ANTITRUST AND CORPORATE LAW: REVISITING THE MARKET FOR CORPORATE CONTROL

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ABSTRACT

This Article addresses the connection between antitrust law and the market for corporate control. It argues that antitrust law should only seek to regulate the market for corporate control when there is a problem of competition that corporate law cannot fix on its own. The Article revisits various suggested problems of competition in the market for corporate control and argues that, in each case, there is no need for the involvement of antitrust law. The Article then highlights one instance in the market for corporate control where antitrust law is needed—and suggests a minor change to enable it to do so better. The Article concludes that, by and large, antitrust law is filling its correct role in the market for corporate control.

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INTRODUCTION

Antitrust law and corporate law are generally seen as different beasts. For over one hundred years, antitrust law has been "divorced" from corporate law,[1] and one scholar has called it "a stretch, and a big one" to argue that antitrust law is part of corporate law.[2] The two bodies of law are taught and practiced differently. Large firms that deal with corporate matters have dedicated and separate antitrust departments. A corporate law class will only briefly touch upon certain topics in antitrust law, and an antitrust course is more likely to cover economics than corporate law.[3] The separation between the two areas of law has "historical and professional" roots.[4] Corporate law came first; antitrust law only became a separate discipline in the 1950s, a half-century after corporate law.[5] And because there has been a "pattern of oscillation" over the past 120 years whereby the one body of law is strong at a time when the other is weak, academic dialogue between the two disciplines has been rare.[6]

Despite—or perhaps because of—this supposed separation, academics have argued that they should be linked.[7] Antitrust law seeks to protect competition in markets, and the market for corporate control is a market like any other.[8] Furthermore, it is important and valuable, worth trillions of

1. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 16, 27 (2008).

2. Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 233, 245 (2002).

3. *See, e.g.*, WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 252, 449-50, 587-94 (4th ed. 2012) (two brief mentions of competition law in addition to discussion of state takeover statutes); WILLIAM KLEIN ET AL., BUSINESS ASSOCIATIONS (7th ed. 2009) (leading corporations casebook which does not mention antitrust at all); THOMAS MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS (4th ed. 2009) (no mention of the market for corporate control).

4. Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833, 842 (2011).

5. *Id.* at 842-43.

6. *Id.* at 850.

7. *See infra* note 10.

8. The Sherman Antitrust Act, the preeminent achievement in antitrust law, does not mention "markets," instead limiting itself to "trade" and "commerce." *See* Sherman Antitrust Act §§ 1-3, 7, 15 U.S.C. §§ 1-3, 6a (2006) (prohibiting the restraint of interstate trade or commerce and prescribing penalties for violations). The scope of the Act was

dollars each year.[9] It would seem reasonable, therefore, that antitrust law should ensure that the market for corporate control functions in a competitive fashion.

The initial work in this field was done by Professor Edward Rock,[10] and the views that Professor Rock expressed have been reanimated recently by Thomas Piraino and Spencer Waller.[11] But this area of law is not simply of academic interest. Various court cases have dealt with the intersection of antitrust laws and the market for corporate control.[12] In a case currently before the United States District Court for the District of Massachusetts, *Dahl v. Bain Capital*, a group of plaintiffs is seeking a remedy against a group of private equity firms for violating section 1 of the Sherman Act in allegedly colluding in leveraged buyout deals over the last decade.[13] This Article builds on the work of Rock and Piraino, to which it is indebted, but suggests a different approach to resolving the question of tension between antitrust law and the market for corporate control.

Three clarifying notes are in order here. First, references to antitrust law in this Article are to federal antitrust law, unless otherwise noted. Second, because of Delaware's importance as a state of incorporation, I generally focus on Delaware corporate law. Third, I take a broad, although common, view of corporate law, and include under this heading, the

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originally disputed: For example, one early decision ruled that the government did not have the right to regulate intrastate manufacturing, as this was not classified as "commerce." United States v. E. C. Knight Co., 156 U.S. 1, 12 (1895). Since these early days, however, the Court has held that the Sherman Act exists to preserve the smooth functioning of the market. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.").

9. *See* BLOOMBERG, 2012 M&A OUTLOOK 5 (Anita Khalili et al., 2011), *available at* http://about.bloomberg.com/pdf/manda.pdf (reporting that over $2 trillion worth of deals took place in 2011).

10. Edward B. Rock, *Antitrust and the Market for Corporate Control*., 77 CALIF. L. REV. 1365 (1989) [hereinafter Rock, *Corporate Control*]; Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497 (1992) [hereinafter Rock, *Antitrust Lens*].

