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Corporate Law Through an Antitrust Lens

Edward B. Rock

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CORPORATE LAW THROUGH AN ANTITRUST LENS

*Edward B. Rock**

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I. INTRODUCTION: MARKETS AND FIRMS

Do antitrust and corporate law have much to say to each other? Judges, lawyers, law professors, and law students all seem to think that they do not.¹ Antitrust is about markets; corporate law is about firms. Antitrust is about competition; corporate law is about cooperation. Antitrust regulates relations among firms; corporate law governs relations within firms. In this Article, I argue that this common view is fundamentally flawed. When shareholders are also competitors, the normal corporate law instinct that collective action should be facilitated fails. At the borderline between firms and markets, antitrust, with its more subtle appreciation for the complexity of the relationships between competition and cooperation, comes to the fore.

The division between corporate law and antitrust corresponds to the more general and equally traditional distinction between firms and markets. Economists have historically distinguished between firms, in which relations are governed by commands, and markets, in which relations are regulated by prices.² But the comfortable distinction between antitrust and corporate law begins to dissolve as the underlying distinction between markets and firms becomes less clear. In both economics and law, the firm/market distinction has lost much of its significance. In the economics of industrial organizations, some of the most exciting modern work has questioned both the definition and importance of the firm/market boundary, demonstrating that it is neither clear what the firm "is" nor how relations within firms differ from relations in markets.³ Rather, as many have argued, the important and interesting questions relate to which kinds of contracts are used for which activities and to the economic implications of different contractual arrangements.⁴

1. This intuitive sense of the non-overlapping domains of the two subjects manifests itself in a number of ways. Relatively few people teach both subjects. Courts have been hostile to attempts to invoke antitrust doctrine in corporate contexts to prevent, for example, bidding agreements among competing bidders in auctions for corporate control. See, e.g., *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990), cert. denied, 111 S. Ct. 1624 (1991); *Kalmanovitz v. G. Heileman Brewing Co.*, 769 F.2d 152, 158 (3d Cir. 1985).

2. See Joseph E. Stiglitz, *Symposium on Organizations and Economics*, J. Econ. Persp., Spring 1991, at 15, 17.

3. The literature on the theory of the firm is rich and extensive. See, e.g., Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *Am. Econ. Rev.* 777 (1972); Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 *J.L. & Econ.* 1 (1983); Ronald H. Coase, *The Nature of the Firm*, 4 *Economica* 386 (1937); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 *Colum. L. Rev.* 1757 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305 (1976); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 *J.L. & Econ.* 297 (1978).

4. See Cheung, *supra* note 3, at 18; Klein et al., *supra* note 3, at 326; Yoram Barzel,

Similarly in corporate law, it is now commonplace to think of the firm as a network of contracts and of corporate law as providing a standard form contract.⁵ As in economics, this new view erodes the firm/market boundary. If firms are a network of contracts, what significance should be given to the fact that some of the agreements are between shareholders while others are between firms?

Indeed, as soon as one begins to think about antitrust and corporate law together, two contrasting features emerge. First, from a collective action perspective, it is not at all clear that there should be any difference: some of the most interesting questions in both fields revolve around similar versions of the familiar Prisoners' Dilemma. Second, the governing intuitions concerning the law's proper attitude towards collective action problems are radically different, indeed, precisely opposite in the two fields.

In antitrust, the paradigm for Sherman Act Section 1⁶ jurisprudence might be termed the "Cartelists' Dilemma." It is better for all widget manufacturers collectively if each raises prices and reduces output, but it is better for each manufacturer individually to cut prices and increase output while the others charge a higher price. The effect of the Cartelists' Dilemma is that, absent effective coordination, each producer is likely to cut its prices and expand its output until, in theory at least, the competitive level is reached.⁷

The paradigm for much of corporate law is the "Shareholders' Dilemma."⁸ It is better for dispersed shareholders collectively if each contributes to monitoring and disciplining managers, but because all will benefit as long as someone does, it is better for each not to contribute. When shareholdings are dispersed, this collective action problem leads to rational apathy by shareholders.

Economic Analysis of Property Rights 52-55 (1989) (the firm versus the market is a false dichotomy).

5. See generally Symposium: Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395-1774 (1989) (discussing proper role of mandatory requirements in corporate law).

6. Sherman Act § 1, 15 U.S.C. § 1 (1988). Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"

7. For discussions of competition as a Prisoner's Dilemma game, see Edna Ullmann-Margalit, *The Emergence of Norms* 44-45, 127-29 (1977); John S. Wiley, Jr., *Reciprocal Altruism as a Felony: Antitrust and the Prisoner's Dilemma*, 86 Mich. L. Rev. 1906, 1914-28 (1988); Peter Huber, *Competition, Conglomerates, and the Evolution of Cooperation*, 93 Yale L. J. 1147 (1984) (book review of Robert Axelrod, *The Evolution of Cooperation* (1984)).

8. For discussions of the Shareholders' Dilemma, see Robert C. Clark, *Corporate Law* § 9.5-9.5.4, at 389-400 (1986); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 Geo. L. J. 445, 453-63 (1991). The Shareholders' Dilemma primarily characterizes large, publicly held corporations in which ownership is separated from control. Close corporations, in which shareholders are also managers, pose distinct problems.

The Cartelists' Dilemma and the Shareholders' Dilemma are structurally similar. In both cases, it would be better for all would-be cartelists or shareholders if all cooperated, but in the absence of effective coordination, it is better for each to defect. If all parties follow this strategy, the players are collectively worse off than if all cooperated.⁹

Despite the deep structural similarities, the prevailing legal responses to these prisoner-type dilemmas have been exactly opposite.¹⁰ In antitrust, the law takes the side of the jailer, frustrating communication and coordination among the prisoners. In large measure, the central purpose of Section 1 of the Sherman Act is to prevent escape from the Cartelists' Dilemma, for it is the dilemma that produces and preserves competition. Thus, courts enforce a per se prohibition on price fixing among competitors,¹¹ interpret "agreement" broadly,¹² and scrutinize and restrict exchanges of information,¹³ basing point pricing systems,¹⁴ preannouncement of price increases,¹⁵ and detailed price books,¹⁶ all in order to frustrate coordination and enforcement of collective decisions.¹⁷

9. Collective action problems figure prominently in other areas of the law as well. See, e.g., Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986) (bankruptcy); Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 724-31 (1985) (constitutional law); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 354-59 (Papers & Proc. 1967) (property).

10. For a description of the "Prisoners' Dilemma," see *infra* text accompanying note 78.

11. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-24 (1940); *United States v. Trenton Potteries*, 273 U.S. 392, 396-402 (1927).

12. See, e.g., *American Tobacco v. United States*, 328 U.S. 781, 809-10 (1946); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939).

13. See, e.g., *United States v. United States Gypsum*, 438 U.S. 422, 429-30, 440-42, 456-59 (1978); *United States v. Container Corp.*, 393 U.S. 333, 335 (1969); *Sugar Inst. Inc. v. United States*, 297 U.S. 553, 599 (1936); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 382 (1921); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 603 (1914).

14. See *FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 631-32 (5th Cir. 1981), cert. granted sub nom. *Weyerhaeuser Co. v. Lyman Lamb Co.*, 456 U.S. 971 (1982), dismissed (after settlement), 462 U.S. 1125 (1983).

15. See *United States v. General Elec. Co.*, 1977-2 Trade Cas. (CCH) ¶¶ 61,659, 61,660 (E.D. Pa. 1977).

16. See *id.*

17. Antitrust's long standing and deep suspicion of agreements among competitors has been reflected in ringing judicial prose:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); accord *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the

By contrast, much of corporate law can be read as providing mechanisms to facilitate escape from the equivalent Shareholders' Dilemma.¹⁸ Boards of directors, proxy regulations, attorneys' fee provisions, and derivative suits can all be viewed as attempts to spread the costs of monitoring and disciplining managers among shareholders pro rata, thereby overcoming their collective action dilemma. In corporate law, the law takes the side of the prisoners, moving quickly from the identification of a collective action dilemma to strategies facilitating escape.¹⁹

At the uncertain borderline between firms and markets, where shareholders are also competitors, these divergent approaches collide. Some of the most difficult current corporate law issues emerge at this problematic boundary. Should bidders in a tender offer auction be permitted to adopt arrangements that eliminate competition among themselves in order to reduce the price paid to target shareholders?²⁰ Should target shareholders be permitted to eliminate competition to tender their shares in order to increase their tender offer premium? Should non-equity stakeholders be permitted to form coalitions against shareholders?²¹ Should states be permitted to opt out of the competitive national and international market for corporate control? Each of these issues revolves around the tension between cooperation and competition, between intra-firm and market relations.

Corporate law, with its emphasis on fiduciary duty and its assumption that cooperation is good, provides an inadequate conceptual framework for analysis because, as antitrust teaches, sometimes cooperation is bad. Naked price fixing among competitors has few defenders. But a corporate law jurisprudence that focuses on fiduciary duty cannot ask the question whether actions that are in the interests of shareholders should be prohibited. It is not surprising, then, that as one ap-

Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.'').

18. See Clark, *supra* note 8, § 9.5.4, at 394-400.

19. For examples of the corporate law move from identifying a collective action problem to facilitating escape, see Lucian A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1696, 1752-54 (1985); John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 Geo. L.J. 1495, 1542-44 (1990); Dale A. Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 Cornell L. Rev. 117, 124-31 (1986); Dale A. Oesterle, *Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis*, 71 Cornell L. Rev. 53, 78-82 (1985) [hereinafter Oesterle, *Target Managers*].

20. I discuss this question in detail in Edward B. Rock, *Antitrust and the Market for Corporate Control*, 77 Cal. L. Rev. 1365 (1989).

21. A "stakeholder" here refers to all participants in the corporate enterprise, including shareholders, employees, bondholders, customers, suppliers and surrounding communities. See, e.g., 15 Pa. Cons. Stat. Ann. § 515(a)(1) (1991) (directors may consider nonshareholder interests).

proaches the firm/market boundary where shareholders are not just co-owners, but also competitors, corporate law's traditional framework should prove inadequate.

By contrast, antitrust has long been forced to search for an appropriate balance between competition and cooperation, an issue that arises most sharply at the borderline between firms and markets. I argue in this Article that the antitrust perspective provides an essential analysis of corporate law issues lying at the firm/market boundary, that the antitrust perspective is better able to grapple with the ambiguity of this distinction, and that antitrust provides a useful conceptual framework for thinking about the interplay of cooperation and competition in the corporate law context. In Part II, I describe the antitrust jurisprudence of the borderline between firms and markets. In Part III, I apply this antitrust analysis to four important contexts: first, the paradigm corporate law case of collective action to control agency costs; second, collective action by shareholders to eliminate competition to tender their shares in a tender offer; third, stakeholder coalitions; and, finally, state attempts to opt out of the competitive market for control.

The antitrust analysis casts penetrating light on this set of issues. From the antitrust perspective, the paradigmatic corporate law strategy of facilitating collective control of agency costs is justified because in controlling agency costs, shareholders do not compete with each other. Moreover, collective action is necessary to enforce the contracts between managers and shareholders.

By contrast, collective attempts to coordinate shareholders' response to a tender offer in order to increase tender offer premiums are fundamentally different: unlike the paradigm case, shareholders, absent collective action or regulatory protection, compete with respect to selling their shares.²² The intuition behind this section is that it is useful to think about agreements among competing shareholders to eliminate competition to tender as analogous to agreements among competing widget manufacturers to eliminate competition in selling widgets. In these terms, agreements among shareholders are agree-

22. Regulatory provisions displace some of the competition among target shareholders to tender. For example, the pro rata and best price provisions of the Williams Act, 15 U.S.C. § 78n(d)(6) and 78n(d)(7), require that tendered shares be accepted pro rata and that earlier tendering shareholders receive the same price as later tendering shareholders. These provisions limit the means by which a bidder can play target shareholders off against each other.

But such provisions do not entirely eliminate (and, as I argue below, should not be read as intending to eliminate), competition to tender, nor do they place target shareholders in the bargaining position of a sole owner. Direct competition to tender can be reintroduced by means of a partial or two tier tender offer. Moreover, difficulties faced by shareholders in coordinating a collective response to a one or two-tier tender offer may, as a practical matter, approximate the effects of direct competition. For a discussion of why these regulatory provisions should not be interpreted as ousting the antitrust laws from the tender offer context, see text accompanying *infra* notes 171–176.

ments among sellers that will have the typical and predictable negative impact on the buyers, the bidders.

For those skeptical of this intuition, the question is how the collective elimination of competition to tender by shareholders differs from the collective elimination of competition in widgets by widget manufacturers? The normal corporate law justification—that joint bargaining is in the interests of target shareholders—is as unpersuasive as the analogous argument that price fixing is in the interests of competing manufacturers.²³ Two principal secondary justifications likewise fail: joint bargaining among shareholders cannot be justified either on the grounds that shareholders are co-owners of a commonly held asset or on the grounds that shareholders, unlike widget manufacturers, are subject to being frozen out by a majority shareholder. While there are substantial allocational arguments for joint bargaining, the antitrust perspective makes clear that, even if such allocational claims are demonstrated, proponents of such agreements must also show that joint bargaining agreements are reasonably necessary to achieve allocational efficiency, and in addition, that the procompetitive benefits outweigh anticompetitive effects—burdens that have not yet been met. I then argue that plausible populist and doctrinal justifications are also insufficient.

An extension of this analysis undermines the suggestion that the law should facilitate the formation of stakeholder coalitions. In particular, absent additional normative arguments regarding stakeholders' entitlements, one cannot conclude that stakeholder collective action problems are market failures rather than market successes.

Finally, the antitrust lens proves to be particularly useful in analyzing the validity of state antitakeover legislation. In contrast with the standard judicial and scholarly analyses, the antitrust perspective suggests that the central issue posed by state antitakeover statutes is one of antitrust federalism: to what extent, and with what conditions, can

23. Thus, when shareholders compete, the "hypothetical shareholders' contract" standard, often invoked in law and economics analyses of corporate law, must be expanded to include all affected parties in the hypothetical negotiation. The antitrust approach thus identifies a concern not addressed in the current literature. Haddock, Macey and McChesney, for example, argue that because the resistance rule that will maximize target shareholder interests will probably vary from company to company, target shareholders should be able to precommit to passivity (for example, by a charter provision mandating target management passivity), but should not be required to do so. See David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 Va. L. Rev. 701, 726–37 (1987). But one cannot answer the question whether target shareholders should be required to adopt such a rule solely by reference to the interests of target shareholders. That would be equivalent to arguing that widget manufacturers should be able (although not required) to precommit to competition because competition might be in their interests. It is a separate and additional question whether such a rule is likewise presumptively optimal for the widget buyers who may, as a result of the rule, pay higher prices, or whether such a rule is efficiency-enhancing once all interests are taken into account.

states opt out of competitive markets? The central question, to date entirely ignored, is whether state attempts to escape from a competitive market for control are prohibited or limited by the Sherman Act and the national commitment to competition embodied in it. I argue below that this approach provides a more satisfactory analysis than either of the prevailing analytic frameworks, dormant Commerce Clause analysis or preemption by the Williams Act. In terms of antitrust federalism, state antitakeover statutes are problematic not for the conventional reason that they interfere with a competitive market for control (although they may also be problematic for that reason), but primarily because they do so by allowing private, interested parties, acting without active state supervision, to determine whether or not there should be competition for control.

Conceptually, this Article reflects something of a mirror image of the Chicago School's approach to antitrust. A fundamental insight of the Chicago School is that many (initially unfamiliar) inter-firm arrangements can be viewed as the equivalent of efficiency-enhancing intra-firm arrangements.²⁴ Thus, for example, vertical restraints have been defended as a means of controlling free riding, a problem solved in other contexts by bringing an activity within the firm through vertical integration.²⁵ This Article makes the opposite move, exploring the extent to which nominally intra-firm arrangements can be seen as analogous to competition-destroying inter-firm arrangements.²⁶

My argument here is an argument for a fundamentally different way of thinking about corporate law. For those who are convinced, it may follow that Section 1 of the Sherman Act should be interpreted to regulate shareholder bargaining agreements and their functional equivalent, poison pills. But that is an additional step, well beyond the scope of this Article. For present purposes, I seek to show that the antitrust perspective provides an important vantage point on corporate law problems arising at the firm/market boundary. The precise legal rules implied by that perspective can come later.

24. See, e.g., Robert H. Bork, *The Antitrust Paradox* (1978); Richard A. Posner, *Antitrust Law: An Economic Perspective* (1976); Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 908-10 (1981); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 1, 1-2 (1984); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1975); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 10-13 (1977); see also Williamson, *supra* note 3, at 224-47 (making the same point from the perspective of transaction cost economics).

25. See, e.g., Bork, *supra* note 24, at 297-98; see also other sources cited *supra* note 24.

26. This approach complements Professor Hovenkamp's marvelously rich and revealing historical investigations into the intersection, overlap, and reciprocal influence of antitrust and corporate law, especially during antitrust's formative years. See Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (1991).

II. SECTION 1, THE PROBLEM OF THE ONE AND THE MANY, AND THE FIRM/MARKET BORDERLINE

Section 1 of the Sherman Act proscribes “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce. . . .”²⁷ As such, it applies only to concerted action. Because more than one person is nearly always involved in any business decision, a recurring question has been whether a particular arrangement or action presents the requisite concert of action to implicate the competitive concerns underlying Section 1.

In two paradigmatic antitrust contexts, the question whether the necessary concert of action is present has seemed obvious. In the classic price fixing cartel, concert of action of the requisite sort is clear: The cartel is nothing more than an agreement among competitors to fix prices and restrict output. Likewise, in the case of ordinary single firm action, such as when a firm decides to increase prices, the result is equally clear. Although in almost every case there will be some “agreement” between at least two people—say, between the Executive Vice President for Operations and the Executive Vice President for Marketing—in the ordinary case that agreement has not been thought to be the sort that triggers Section 1.²⁸ In such cases, “[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”²⁹ Such decisions, while perhaps “‘price fixing’ in the literal sense,”³⁰ are treated as unilateral action and therefore not subject to Section 1.

The question of concerted action becomes problematic in precisely those instances when one would expect it to be: when the challenged agreement occurs in a context that falls between the paradigmatic independent firm and the paradigmatic market. The courts have dealt with this issue in a wide variety of cases. In each of these contexts, the actors are both participants in the “firm” as well as competitors in the “market.” As I will show below, these ambiguous cases provide the outlines of a more general antitrust analysis.

27. 15 U.S.C. § 1 (1988).

28. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). In *Copperweld*, the Court overruled the “intraenterprise conspiracy” doctrine, which had held that an agreement among separately incorporated subsidiaries or between a parent and a separately incorporated subsidiary satisfied the concert of action requirement for Section 1. See also *Knutson v. Daily Review Inc.*, 548 F.2d 795, 801–03 (9th Cir. 1976) (quoting Phillip Areeda, *Antitrust Analysis* 319 (2d ed. 1974)) (“So long as a business enterprise is regarded as an individual economic unit, it must be permitted to act.”), cert. denied, 433 U.S. 910 (1977); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (“A corporation cannot conspire with itself . . .”), cert. denied, 345 U.S. 925 (1953).

29. *Copperweld*, 467 U.S. at 769.

30. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979).

In this section, I examine the antitrust analysis of organizations lying at this firm/market borderline. In these cases, the first question is whether the parties to the agreement are competitors or potential competitors in the market that the agreement affects or to which it is directed.³¹ If so, then Section 1 applies even if the agreement takes place within a corporation. In such circumstances, the courts simply ignore the corporate form. When this threshold is met, the substantive question is whether the anticompetitive effects of the agreement outweigh any procompetitive consequences.³² When this is the case, the agreement will be proscribed by Section 1.

A. *The Concert of Action Requirement*

In a variety of cases, courts have found the Section 1 concert of action requirement satisfied when participants in an enterprise are also competitors or potential competitors. Courts have faced the issue in the context of various joint ventures,³³ including trade associations, standard-setting organizations, professional societies, agreements among doctors and hospitals, sports leagues, and securities and commodities exchanges. From the corporate law perspective, what is perhaps most striking about the antitrust treatment of joint ventures has been the ease with which the courts have pierced the corporate veil to find a “contract, combination or conspiracy.”

