out when eliminating minority is primary purpose).

224. See *supra* notes 26-36 (describing Delaware courts' application of business purpose test to squeeze-out mergers).

225. See *Tanzer v International Gen. Indus.*, 379 A.2d 1121, 1123-24 (Del. 1977) (holding that parent company did not breach its fiduciary duty as majority stockholder in subsidiary by effecting merger primarily to advance its own business purpose), *overruled by Weinberger v UOP, Inc.*, 457 A.2d 701 (Del. 1983).

226. See *supra* notes 45-52 and accompanying text (describing *Alpert* court's application of business purpose test to squeeze-out mergers).

227. See *NoDak Bancorp. v Clarke*, 998 F.2d 1416, 1423 (8th Cir. 1993) (suggesting that allowing minority shareholders to challenge squeeze-out mergers would stifle bank consolidations).

228. See *supra* note 210 (describing regulatory objectives that federal banking agencies have sought to promote through consolidation).

229. Cf. *Alpert v 28 Williams St. Corp.*, 473 N.E.2d 19, 29 (N.Y. 1984) (holding that capital considerations driving squeeze-out merger constituted valid corporate purpose).

purpose, a problem with which courts have struggled in applying the standard to squeeze-out mergers involving nonbank corporations.²³⁰

VII. Conclusion

The Eighth and Eleventh Circuits' opinions present two very different approaches that other federal courts might take when addressing the issue of squeeze-out mergers under the National Bank Act. Courts should take care to read the statute within the legal context that existed when Congress drafted the merger and consolidation provisions. The narrow objectives of the statute clearly do not indicate a congressional endorsement of squeeze-out mergers. While legal assumptions regarding the propriety of squeeze-out mergers have changed, Congress—not the courts or the Comptroller—must decide whether these changes would be appropriate in the context of the National Bank Act. If Congress does decide to allow national banks to engage in squeeze-out mergers, applying the suggested business purpose standard to such transactions would protect minority shareholders from mergers designed solely to eliminate their interests without stifling beneficial consolidations that actually promote desired regulatory objectives.

Thomas W Maddi

230. See Weiss, *supra* note 17, at 670 (arguing that inability of courts to articulate what represents proper business purpose poses insurmountable problem in applying standard). Professor Weiss suggests that because of the difficulty in defining what constitutes a valid purpose, the courts might apply the test in a highly subjective manner, depending on whether the court emphasizes the merger's squeeze-out elements or economic components. *Id.* Arguably, this ambiguity about the standards for proper purpose creates uncertainty and increases the risk of litigation for merger participants. *Id.* at 670-71.