11. Thomas A. Piraino, Jr., *The Antitrust Implications of "Going Private" and Other Changes of Corporate Control*, 49 B.C. L. REV. 971 (2008); Waller, *supra* note 4.

12. *See, e.g.*, Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990) (adjudicating a case in which a shareholder brought suit against rival bidders for cooperating in their bidding activities); Kalmanovitz v. G. Heileman Brewing Co., 769 F.2d 152 (3d Cir. 1985) (dealing with the question of antitrust violations in a tender offer bid).

13. Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112 (D. Mass. 2008) (denying the private equity firms' motion to dismiss). The suit is still in progress, and, on account of the editing schedule of this Article, I have not attempted to update this piece to take account of all the latest developments. *See, e.g.*, Peter Lattman & Eric Lichtblau, *E-Mails Hint at Collusion Among the Largest Equity Firms*, N.Y. TIMES, Oct. 11, 2012, at B1 (discussing developments in the case).

Williams Act, a piece of federal securities regulation that has had a major impact on the market for corporate control.

Part I of this Article traces the origins of antitrust and corporate law. Part II discusses the potential for conflict between corporate and antitrust law. It shows how courts have managed to resolve conflicts between the two bodies of law in the past, and sets out a principle by which such conflicts might be resolved. This principle is that corporate law should be given the opportunity to resolve anticompetitive situations in the market for corporate control on its own, and federal antitrust law should confine itself to dealing with those anticompetitive situations that corporate law cannot resolve. Part III explores three areas where it has been argued that antitrust law should solve an anticompetitive situation in the market for corporate control, and argues that in each instance, corporate law can resolve any issues on its own. Therefore, corporate and antitrust law do not conflict in these areas. Part IV discusses one area—mergers and acquisitions—in which there is a problem of competition that corporate law cannot solve on its own. It suggests that the antitrust legislative response in this area is largely appropriate, and offers only a minor suggestion that would ensure that the approach taken by antitrust law in this area does not conflict with corporate law. In sum, this Article concludes that, insofar as the market for corporate control is concerned, antitrust law is generally playing its proper role.

I. ANTITRUST AND CORPORATE LAW SIDE-BY-SIDE

A. The Path of Federal Antitrust Law

Antitrust law can be traced back for over four hundred years.[14] Modern antitrust law in the United States, however, begins with the passage of the Sherman Act in 1890.[15] Before the passage of the Sherman Act, restraints existed on the excessive accumulation of capital—in state law. Until the late 1880s, state corporate law prevented one company from

14. *See* Darcy v. Allein (*The Case of Monopolies*), (1603) 77 Eng. Rep. 1260, 1266 (K.B.) (holding that a patent granting a monopoly over the importation of playing cards into England was "utterly void"). Common law courts first established a doctrine against restraint of trade in *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (K.B.). But questions of competition were before the courts as early as the fifteenth century. *See The Schoolmaster Case*, Y.B. 11 Hen. 4, fol. 47, pl. 19 (1410) (Eng.) (holding that it was lawful competition for a schoolmaster to set up a new school in competition with an older school).

15. 15 U.S.C. §§ 1–7 (2006).

holding another company's stock.[16] This acted as a powerful restraint on companies' ability to buy competitors. Under the doctrine of *ultra vires*, corporations were only permitted to carry out acts for which they had been granted permission in their charter—and taking over other corporations was not among them.[17] Courts rationalized the doctrine of *ultra vires* on the ground that an *ultra vires* contract, such as a takeover, worked "a diversion of capital from the objects contemplated by the charter to the detriment of non-assenting shareholders," and was thus illegal.[18]

To evade the restrictions on cross-shareholdings, corporations began to organize as trusts.[19] Several states quickly recognized the intent behind the new form, and Ohio and New York successfully sued to force the dissolution of two of the largest entities—the Standard Oil and Sugar Trusts.[20] Frustrated by these efforts, industrialists (and their lawyers) reconsidered how the corporate form could be made to serve their purposes. What happened next was a critical moment in corporate and antitrust law: New Jersey enacted a corporation law that permitted cross-shareholdings.[21]

In response to this new law, a wave of trusts, including the Sugar Trust, reincorporated in New Jersey.[22] The state became so wealthy as a result of incorporation and franchise fees that its entire budget was paid by these corporation taxes alone.[23] Other states attempted to copy New Jersey by enacting their own cross-shareholding statutes, but had little success. The *ultra vires* doctrine, which had acted as a restraint on monopolies, was now dead. Because corporations could flow to any state that copied New Jersey, the states could only revive the doctrine by acting together. But such cooperation was impossible because the incentive for a state to cheat was too high.[24]

Corporate law had kept a check on company size, but now failed to do so. Congress recognized that the states were unwilling or unable to control

16. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 191 (1985).