Consider, for example, the old and famous *United States v. Terminal Railroad Ass’n* case.³⁴ The notorious Jay Gould and a group of railroads formed a corporation to acquire the terminal facilities and rail bridges

31. One might extend this to include “separate economic actors” as well to explain why vertical cases—where the restraint is between a manufacturer and wholesaler or retailer—come within the scope of Section 1. See, e.g., *Copperweld*, 467 U.S. at 768–70. But such an extension may be unnecessary if one views vertical arrangements as problematic largely to the extent that they involve potential competitors. This issue is not addressed because the critical relations at issue in corporate law, at least in this preliminary inquiry, are horizontal.

32. This is a general statement of the Rule of Reason. For a more detailed description, see *infra* notes 68–77 and accompanying text. Certain patterns of conduct have been determined to be almost *always* anticompetitive and rarely justified by procompetitive benefits. In these instances, courts have held such practices to be *per se* illegal, that is, illegal without any showing of actual anticompetitive effects. The classic *per se* offenses are price fixing by competitors, see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and market division by competitors, see *United States v. Topco Assocs.*, 405 U.S. 596 (1972). For the Court’s most recent explanation of the rationales for the *per se* rule, see *FTC v. Superior Court Trial Lawyers Ass’n*, 110 S.Ct. 768, 780–82 (1990).

33. The phrase “joint venture” has no determinate meaning in antitrust jurisprudence. See Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1007 (1969). Rather, it has been—and, in this Article, will continue to be—loosely used to refer to ventures formed by competitors or potential competitors, including both temporary business associations and more permanent arrangements.

34. 224 U.S. 383 (1912).

in St. Louis, thereby controlling east-west rail traffic. The corporation charged nonshareholder railroads a substantially higher price for the use of the terminal facilities than it charged shareholder railroads. The Court found that the discrimination toward customer railroads constituted a violation of the Sherman Act.³⁵ In so doing, the Court looked through the corporate form, finding the operation of the terminals to be an ongoing "contract, combination or conspiracy" in violation of Section 1. Critical for the Court was the fact that the corporation was not a truly independent entity, but was controlled by the shareholder-railroads, each of whom appointed a director.³⁶

The Court followed the same approach in *Associated Press v. United States*.³⁷ Associated Press (AP) was a cooperative association of newspapers incorporated under New York law. At issue in the case was whether bylaws prohibiting AP members from selling news to non-members and granting each member the power to block its non-member competitors from membership constituted a "contract, combination or conspiracy" in restraint of trade in violation of Section 1 or a conspiracy to monopolize in violation of Section 2. With minimal discussion, the Court affirmed the district court's holding that the bylaws themselves constituted agreements among competitors and thereby violated Section 1.³⁸

Similarly, where shareholders are also potentially competing licensees or member stores, concert of action has been found. For example, in *United States v. Sealy, Inc.*,³⁹ the government brought a Section 1 action against Sealy, a corporation that owned, promoted and licensed the Sealy trademark. The licensees held substantially all of the corporation's stock and, according to its bylaws, directors had to be stockholder-licensees or their nominees. The Court treated Sealy as consisting of little more than ongoing concerted action by its stockholder-licensees.⁴⁰ Similarly, in *United States v. Topco Associates, Inc.*,⁴¹ the Court treated a purchasing cooperative of independent grocery stores that promoted a common Topco brand name in competition with the private label products of the large chains as nothing more than an ongoing combination and conspiracy subject to Section 1. The Court looked through Topco's independent incorporation on the grounds that Topco's stock was owned by member stores and that Topco members controlled its operation.⁴² In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*,⁴³ the Court again ignored the

35. See *id.* at 409-11.

36. See *id.* at 398-400.

37. 326 U.S. 1 (1945).

38. See *id.* at 12-13.

39. 388 U.S. 350 (1967).

40. See *id.* at 352-54.

41. 405 U.S. 596 (1972).

42. See *id.* at 609.

43. 472 U.S. 284 (1985).

corporate form in finding concert of action in the operation of a purchasing cooperative composed of competing retail stationers.⁴⁴

The same disregard for organizational form appears when members of trade groups, professional societies, or standard-setting organizations are competitors. Thus, in *Goldfarb v. Virginia State Bar*,⁴⁵ the Court ignored the separate existence of the bar association in finding the bar's minimum fee schedule to be concerted action by the member lawyers in violation of Section 1.⁴⁶ Similarly, in *National Society of Professional Engineers v. United States*,⁴⁷ the Court assumed that an ethical canon of the Society prohibiting competitive bidding by members satisfied the concert of action requirement.⁴⁸ Likewise, private standard-setting associations, which typically include members having horizontal business relations, have traditionally been treated as continuing conspiracies of their members when agreements have related to areas in which they compete.⁴⁹

The market for medical services has raised similar issues. Again, the courts have looked through the organizational form when members or shareholders have been competitors. Thus, in *Arizona v. Maricopa County Medical Society*,⁵⁰ the Court held that the maximum price set by the medical foundations was nothing more than a maximum price fixing agreement among the competing member doctors and therefore per se illegal.⁵¹ In *FTC v. Indiana Federation of Dentists*,⁵² the Court held that the Federation's policy of not cooperating with third-party insurers in the review of dental care constituted a collective refusal to deal by the member dentists and, as such, was an unreasonable restraint of trade in violation of Section 1.⁵³

In the courts of appeals, a recurring issue has been whether the refusal of a hospital's medical staff to grant admitting privileges triggers Section 1 scrutiny. Again, the courts have taken the view that when the decision makers are competitors or potential competitors of the doctor applying for privileges, and who thus have an interest in

44. See *id.* at 293-96.

45. 421 U.S. 773 (1975).

46. See *id.* at 781-82.

47. 435 U.S. 679 (1978).

48. See *id.* at 692-93.

49. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 509-10 (1988) (steel industry); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961) (association of pipeline companies, gas distributors, and manufacturers of gas burners); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-68 (1941) (textiles); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426-27 (7th Cir. 1965) (agreement among members of association on composition of macaroni with view toward depressing price of critical input held violation of Section 1). See generally 7 Phillip E. Areeda, *Antitrust Law* ¶¶ 1475-78, at 334-60 (1986).

50. 457 U.S. 332 (1982).

51. See *id.* at 356-57.

52. 476 U.S. 447 (1986).

53. See *id.* at 457-59.

minimizing competition, the actions of the medical staff will be considered collective action by the competing doctors.⁵⁴ Similarly, when a third-party payor is controlled by participating physicians, actions of the payor are considered to be collective action by the physicians.⁵⁵ On the other hand, when the third-party payor is independent of the physicians, the third party is considered to be an independent actor outside of Section 1.⁵⁶

Sports leagues provide another common example of an arrangement that lies at the firm/market boundary. One can view a sports league as a firm in which "horizontal restraints on competition are essential if the product is to be available at all."⁵⁷ Alternatively, one can view a sports league as a market composed of competitors whose agree-

54. In the leading case of *Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985), the court held:

The York medical staff is a group of doctors, all of whom practice medicine in their individual capacities, and each of whom is an independent economic entity in competition with other doctors in the York medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis.

Id. at 815; accord *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990) (because members of the medical staff practice medicine in their individual capacities, each is a separate economic entity potentially in competition with other physicians), cert. denied, 110 S. Ct. 1960 (1990); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) cert. denied, 489 U.S. 1078 (1989) (same); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (nurse anesthetists excluded from community hospital at behest of competing anesthesiologists).

For discussions of the application of antitrust to potentially anticompetitive arrangements among doctors and hospitals and, in particular, to credential decisions, see James F. Blumstein & Frank A. Sloan, *Antitrust and Hospital Peer Review*, 51 *Law & Contemp. Probs.*, Spring 1988, at 7; Clark C. Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 *Duke L.J.* 1071; Philip C. Kissam et al., *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 *Cal. L. Rev.* 595 (1982).

55. See, e.g., *Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1028-29 (9th Cir. 1988) (physicians formed a majority of the board and therefore controlled payor), cert. denied, 110 S. Ct. 140 (1989); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 481 (4th Cir. 1980) (doctors exercised control over third-party payor), cert. denied, 450 U.S. 916 (1981).

56. See, e.g., *Barry v. Blue Cross*, 805 F.2d 866, 868-69 (9th Cir. 1986) (when two-thirds of board were public representatives, inadequate evidence that doctors controlled plan); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 253-54 (3d Cir. 1984) (when only two of thirty-two members of Blue Shield board were dentists and when dental policy committee, composed of dentists, was only advisory, Blue Shield's actions were unilateral conduct), cert. denied, 471 U.S. 1016 (1985); *Royal Drug Co. v. Group Life and Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984) (pharmacy agreements did not constitute per se illegal horizontal combination because agreements did not run between competitors in pharmaceutical industry, nor between competitors in insurance industry, but between individual pharmacies and Blue Shield, which did not compete with pharmacies), cert. denied, 469 U.S. 1160 (1985).

57. *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984).

ments pose anticompetitive dangers. Indeed, the leading Supreme Court case, *NCAA v. Board of Regents*,⁵⁸ while describing the NCAA in terms that highlight the extent to which it can be viewed as a firm, ultimately focused on the anticompetitive effects of joint bargaining over television rights.⁵⁹ Whether sports leagues are seen as a firm or a market, courts have viewed them as satisfying the Section 1 concert of action requirement because it has seemed obvious that they involve agreements among competitors.⁶⁰

58. 468 U.S. 85 (1984).

59. The Court first noted that in many respects, the NCAA resembles a firm: [T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id. at 101–02.

However, the Court went on to conclude:

Because it restrains price and output, the NCAA’s television plan has a significant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA’s output restriction has the effect of raising the price the networks pay for television rights. . . . The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preferences.

Id. at 104–06.

60. See, e.g., *Haywood v. NBA*, 401 U.S. 1204 (1971) (basketball); *Radovich v. NFL*, 352 U.S. 445 (1957) (football); *Volvo N. Am. Corp. v. Men’s Int’l Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988) (tennis); *Los Angeles Memorial Coliseum Comm’n v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984) (football); *Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir.), cert. denied, 459 U.S. 835 (1982) (boxing); *NASL v. NFL*, 670 F.2d 1249 (2d Cir.), cert. denied, 459 U.S. 1074 (1982) (football); *United States Trotting Ass’n v. Chicago Downs Ass’n*, 665 F.2d 781 (7th Cir. 1981) (horse racing); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (football); *Ashley Meadows Farm, Inc. v. American Horse Shows Ass’n*, 609 F. Supp. 677 (S.D.N.Y. 1985) (horse shows). But see *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) (no interstate commerce involved); *Flood v. Kuhn*, 407 U.S. 258, 284–85 (1972) (affirming *Federal Baseball* on stare decisis grounds).

The discussion of the application of Section 1 to sports leagues has become something of a cottage industry. See, e.g., Lee Goldman, Sports, Antitrust, and the Single Entity Theory, 63 Tul. L. Rev. 751 (1989); Myron C. Grauer, The Use and Misuse of the Term “Consumer Welfare”: Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act, 64 Tul. L. Rev. 71

Finally, commodities and securities exchanges provide another example of an organization that can be viewed either as a firm or a market. Because exchanges are typically established and controlled by competing members, the courts have consistently held that exchange rules governing behavior of members are agreements among competitors.⁶¹ At the same time, exchanges require rules in order for the product of the exchange, a marketplace, to be available at all. Thus, in *Board of Trade v. United States*,⁶² the Court rejected a charge of price fixing against a requirement that off-hour trades be made at the closing market price on the grounds that channelling trades into the exchange made the market more competitive.⁶³

B. *Distinguishing Among Activities*

Central to the determination of concert of action, and thus to the applicability of Section 1, has been a distinction between agreements that affect markets in which the participants compete and agreements with respect to other matters. In each case in which concert of action has been found, the agreements have related to a market in which the parties to the agreement have been competitors or potential competitors.⁶⁴ Thus, in *Terminal Railroads*, the agreement restricting access to

(1989); Myron C. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich. L. Rev. 1 (1983); Gary R. Roberts, The Antitrust Status of Sports Leagues Revisited, 64 Tul. L. Rev. 117 (1989) [hereinafter Roberts, Antitrust Status]; Gary R. Roberts, The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View, 60 Tul. L. Rev. 562 (1986); Gary R. Roberts, Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry, 32 UCLA L. Rev. 219 (1984); John C. Weistart, League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry, 1984 Duke L.J. 1013.

The cases and the analysis in the text suggest that the appropriate answer to the single entity/concerted action question in the context of sports leagues is that a Section 1 "rule of reason" analysis applies if an agreement among teams relates to a market in which the teams compete, but does not apply if the agreement relates to a market in which they are neither competitors, potential competitors nor independent economic actors. The debate over the proper antitrust treatment of league governance rules ultimately revolves around this question. See Roberts, Antitrust Status, *supra*, at 127.

61. See, e.g., *Silver v. NYSE*, 373 U.S. 341 (1963); *Board of Trade v. United States*, 246 U.S. 231 (1918). In *Silver*, the Court thought it obvious that "removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act," despite the fact that the only concert of action was the members' agreement to comply with Exchange directives upon being admitted to membership. *Silver*, 373 U.S. at 347.

62. 246 U.S. 231 (1918).

63. For a recent analysis of exchanges as firms, see Jonathan Macey & Hideki Kanda, The Stock Exchange as a Firm: The Emergence of Close Substitutes for the New York and Tokyo Stock Exchanges, 75 Cornell L. Rev. 1007 (1990).

64. The rules governing interlocking directors revolve around a similar distinction, prohibiting anyone from serving as a director "in any two or more corporations . . . if

the cross-Mississippi terminals and bridges related to the railroad market in which the shareholders competed. In *Associated Press*, the objectionable bylaws limited competition in the members' daily newspaper markets. In *Sealy* and *Topco*, the territorial restrictions on the use of the trademark affected competition in the mattress and grocery markets respectively. In *Northwest Stationers*, the expulsion of Pacific from the purchasing cooperative affected Pacific's ability to compete in the retail stationery market. In *Goldfarb*, *Professional Engineers*, *Indiana Dentists* and *Maricopa*, the objectionable association rules affected competition in the professional services markets in which members competed. In the doctor staff privileges cases, the illegal agreements among doctors related to the market for medical services. Finally, in *NCAA*, the joint bargaining arrangement affected competition among member schools for television contracts.

In each of these cases, the agreement raised an antitrust concern because it affected or potentially affected a market in which members competed. When that has not been the case, however, no concerns are or should be triggered.⁶⁵ The decision, for example, of any of these joint ventures to establish a central office, to rent space, or to hire association employees, is and should be unobjectionable precisely because any agreement to engage in these activities has no significant potential to affect competition in any market in which the members compete.⁶⁶

This distinction—whether or not stakeholders⁶⁷ compete in the market to which the agreement relates—provides the critical link for the antitrust analysis of corporate law issues at the firm/market borderline. The intuition underlying this Article is that the antitrust analysis

such corporations are . . . competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." Clayton Act § 8, 15 U.S.C. § 19 (1988). See generally 5 Areeda, *supra* note 49, ¶¶ 1300–1305, at 359–76 (discussing relevant statutes and horizontal, vertical, and indirect interlocks) (Volume Five of the treatise is co-authored with Donald F. Turner; it was published in 1980). As elsewhere, the key is whether actors are competitors or potential competitors.

65. See 7 Areeda, *supra* note 49, ¶ 1477, at 347–48; *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 614 (6th Cir. 1990), modified 927 F.2d 904 (6th Cir.), cert. denied, 112 S. Ct. 406 (1991):

The fact that medical staff members may be in competition with each other does not mean that every decision of the medical staff warrants scrutiny under section 1 of the Sherman Act. When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital.

Id.

66. This is not to say that the distinction is unproblematic. Inevitably, there are difficulties in discerning whether or not the parties to the agreement compete in the affected market.

67. As above, the term "stakeholder" is used to refer to all participants in the corporation, including shareholders, employees, creditors, customers, etc.

illustrated in the preceding cases applies when agreements among competing stakeholders relate to the market for corporate control.

C. *The Rule of Reason Analysis*

As we have seen, the threshold question is whether Section 1 applies. When the parties to an agreement compete in the market affected by the agreement, the concert of action requirement has been satisfied. The substantive question is then reached: Does the challenged arrangement constitute a contract, combination or conspiracy in restraint of trade?

The fundamental mode of analysis under Section 1 is the "rule of reason," whose test is "whether the challenged agreement is one that promotes competition or one that suppresses competition."⁶⁸ Such an extraordinarily broad formulation is not particularly helpful. Although a great deal has been written by courts and commentators on the nature of the rule of reason and the per se rule,⁶⁹ the actual analytic process utilized by the courts in assessing the competitive impact of challenged restraints can be concisely summarized. Professor Areeda's structured rule of reason analysis provides a useful analytic framework.⁷⁰

In Professor Areeda's view, courts apply a multi-stage, sequential analysis in which the burdens of proof shift between plaintiffs and defendants. As the general statements of the rule of reason indicate, the ultimate inquiry is whether a restraint is "one that tends to impair competition significantly without adequate justification."⁷¹ I have taken the liberty of slightly recasting Professor Areeda's analysis in order to make it more directly applicable to arrangements at the firm/market borderline.

1. *Restraint of Trade*. — In keeping with normal litigation burdens, to withstand summary judgment, a "plaintiff must show by argument that the challenged activity is of a type that restrains trade within the meaning of the Sherman Act."⁷²

2. *Quick Look*. — A restraint of the sort that lies within the general prohibitions of the Sherman Act may "avoid summary condemnation if the defendant claims justification of the kind which a 'quick look'—usually at the arguments alone—shows to be legitimate in principle and

68. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

69. See *supra* note 32 for discussion of the per se rule.

70. See 7 Areeda, *supra* note 49, ¶ 1511, at 427–36. For a similar structured rule of reason, see also Richard Schmalensee, *Agreements Between Competitors in Antitrust, Innovation and Competitiveness* 104–14 (Thomas M. Jorde & David J. Teece, eds. 1992).

71. *Id.* at 428.

72. *Id.*

capable of being proved satisfactorily.”⁷³

3. *Significant Magnitude*. — Once the restraint survives summary condemnation, as it is likely to do in nearly all cases at the firm/market borderline, “the plaintiff must show that the type of restraint identified . . . is likely to be of significant magnitude.”⁷⁴ The purpose of this requirement is to screen out de minimis or harmless restraints. How the plaintiff meets this burden will vary. Proof of actual detrimental effects will suffice. If, for example, the plaintiff can show either output restriction or the transfer of consumer or producer surplus as a result of the restraint, that will typically be sufficient. In the absence of a showing of actual detrimental effects, defendants’ market power (as determined by the normal proxy of substantial market share) will usually suffice. But when actual detrimental effects can be shown, such an indirect measure of market power need not be used, and the failure to demonstrate a substantial percentage of a relevant market will not defeat a claim.

4. *Justifications*. — “The defendants have the burden of coming forward with allegations and evidence that the justifications claimed are legitimate in principle and are actually promoted significantly by the restraint.”⁷⁵ This step combines two inquiries: whether the restraint has procompetitive goals and whether the restraint is reasonably necessary to the accomplishment of those goals. In conducting this analysis, courts have used a variety of presumptions depending on the general severity of the restraint.

5. *Balancing*. — “Where both benefit without a preferable alternative and harm are potentially significant, balancing is necessary”⁷⁶ How one conducts the ultimate, fifth step, rule-of-reason balancing is problematic. Professor Areeda’s analysis is, in part, an attempt to avoid it by identifying cases in which it is unnecessary. But in the most interesting cases, one may not be able to do so.

As Professor Areeda points out, the *NCAA* case illustrates this sequential analysis (with the exception of the final balancing) in a classic case at the firm/market borderline.⁷⁷ But for those cases in which the

73. *Id.* at 428–29.

74. *Id.* at 429.

75. *Id.*

76. *Id.* at 430.

77. In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), member institutions, competitors both in athletic terms as well as in the marketing of television rights, agreed through the NCAA on the total number of member football games that would be televised, the number of times individual colleges could appear, and the aggregate price and schedule of fees for telecasts. Because the NCAA’s television plan limited the number of games broadcast and precluded price negotiation between broadcasters and individual institutions—the sort of horizontal restraints on price and output that lie at the heart of the prohibitions of Section 1—the first step was satisfied. See *id.* at 91–94.

Moving to the second step, the Court, noting the critical role that the NCAA plays in creating and marketing the product “college football,” examined the particular justifications offered for the joint bargaining efforts. Because the NCAA involved an

ultimate balancing is necessary, collective action theory provides a useful approach to this problem.

D. *A Collective Action Analysis*

As we have seen, in the Cartelists' Dilemma, sellers collectively would be better off if they would all charge the monopoly price and limit output, but each is better off individually if the others charge the monopoly price and the individual seller cheats. This temptation to cheat may prevent the dispersed sellers from reaching a monopoly price or, if they are already at a price above the competitive one, may lead to a downward spiral to the competitive price.

Consider the standard Prisoners' Dilemma matrix in which A and B are the two dominant competitors in some market:

		B	
		cooperate	cheat
A	cooperate	(1,1)	(-1,2)
	cheat	(2,-1)	(0,0)

If one considers only the interests of the prisoners (A and B), then Box 1 (1,1) is collectively superior to Box 4 (0,0), and failure to reach Box 1, from A and B's perspectives, is a collective action failure. But if one considers the interests of the prisoners plus the interests of the jailer, where the jailer is a proxy for buyers' interests—an interest not included in the standard two-by-two matrix—then Box 1 is clearly infer-

industry in which horizontal restraints on competition were essential if the "product" was to be available at all, the Court held that the specific competitive justifications for the challenged practices must be examined. *Id.* at 101.

The Court then proceeded to the third step, holding that the prices charged networks were "unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market," and that "price is higher and output lower than they would otherwise be." *Id.* at 106-07. In addition to these actual anticompetitive effects, the Court also found that the NCAA had market power in the market for college football games. Thus, the Court concluded that the NCAA television plan constituted a sufficiently serious restraint that it should be regarded as unreasonable in the absence of competitive justification, the fourth step of the analysis. See *id.* at 109-10.

At this stage, although the Court accepted as legitimate in principle the NCAA's claim that the television plan "efficiently created a marketable product and facilitated competitive balance among teams," it held that the restraints involved in the television plan were not reasonably necessary to achieve those goals, both because the restraints did not further them effectively and because they would be equally well served by less restrictive alternatives. *Id.* at 104-13. Because the Court did not find any of the NCAA's purported justifications persuasive, it ended the analysis at this stage without proceeding to an ultimate balancing. See 7 *Arceeda*, *supra* note 49, ¶ 1511, at 430-36.

ior to Box 4 because the loss to the jailer (the consumers) is greater than the gain to the prisoners (the manufacturers), and the collectively irrational result for the sellers considered by themselves is, instead, collectively rational for society as a whole. If one represented the collective action dilemma as a three-person game (including payoffs to the buyers), what appears to be a collective action failure from the perspective of the two would-be cartelists is, in fact, welfare increasing for society as a whole.

The standard graph of monopoly pricing illustrates the point nicely:

The benefit of price fixing to the sellers (the prisoners considered jointly) is the transferred consumer surplus ($P_C P_M AB$), less the lost producer surplus from the reduced output (zero where, as here, marginal cost is constant) less any costs incurred in establishing and maintaining

the cartel. The loss to the consumers (the jailer) is the transferred consumer surplus ($P_c P_m AB$), plus the lost consumer surplus from the reduced output (BAC), plus any costs incurred in preventing the establishment and maintenance of the cartel. Because the transferred consumer surplus cancels out, the loss to consumers is greater than the benefit to the sellers by an amount equal to the deadweight welfare loss triangle (BAC), plus rent seeking and transaction costs.⁷⁸ The collectively rational outcome is therefore to prohibit naked price fixing. Once the jailer's interests are added to the picture, Box 4 is clearly superior to Box 1.

This analysis suggests that, as a first approximation, escape from a collective action dilemma should not be facilitated if the net benefits to the parties to the agreement are less than the net costs to non-parties. More controversially, some argue that collective action should be permitted whenever the benefits to the parties outweigh the costs to non-parties, whether or not non-parties share in those benefits.⁷⁹ In ranking outcomes, it is crucial that all interests be factored in.

This collective action approach to the rule of reason provides a good account of the antitrust analysis of joint ventures and foreshadows the analysis in the corporate context. Consider, for example, a partnership agreement among lawyers that provides for collectively determined hourly rates as well as a commitment not to compete during the term of the partnership. How would such an arrangement be ana-

78. The relationship between the monopoly overcharge, the deadweight welfare loss, the rent-seeking expenditures by the would be monopolist, and the rent-defending expenditures by strategic buyers is complicated by the interrelationship among the various costs. Rent-defending expenditures by buyers may, for example, reduce the deadweight welfare loss and monopoly overcharge, thereby reducing the rent-seeking expenditures by a would-be monopolist. For a clear discussion of this relationship and the conditions under which rent-defending expenditures increase or decrease social welfare, see Tore Ellingsen, *Strategic Buyers and the Social Cost of Monopoly*, 81 *Am. Econ. Rev.* 648, 650-52 (1991). For the seminal discussions of the conversion of the distributional consequences of monopoly into allocational inefficiency, see Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 *W. Econ. J.* 224 (1967); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 *J. Pol. Econ.* 807, 809-21 (1975).

79. American antitrust doctrine has yet to answer the question of how to balance an increase in market power against an increase in efficiency. See Alan A. Fisher et al., *Price Effects of Horizontal Mergers*, 77 *Cal. L. Rev.* 777, 778 (1989); Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 *Cal. L. Rev.* 835, 851-55 (1987). For an economist's approach to the tradeoff, see Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 *Am. Econ. Rev.* 18, 33-34 (1968) and Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 *U. Pa. L. Rev.* 699, 703-13 (1977). Interestingly, European competition law provides that arrangements that result in both market power and efficiencies may be legal if they provide "consumers a fair share of the resulting benefit." Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85(3), 298 U.N.T.S. 11, 48; accord Richard Whish, *Competition Law* 195-202 (1985).

lyzed under the structured approach?⁸⁰

First, the agreement is of the type that restrains trade within the meaning of the Sherman Act. The lawyers in the firm are competitors or potential competitors and agreements as to price are of the sort that implicate Sherman Act scrutiny. But the lawyers can offer pro-competitive justifications: a partnership can offer more attractive legal services than sole practitioners; lawyers in a firm can specialize; clients can receive one-stop service; a reputation for quality can be developed; economies of scale for support services can be exploited, and so forth. Thus, the partnership can avoid summary condemnation.

Given these justifications, by Professor Areeda's analysis, plaintiffs must next show that the restraint is likely to be of significant magnitude. Whether plaintiffs can do so will depend on the structure of the market and the size of the firm. If the firm consists of a relatively small percentage of the lawyers in the market, this restraint is unlikely to be significant. On the other hand, if so many lawyers band together that there are only two firms,⁸¹ one might conclude that each firm has significant market power.

In that event, the lawyers would then have to justify the arrangement. They might, for example, argue that the partners face a collective action dilemma: It is better for the lawyers collectively to adopt a common price list. While it may be better for each individually to try to steal clients from other lawyers by competing on price, if that happened, the firm might well self-destruct. Alternatively, the lawyers might argue that in dealing with a firm, clients demand a common price list. Plaintiffs might respond that eliminating fee competition among firm lawyers is not reasonably necessary to the preservation of the firm, and that a common price list could be provided even if firm lawyers were permitted to compete with each other on hourly rates.

Assuming that the lawyers' collective action justification were accepted as legitimate, one would be forced to the final step of the analysis: the balancing of pro- and anticompetitive effects. This is at least in part a factual question: are we better off with the lawyers in Box 1 or Box 4? The lawyers collectively benefit in the move from Box 4 to Box 1, just as competing manufacturers benefit from a price fixing cartel, but does society as a whole lose more than the lawyers gain? When the market for legal services is reasonably competitive, everyone is better off permitting partnerships. The partnership agreement permits lawyers to form firms, with all the attendant advantages, and the competitive market for legal services prevents them from charging a price above the competitive level. But when all the lawyers in town are united into only two firms, there are both benefits (e.g., specialization)

80. See *supra* text accompanying notes 70-77.

81. Cf. lawyer joke #32 (sole lawyer in small town was starving; second lawyer arrived and they both grew rich).

and costs (e.g., higher fees because of a reduction in competition). The interpretation of the rule of reason sketched here, by which an arrangement is legal if the net benefits to the parties to the agreement outweigh the net costs imposed on non-party consumers, provides a standard against which this question could be answered.⁸²

E. Summary

Joint ventures, trade associations, professional societies, doctor-controlled hospitals, sports leagues, and securities or commodities exchanges can all be thought of as firms or as markets, depending on what questions one is trying to answer. With respect to some activities, it will make sense to consider the arrangement as a single entity, beyond the reach of Section 1. With respect to other activities, competition among the participants may be restrained and it makes sense to ask whether or not the restraint is reasonable or unreasonable.

Two issues emerge as critical. First, the threshold question is whether the agreement at issue is an agreement among competitors or potential competitors that affects the market in which they compete. Second, if it is, then courts have developed a structured, sequential analysis to determine whether the agreement is one that promotes or restrains competition. While by no means unambiguous in its application, the antitrust mode of analysis provides a sophisticated framework for analyzing arrangements at the firm/market boundary. In the next Part, I apply this antitrust analysis to several significant issues in corporate law arising at the firm/market borderline.

III. AN ANTITRUST PERSPECTIVE ON CORPORATE LAW

When shareholders or members of a joint venture compete within a market that is affected by their intra-firm agreement, Section 1 applies and, depending on the competitive impact, may or may not prohibit the agreement. Generally, courts have followed this approach with regard to agreements affecting product markets in which members or shareholders compete. The intuition underlying this Article is that the same perspective is appropriate and provides insight when shareholders compete in capital markets.

A. An Illustration: *Dodge v. Ford Motor Company*

As an initial illustration of the antitrust perspective on corporate law, consider that icon of the corporate law, *Dodge v. Ford Motor Com-*

82. Whether this balancing is theoretically difficult (e.g., involving interpersonal utility comparisons) or theoretically easy (e.g., involving wealth maximization) depends on what theory is read into the final step of the analysis. See generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 Yale L.J. 1211, 1221-28 (1991) (efficiency criteria have contestable distributional consequences, the evaluation of which requires interpersonal utility comparisons).

pany.⁸³ While *Dodge* has long been considered the preeminent example of the shareholder primacy view of the corporation,⁸⁴ the antitrust perspective suggests a rather different view. How did the Dodge Brothers, who we now primarily associate with Chrysler, become shareholders of Ford Motor Company? Why did they end up suing Ford?⁸⁵

In the early days of the industry, automobile companies would buy bodies from a body company, engines and transmissions from a machine shop, and then assemble the parts.⁸⁶ The best machine shop in Detroit was that of the colorful John and Horace Dodge.⁸⁷

In the late 1890s, an engineer named Henry Ford designed a car and started a company that quickly went bankrupt.⁸⁸ Convinced that the future of the infant car industry lay with light, simple, low-priced cars, he continued to design engines, and by 1902 had designed a new car.⁸⁹ Ford then approached the Dodges, asking them to make 650 chasses (engines, transmissions, and axles) for his first season.⁹⁰ Recognizing a promising design, the Dodges turned down contracts from Oldsmobile and other established car companies to devote their full efforts to manufacturing the Ford chasses.⁹¹ During this period, Ford was trying to raise capital for the enterprise. Given the speculative nature of the infant automobile industry and Ford's previous failure, convincing investors proved difficult.⁹²

Ultimately, Ford managed to raise start-up capital from, among other sources, the Dodge brothers. Of the 1,000 shares originally issued, Ford and his partner Malcomson together received 510 shares of Ford Motor Company (FMC).⁹³ The Dodge brothers each bought 50

83. 170 N.W. 668 (Mich. 1919).

84. See Jesse H. Choper et al., *Cases and Materials on Corporations* 36 (1989); Clark, *supra* note 8, at 678-79; William T. Allen, *Corporate Takeovers and Our Schizophrenic Conception of the Business Corporation* (copy on file with the Columbia Law Review). Dean Clark is one of the few to notice the antitrust overtones in the case. See Clark, *supra* note 8, § 16.2.1, at 604.

85. The following account comes from Allan Nevins, *Ford: The Times, The Man, The Company* (1954) (in collaboration with Frank E. Hill) [hereinafter 1 Nevins]; Allan Nevins & Frank E. Hill, *Ford: Expansion and Challenge 1915-1933* (1957) [hereinafter 2 Nevins]; Allan Nevins & Frank E. Hill, *Ford: Decline and Rebirth 1933-1962* (1963), the definitive biographies of Henry Ford and the Ford Motor Company, and Caroline Latham & David Agresta, *Dodge Dynasty: The Car and the Family that Rocked Detroit* (1989).

86. See 1 Nevins, *supra* note 85, at 222.

87. See *id.* at 230-31.

88. See *id.* at 172-91.

89. See *id.* at 225-26.

90. See *id.* at 231-32.

91. See *id.* at 231.

92. See *id.* at 229-30, 233-37.

93. See *id.* at 238. Ford subsequently bought out Malcomson and some of Malcomson's associates giving him 58.5% of the shares. See *id.* at 330-32.

shares for \$5,000.⁹⁴ There were eight other outside shareholders.⁹⁵

FMC was an instant success,⁹⁶ growing to monumental size over the next decade. The Dodge brothers supplied increasing numbers of chasses, growing rich in the process. But friction repeatedly arose between the Dodges and FMC in the annual chasses price negotiations.⁹⁷ As early as 1910, the Dodges suggested that Ford buy their company and run it as a subsidiary.⁹⁸ Negotiations proceeded, leading to a lease on the Dodge brothers' plant, but eventually the Dodges realized that Ford had no intention of concluding a deal.⁹⁹

In 1913, after the negotiations to sell their company to FMC fell through, John Dodge canceled the lease with FMC and resigned his position as vice president and director.¹⁰⁰ Shortly thereafter, the Dodges announced that they would begin to manufacture a car under their own name.¹⁰¹

Over the next year, the Dodges designed their new car and expanded and retooled their factory.¹⁰² The first Dodge automobile rolled off the assembly line in November 1914. By 1915, the factory was up to speed, producing more than 45,000 cars a year.¹⁰³ The process of redesigning and expanding the Dodge plant was enormously expensive.¹⁰⁴

In January of 1916, Ford informed the Dodges that, although FMC had accumulated \$58 million in profit, he was cutting the annual dividend to reinvest for the growth of the company.¹⁰⁵ The Dodges, who had been receiving \$1.2 million per year in dividends on their FMC stock and depending on this income for the operation and expansion of their own factory, would now only receive \$120,000. Ford refused to buy the Dodges out, saying that as he already owned the majority of the stock, he saw no need to buy more.¹⁰⁶

In August of 1916, Ford, without consulting the board of directors, slashed car prices by ten to twenty percent.¹⁰⁷ Given that the company

94. See *id.* at 238. This \$10,000 investment was in addition to the substantial amounts the Dodges had invested to equip their machine shop to produce the chassis.

95. See *id.*

96. See *id.* at 246.

97. See *id.* at 479.

98. See Latham & Agresta, *supra* note 85, at 114.

99. See *id.* at 114–15.

100. See 1 Nevins, *supra* note 85, at 479; Latham & Agresta, *supra* note 85, at 115–16.

101. Given the Dodges' acknowledged expertise in building engines, success was confidently predicted. More than 22,000 people applied for Dodge dealerships. See Latham & Agresta, *supra* note 85, at 116.

102. See *id.* at 117–20.

103. See *id.* at 123.

104. See *id.* at 120–22.

105. See 2 Nevins, *supra* note 85, at 90–91.

106. See *id.* at 91; Latham & Agresta, *supra* note 85, at 134.

107. See 1 Nevins, *supra* note 85, at 572–73; 2 *id.* at 93.

could sell all the cars that it could produce at the higher price, this resulted in at least a short-term decline of \$40 million in profits.¹⁰⁸ Later in August, Ford announced publicly that all \$58 million in accumulated profits would be plowed back into the business, thus eliminating special dividends entirely.¹⁰⁹

In November of 1916, the Dodge Brothers, facing a cash shortage from the reduction in dividends, filed the case that was to become a corporate law classic. They made several claims, the most important of which were that FMC was monopolizing the market for inexpensive cars and that the directors had abused their discretion by refusing to pay dividends.¹¹⁰

In October 1917, the Michigan circuit court rejected the monopolization charge, but otherwise largely accepted the Dodges' claims, ordering that fifty percent of the cash surplus (about \$20 million) be paid.¹¹¹ On appeal, the Michigan Supreme Court partially reversed the circuit court, holding for FMC on all the issues except the most important issue, the payment of dividends. On the monopolization claim, the Court affirmed the circuit court, holding that the plaintiffs had failed to prove that FMC's expansion would result in the monopolization of the low-price car market in violation of state, federal or common law. But on the dividend issue, the Court affirmed, holding for the Dodges in what has become the quintessential statement of the shareholder primacy view.¹¹²

The antitrust perspective potentially transforms our view of the case. Despite the rejection of the monopolization claim, the inference that Ford cut the dividends in order to hamper the Dodges in competing with FMC seems to color the analysis.¹¹³ The practical effect of the courts' decisions was to provide funds for the Dodges to invest in and

108. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683 (Mich. 1919).

109. See 2 Nevins, *supra* note 85, at 94.

110. See *Dodge*, 170 N.W. at 678-79.

111. See 2 Nevins, *supra* note 85, at 101-02.

112. The Court stated that:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.

Dodge, 170 N.W. at 684.

113. Latham and Agresta quote the Michigan Supreme Court as stating that: Where a corporation with an unsatisfied demand for its cars and the output of 500,000 per annum deliberately makes a cut of \$80 in the price of a car, and enters upon a duplication of its present enormous plant, not to speak of other large expenditures, suspicion will arise that its motives are not wholly philanthropic; domination quite as much as philanthropy comes to mind.

Latham & Agresta, *supra* note 85, at 139. I have been unable to find this passage in the reported case.

expand their competing automobile company. Indeed, by preventing Ford from hindering the expansion of the Dodge brothers, probably the most skilled and dangerous competitors that FMC faced, the case may perhaps better be read as subordinating pure shareholder interests to competitive concerns than as an undiluted expression of the shareholder primacy view.

B. The Paradigm Case: Collective Action to Control Agency Costs

Consider, then, the antitrust analysis of the paradigmatic corporate law problem: collective action to minimize agency costs. If one applies the Areeda framework, the analysis terminates after the first step. Because agreements among shareholders to monitor and discipline managers are not agreements relating to markets in which the shareholders compete, they are not the type of activity that restrains trade within the meaning of the Sherman Act. It is this feature, rather than any argument that the antitrust laws do not apply to agreements among shareholders,¹¹⁴ or that trade or commerce is somehow not involved,¹¹⁵ that justifies the quick conclusion that antitrust is not implicated in the normal context of corporate governance.

The same result follows from a direct application of the rule of reason under the earlier collective action interpretation. Consider the simple case in which managers are paid a competitive salary yet still feel a temptation to steal from the till. Does it make sense to facilitate collective action among shareholders (such as derivative suits or the election of outside directors) to prevent managers from stealing? Are the net benefits to the shareholders of escape from their Shareholders' Dilemma greater than the net costs to non-participants?

Assume a corporation with 100 shares in which, absent collective action, the managers will be able to steal \$1000 while spending \$50 to conceal it from the shareholders, and in which organizing the shareholders and preventing the managers from stealing can be accomplished for \$100. The net benefit to the shareholders of collective action is \$900 (\$1000 saved less costs of \$100). The net cost to the managers is \$950 (\$1000 lost plus saved costs of \$50). On this analysis, it would seem that the benefit to shareholders of collective action is less than the costs to the managers, and that collective action is therefore unjustified.

But this analysis undercounts the costs. In this case, there is a contract between managers and shareholders in which managers explicitly or implicitly promise not to steal. While it may be that the benefit to the managers of breaching that contract is greater than the cost to the

114. See *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828-32 (2d Cir. 1990), cert. denied, 111 S. Ct. 1624 (1991).

115. See *Kalmanovitz v. G. Heileman Brewing Co.*, 769 F.2d 152, 156-57 (3d Cir. 1985).

shareholders, that is at best a reason to permit breach with payment of damages. If one instead permitted discharge without payment of damages, the costs of contracting would rise astronomically. Shareholders would demand higher returns before they would invest; managers would invest resources in trying to steal; individual shareholders would invest resources in preventing theft, and so forth. If all of these costs were taken into account, the net benefits to managers from stealing would likely be much less than the net cost to shareholders. With respect to stealing from the till, shareholders and managers are therefore collectively better off allowing shareholders to reach Box 1 than keeping them in Box 4.

Accordingly, under both the collective action analysis and the structured rule of reason analysis, the paradigmatic intra-firm corporate governance solutions do not raise any significant antitrust concerns. This explains why it makes sense to ignore antitrust in the normal corporate context.

C. Shareholders' Decision to Tender: Joint Bargaining Agreements and Functional Equivalents

Consider, now, a situation superficially similar to (but fundamentally different from) the classic corporate law concern with shareholders' collective need to monitor and discipline managers: the problem of the shareholder faced with a one-tier, all shares tender offer. Because of their collective action problem, shareholders confronted with a tender offer face a "threat": they may receive less than they would have had they been able to coordinate their actions and to negotiate effectively.¹¹⁶ Thus, in Professor Bebchuk's terms, shareholder choice is

116. Before the Williams Act with its "pro rata" and "best price" provisions, bidders could play one shareholder off against another, bargaining down the price of the shares. The pro rata rule, Williams Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1988), provides that when a tender offer is oversubscribed, the shares will be accepted pro rata, according to the number of securities deposited by each depositor. This provision prevents first come, first served tender offers. The best price rule, Williams Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1988), requires that when the bid is increased, earlier tendering shareholders must receive the increased consideration. But even with the protection of the pro rata and best price rules, direct competition can be reintroduced by means of a partial or two-tier tender offer. See *infra* note 117. Moreover, even without direct competition, an inability to coordinate bargaining will mean that shareholders will receive smaller premiums than they would with joint bargaining, moving them toward the competitive outcome.

Prof. Oesterle has clearly articulated the target shareholders' problem:

The shareholders must bargain collectively if they are to vindicate their belief, or the belief of their board, that a higher price is available. Absent collective action, [target] shareholders lose the possibility of sharing in any negotiated premium over the initial twenty percent offer. They lose the power to enforce a bottom line position at a thirty percent premium or to bluff to a premium of up to fifty percent. Thus, the stampede effect diminishes the target shareholder's

“distorted” with respect to the “sole owner” standard.¹¹⁷

Poison pills,¹¹⁸ when used by loyal management, are a solution to the shareholders’ dilemma. By preventing bidders from dealing directly with target shareholders, they make target management the exclusive negotiating agent for the shareholders. As such, they are the functional equivalent of a joint bargaining agreement. Indeed, this has been the primary justification for their use.¹¹⁹

ability to bargain for a portion of the potential gain caused by the new combination of bidder-target.

Oesterle, Target Managers, *supra* note 19, at 63.

On price inadequacy as a “threat,” see *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1152–53 (Del. 1989); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985); *City Capital Assocs. Ltd. Partnership v. Interco, Inc.*, 551 A.2d 787, 796–800 (Del. Ch. 1988), partially overruled by *Paramount Communications*, 571 A.2d 1140.

117. See Bebachuk, *supra* note 19, at 1700–04. Professor Bebachuk argues that tender offer regulation should seek to put dispersed shareholders into the bargaining position of a sole owner.

In a two-tier offer, additional pressure results from the successful bidder’s (theoretical) ability to freeze out minority shareholders at a price below the value of the shares to the minority shareholder, a pressure that has led some courts and commentators to characterize such tender offers as “coercive.” See, e.g., *Unocal*, 493 A.2d at 955; Victor Brudney & Marvin A. Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 337 (1974); Leo Herzl & Richard W. Shepro, Bidders and Targets: Mergers and Acquisitions in the U.S. 11–15 (1990).

Similarly, in a partial tender offer, in which the bidder offers to buy 51% of the shares but makes no commitment as to the remaining 49% of the shares, the value of the remaining 49% shares will be impaired by the fact that a single party has acquired 51%. The value of the minority shares will suffer for three reasons. First, there will no longer be any possibility of a control premium in the future. Second, the minority shareholders may be subject to various sorts of self-dealing and oppression by the majority shareholder that, while not rising to the level that would trigger liability, may nonetheless negatively affect the value of the shares. Finally, a majority shareholder will be able to freeze out the minority whenever it is desirable from the majority shareholder’s perspective. See Bebachuk, *supra* note 19, at 1708–15.

Note that even an all shares, all cash offer is, in fact, a two-tier offer. Non-tendering shareholders are frozen out at the same price, but several months later, without any interest. The second stage of such an offer is thus slightly lower than the first stage in an amount equal to the time value of money, further discounted by the risk that the second stage will be delayed or canceled. For a tender offer to be truly one-tier, the second stage merger consideration would have to be slightly higher than the first stage.

118. A “poison pill” is a preferred rights plan typically adopted by target management that has the effect of preventing an acquisition of the target without the consent of the target board. See Ronald J. Gilson, The Law and Finance of Corporate Acquisitions 636–40 (1986); *id.* at 140–47, 155–60 (Supp. 1991).

119. For examples of poison pills used as means enabling management to negotiate on behalf of shareholders, see *Barkan v. Armsted Indus.*, 567 A.2d 1279, 1282 (Del. 1989); *City Capital*, 551 A.2d at 790, 797; *MAI Basic Four, Inc. v. Prime Computer, Inc.*, Civ. A. No. 10,868, 1989 WL 63900, at *1–2 (Del. Ch. June 13, 1989); *Grand Metro. PLC v. Pillsbury Co.*, Civ. A. Nos. 10,319, 10,323, 1988 WL 119402, at *1–2 (Del. Ch. Nov. 7, 1988); *Doskocil Co. v. Griggy*, Civ. A. No. 10,095, 1988 WL 105751, at *3–5 (Del. Ch. Oct. 7, 1988); *Facet Enters., Inc. v. The Prospect Group*, 1988 WL 36140, at *4–5 (Del. Ch. Apr. 15, 1988); Bebachuk, *supra* note 19, at 1742; Robert Comment &

But the fact that joint bargaining may benefit shareholders or the fact that shareholders' choice is "distorted" cannot alone justify such joint bargaining. A widget manufacturer's choice is likewise "distorted" with respect to the "sole producer" standard.¹²⁰ Just as joint bargaining will allow shareholders to exert greater bargaining power in negotiating with a bidder (and receive higher prices), so too will joint bargaining allow widget manufacturers to exert greater bargaining power (and receive higher prices) in selling widgets.¹²¹ The question is whether there are convincing arguments for permitting shareholders to engage in joint bargaining while prohibiting widget manufactures from doing the same thing.

1. *The Rule of Reason Analysis.* — Consider how joint bargaining in response to a tender offer would be analyzed under the general, structured rule-of-reason analysis.¹²² To begin, can a plaintiff show by argument that a joint bargaining agreement in response to a one-tier tender offer is the type of activity that restrains trade within the meaning of the Sherman Act?¹²³

In the tender offer context, this initial condition is met because,

Gregg A. Jarrell, *Two Tier and Negotiated Tender Offers: The Imprisonment of the Free Riding Shareholder*, 19 J. Fin. Econ. 283, 284–88 (1987) ("stockholders share an agent in the person of target management who can negotiate for their common interest"); Gregg A. Jarrell, *The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merger?*, 28 J.L. & Econ. 151, 156–57 (1985); Oesterle, *Target Managers*, supra note 19, at 64–70; Office of the Chief Economist, *Shark Repellants: The Role and Impact of Antitakeover Charter Amendments*, Staff Study (Gregg A. Jarrell et al.), 1984 Fed. Sec. L. Rep. (CCH) ¶ 83,714 (1984).

Indeed, Professors Gilson and Kraakman describe the poison pill as "the least ambitious rationale for defensive tactics." Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 Bus. Law. 247, 261 (1989).

120. See Bebchuk, supra note 19, at 1764–80.

121. It is this feature that makes the "hypothetical shareholders' contract" standard overly narrow. The hypothetical contract will not provide an efficient result when the (hypothetical) parties to the contract are also competitors. See supra note 23.

122. See supra text accompanying notes 68–77.

123. As a general principle, antitrust is particularly suspicious of joint bargaining agreements and joint sales agents, especially when the result is higher prices. See *Citizen Publishing Co. v. United States*, 394 U.S. 131, 133–34 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350, 355–58 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597–98 (1951), partially rev'd on other grounds, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 764–65 (1984); *Yamaha Motor Co. v. Federal Trade Comm'n*, 657 F.2d 971, 979–81 (8th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *Virginia Excelsior Mills, Inc. v. Federal Trade Comm'n*, 256 F.2d 538, 540 (4th Cir. 1958); 2 Areeda, supra note 49, ¶ 405, at 280; Lawrence A. Sullivan, *Handbook of the Law of Antitrust* §§ 77, 102, 104 (1977); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1530–34, 1555 (1982); Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 Geo. L.J. 1605, 1615–19 (1986). Such arrangements are problematic because they are the most effective means of coordinating pricing, preventing cheating, and preventing nonprice competition by cartel members.

absent some private or regulatory protective device, shareholders will compete to tender their shares into an above-market bid.¹²⁴ Even when, as in the tender offer context, some competition has already been eliminated by regulation, collective action designating management as shareholders' sole negotiating agent is designed to eliminate the remaining competition and to facilitate a collective response.¹²⁵ Like an agreement among widget manufacturers to sell at a common cartel price, joint bargaining by shareholders impairs the competitive process and therefore is activity of the type that restrains trade within the meaning of Section 1.

But unlike the naked price fixing agreement among members of a cartel, a collective response to a tender offer may avoid summary condemnation because arguments can be formulated that will pass the "quick look." Defendant shareholders could argue that a collective response is legitimate because shareholders, unlike widget manufacturers, are co-owners of a commonly held asset (the corporation), because they are subject to being frozen out, and because joint bargaining may increase allocational efficiency by making it more likely that the highest valuing user will end up with the company or by encouraging the optimal level of investment by potential targets. Because, as in *NCAA*, a corporation presents a context in which horizontal restraints may be necessary if the activity (in this case the pooling of capital that constitutes a corporation) is to occur at all, specific competitive justifications must be examined.

The inquiry then proceeds to the question whether plaintiff can show that the restraint was of a significant magnitude. The substantial increases in tender offer premiums that result from the use of joint bargaining would satisfy that requirement.¹²⁶ Just as the magnitude of the

124. See *supra* notes 22 & 116 and accompanying text.

125. Oesterle, in defending management's role as negotiating agent against proponents of management passivity, has described defensive devices in exactly these terms:

The best solution for target shareholders is, of course, collusion. An organized refusal to tender to the lower offer breaks the [target shareholders'] dilemma. . . . The most workable method [of collusion] and the one seemingly most often chosen by corporations, is to delegate negotiation responsibility to management. Target managers are ideally situated to consolidate shareholder power, permitting the collusion which generates the largest possible total blended premium. Through the creation of, among other devices, revocable poison pill plans and waivable supermajority vote provisions, target managers can effectively and efficiently maximize the ultimate tender price.

Dale A. Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 *Cornell L. Rev.* 117, 129-30 (1986).

126. On the magnitude of the premiums resulting from joint bargaining, see Michael Bradley et al., *Synergistic Gains from Corporate Acquisitions and their Division Between Stockholders of Target and Acquiring Firms*, 21 *J. Fin. Econ.* 3, 21-25 (1988) (target shareholders received an average premium of 42-46% in multiple bidder tender offers compared to a premium of 26-30% in single bidder offers); Gregg A. Jarrell et al.,

premium above the competitive level charged by a cartel provides evidence that the type of restraint (horizontal price fixing) is of significant magnitude, so too the increase in tender offer premiums from the use of a poison pill is evidence that the type of restraint (a joint bargaining agreement) is of significant magnitude.¹²⁷

The Market for Corporate Control: The Empirical Evidence Since 1980, 2 *J. Econ. Persp.* 49, 58 (1988) (once a bid has been made, shareholders receive higher premiums where board puts up a fight); Gregg A. Jarrell & Michael Bradley, The Economic Effects of Federal and State Regulations of Cash Tender Offers, 23 *J.L. & Econ.* 371, 389-90 (1980) (The Williams Act had the effect of increasing tender offer premiums by 20%: from mean tender offer premiums of 32.4% to 52.8%).

127. With respect to the market for corporate control as a whole, a rule permitting joint bargaining among shareholders, like a rule permitting price fixing agreements, allows shareholders by acting jointly to move from the position of price-takers facing a horizontal demand curve to price-setters facing the downwardly sloping industry demand curve. As in the paradigmatic cartel case, the effect of this joint action (if indeed it is in the interests of the shareholders) is to sell fewer companies at a higher price per company. And, as in the classic antitrust analysis, this leads to both distributional consequences (wealth transferred from buyers to sellers) and allocational consequences (the dead weight welfare loss from the failure of buyers to buy companies at a price greater than sellers would be willing to accept plus rent-seeking and defending expenditures).

The debate over whether a rule permitting target managers to seek competing bids in response to a tender offer is in shareholders' interests can thus be viewed as a debate over shareholders' best strategy for maximizing rents. Professors Bebchuk and Gilson argue that the higher premiums resulting from tender offer auctions, while reducing the number of control contests, will maximize shareholders returns. See Lucian A. Bebchuk, The Case for Facilitating Competing Tender Offers, 95 *Harv. L. Rev.* 1028, 1034-46 (1982) [hereinafter Bebchuk, Facilitating Competing Bids]; Lucian A. Bebchuk, The Case for Facilitating Competing Tender Offers: A Reply and Extension, 35 *Stan. L. Rev.* 23, 33-38 (1982) [hereinafter Bebchuk, Reply]; Ronald J. Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 *Stan. L. Rev.* 51, 62-67 (1982). By contrast, Professors Easterbrook and Fischel argued that the higher prices will reduce the incidence of tender offers (and tender offer premiums) sufficiently to leave shareholders worse off. See Frank H. Easterbrook & Daniel R. Fischel, Auctions and Sunk Costs in Tender Offers, 35 *Stan. L. Rev.* 1, 2 (1982) [hereinafter Easterbrook & Fischel, Auctions and Sunk Costs]; Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 *Harv. L. Rev.* 1161, 1176-77 (1981) [hereinafter Easterbrook & Fischel, Proper Role]. As Professor Coffee points out, the question whether increased premiums will be offset by the lower number of transactions depends on the elasticity of the demand curve for companies. See John C. Coffee, Jr., Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance, 84 *Colum. L. Rev.* 1145, 1175-83 (1984).

But that is precisely the question facing a profit maximizing monopolist in setting price and output: whether one has reached the elastic portion of the demand curve. The stock price studies indicating that the lion's share of tender offer gains go to target shareholders are consistent with the suggestion that target shareholders, whether by means of joint bargaining through management, the Williams Act's provisions, or both, have managed to convert most of the buyer or consumer surplus into seller or producer surplus. For a summary of the stock price studies, see Gilson, *supra* note 118, at 434-40; *id.* at 61-86 (Supp. 1991).

Easterbrook and Fischel, by adopting the perspective of the widely diversified

In response, defendant shareholders could argue that because a nearly unlimited number of companies have similar investment characteristics,¹²⁸ shareholders collectively have no market power. Accordingly, they could assert that any restraint of competition among shareholders will be of minimal significance.

To this assertion, plaintiff can make two sorts of responses. First, plaintiff can argue, in accord with cases such as *NCAA* and *Professional Engineers*, that when actual detrimental effects are shown (here, the increased premiums resulting from joint bargaining), market power (defined in terms of a large share of a relevant market) is legally irrelevant.¹²⁹ In addition, as in other antitrust contexts, persistently high profitability (larger tender offer premiums in response to joint bargaining) together with evidence of collective action are a strong indication that those competitors in fact have market power.¹³⁰

Moreover, plaintiff could argue that collectively shareholders do in fact possess market power, within what one might characterize as the submarket for the shares of a given target. The analysis of market power within the market for corporate control must pay close attention to the peculiarities of that market.¹³¹ It is a much thinner market than the market for shares because, for any given company, relatively few suitable partners can be found.¹³² Once a bidder has invested the up-

shareholders and by assuming that shareholders own equal stakes in bidders and targets, focus on overall wealth maximization, rather than rent maximization by target shareholders. See Easterbrook & Fischel, *Auctions and Sunk Costs*, supra, at 7-8. But the mandatory passivity rule they propose is something of an embarrassment for their contractual approach, as they recognize. See Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 170-74 (1991). The antitrust perspective makes clear why a mandatory rule may be necessary: this is a situation where actions in the collective interest of target shareholders qua target shareholders may not be in the general interest.

128. See, e.g., Richard A. Brealey & Stewart C. Myers, *Corporate Finance* 307-08 (4th ed. 1991).

129. See *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 694-95 (1978); 7 Areeda, supra note 49, ¶ 1511, at 433.

130. See Richard Schmalensee, *Another Look at Market Power*, 95 Harv. L. Rev. 1789, 1805-07 (1982).

131. For a more extensive discussion of market power in the market for corporate control, see Rock, supra note 20, at 1418-21.

132. See, e.g., *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 572-73 (11th Cir. 1988) (Storer's directors, four of whom were elected on a platform committed to selling the company, searched from March through July for potential bidders but only two indicated any interest); *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 269 (2d Cir. 1986) ("[N]one of over forty companies contacted [by Goldman Sachs] were willing to act as a 'white knight,' and that of three LBO firms contacted, . . . only Merrill [Lynch] was interested in participating in a leveraged buyout."); *Solash v. Telex Corp.*, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶¶ 93,608, 97,723 (Del. Ch. 1988) ("[The Memorex] prospect was developed after a canvass of some fifty firms failed to uncover any active interest in acquiring the company at prices reflecting a comparable premium to that being offered by Memorex."); *Thompson v. Enstar Corp.*,

front (and partially sunk) costs of identifying a target and launching a tender offer, identifying an alternative transaction, if one exists, may be more expensive than proceeding.¹³³

Having passed this hurdle, the analysis then proceeds to the justifications for joint bargaining that can be offered by defendant shareholders. Can joint bargaining in response to a single-tier tender offer be justified as promoting a procompetitive goal, and as reasonably necessary to the accomplishment of that goal? What justifications can be offered for allowing competing shareholders (but not competing widget sellers) to use a joint bargaining agent? If (and only if) procompetitive justifications can be offered does one proceed to a balancing of the benefits to shareholders against the costs to others.¹³⁴

Five sorts of arguments can be made. First, shareholders, unlike

509 A.2d 578, 581 (Del. Ch. 1984) (“[A]fter contact with over 100 prospects, and after an in-depth review by 26 seriously interested buyers, only one firm offer was before the board . . .”).

133. In the language of transaction cost economics, these firm specific investments create a potential for opportunistic behavior by shareholders to secure appropriable quasi-rents. See, e.g., Oliver E. Williamson, *The Economic Institutions of Capitalism* 52–56 (1985); Klein et al., *supra* note 3, at 298–302.

134. In the Delaware cases, the use of a poison pill by loyal management to maximize the premium to shareholders is considered unproblematic. See *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356–57 (Del. 1985) (finding poison pill “reasonable” in light of belief that company was vulnerable to coercive acquisition techniques); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180–81 (Del. 1986) (finding pill was adopted in good faith and upon reasonable investigation to protect shareholder interests); *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 66–69 (Del. 1989) (finding directors exercised “due care” and fulfilled fiduciary duty to shareholders); *In re J.P. Stevens & Co. Shareholders Litig.*, 542 A.2d 770, 781–82 (Del. Ch. 1988) (finding topping fee provision not inconsistent with duty to seek best available transaction for shareholders); *Facet Enters., Inc. v. The Prospect Group, Inc.*, 1988 WL 36140, at *6–7 (Del. Ch. Apr. 15, 1988) (allowing directors to hold off redeeming “poison pill” rights plan); *In re RJR Nabisco, Inc. Shareholders Litig.*, No. Civ. A. 10,389, 1989 WL 7036, at *18–22 (Del. Ch. Jan. 31, 1989) (requiring only good faith and investigation). Indeed, within a jurisprudence of fiduciary duty, such actions by management further and do not threaten shareholder interests. But the Delaware cases beg the prior and more fundamental question of why we should permit managers to act as bargaining agents for shareholders, but not permit similar joint bargaining by widget manufacturers. One cannot ask this question within Delaware corporate law jurisprudence because of the fundamental premise that managers only owe fiduciary duties to their own shareholders, not to the shareholders of other corporations or to the general public.

In a departure from the shareholder primacy approach, some state non-shareholder constituency statutes and some recent Delaware opinions suggest that the board may balance the interests of shareholders and non-shareholder interests. See, e.g., 15 Pa. Cons. Stat. Ann. §§ 515, 516, 1715, 1716 (Supp. 1991); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1153–54 (Del. 1990). See generally David Millon, *Redefining Corporate Law*, 24 Ind. L. Rev. 223, 235–40 (1991) (arguing that recent judicial and legislative efforts “indicate a willingness to subordinate shareholder financial interests to the interests of nonshareholders and of the corporate entity’s longer-term viability, at least in the hostile takeover context”). While these developments may represent a broadening of traditional fiduciary duties, they do not

widget manufacturers, are co-owners of a commonly held asset and their relationship as co-owners may be thought to justify collective bargaining. Second, shareholders, unlike widget manufacturers, are subject to being frozen out by a successful bidder and that freezeout possibility may also be thought to justify joint bargaining. Third, joint bargaining may be thought to be potentially justified because it leads to greater allocational efficiency by providing additional time for a higher valuing bidder to enter the contest or by encouraging optimal investment by targets. Finally, some other distributional or doctrinal feature of the shareholders' situation may be thought to distinguish shareholders from widget manufacturers and thereby justify joint bargaining. The first three arguments fall within the rule of reason analysis and are considered in the remainder of this subsection. The distributional and doctrinal arguments fall outside the scope of the rule of reason analysis and are considered in subsequent subsections.

a. *Shareholders as Co-Owners*. — An initial argument might be based on co-ownership: because shareholders, unlike widget manufacturers, are co-owners of a commonly held asset, they should be entitled to bargain jointly. On further inspection, however, co-ownership provides little basis for allowing shareholders to act jointly with respect to selling their shares.

Co-ownership is a familiar problem in antitrust. The oil field provides a good example.¹³⁵ Where there is an underground pool of oil, the oil under one parcel may be drained away by a well drilled on a nearby parcel. This creates an incentive to drill an excessive number of wells and to pump as much oil from each well as possible in order to drain away one's neighbor's oil or to ensure that one's own oil is not drained away. At the same time, excessive and disorganized production is wasteful: more holes are drilled than necessary and a substantial

extend to include the interests of the buyer of the shares, nor do they authorize or direct courts to balance the losses to buyers against the gains to sellers.

135. See Robert E. Hardwicke, *Antitrust Law, et al. v. Unit Operation of Oil or Gas Pools* 31-33, 107-74 (rev. ed. 1961); John S. Lowe, *Oil and Gas Law in a Nutshell* 220-36 (1983); Eugene V. Rostow, *A National Policy for the Oil Industry* 119-48 (1948); Burns H. Errebo, *Unit Operation at Cotton Valley: An Alleged Violation of the Sherman Act*, 24 Tul. L. Rev. 76, 81-90 (1949); John C. Jacobs, *Unit Operation of Oil and Gas Fields*, 57 Yale L.J. 1207, 1217-20 (1948).

For more recent treatments of the common pool problems present in the exploitation of oil fields, see Gary D. Libecap, *Contracting for Property Rights* ch. 6 (1989) (exploring the obstacles to fieldwide unitization); Gary D. Libecap & Steven N. Wiggins, *Contractual Responses to the Common Pool: Pro-Rationing of Crude Oil Production*, 74 Am. Econ. Rev. 87, 88-90 (1984); Gary D. Libecap & Steven N. Wiggins, *The Influence of Private Contractual Failure on Regulation: The Case of Oil Field Unitization*, 93 J. Pol. Econ. 690, 691-99 (1985). On analogous problems raised by groundwater basins, see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* ch. 4 (1990).

For a recent judicial treatment in the context of state natural gas field regulation, see *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262 (1989).

amount of oil is left in the ground that could otherwise be recovered. The most efficient means of exploiting an oil field is "unitization," by means of which the field may be operated as an integrated whole with each owner entitled to a pro rata share of the production.¹³⁶

Unitization poses an obvious antitrust issue: it is an agreement among competitors with the purpose and effect of limiting production.¹³⁷ Under modern cases, such agreements would be subject to the rule of reason because they often increase the overall, long-term output of the field and reduce the costs of development, even if they reduce production in the short term.¹³⁸ On such an analysis, unitization agreements restricted to eliminating physical waste in production would almost certainly be permissible.

Now consider agreements at the other end of the efficiency spectrum: agreements among co-owners to eliminate what oil drillers would call "economic waste," that is, "excessive" use of oil because of "unreasonably" low prices caused by "overproduction," agreements relating to the price at which the oil from the field would be sold, or agreements whereby the owners agree to sell their interests jointly.¹³⁹ Such agreements would pose substantially more serious antitrust

136. Unit operation of oil or gas pools found on land leased from the federal government is explicitly permitted, and perhaps required, "whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest." 30 U.S.C. § 226(m) (1988).

137. The proper analysis of such agreements under the antitrust laws is unclear because of a dearth of cases, and because unitization agreements are now either approved by state regulatory commissions (and thus largely protected by state action immunity) or mandated by federal law. In *United States v. Cotton Valley*, 77 F. Supp. 409, 412-14 (W.D. La.), aff'd, 339 U.S. 940 (1948) (per curiam), the Department of Justice alleged that unitization agreements covering the Cotton Valley oil field had been used to violate the Sherman Act. The case thus squarely raised the issue of the application of the antitrust laws to unitization agreements and the line between agreements relating to the operation of an oil field that violated the Sherman Act and those that did not. The case was dismissed before the issue was decided. The only other case on point is *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1301-03 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), in which the Fifth Circuit reversed the district court's holding that unitization agreements were completely exempt from the antitrust laws, and limited state action immunity to state regulated and approved agreements.

Following *Cotton Valley*, the antitrust issue all but disappeared. By contrast, up until then, there had been substantial discussion of the antitrust issues raised by joint operation of oil and gas fields, including pooling and unitization agreements. See, e.g., Rostow, *supra* note 135, at 123-44; Errebo, *supra* note 135, at 81-90; Jacobs, *supra* note 135, at 1217-20; Cornelius F. Kelley, *Relation of Anti-Trust Legislation to Conservation of Mineral Resources*, 53 ABA Rep. 639, 651 (1928); Abram F. Myers, *Relation of the Federal Antitrust Laws to Problems of Mineral Conservation*, 55 ABA Rep. 672, 678-82 (1930).

138. Cf. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-23 (1979) (blanket licenses for musical compositions may increase output).

139. See, e.g., Rostow, *supra* note 135, at 30, 34-35, 43-53 (describing types of waste in oil production and prescribing solutions).

problems.¹⁴⁰ Unlike a unitization agreement, these sorts of joint bargaining agreements bear no relation to the efficient operation of a field. Rather, if successful, they would benefit co-owners by allowing them to increase profits by eliminating competition amongst themselves and as such, closely resemble the classic cartel arrangement. As to these matters, the co-owners are competitors. Their relationship as co-owners, while centrally important to the justification of agreements relating to the efficient development and operation of the field, is irrelevant to the analysis of agreements relating to matters on which they compete. Whether analyzed under the per se rule or the rule of reason, such an agreement would very likely be illegal.

Similarly, while the shareholders' relationship as co-owners justifies collective action in the core corporate governance area—the monitoring and disciplining of officers and directors—it provides little justification for agreements relating to their individual interests, such as the sale of their shares, where their co-owners are competitors. As the *NCAA* case makes clear, shareholders' status as co-owners does not provide any sort of blanket license for engaging in concerted activities.¹⁴¹

b. *The Freezeout Complication*. — Unlike co-owners of an oil field, co-owners of a corporation may be frozen out. The modern Delaware de-

140. See *Cotton Valley*, 77 F. Supp. at 412–13 (discussing line between appropriate conservation measures and violations of the Sherman Act); Rostow, *supra* note 135, at 27–53, 119–22 (discussing the anticompetitive potential of unitization agreements and other “conservation” measures); Errebo, *supra* note 135, at 80–86; Jacobs, *supra* note 135, at 1217–19 (Sherman Act should not apply to pooling agreements motivated by efficiency concerns); see also *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) (joint bargaining by member schools over television licensing fees violates Sherman Act); *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 348–49 (1982) (agreements to fix maximum price no less suspect than those fixing minimum price); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597–600 (1951) (discussing legality of agreements to suppress competition); *Yamaha Motor Co. v. Federal Trade Comm’n*, 657 F.2d 971, 977–81 (8th Cir. 1981) (discussing anti-competitive effects of joint-venture agreement), cert. denied, 102 S. Ct. 1768 (1982); Brodley, *supra* note 123, at 1569–70 (joint buying group suspect where market power as buyer); Pitofsky, *supra* note 123, at 1615–17 (efficiency gains not significant). Agreements beyond the scope of state regulation of oil and gas production are not immune from the antitrust laws. See *Woods Exploration & Prod. Co.*, 438 F.2d at 1303.

141. *NCAA*, 468 U.S. at 104–10 (where college teams are competitors with respect to television rights, concerted action implicates section 1). So-called “ancillary restraints” however pose no problem. Thus, on an antitrust analysis, the typical close corporation shareholder agreement would easily pass muster. Suppose that shareholders of a close corporation, in order to prevent any separation between ownership and control, agreed that each shareholder/employee would not sell his or her shares to any third party and further, that upon termination of employment, would sell all shares back to the company according to an agreed upon formula. While such an agreement would undoubtedly restrict competition in the sale of the shares of the corporation, it would not raise any significant antitrust concerns. Such an agreement, like the noncompete agreement that may be in the employee/shareholder’s employment contract, would be ancillary to the establishment and maintenance of the organization.

cisions have largely held that a majority shareholder may eliminate a minority shareholder in a cash-out merger.¹⁴² Moreover, shareholders cashed out are not entitled to any portion of the gains arising from the merger.¹⁴³ Minority shareholders are entitled only to their pro rata

See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (C.C.A. Tenn. 1898), modified, 175 U.S. 211 (1899).

Other agreements among shareholders may likewise be ancillary. For example, a syndicate of underwriters collectively purchases the initial public stock offering of a corporation and, as part of the syndicate agreement, agrees on the resale price. In that situation, even though the members of the syndicate agree not to compete against each other as to price in reselling the security, such an agreement does not violate the Sherman Act because it is ancillary to the main purpose of the syndicate, the orderly marketing of the new shares of the corporation. See *United States v. Morgan*, 118 F. Supp. 621, 689-91 (S.D.N.Y. 1953). Similarly, an agreement among the members of the syndicate to "stabilize" the prices of such new issues for a reasonable period is legal, when entered into as part of a syndicate to distribute a new issue, but might well violate the antitrust laws if entered into for other reasons. See *id.* at 694-98.

142. See *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 844-45 (Del. 1987); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983); *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30, 32-33 (Del. Ch. 1971); *Stauffer v. Standard Brands Inc.*, 187 A.2d 78, 79 (Del. 1962), overruled by *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979); *Coyne v. Park & Tilford Distillers Corp.*, 154 A.2d 893, 895-98 (Del. 1959).

For a brief period, the Delaware courts flirted with a "business purpose" test. In *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), overruled by *Weinberger v. UOP*, 457 A.2d 701 (Del. 1983), the Delaware Supreme Court departed from precedent, holding that a majority shareholder may not "cause a merger to be made for the sole purpose of eliminating a minority shareholder on a cash out basis." *Id.* at 978. Rather, the court held, a freezeout merger is permissible only if the majority has a legitimate business purpose beyond simply a desire to eliminate the minority shareholders. See *id.* at 979.

Within weeks, however, this "business purpose" test was drained of any significant content in *Tanzer v. International Gen. Indus.*, 379 A.2d 1121, 1124 (Del. 1977), overruled by *Weinberger v. UOP*, 457 A.2d 701 (Del. 1983). In *Tanzer*, the Delaware Supreme Court held that a majority shareholder satisfied the business purpose test by effecting a cash out merger to serve its own business purposes, even if doing so did not serve any business purpose of the subsidiary corporation or the subsidiary's minority shareholders.

In 1983, recognizing the failure of the business purpose test, the Delaware Supreme Court abandoned it. See *Weinberger v. UOP*, 457 A.2d 701, 715 (Del. 1983).

143. See Del. Code Ann. tit. 8, § 262(h) (1991) (in a statutory appraisal, the Court of Chancery "shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation"); *Harriman v. Du Pont*, 411 F. Supp. 133, 154 (D. Del. 1975); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 940 (Del. 1985) (quoting *Sterling v. Mayflower Hotel*, 93 A.2d 107, 114 (Del. 1952)); *Weinberger*, 457 A.2d at 713-14; *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 140-42 (Del. 1980); *Tanzer*, 402 A.2d at 395 (Del. 1979); *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950).

A focus of post-*Weinberger* litigation has been over what sort of valuation proceeding dissatisfied minority shareholders may pursue. *Weinberger*, as interpreted by subsequent opinions, provides that if shareholders' sole complaint is that the price is unfair, the exclusive remedy is a judicial appraisal proceeding under § 262. See *Cede & Co. v. Technicolor, Inc.*, 1987 WL 4768, at *6 (Del. Ch. Jan 20, 1987) (Westlaw, State, Del. Case Law File), rev'd in part on other grounds, 542 A.2d 1182 (Del. 1988); *Rabkin v.*

share of the corporation under current management.¹⁴⁴ The minority shareholders' situation is further exacerbated by the procedural impediments attendant on a judicial appraisal. One might therefore argue that this freezeout possibility justifies joint shareholder bargaining. But, as shown below, this argument fails.

The threshold question is how to analyze the freezeout rule itself. From the antitrust perspective, the freezing out of the minority shareholders by collective action of the majority shareholders resembles a "group boycott" or a "collective refusal to deal." From this perspective, does the freezeout rule itself pose significant concerns?

*Northwest Wholesale Stationers v. Pacific Stationery and Printing*¹⁴⁵ provides an intriguing analogy. Northwest was a cooperative comprising approximately 100 office supply retailers in the Pacific Northwest, which acted as the retailers' primary wholesaler. At the end of each year, Northwest would distribute its profits to members in the form of a percentage rebate on purchases. A bylaw prohibited member retailers from engaging in wholesale. The plaintiff, Pacific, was both a wholesaler and a retailer, but had been grandfathered in when the bylaw was enacted. Pacific's ownership changed hands and the new owners did not officially notify the directors of Northwest, apparently in violation of another Northwest bylaw. The Northwest membership subsequently voted to expel Pacific.

Pacific claimed that its expulsion constituted a group boycott that limited Pacific's ability to compete and should be considered a per se violation of Section 1. The Court rejected Pacific's argument for the application of the per se rule to its expulsion because such rules are a necessary part of establishing and maintaining a cooperative. As the Court held in a passage that provides insight into how one might analyze a freezeout rule:

The act of expulsion from a wholesale cooperative does not

Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104 (Del. 1985). If, on the other hand, shareholders can show that there was unfair dealing in addition to unfairness of price, then shareholders are entitled to a procedurally more desirable valuation proceeding. See *id.*

144. Del. Code Ann. tit. 8, § 203 (1991) limits the majority shareholder's ability to freeze out minority shareholders in the context of a takeover by preventing an acquiring company from merging with the target for three years, unless: (a) the firm has opted out, (b) the target board approves in advance, (c) the bidder acquirers at least 85% in a single transaction, or (d) the transaction is approved by the post-acquisition board and two thirds of the disinterested shareholders. The primary effect of such a "business combination" statute (also adopted by New York (without exceptions), Wisconsin, Georgia, and Arizona) is to render more difficult the second step, follow-up, freeze-out merger to eliminate non-tendering shareholders. This inability to acquire 100% ownership apparently complicates financing of bids by preventing the acquirer's use of the target's assets as security for acquisition financing. It also complicates post-acquisition transactions between the bidder and the target because of the obligation that all such transactions be intrinsically fair.

145. 472 U.S. 284 (1985).

necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. Disclosure rules, such as the one on which Northwest relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members. Nor would the expulsion characteristically be likely to result in predominantly anticompetitive effects, at least in the type of situation this case presents.¹⁴⁶

Indeed, *Northwest* itself seems to have involved a freezeout. While Northwest was organized as a cooperative rather than a corporation, the essence of Pacific's complaint was that it no longer could be a shareholder. Although Pacific was not precluded from purchasing from Northwest, it lost its right to a share of Northwest's profits.

Just as wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively, so too must corporations. In eliminating the right of the nineteenth-century shareholder to veto any merger, the freezeout rule was in the collective interest of the shareholders because it solved two collective action problems.¹⁴⁷ First, permitting a majority shareholder to freeze out the minority prevents strategic behavior by eliminating the blocking power of individual shareholders. Under the old rule, nonconsenting shareholders could demand extra compensation in exchange for acceding to the wishes of the majority. Second, the rule minimizes a free rider problem. By allowing an acquiring company to eliminate objecting shareholders at a price equal to the pro rata value of the firm, exclusive of merger gains, shareholders are unable to take a free ride on the benefits that a new controlling shareholder might bring. If shareholders could either remain in the firm under new management or be paid a pro rata share of merger gains, a free rider problem could arise that might prevent transfers of control that would be in the collective interests of the shareholders.¹⁴⁸

The question remains whether the freezeout possibility, and the pressure that it may place on shareholders to tender, provides a justification for permitting joint bargaining arrangements that might be objectionable in other contexts. Because the freezeout rule already makes shareholders better off by solving two collective action problems (holdout behavior and free riding), it is difficult to see how or why the

146. *Id.* at 296 (citation omitted).

147. On the evolution of the freezeout rule, see William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 *Am. B. Found. Res. J.* 69, 86-92.

148. See Sanford J. Grossman & Oliver D. Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, 11 *Bell J. Econ.* 42, 52 (1980). The traditional Delaware freezeout rule solves this free rider problem by denying frozen out shareholders any portion of the merger gains. *Del. Code Ann. tit. 8, § 203* (1991), by potentially delaying the business combination by up to three years, may reintroduce it.

pressure to tender that may result from the rule would then additionally justify an otherwise objectionable joint bargaining agreement between competing shareholders.

Compare the shareholders' position with that of the part owner of an oil field. There may be some situations in which a third party will wish to acquire the whole oil field. In the absence of a governmental taking, the individual rights holders cannot be forced to sell. They are thus in precisely the same position as shareholders were under the old freezeout rule. And, as under the old corporate law rule, rights holders may behave strategically, holding out for extra compensation, or may try to free ride by remaining as unit holders under new, better field management. In the oil field context, I argued above that a joint bargaining agreement with respect to the sale of drilling rights would be problematic and, indeed, probably a violation of the antitrust laws. To argue that the existence of a freezeout rule, which already puts shareholders in a better position than oil rights holders, would justify such a joint bargaining arrangement between shareholders is to argue that a rule that makes shareholders better off than other co-owners of commonly held assets justifies making them even better off. If this argument were accepted, not only would shareholders be better off than other co-owners by virtue of the freezeout rule that enables them to overcome the holdout and free riding problems, but they would derive additional benefits by relying on that rule as a justification for a joint bargaining agreement. The freezeout possibility therefore cannot justify joint bargaining by shareholders.

c. *Allocational Arguments*. — Even if joint bargaining is not justifiable on the grounds that shareholders are co-owners or that shareholders face a freezeout, one may still ask whether it is nonetheless justifiable on the ground that it makes the market for corporate control more efficient. The question of what rules governing tender offers will maximize allocational efficiency is hotly contested and depends in significant measure on difficult and unknown empirical evidence.¹⁴⁹ It is beyond the scope of this Article to sort out the debate. Instead, I focus here on comparing how this dispute fits into the antitrust and corporate law frameworks and how, from the antitrust perspective, the different arguments relate to familiar antitrust disputes.

Note first how difficult it is to fit the allocational efficiency dispute into the normal corporate law fiduciary duty framework. By focusing on fiduciary duty, corporate law's traditional jurisprudence truncates the inquiry at the point where it determines whether actions are in the

149. Among the important contributions to this debate are Bebchuk, *supra* note 19; Bebchuk, *Facilitating Competing Bids*, *supra* note 127; Bebchuk, *Reply*, *supra* note 127; Coffee, *supra* note 127; Easterbrook & Fischel, *Auctions and Sunk Costs*, *supra* note 127; Easterbrook & Fischel, *Proper Role*, *supra* note 127; Gilson, *supra* note 127; Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. Legal Stud. 165 (1988).

interest of shareholders, and often well before that point. If joint bargaining, for example, is in the interests of target shareholders, it is fundamentally irrelevant whether it is also allocationally efficient.

By contrast, antitrust has traditionally said that it was concerned with competition, not competitors.¹⁵⁰ Restrictions among competitors cannot be justified on the grounds that they are in the competitors' joint interests, but only on the grounds that they increase competition. Thus, for example, in *Board of Trade v. United States*,¹⁵¹ an exchange rule prohibiting off-hour trades at any price other than the closing bid was upheld against a government charge of price fixing on the grounds that it maximized the exchange's efficiency as a competitive market by channeling transactions onto the exchange.¹⁵²

The principal efficiency argument that has been made in support of joint bargaining is that permitting it (by means of a limited duration poison pill) will increase allocational efficiency by slowing down the sale process sufficiently to allow enough time for the highest valuing user to make a bid.¹⁵³ From the antitrust perspective, one would be skeptical of this argument. Imagine how suspect an analogous argument would be from competing widget manufacturers who wished to act collectively to slow down the sale process to allow the highest valuing user to buy the widgets. At the very least, the significant premiums that result from such joint bargaining would raise a question about the necessity of such a restraint in achieving allocational efficiency.

But does this skepticism lead to Easterbrook and Fischel's thesis that managers should remain passive in response to a tender offer?¹⁵⁴ Whether it does or not depends on the (as yet undetermined) answer to the underlying issue of allocational efficiency. To move from asserting that joint bargaining by shareholders through their managerial agents by means of a poison pill is problematic on antitrust grounds to a conclusion that target management must remain passive would require additional argument. In the normal antitrust context, while competing widget manufacturers are precluded from fixing prices, they are not precluded from individually seeking additional buyers or even from jointly doing so. Industry advertising to stimulate demand is common. Rather than implying the passivity thesis, this line of argument suggests

150. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

151. 246 U.S. 231 (1918).

152. See *id.* at 240-41.

153. See, e.g., Bebchuk, *Facilitating Competing Bids*, *supra* note 127, at 1051; Bebchuk, *Reply*, *supra* note 127, at 39; Haddock et al., *supra* note 23, at 707, 710-11; Gilson, *supra* note 127, at 62.

154. Easterbrook and Fischel have argued that the proper role of target management faced with a tender offer is passivity. See Easterbrook & Fischel, *Proper Role*, *supra* note 127, at 1178; Easterbrook & Fischel, *Auctions and Sunk Costs*, *supra* note 127, at 17-20. By contrast, see Bebchuk, *Facilitating Competing Bids*, *supra* note 127 (arguing that allowing managers to seek competing bids will maximize shareholder returns) and Gilson, *supra* note 127 (same).

a version of the English approach: target management can seek competing bids, can propose alternative transactions, and can lobby shareholders, but cannot engage in actions that prevent or delay the bid from going forward, such as litigation or poison pills.¹⁵⁵

Once one permits target shareholders and target managers to solicit competing bids, to propose alternative transactions, or to lobby shareholders, is the antitrust perspective then committed to allowing them to use poison pills to gain the time necessary to do so in an intelligent and orderly fashion? Again, it may be (depending on the determination of the allocational efficiency issue), but not necessarily: the additional time provided by poison pills may be anticompetitive insofar as it permits competitors to coordinate their actions.¹⁵⁶

A number of scholars have advanced an additional efficiency consideration, arguing that increased premiums from resistance to tender offers (including joint bargaining) may increase allocational efficiency by making it more likely that targets will invest in value-increasing projects.¹⁵⁷ In antitrust terms, this is an argument that restricting competition is justified because it will lead to greater investment.

From the antitrust perspective, this argument can be interpreted in two ways. On one level, it is simply a statement about the supply curve for companies or the supply curve for investment. The higher the premiums, i.e., the higher the price, the greater the supply of targets, and the greater the amount of internal investment by potential targets. Such an argument is equivalent to arguing that price fixing is justified because the increased profits make investment by the colluding firms more likely. In this form, the argument is a non sequitur. Without knowing whether an increase in investment will be efficient or inefficient, the argument cannot justify allowing shareholders to limit competition.¹⁵⁸

155. On the English approach, see, e.g., Bebchuk, *supra* note 19, at 1796–1801. The English rule has been defended as providing an appropriate solution to the problem of entrenchment by disloyal managers. The argument in the text suggests that it may likewise be a solution to the competitive dangers of defensive actions by *loyal* managers.

156. See Easterbrook & Fischel, *Auctions and Sunk Costs*, *supra* note 127, at 4–7. To draw an example from antitrust, the advance announcement of proposed price increases invites price following or “conscious parallelism” while reducing the costs to the proposer if the price rise is not generally followed. See, e.g., *DuPont v. FTC* (Ethyl Corp.), 729 F.2d 128, 134 (2d Cir. 1984) (advance notice of price changes held insufficient to establish violation given special history of industry practices); *United States v. General Elec. Co.*, 1977-2 Trade Cases (CCH) ¶¶ 61,659, 61,663 (E.D. Pa. 1977) (price protection plan adopted prospectively).

157. See, e.g., Haddock et al., *supra* note 23, at 707, 710–11; David W. Leebron, *Games Corporations Play*, 61 N.Y.U. L. Rev. 153, 205–14 (1986).

158. Consider the related market for initial public offerings. More companies are started when the IPO market is hot than when it is cold. Is a hot IPO market more or less allocationally efficient than a cold IPO market? One cannot tell without knowing more. All one knows is that higher prices call forth more companies, not that the

But there is a second, more interesting interpretation of the argument that relates more closely to a claim of allocational efficiency. One can read the argument as claiming not simply that higher premiums lead to more investment, but that allowing shareholders to bargain jointly eliminates a collective action problem that interferes with value-increasing investments. Specifically, the argument seems to be that unless shareholders can bargain with bidders jointly (by means of loyal managers), they will fail to make at least some investments whose present value is greater than the cost, because their collective action problems may prevent them from realizing the maximum value of those investments.

Stated in these terms, the argument is a version of a fairly common though controversial antitrust argument. The now standard defense of vertical restraints is that they are necessary to solve collective action problems, principally free rider problems, that otherwise would prevent the efficient level of distributor or retailer investment.¹⁵⁹ There are similar suggestions in the horizontal context in *Broadcast Music, Inc. v. CBS*:¹⁶⁰ a blanket license to perform copyrighted musical compositions was justified in part as a necessary mechanism for enforcing individual copyrights and, by extension, for encouraging an optimal investment in creating copyrightable works.¹⁶¹ Read this way, the argument is one in which particular restrictions on competition among shareholders are justified because they are, on balance, output-increasing rather than output-restricting. While this is the right sort of argument to make to justify joint bargaining by shareholders—it ties joint bargaining to a procompetitive goal—establishing that joint bargaining is, in fact, reasonably necessary to induce the optimal level of investment is more difficult. No empirical evidence indicates that shareholders' inability to coordinate their response to tender offers during the pre-Williams Act era of "Saturday Night Special," fast-track tender offers led to suboptimal investment. Without such evidence the argument remains purely speculative.

d. *The Ultimate Balancing*. — Even if shareholder defendants can establish that joint bargaining is reasonably necessary to some procompetitive goals, they would still have to establish the final step of the rule of reason analysis: that the procompetitive effects of the joint bargaining by shareholders outweigh the anticompetitive effects. Although a gen-

marginal benefit of those companies is greater than the marginal costs. Similarly, the fact that higher tender offer premiums will lead to greater investment in target companies does not indicate that lower premiums lead to inefficiently low investment or that the amount of investment is efficient at the higher level.

159. See, e.g., *Business Elecs. Corp. v. Sharp*, 485 U.S. 717, 724 (1988); *Monsanto Co. v. Sprayrite Serv. Corp.*, 465 U.S. 752, 762–63 (1984); *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 55–56 (1977).

160. 441 U.S. 1 (1979).

161. See *id.* at 18–20.

eral answer to this question is beyond the scope of this Article, one can make a number of preliminary observations.

First, unlike corporate law's traditional fiduciary perspective in which joint bargaining is the least ambitious (and easiest) basis for justifying poison pills, from the antitrust perspective the burden is on target shareholders to justify elimination of competition to tender—a burden that so far seems not to have been met. However one comes out on the ultimate balancing, one cannot escape the conclusion that joint bargaining by shareholders in response to a tender offer involves clear anticompetitive effects and potentially important, but less definite, procompetitive benefits.

Second, even if an allocational efficiency defense for joint shareholder bargaining can be established, the magnitude of the premiums that result implicates the hotly contested antitrust issue of the extent to which increases in allocational efficiency can justify significant distributional effects (the transfer of wealth from buyers to sellers).¹⁶² In any event, because rent-seeking tends to convert distributional effects into allocational effects, the magnitude of the wealth effects of joint bargaining should be of significant concern, regardless of one's view of the ultimate goals of antitrust.¹⁶³

Finally, this balancing, however difficult, addresses critical issues that are utterly ignored in the traditional corporate law approach. At best, that approach allows one to ask the question whether joint bargaining is in the interests of the shareholders. That is equivalent to asking whether price fixing is in the interests of manufacturers. While such an inquiry may be relevant (after all, if price fixing were not in the interests of manufacturers, then it could be condemned without even considering the effects on consumers), one cannot make it dispositive without missing at least half of the story—the impact on everyone else.¹⁶⁴

162. See sources cited *supra* note 79.

163. See sources cited *supra* note 78.

164. Two-tier and partial tender offers pose somewhat different issues, although the disappearance of two-tier offers renders these differences of largely academic interest. Confronted with a two-tier tender offer in which the back end is less than the pre-offer value of the shares to the shareholders, shareholders are subject to an additional source of pressure beyond that presented by one-tier offers. Not only might shareholders' choice be distorted with respect to that of a sole owner, but they may, at least in theory, be put in a position in which they will end up worse off by not tendering if the value of the minority share is less than the price before the offer was made.

This introduces an additional justification for joint bargaining into the antitrust analysis. Shareholder defendants might argue that two-tier offers may lead to a market failure because shareholders may be driven to tender even if they value the company more highly than the bidder does. See, e.g., *Bebchuk*, *supra* note 19, at 1723–26. Furthermore, they might argue that joint bargaining is reasonably necessary to cure this market failure.

Joint action to prevent or repair market failure is a classic antitrust justification for collective action. See, e.g., 7 *Arceda*, *supra* note 49, ¶ 1504, at 383. The debate over

2. *Populist/Distributional Arguments*. — An additional argument may be thought to justify different antitrust treatment of shareholders and widget manufacturers. Target shareholders are perceived to be “weaker” than bidders.¹⁶⁵ To the extent that corporate law is about protecting weaker uninformed parties¹⁶⁶ against stronger, better informed parties, one might justify allowing shareholders to band together to bargain jointly as a way of equalizing bargaining power. A similar argument can be made in the antitrust context. Consumers are perceived to be weaker than manufacturers so that one reason to prevent cartels is to protect weaker consumers from exploitation by stronger manufacturers.

This populist reading of antitrust and corporate law reflects fundamental features of both areas, but a number of differences exist when applied to these situations. First, in the antitrust case, the protection of the weaker party justifies preventing collective action, while in the corporate context it is used to permit it. A closer parallel would be with preventing bidders from colluding during a tender offer bidding auction. That case is truly parallel: in both, one is preventing the stronger parties from cooperating to the detriment of the weaker. To go beyond prohibiting agreements that restrain competition to protect weaker parties, to permitting agreements that restrain competition to offset superior bargaining power requires additional argument. In the antitrust context, the courts have usually refused to take that step.¹⁶⁷

two-tier tender offers can be viewed as a debate over whether such offers create a market failure (and thus should be prevented) or whether they repair a market failure (and thus should be permitted). In reply to defendant shareholders' market failure argument, plaintiff would argue that two-tier tender offers are necessary to overcome free riding by target shareholders that (potentially) leads to the rejection of value-increasing tender offers and are necessary to allow bidders to capture the full value of their investment in search. See, e.g., Grossman & Hart, *supra* note 148, at 54. One can argue further that two-tier offers, although perhaps structurally coercive considered independently, reintroduce competition to tender that was arguably eliminated by the Williams Act's pro rata and best price provisions.

A second and separate question is whether, assuming that two-tier tender offers can cause a market failure, joint bargaining is reasonably necessary to prevent that failure, or whether a less restrictive alternative might be available. Plaintiffs would presumably argue that a fair price charter provision would suffice to eliminate the market failure, but with less restriction on competition among shareholders to tender.

If one concludes that a collective bargaining agreement in response to a two-tier tender offer provides benefits without a less restrictive alternative (avoiding market failure, possibly increasing allocational efficiency), but also imposes potentially significant harm (eliminating competition among shareholders, permitting free riding), balancing is necessary. The ultimate question of which side is right is well beyond the scope of this Article and, in light of the disappearance of two-tier offers, largely moot.

165. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955–58 (Del. 1985).

166. See *supra* notes 18–19 and accompanying text.

167. See Sullivan, *supra* note 123, at 286–89. The countervailing power justification for collective bargaining is not very persuasive. If the premise is correct, that is, if a seller has market power, allowing buyers to bargain jointly may make the

A second difficulty with the populist justification is that the perception of shareholders as weak and uninformed is now simply inaccurate. Over the last twenty years, shareholdings have become increasingly concentrated. Institutional investors now hold approximately forty-five percent of all U.S. equities and an even greater percentage of the largest companies.¹⁶⁸ Moreover, because all shareholders get the benefit of the highest price offered to any one of them, individual shareholders benefit from the sophistication of the large shareholders.¹⁶⁹ In such a world, it no longer seems correct to think of shareholders as wards of the court.¹⁷⁰

3. *A Doctrinal Justification.* — Finally, one might argue that regardless of the merits, Congress has decreed that competition among shareholders in tendering stands on a fundamentally different footing than other competition among shareholders and, by decree, should not be analyzed under the antitrust laws. The Williams Act's pro rata and best price rules,¹⁷¹ the provisions that require a bidder making a tender offer to accept shares to an oversubscribed offer on a pro rata basis and to pay all shareholders the highest price offered regardless of when they tendered their shares, provide the core of this argument.

The purpose and effect of these provisions is to limit competition to tender among shareholders of a target company. As Senator Williams stated in explaining the Act, the pro rata rule "would outlaw tender offers on a first-come, first-served basis and thus eliminat[e] pressure on shareholders to make hasty deposits."¹⁷² Similarly, the House and Senate reports indicate that the purpose of the best price rule was "to assure fair treatment of those persons who tender their shares at the beginning of the tender period, and to assure equality of

situation worse by further restricting output. See *id.* For a detailed discussions of the conditions under which countervailing power will and will not be efficient, see F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 527-35 (3d ed. 1990).

168. See Carolyn K. Brancato, *The Pivotal Role of Institutional Investors in Capital Markets*, in *Institutional Investing: The Challenges and Responsibilities of the 21st Century* 3, 14 (Arnold Sametz ed., 1991); Rock, *supra* note 8, at 447-48.

169. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 638 (1979) (competition among firms for shoppers may protect non-shoppers, at least in the absence of an ability to price discriminate); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387, 1420-24 (1983) (same, applied to warranty and security interest terms); Michael H. Schill, *An Economic Analysis of Mortgage Protection Laws*, 77 Va. L. Rev. 489, 517-21 (1991) (applying shopper argument to mortgage protection terms).

170. See, e.g., *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966) (illustrating judicial concern for unsophisticated shareholders).

171. 15 U.S.C. § 78n(d)(6) (1988); *id.* § 78n(d)(7).

172. 113 Cong. Rec. 856 (Jan. 18, 1967) (statement of Sen. Williams).

treatment among all shareholders who tender their shares.”¹⁷³ On this argument, the Williams Act has already eliminated the competition to tender that would face shareholders in a state of nature.

In doctrinal terms, the question is whether the pro rata and best price rules impliedly repeal the Sherman Act in the tender offer context. I have argued elsewhere that the Williams Act does not and should not be interpreted as any sort of implied repeal of the Sherman Act as it applies to the market for control.¹⁷⁴ Rather, it should be (and has been) read as a limited legislative attempt to impose minimum ground rules on the tender offer process.¹⁷⁵ Consistent with the cases interpreting the Williams Act, the Act should be interpreted as leaving undisturbed whatever antitrust restrictions exist on joint bargaining agreements among shareholders because the Act contains no express exemption from the antitrust laws, and because there is no plain repugnancy or irreconcilable conflict between the pro rata and best price rules and the preservation of the remaining competition among shareholders. Indeed, the fact that the Williams Act does not prohibit, and has not been interpreted to prohibit,¹⁷⁶ two-tier or partial tender offers—which reintroduce strong competition among shareholders even under a proration rule—is substantial evidence that it should not be read as fully insulating shareholders from competitive pressures.

The language of the Williams Act, its legislative history, and the cases interpreting it are too sparse and unclear to require either conclusion. A court could come out either way. This leads the inquiry to the underlying issue with which we started: should competition among shareholders to tender be protected?

4. *Summary.* — Joint bargaining among target shareholders is thus deeply problematic from the antitrust perspective. On the anticompetitive side, joint bargaining like other cartel activity, leads to the conversion of buyer surplus into seller surplus, with attendant allocational and distributional effects. By contrast, joint bargaining’s procompetitive effects, while potentially significant, are less clearly demonstrated. On the current evidence, shareholder joint bargaining would be of doubtful validity under an antitrust analysis.

My treatment of agreements among target shareholders eliminating competition to tender is thus symmetrical with my treatment else-

173. S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

174. See Rock, *supra* note 20, at 1391–96.

175. See *id.*

176. See *Radol v. Thomas*, 772 F.2d 244, 255 (6th Cir. 1985), cert. denied, 477 U.S. 903 (1986); Note, Front-End Loaded Tender Offers: The Application of Federal and State Law to an Innovative Corporate Acquisition Technique, 131 U. Pa. L. Rev. 389, 394–413 (1982). By holding in *CTS* that the Williams Act does not preclude states from enacting legislation to protect shareholders from the pressure imposed by two-tier tender offers, the Supreme Court impliedly recognized that the Williams Act itself does not prohibit such bids.

where of agreements among competing tender offer bidders eliminating competition for control.¹⁷⁷ As I have argued, such agreements among competing bidders should be subject to Section 1 of the Sherman Act and indeed should be per se illegal. By contrast, an agreement among non-bidders (for example, the typical agreement among bidder shareholders establishing or maintaining the bidder firm) would not raise any antitrust concern because when such shareholders are not themselves bidders or potential bidders, agreements among them do not eliminate any competition.

The antitrust perspective on tender offers has a number of virtues. First, it calls into question joint bargaining by shareholders and the functional equivalent, the use of a poison pill by loyal managers. The antitrust perspective links the issue directly to the more general problem of the circumstances under which joint bargaining by competitors or potential competitors is justifiable. As such, it provides a perspective lacking in the fiduciary duty analysis which, by framing the question in terms of management disloyalty and entrenchment, largely assumes that the use of poison pills by loyal managers is unproblematic.

In addition, the perspective suggests that antitrust provides the natural doctrinal framework for law and economics analyses. The core of the analyses of tender offers—allocational efficiency—fits far better into a jurisprudence of competition than a jurisprudence of fiduciary duty.

But the shift in perspectives may accomplish even more. By locating the issues within the antitrust framework, they are linked to a more general debate on the relationship between competition and cooperation. In demanding consistency between the treatment of competing widget manufacturers and competing shareholders, the antitrust perspective forces the articulation of the relevant differences, if any, between the two.

D. *Stakeholder Coalitions*

In a recent article, Professor John Coffee describes the interplay between bidders, managers, shareholders, and non-equity stakeholders during battles for control in terms of the formation and dissolution of coalitions.¹⁷⁸ As pressure on managers from shareholders and bidders increases, management may seek to form coalitions with bondholders or employees against shareholders and bidders. Shareholders may seek to form coalitions with bidders against bondholders, employees, and managers. Employees and bondholders may form coalitions with bidders against shareholders and managers, and so on.

In describing the bargaining process among the different corpo-

177. See Rock, *supra* note 20, at 1386–1402.

178. See John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 Geo. L.J. 1495 (1990).

rate constituencies, Coffee describes a process in which actors at times fail to achieve their collective self-interest. Coffee characterizes this failure as a "market failure,"¹⁷⁹ asserting that if parties are unable to make credible commitments, they "may make choices that yield individually rational, but collectively irrational, outcomes."¹⁸⁰ Moreover, courts, by refusing to enforce parties' commitments, may be instrumental in bringing about this (apparently regrettable) state of affairs: "Courts are not necessarily at stage center in this process, and legal rules that attempt to preclude collusion may only complicate the bargaining process by locking the parties into a familiar problem known to game theorists as the 'Prisoner's Dilemma.'"¹⁸¹

Although Coffee provides a persuasive positive account, in these more normative comments one sees the corporate law intuition shining through. He moves from the identification of a collective action dilemma to the characterization of that dilemma as a "market failure" to the conclusion—albeit very cautious and tentative—that escape should be facilitated. But the antitrust perspective teaches that each move is a distinct and by no means obvious normative step. Assuming that Coffee is correct in observing that at times stakeholders are unable to achieve their collectively rational result because of an inability to make enforceable commitments, is that a failure or a success? Is the stakeholder collective choice dilemma one from which escape should be facilitated or prevented?

How one answers these questions depends on where one starts. Suppose one adopts a shareholder primacy model of corporate governance, that is, the view that managers should govern the corporation to maximize shareholders' gains, subject to external constraints imposed by statute and regulation.¹⁸² On that view, the criterion for whether to facilitate or frustrate escape would be whether the manager/stakeholder coalition interfered with ensuring that managers represented shareholders. In the shareholder primacy model, then, managers and non-equity stakeholders should be prevented from escaping from their collective action problem because a successful escape would permit managers and stakeholders to form an alliance against the interests of the shareholders.¹⁸³ Indeed, on this view, the stakeholders' dilemma,

179. *Id.* at 1532.

180. *Id.* at 1545.

181. *Id.* at 1499.

182. See, e.g., Clark, *supra* note 8, § 1.2.3., at 17–19, § 16.2.1, at 677–81.

183. That of course leaves open the question that courts have had to struggle with: how do you distinguish between true arm's length agreements and collusive behavior? Compare *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 592 F. Supp. 203, 224–28 (N.D. Tex. 1984), *aff'd in part, vacated in part, and remanded*, 741 F.2d 707 (5th Cir. 1984) (declining to enjoin "springing warrant" in bond that was functional equivalent to poison pill rights offering) and *In re Desoto, Inc. Shareholder Litig.*, [1989–90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,964 (Del. Ch. 1990) (change of control provision inserted into sales contract with largest customer not enjoined) with *Air Line Pilots*

like the Cartelists' Dilemma, is a market success, not a failure.

But Coffee approaches the question from a somewhat different perspective. In place of the shareholder primacy model, Coffee inclines towards a broader view of corporate governance according to which "implied contracts" or "implicit bargains" between the firm and stakeholders should be respected.¹⁸⁴ On this view, because such expectations are not (and, assertedly cannot be) protected by explicit and enforceable contracts, stakeholder coalitions should be permitted. One can conclude that such mechanisms are appropriate, however, only if one takes the view that: (1) stakeholders have entitlements in the firm beyond those embodied in explicit contracts; (2) those entitlements can only be protected by means of coalitions with *other* constituencies; and (3) stakeholders cannot be protected without permitting or facilitating escape from their collective action dilemma.¹⁸⁵

A second argument for helping stakeholders and managers overcome their collective action problems could be made if one could show that permitting or facilitating escape would make the firm more valuable. For example, if one concluded that tin parachutes, employee representation on the board of directors, or ESOPs improved a firm's labor relations and led to more efficient operation of the firm,¹⁸⁶ and

Ass'n Int'l v. UAL Corp., 717 F. Supp. 575, 586–89 (N.D. Ill. 1989) (enjoining "labor contract poison pill").

184. See Coffee, *supra* note 178, at 1548–49. Coffee's endorsement of stakeholder coalitions is not unqualified since, as he notes, "coalition" may at times simply be no more than a synonym for "collusion." *Id.* at 1547. Nevertheless, he argues that stakeholders ought to be able to protect themselves in takeover situations and, absent appropriate legislation or the ability to contract expressly, coalitions are their best bet and for that reason ought to be respected. See also John C. Coffee, Jr., *Shareholders Versus Managers: The Strain in the Corporate Web*, 85 Mich. L. Rev. 1, 23–24, 93–103 (1986) (examining how perception of modern corporation as a complex set of contracts among various constituencies should affect substance of corporate takeover/defense laws); John C. Coffee, Jr., *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 Wis. L. Rev. 435, 446–50 (1988) (suggesting model of corporate directors as mediators between shareholders and stakeholders to protect implicit and explicit contracts).

185. This view is analogous to the strain in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 16–24 (1979), permitting blanket licenses and joint enforcement as a necessary means of enforcing copyrights. *Broadcast Music* differs from the corporate governance context in that copyright holders are beneficiaries of a statutory entitlement that the court believed would be worthless without collective enforcement. By contrast, stakeholders' entitlement to protect "implicit contracts" is less clear. But that may have been changed by state antitakeover legislation. One reading of those statutes is that most seek to establish precisely that entitlement. See generally Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 Mich. L. Rev. 846, 848 (1989); Millon, *supra* note 134, at 255–70.

186. See, e.g., Alexander C. Gavis, *A Framework for Satisfying Corporate Directors' Responsibilities Under State Nonshareholder Constituency Statutes: The Use of Explicit Contracts*, 138 U. Pa. L. Rev. 1451, 1479–91 (1990); Patrick J. Ryan, *Corporate Directors and the "Social Costs" of Takeovers—Reflections on the Tin Parachute*, 64 Tul. L. Rev. 3, 38–48 (1989).

that markets were sufficiently competitive to prevent rent-seeking, that might be a reason for establishing appropriate mechanisms for collective action.

But until proponents of stakeholder coalitions establish one of these premises, they cannot conclude that the failure of stakeholder coalitions is a collective action failure rather than a collective action success.

E. State Takeover Regulation and the Sherman Act

Both the plausibility and importance of the antitrust perspective are further demonstrated by the insight provided when the focus is shifted to the apparently unrelated issue of the constitutionality of state antitakeover statutes. The antitrust perspective redirects the analysis in a unique and revealing way.

To date, the analyses of state takeover statutes have been limited to two doctrinal frameworks: the dormant Commerce Clause and preemption by the Williams Act.¹⁸⁷ Neither approach has been particularly satisfactory in responding to what is most troubling about these state legislative initiatives: the state's attempts, often at the instigation of self-interested managers of large state corporations, to interfere with—indeed, to opt out of—the competitive market for corporate control.¹⁸⁸

187. See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 78–94 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 630–46 (1982); Allen Boyer, When it Comes to Hostile Tender Offers, Just Say No: Commerce Clause and Corporation Law in *CTS Corp. v. Dynamics Corp. of America*, 57 U. Cin. L. Rev. 539, 540–43 (1988); Maureen B. Callahan & David J. Burman, The Validity of Washington's Antitakeover Act Under the Commerce and Supremacy Clauses, 13 U. Puget Sound L. Rev. 41 passim (1989); Daniel R. Fischel, From *MITE* to *CTS*: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading, 1987 Sup. Ct. Rev. 47, 71–90 (1987); Donald C. Langevoort, The Supreme Court and the Politics of Corporate Takeovers: A Comment on *CTS Corp. v. Dynamics Corp. of America*, 101 Harv. L. Rev. 96 passim (1987); Robert A. Prentice, The Role of States in Tender Offers: An Analysis of *CTS*, 1988 Colum. Bus. L. Rev. 1, 13–21, 33–40 (1988); Donald H. Regan, Siamese Essays: (I) *CTS Corp. v. Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1865–84 (1987); Elliott J. Weiss, What Lawyers Do When the Emperor Has No Clothes: Evaluating *CTS Corp. v. Dynamics Corp. of America* and Its Progeny (pts. I & II), 78 Geo. L.J. 1655, 1673–82 (1990), 79 Geo. L.J. 211 (1990) [hereinafter Weiss, Emperor I and Weiss, Emperor II] (discussing fully briefs and opinions in twelve post-*CTS* constitutional challenges to state takeover statutes arising in the two years after the Supreme Court's opinion in *CTS*, all of which limited analysis to Williams Act preemption and the dormant Commerce Clause).

188. Judge Posner articulated the concern clearly:

Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute.

CTS, 794 F.2d 250, 264 (7th Cir. 1986), rev'd, 481 U.S. 69 (1987); see also Millon, *supra*

Under the dormant Commerce Clause, the inquiry has focused on two principal issues: discrimination against out of state actors and the burden on interstate commerce resulting from potentially inconsistent regulation by the states.¹⁸⁹ In the leading Supreme Court case on the constitutionality of state takeover statutes, *CTS Corp. v. Dynamics Corp.*,¹⁹⁰ the Court upheld the constitutionality of the Indiana control share acquisition statute¹⁹¹ against a dormant Commerce Clause challenge on the grounds that it did not discriminate against out of state actors and, because it was limited to state-chartered corporations, did not create a significant possibility of inconsistent state regulation.¹⁹²

By limiting takeover legislation to state-chartered corporations, states have been able to accomplish a large part of their goal of insulating state corporations from the competitive market for control. Post-*CTS*, the dormant Commerce Clause has ceased to provide any meaningful limit on takeover legislation governing state-chartered corporations.¹⁹³ But in focusing on discrimination and the possibility of inconsistent regulation, the dormant Commerce Clause analysis fails to address the more fundamental substantive questions relating to competition posed by a state's opting out of the competitive national market for control. The Commerce Clause's focus on political union makes it an unsuitable framework for evaluating the effect of state restrictions on competition.¹⁹⁴

note 134, at 225 (discussing state antitakeover legislation as attempts to opt out of a competitive market for control).

The question posed by state takeover legislation is whether, and under what circumstances, a state is authorized to opt out of a competitive market for corporate control.

189. See *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335–43 (1985); *CTS*, 481 U.S. at 87–89; *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37–49 (1980).

190. 481 U.S. 69 (1987).

191. Ind. Code Ann. §§ 23-1-42-1 to 23-1-42-11 (Burns 1989).

192. In *CTS*, the Supreme Court largely ignored the uncertain and unstructured *Pike* balancing of burdens on out of state interests against benefits to in state interests. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Whether the *Pike* test survives *CTS*, either in general or with regard to state takeover legislation, is unclear. See *CTS*, 481 U.S. at 95–96 (Scalia, J., concurring) (“[The *Pike* balancing] is ill suited to the judicial function and should be undertaken rarely if at all.”); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505–09 (7th Cir.) (Easterbrook, J.), cert. denied, 110 S. Ct. 367 (1989); Regan, *supra* note 187, at 1866–68; Weiss, Emperor I, *supra* note 187, at 1674; Weiss, Emperor II, *supra* note 187, at 238–64 (discussing post-*CTS* corporate law cases: all but *Amanda* apply *Pike* test even though courts are uncertain of its continued vitality).

193. See, e.g., Weiss, Emperor II, *supra* note 187, at 225–64 (discussing post-*CTS* cases upholding state takeover statutes covering state chartered corporations). By contrast, the dormant Commerce Clause continues to restrain extra-territorial takeover legislation. See *id.* at 217–25.

194. As Tribe points out, “the negative implications of the Commerce Clause derive centrally from a political theory of union, not primarily from an economic theory of free trade. The function of the clause is to ensure national solidarity, not national efficiency.” Laurence H. Tribe, *American Constitutional Law* 25 (Supp. 1979).

The Williams Act preemption analysis has similarly failed to address these fundamental issues relating to competition.¹⁹⁵ As the Williams Act does not explicitly preempt any state takeover regulation, the preemption analysis has necessarily focused on the implied preemption question whether a state's statute frustrates the purposes of the Act. In *CTS*, the Court took a limited view of the Williams Act as only imposing general federal securities law disclosure requirements and basic procedural rules for tender offers.¹⁹⁶ Casting doubt on the broad view of the purposes of the Williams Act as mandating neutrality between management and bidder contained in the plurality opinion in *Edgar v. MITE Corp.*,¹⁹⁷ the *CTS* Court held that, even accepting the *MITE* view, the Indiana statute withstood challenge because it protected shareholders and posed only an illusory conflict with the Williams Act time schedule.¹⁹⁸

The lack of any clear commitment to a competitive market for control in the Williams Act and its legislative history, combined with the relative opacity of the *CTS* opinion,¹⁹⁹ makes the Williams Act a severely limited framework within which to consider attempts by states to opt out of, or to enable state corporations to opt out of, competition in that market. The content and structure of the Williams Act—a statute imposing disclosure requirements on and ground rules for tender offers—shifts the inquiry away from these troubling aspects of state takeover legislation. In implicitly rejecting the *MITE* plurality's broad view of the Williams Act, the *CTS* Court seems also to have rejected the inclusion of a concern with preserving a competitive market for control into the Williams Act preemption analysis.²⁰⁰

195. See sources cited *supra* note 187.

196. See *CTS*, 481 U.S. at 79.

197. 457 U.S. 624 (1982).

198. See *CTS*, 481 U.S. at 81–84. In contrast to the *CTS* Court's narrower conception of the Williams Act, the *MITE* plurality had argued that the ultimate policy underlying the Act was "investor protection" to be achieved by "maintaining the balance between management and the bidder." *MITE*, 457 U.S. at 634. The plurality would have held the Illinois antitakeover statute at issue in *MITE* to be preempted because it upset this "policy of neutrality" by 1) providing a 20-day precommencement period that unduly favored incumbent management 2) providing for a hearing on the tender offer without a deadline which would allow management "to stymie indefinitely a takeover" and 3) allowing the Illinois Secretary of State to pass on the "fairness of the tender offer at the expense of 'investor autonomy.'" *Id.* at 635–40.

199. The *CTS* opinion is somewhat opaque on why the Indiana statute was not preempted, on whether any state statute that did not directly conflict with the Williams Act would be preempted on the grounds that it "frustrated the purposes" of the Williams Act, and finally, on whether the Williams Act would preempt more restrictive state takeover statutes. Weiss, *Emperor I*, *supra* note 187, at 1678–82.

200. In *MITE*, Justice White, joined by Justices Burger and Blackmun, had argued that any state legislation that interfered with what he saw as the Williams Act policy of neutrality between bidders and target management was preempted. See *MITE*, 457 U.S. at 630–34. In his related discussion of the constitutionality of the statute under the *Pike* balancing test, see *supra* note 192, Justice White, this time joined by Justices Burger,

What the cases and commentators have uniformly missed is what seems almost too obvious from the antitrust perspective: the first and most appropriate place to look for a national commitment to competitive markets and for restrictions on state attempts to opt out of competitive markets is not the dormant Commerce Clause or the Williams Act, but the *Sherman Act*. It is the Sherman Act that establishes competition as the fundamental principle of commerce.²⁰¹ And it is antitrust that, in other contexts, has repeatedly been forced to confront the extent to which states may displace the competitive processes protected by the Sherman Act. Given the confused and obscure elements of antitrust federalism doctrine, it is hard to claim that antitrust offers clear and obvious answers to the questions posed by state takeover legislation. Rather, I make the more modest claim that antitrust federalism provides a useful way of thinking about the difficult issues raised by state takeover legislation and for relating state attempts to displace competition in the market for control to other state attempts to displace market competition.

1. *The Parker Doctrine*. —The essence of antitrust federalism, also known as the “*Parker* state action doctrine,”²⁰² is the proposition that the Sherman Act prohibits private action that displaces competition, but does not proscribe anticompetitive restraints imposed by a State as an act of government.²⁰³ Ultimately, the *Parker* doctrine reflects a con-

Stevens, O'Connor, and Powell, held that the Illinois statute imposed a burden on interstate commerce by interfering with “the reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition.” *MITE*, 457 U.S. at 643 (citing Easterbrook & Fischel, *Proper Role*, supra note 127, at 1173–74). This view of the Williams Act and the Commerce Clause as protecting a competitive market for control was clearly rejected by the court in *CTS*.

201. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (“Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.” (footnotes omitted)); *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“[Federal antitrust laws] are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedoms.”); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (“[Federal antitrust law] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”).

202. After the leading case of *Parker v. Brown*, 317 U.S. 341 (1943).

203. See *id.* at 350–52; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975). For recent informative and enlightening discussions, criticisms, and reformulations of the *Parker* doctrine, see Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 45–49 (1983); Einer R. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 668–729 (1991); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 508–18 (1987); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227, 229–34, 247–56 (1987); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of*

strained view of antitrust as limited to the prevention of private restraints of trade rather than as embodying an overarching commitment to competitive markets or a view that economically inefficient restraints are against public policy.²⁰⁴ At the same time, antitrust federalism reflects a strong vision of federalism that permits states to choose alternative forms of economic regulation.²⁰⁵ This two-faceted view, precisely because it is generally applicable to state economic regulation, provides an important perspective on state takeover legislation.

The attempt to distinguish between private and state restraints on competition has led to doctrinal intricacy and, some argue, incoherence.²⁰⁶ Einer Elhauge provides the most comprehensive and compelling description of the numerous and somewhat inconsistent cases. He shows that the cases embody a

process view that restraints on competition must be subject to antitrust review whenever the persons controlling the terms of the restraints stand to profit financially from the restraints they impose. Conversely, restraints are immune from antitrust review whenever *financially disinterested and politically accountable* persons control and make a substantive decision in favor of the terms of the challenged restraint before it is imposed on the market.²⁰⁷

He argues further that distinguishing between private and state action by reference to the financial disinterest and political accountability of the decision maker is the most effective way of furthering the antitrust goal of preventing private restraints of trade and the shift in wealth that accompanies them, while retaining a deference to state economic regulation that is essential to federalism.²⁰⁸ The compromise embodied in antitrust federalism holds promise for resolving the analogous tensions created by state takeover legislation.

2. *Antitrust Federalism and State Takeover Legislation*. — The Sherman Act intersects with state legislation in two separate but related litigation

the State Action Exemption After *Midcal Aluminum*, 61 B.U. L. Rev. 1099, 1125–36 (1981) (criticizing actual state supervision requirement); S. Paul Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Law, 49 N.Y.U. L. Rev. 693 *passim* (1974); Matthew L. Spitzer, Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory, 61 S. Cal. L. Rev. 1293, 1318–26 (1988); John S. Wiley, Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713, 729–39 (1986).

204. See Elhauge, *supra* note 203, at 672.

205. As such, *Parker* is a counterpart to the contemporaneous rejection of substantive due process. On the relation between the *Parker* doctrine and the rejection of substantive due process, see Paul R. Verkuil, State Action, Due Process, and Antitrust: Reflections on *Parker v. Brown*, 75 Colum. L. Rev. 328, 330–41 (1975).

206. See Easterbrook, *supra* note 203, at 26; Page, *supra* note 203, at 1099; Wiley, *supra* note 203, at 714.

207. Elhauge, *supra* note 203, at 671 (emphasis added). Merrick Garland makes a similar argument. See Garland, *supra* note 203, at 487.

208. See Elhauge, *supra* note 203, at 682–96.

contexts. In the first posture, the claim is made that a state statute is invalid because it is preempted by the Sherman Act. This is the familiar preemption question.²⁰⁹ As in the typical preemption context, enforcement of a state statute will not be enjoined absent irreconcilable conflict with federal antitrust policy.²¹⁰ When facially challenged, a state statute will be enjoined only if it mandates a per se violation of the Sherman Act without active state supervision.²¹¹ By contrast, conduct subject to the rule of reason may or may not be anticompetitive, and therefore a statute permitting such conduct does not inevitably conflict with the Sherman Act so as to require preemption.²¹²

In the second context, a state statute is used defensively in an attempt to avoid liability for conduct that could otherwise violate federal antitrust law.²¹³ In this situation, the question is typically couched in terms of whether the state statute "immunizes" the challenged conduct.²¹⁴ The issue however has less to do with implied immunity than

209. See, e.g., *Parker v. Brown*, 317 U.S. 341, 350 (1943) (whether the California raisin marketing plan was preempted by the Sherman Act); *California v. ARC Am. Corp.*, 490 U.S. 93, 103 (1989) (whether state statutes permitting indirect purchasers to recover under state antitrust statutes were preempted by federal antitrust law's restriction on recovery by indirect purchasers); 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987) (whether New York statute mandating mark up above "posted" wholesale price was preempted by Sherman Act); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (whether California "designation statute" preventing unlicensed beverage importer from accepting delivery was preempted by Sherman Act); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980) (whether California statute mandating resale price maintenance was preempted by Sherman Act); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978) (whether Maryland's prohibition on vertical integration in gasoline distribution was preempted by Sherman Act or Robinson-Patman Act); *Bates v. State Bar*, 433 U.S. 350, 359 (1977) (whether the Supreme Court of Arizona's prohibition on attorney advertising was preempted by §§ 1 and 2 of the Sherman Act); *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41-45 (1966), commerce clause analysis overruled by *Healy v. Beer Inst.*, 109 S. Ct. 2491, 2502 (1989) (whether liquor price affirmation statute requiring brand owners to file prices with affirmation that prices are no higher than those in other states was preempted by Sherman Act); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951) (whether Louisiana law authorizing price-fixing by liquor retailers was preempted by the Sherman Act).

210. See *Duffy*, 479 U.S. at 341-42; *Rice*, 458 U.S. at 659; *Midcal*, 445 U.S. at 103.

211. See *Midcal*, 445 U.S. at 105.

212. See *Duffy*, 479 U.S. at 342.

213. A subcategory of this second context involves the antitrust liability of municipalities. See, e.g., *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 48 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394 (1978). These cases raise somewhat different issues that are not relevant to the matters at hand. For a discussion of these cases, see Elhauge, *supra* note 203, at 732-38.

214. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 65 (1985) (whether truckers engaged in collective ratemaking authorized and supervised by the states are immune from antitrust liability); *Town of Hallie*, 471 U.S. at 47 (whether municipality's anticompetitive activities are protected from antitrust

it does with whether, in the specific factual circumstances, the Sherman Act preempts an arguably inconsistent state statute.²¹⁵ The cases hold that when the state acts directly in its sovereign, legislative capacity, there is no antitrust liability.²¹⁶ When, however, the state authorizes private action, the test for antitrust immunity as articulated in *California Retail Liquor Dealers Association v. Midcal Aluminum*,²¹⁷ is whether the conduct is both clearly authorized and actively supervised.²¹⁸ Authorization of the conduct must be clearly articulated and affirmatively expressed in order to ensure that it is a state policy rather than merely private action. Conduct must also be actively supervised by the state itself—for example, by actually setting prices or by reviewing the reasonableness of prices set by private parties—in order to prevent states from “casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”²¹⁹

a. *Indiana Control Share Acquisitions Act*. — Consider first the Sherman Act facial preemption analysis of the Indiana Control Share Acquisitions Act (ICSA),²²⁰ the statute upheld against Williams Act preemption and dormant Commerce Clause challenges in the landmark *CTS* case. ICSA conditions the transfer of voting rights on approval by a majority of the pre-existing disinterested shareholders. By denying a bidder voting rights until approval, ICSA eliminates competition to tender by allowing shareholders collectively to decide whether or not the bid should proceed.²²¹ Moreover, under ICSA, the choice of whether or not to eliminate competition to tender is left to the share-

liability); *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984) (whether bar exam grading committee immune from antitrust liability); *Louisiana Power & Light*, 435 U.S. at 394–408 (whether city is immune from antitrust liability by virtue of its identity as a city and without a specific state authorization); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592–98 (1976) (whether defendant utility immune from antitrust liability by virtue of state public utility commission approval and enforcement of rates); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786 (1975) (whether state affiliation of bar association immunizes it from liability for setting minimum rates).

215. See, e.g., *Community Communications Co.*, 455 U.S. at 60–71 (Rehnquist, J., dissenting). For a counter-argument, see Harry First, *Private Interest and Public Control: Government Action, the First Amendment, and the Sherman Act*, 1975 *Utah L. Rev.* 9, 43–45.

216. See, e.g., *Parker v. Brown*, 317 U.S. 341, 352 (1943); *Hoover*, 466 U.S. at 567–69 (1984) (“Thus, under the Court’s rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws.”); *Bates v. State Bar*, 433 U.S. 350, 360 (1977); *Goldfarb*, 421 U.S. at 788.

217. 445 U.S. 97 (1980).

218. See *id.* at 105; *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985).

219. *Southern Motor Carriers*, 471 U.S. at 62 n.23 (quoting *Midcal*, 445 U.S. at 106).

220. Ind. Code Ann. §§ 23-1-42-1 to 23-1-42-11 (West 1989).

221. See *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 83 n.7 (1987). Indeed, some have defended state takeover legislation on the grounds that it facilitates just this sort of joint bargaining. See, e.g., Oesterle, *supra* note 19, at 65–66.

holders and managers, who have the ability to opt into the provisions of the statute during a transition period or to opt out thereafter.

Under an antitrust federalism analysis, ICSA would not be facially preempted because it does not mandate conduct, and because the conduct authorized (the elimination of competition among shareholders to tender) is unlikely to be considered a per se violation of Section 1.²²² As such, ICSA would not create any irreconcilable conflict with the Sherman Act.

But suppose the question arose in the second context: a bidder alleges that the shareholder vote authorized by ICSA constitutes a contract, combination or conspiracy in restraint of trade under Section 1 because it eliminates competition among shareholders to tender. Shareholders of the corporation defend by asserting that the vote was authorized by ICSA and therefore exempt from antitrust liability.

Because ICSA simply provides a mechanism by which interested and politically unaccountable shareholders may eliminate competition to tender, it falls on the private action side of the private action/state action dichotomy.²²³ ICSA therefore protects shareholders from any antitrust liability only if it meets the two prongs of the *Midcal* test: the restraint of competition is “one clearly articulated and affirmatively expressed as state policy” and the policy is actively supervised by the state itself.²²⁴

The first prong is easily satisfied: ICSA, by its terms, authorizes the shareholders to bargain collectively by means of the shareholder vote on the transfer of voting rights. By contrast, the “active supervision” requirement seems to be absent. No state actor or agency regulates the substantive terms of the transaction.²²⁵ ICSA shares the critical defect of the wine and liquor price posting cases,²²⁶ namely, it

222. See *supra* notes 210–211 and accompanying text.

223. The decision to opt in or to opt out of the terms of a state takeover statute has been viewed as private, not state action. See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del. 1985); John C. Coffee, Jr., *The Future of Corporate Federalism*, 8 Cardozo L. Rev. 759, 774 (1987) (“Action taken by shareholders pursuant to enabling legislation is private action which neither offends the Commerce Clause nor is preempted by the Williams Act.”); Prentice, *supra* note 187, at 80; see also *CTS*, 481 U.S. at 94 n.14 (because the Court decided the case on other grounds, it did not reach question of whether a corporation’s decision under ICSA is purely private activity beyond the reach of the Commerce Clause).

224. *Midcal*, 445 U.S. at 105.

225. See, e.g., *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (“The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”) (quoted in Elhauge, *supra* note 203, at 693); see also Elhauge, *supra* note 203, at 695 (“state action immunity applies only when a financially disinterested state official controls the terms of the challenged restraint.”).

226. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *California Retail Liquor Dealers Ass’n v. Midcal Alum., Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

allows private parties to set the price.²²⁷ The only supervision is provided by the state through judicial scrutiny of a contest for control and would seem to be inadequate to satisfy the active supervision requirement for state action immunity.²²⁸

If this analysis is correct, ICSA provides no immunity from any antitrust liability to which shareholders would be subject for eliminating competition to tender.²²⁹ That, of course, leaves open the underlying question of whether elimination of competition to tender raises any substantial antitrust issue at all.²³⁰

b. *Nonshareholder Constituency Statutes*. — The analysis of directors' duty or nonshareholder constituency (NSC) statutes, versions of which have been adopted by numerous states, would proceed in the same way as the ICSA analysis.²³¹ In a typical statute of this sort, target managers are permitted or required to consider the interests of nonshareholder constituencies in responding to a tender offer.²³²

An NSC statute, like a control share acquisition statute, delegates the decision to opt out of competition for control to an interested party who is not politically accountable. In both cases, while the "clear articulation" requirement has arguably been satisfied, "active supervision" is lacking. As such, the statutes fail to meet the requirements of the *Parker* doctrine.²³³

But while the *Parker* analysis is similar, the underlying antitrust

227. See Elhauge, *supra* note 203, at 684–85. The Court indicated that the cases would have been viewed differently if the statutes had mandated a specific mark up or if the state had set the prices or reviewed their reasonableness. See *Duffy*, 479 U.S. at 344 n.6; *Midcal*, 445 U.S. at 105–06 & n.9.

228. See *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (holding that subsequent judicial review of physician staff privileges decision does not constitute adequate state supervision).

229. The most attractive feature of ICSA from the traditional corporate law perspective, namely, collective action by shareholders, see, e.g., Donald C. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corporation of America*, 101 Harv. L. Rev. 96, 104 (1987), thus proves most troubling from the antitrust perspective.

230. See *supra* text accompanying notes 171–176.

231. For a discussion of NSC statutes, and citations to state enactments, see Millon, *supra* note 134, at 240–46.

232. See, e.g., 15 Pa. Cons. Stat. Ann. §§ 515, 1715 (Supp. 1991) (directors may consider nonshareholder interests) and Conn. Gen. Stat. Ann. § 33-313(e) (West Supp. 1991) (directors must consider nonshareholder interests). For a more complete discussion and additional citations, see Millon, *supra* note 134, at 240–46.

Unlike the control share acquisition statutes, of which ICSA is a typical example, the NSC statutes cannot be interpreted as shareholder protective measures. See Johnson & Millon, *supra* note 185, at 848–53. Rather, the goal of such statutes seems to be to protect nonshareholder constituencies indirectly from the effects of a competitive market for control by granting management greater discretion in responding to bids.

233. In terms of the antitrust federalism analysis, a statute that gave discretion to the state's Secretary of State to permit or prohibit tender offers—the sort of statute at issue in *Edgar v. MITE*, 457 U.S. 624 (1982)—would fare better. Unlike ICSA or an NSC statute, such a statute would satisfy the *Parker* requirements because the decision to

analysis poses some different issues. While ICSA provides a mechanism for competing shareholders to eliminate competition to tender, an NSC statute removes the decision from the shareholders entirely, giving to target management the essentially unreviewable power to decide whether or not a bid will succeed. This raises the question whether the threshold "concert of action" requirement for applicability of Section 1 is present. Unlike ICSA, the NSC statute would not seem to involve any concert of action between competing shareholders.

Somewhat oddly, this does not seem to be a problem within the *Parker* doctrine. The Supreme Court held in both *Midcal*,²³⁴ and *324 Liquor Corp. v. Duffy*²³⁵ that state statutes mandating posting of liquor and wine prices by wholesalers and maintenance of those prices by retailers constituted resale price maintenance even though no agreements were present between wholesalers and retailers. In substance, the Court held that if the effect of the state statutes was to mandate behavior which, if voluntary, would have been a violation of Section 1, then that was sufficient for purposes of the concert of action requirement.²³⁶ The limitation on competition to tender imposed by NSC statutes involves as much concert of action as was present in the liquor and wine posting cases.

If Professor Elhauge is correct that the key to understanding the satisfaction of the concert of action requirement in the wine and liquor cases is whether the person or entity setting the terms is financially interested,²³⁷ the analysis of the NSC statutes becomes clearer. As in *Midcal* and *Duffy*, the NSC statutes are problematic because they eliminate competition and delegate the setting of the terms to a financially interested party, target management.

Now contrast ICSA and the NSC statutes with the earlier form of takeover legislation involved in *MITE*.²³⁸ At issue in *MITE* was a statute that granted discretion to the Illinois Secretary of State to block a tender offer if the Secretary believed that it was necessary to protect the shareholders of the target company.²³⁹ The effect of the statute would have been to remove covered corporations from the competitive market for control.²⁴⁰ Leaving aside the extraterritorial impact of the

eliminate competition for control would be delegated to a disinterested and politically accountable actor.

234. 445 U.S. 97 (1980).

235. 479 U.S. 335 (1987).

236. See *Midcal*, 445 U.S. at 103; *Duffy*, 479 U.S. at 342.

237. See Elhauge, *supra* note 203, at 687-88.

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

239. See *id.* at 626-27.

240. The Illinois statute applied to any corporation or other issuer of securities of which shareholders located in Illinois own 10% of the class of equity securities subject to the offer, or for which any two of the following three conditions are met: the corporation has its principal executive office in Illinois, is organized under the laws of Illinois,

Illinois statute and the resulting burden on interstate commerce—the basis upon which the majority held the statute unconstitutional—antitrust federalism identifies an important difference among the different state takeover statutes.

The Illinois statute, like ICSA and the NSC statutes, displaced competition for control. But the Illinois statute differed in that it granted the power to veto a transaction to the Secretary of State, an arm of the sovereign. Because the decision to eliminate competition for control was vested in a disinterested, politically accountable actor, unlike ICSA and the NSC statutes, it would likely have satisfied the requirements of the *Parker* doctrine.²⁴¹

Finally, the antitrust perspective provides some insight into a remaining aspect of state takeover legislation: that it so often seems to be the anticompetitive product of concentrated efforts of financially interested actors. Nonshareholder constituencies—target management, employees, suppliers, customers, and local and state governments—have been, or have perceived themselves to be, losers in the competitive market for control. Banding together, they have been remarkably successful in achieving legislatively what they have been unable to achieve by bargaining: insulation from hostile tender offers.

Although such collective activities may be anticompetitive from an antitrust perspective, they are clearly not prohibited by the Sherman Act. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,²⁴² the Court construed the Sherman Act to permit collective efforts by railroads to disadvantage competing truckers through the enactment of favorable legislation partly because an alternative construction would raise serious constitutional questions. Even if one interprets NSC statutes as the anticompetitive product of collective action by nonshareholder constituencies, such activity would fall squarely within the scope of the *Noerr* doctrine.²⁴³

3. *State Takeover Legislation and Takeover Defenses.* — Both courts and commentators have noted the incongruity of holding state takeover statutes preempted by the Williams Act or precluded by the dormant Commerce Clause while permitting various private defensive measures that are substantially more effective at defeating tender offers.²⁴⁴ Poison pills have generally been conceded to be beyond the reach of

or has at least 10% of its stated capital and paid-in surplus represented within the State.

457 U.S. at 627 (citing Ill. Rev. Stat., ch. 121 1/2, ¶ 137.52-10 (1979)).

241. Cf. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

242. 365 U.S. 127 (1961).

243. The *Noerr* doctrine would likewise protect collective attempts to influence the Secretary of State in situations in which he or she had the power to block a tender offer.

244. See Prentice, *supra* note 187, at 79–80; Morgan Shipman, In Defense of Reasonable State Regulation of Tender Offers, 53 Brook. L. Rev. 99, 102 (1987).

the Commerce Clause and the Williams Act.²⁴⁵ This incongruity is further evidence of the limits of relying on Commerce Clause and Williams Act preemption analysis. A strength of the antitrust perspective is that it provides a more satisfactory analysis of the relation between state takeover legislation and private defensive measures.

While neither the Commerce Clause nor the Williams Act reach private agreements restraining competition in the market for control, the Sherman Act could. Absent clear articulation and active supervision, state corporate law permitting such private action will not insulate it from review under the Sherman Act, any more than state law permitting mergers will insulate the merger from review under the Sherman Act and Clayton Act.²⁴⁶ To the extent that poison pills are authorized under state common law,²⁴⁷ the state does not provide any active substantive control over the terms of the transaction. As a result, the antitrust analysis makes the validity of these private restraints on competition for control depend entirely on the antitrust issues presented: whether defensive measures are agreements with respect to matters as to which the parties compete; and, if so, whether the agreements, on balance, are procompetitive or anticompetitive. By contrast, although the Commerce Clause and Williams Act analyses can, with a bit of pushing and pulling, examine the effects of state takeover legislation on competition for control, neither contains any doctrinal basis to justify examining more potent "private" defensive measures.

Indeed, the previous discussion of antitrust federalism justifies treating state takeover legislation differently from private action that is equally or more effective in restraining competition for control. The *Parker* doctrine suggests that if the restraint is, indeed, the action of the state, then antitrust federalism dictates that deference be shown. On the other hand, if the conduct is private action, no such deference is appropriate. On this view, the incongruity in prohibiting state takeover legislation while permitting more effective private defensive measures becomes clear: things are upside down. One can justify on principles of antitrust federalism, but not on Commerce Clause or Williams Act grounds, greater deference to state takeover legislation than to private defensive measures, so long as the state action is not simply a "gauzy cloak" over what in essence is a private restraint of trade.

4. *The Insight of Antitrust Federalism on State Takeover Legislation.* — Finally and most critically, what does the antitrust federalism analysis

245. Professor Coffee argues that "[a]ction taken by shareholders pursuant to enabling legislation is private action which neither offends the commerce clause nor is preempted by the Williams Act." Coffee, *supra* note 223, at 774.

246. In the legendary *Northern Securities* case, the Supreme Court held that the fact that a merger was authorized under state corporate law did not insulate it from review under the Sherman Act. See *Northern Sec. Co. v. United States*, 193 U.S. 197, 321, 326-27, 332-33, 344-45 (1904).

247. See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1351-53 (Del. 1985).

tell us about the relation between state takeover legislation and our national commitment to competitive markets, including a competitive market for corporate control? The lesson of the jurisprudence of antitrust federalism is that the national commitment to competitive markets is more limited than one might initially think: despite occasional overstatements, federal antitrust policy is directed at preventing private agreements displacing competition. With respect to genuine state attempts to opt for regulation in place of competition, no national policy stands in the way. To the contrary, the national competition policy allows states to adopt alternatives. If a state believes that competition is not suitable for the market for corporate control, just as it might decide that competition is not suitable for the retail distribution of electric power, the state is free to choose a regulated alternative, so long as it can do so in a way that does not conflict with the dormant Commerce Clause or some other provision of the Constitution.

But this notion of antitrust federalism incorporates significant limits. A state cannot simply grant its citizens immunity from the Sherman Act and the pressures of competition,²⁴⁸ whether the favored objects of concern are wine and liquor distributors,²⁴⁹ lawyers,²⁵⁰ doctors,²⁵¹ shareholders, or stakeholders. It may only insulate its corporations from the competitive market for control if it does so with clear articulation and active supervision.

CONCLUSION

I have argued for an alternative way of thinking about corporate law issues at the boundary between firms and markets. Conceptually, the traditional fiduciary duty jurisprudence cannot go beyond asking whether management's actions are in the interests of shareholders. So long as management acts in shareholders' interests, a fiduciary duty based jurisprudence cannot give any weight to costs imposed on others by management's elimination of competition among shareholders. In the paradigmatic corporate governance context, namely collective action to minimize agency costs, this inability is innocuous because, as to these matters, shareholders are not competitors. But at the firm/market boundary, where shareholders are also competitors, agreements eliminating that competition raise serious concerns that mirror those traditionally recognized and analyzed within the antitrust rubric.

The claim of the preceding pages is that the antitrust perspective casts significant light on this set of corporate law issues. I have argued that antitrust provides an important perspective on attempts to elimi-

248. See *Parker v. Brown*, 317 U.S. 341, 351 (1943).

249. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 110 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951).

250. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

251. See *Patrick v. Burget*, 486 U.S. 94, 97 (1988).

nate competition among shareholders to tender, either by means of an agreement or by means of such functional equivalents as the use of poison pills by loyal management to act as shareholders' bargaining agent. Similarly, the antitrust perspective provides a necessary step in appraising the shifting coalitions among shareholders, among stakeholders, and between them. Finally, antitrust provides a missing link in the analysis of state takeover legislation in that the question whether and how states may opt out of a competitive market for corporate control is first and foremost a question of antitrust federalism.

Whether bidders should put a Section 1 count in their complaints challenging poison pills, if and when hostile tender offers revive, remains an open question. But if one becomes convinced that antitrust provides an appropriate framework within which to analyze agreements eliminating competition among shareholders to tender, then the natural next step (and it is a significant step requiring additional argument) may be for bidders to argue and courts to hold that joint shareholder bargaining agreements and their functional equivalents can violate the Sherman Act.

The bad news is that, if I am right, or at least reasonably convincing, corporate law types will need to learn antitrust.²⁵² But more fundamentally, as we continue to take seriously the insights of the theorists of the firm and the metaphor that a firm is a network of contracts, we have no choice but to ask whether certain sorts of corporate contracts are "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade or commerce."²⁵³

252. As antitrust is worth studying for itself, that should not be too bitter a pill to swallow.

253. Sherman Act § 1, 15 U.S.C. § 1 (1988).