17. *See* Clyde L. Colson, *The Doctrine of* Ultra Vires *in United States Supreme Court Decisions*, 42 W. VA. L.Q. 179, 206 (1936) (noting that in cases dealing with ultra vires contracts, the Supreme Court has followed the practice of declaring them void).

18. *Id.* at 206–07.

19. Horwitz, *supra* note 16, at 193.

20. *Id.* at 194.

21. *Id.* at 194–95.

22. *Id.* at 195.

23. *Id.* at 195.

24. Cheating or defecting on an agreement is a typical collective action problem and is relevant to states as well as to individual actors and smaller entities. *See generally* Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241 (1997) (explaining the collective action problem of cheating faced by states).

the trusts and therefore stepped in by enacting the Sherman Act. Section 1 of the Act 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," and section 2 prohibits acting, or attempting to act, as a monopoly.[25]

Federal antitrust law has served many goals since the Sherman Act was passed.[26] At different points,[27] the courts have evaluated business practices (i) construing the Sherman Act literally and narrowly;[28] (ii) under a flexible "rule of reason" standard;[29] (iii) under a rigid "per se" approach;[30] and (iv) under an efficiency-driven "consumer welfare" standard, championed by Robert Bork.[31] Although the history of antitrust law does not conveniently divide into exact periods, it is possible to identify some general approaches to antitrust law that change over time.

In the first period of the application of the Sherman Act, the courts were initially reluctant to strike down mergers—but not for reasons relating to their construction of antitrust law itself. The first major case under the Sherman Act was *United States v. E.C. Knight Co.*, in which the Supreme Court declined to enjoin the American Sugar Refining Company's takeover of four Philadelphia sugar refineries, which would give the company "nearly complete control of the manufacture of refined sugar within the United States."[32] The Court noted that the Sherman Act aimed at the monopolization of "trade or commerce" but held that the contract to take over the Philadelphia refineries was "an attempt to monopolize, or the actual monopoly of . . . *manufacture* . . . ."[33] Such behavior fell outside the scope of the Sherman Act's prohibition because Congress did not have the power to regulate manufacturing under the Commerce Clause.[34]

25. 15 U.S.C. §§ 1–2 (2006).

26. *Id.* §§ 1–7.

27. I present one common historical division of the periods of antitrust law, but this is by no means the only one. *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 555–56 (2012) (demarcating the history of U.S. antitrust policy into four separate "cycles").

28. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (reading the Sherman Act literally and narrowly).

29. *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 62, 66–68 (1911) (using the "rule of reason" standard).

30. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 217 (1940) (using the "per se" approach).

31. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978) ("The only legitimate goal of American antitrust law is the maximization of consumer welfare . . . .").

32. *E.C. Knight*, 156 U.S. at 9.

33. *Id.* at 17 (emphasis added).

34. *Id.* at 16–17.

But the Court soon changed its views on the scope of both the Commerce Clause and the Sherman Act. In *Addyston Pipe & Steel Co. v. United States*, the Court carefully distinguished *E.C. Knight Co.* and held that even though the act of manufacturing goods did not affect interstate commerce, an agreement to sell such manufactured goods did.[35] This holding was overruled in *Swift & Co. v. United States*, in which the Court adopted a theory of a "current of commerce" between the states, which the government had the power to regulate.[36] This decision made clear the course for a much more expansive interpretation of the Sherman Act, covering the activities associated with interstate commerce today.

At the same time, however, the Court changed its literal interpretation of the phrase "every contract . . . in restraint of trade" in section 1 of the Sherman Act. In *Northern Securities Co. v. United States*, the Court ruled that mergers between railroad holding companies did qualify as interstate commerce.[37] The particularly important opinion in this case was that of Justice Brewer, who provided a concurring fifth vote in support of enjoining the merger between the Great Northern Railway Company of Minnesota and the Northern Pacific Railway Company of Wisconsin. The four Justices in the plurality believed that the Sherman Act should be construed literally and that "*every* contract, . . . in whatever form, of whatever nature, and whoever may be parties to it, . . . *in restraint* of trade" should be enjoined.[38] Brewer, on the other hand, considered that the Sherman Act only reached "unreasonable" restraints of interstate commerce, but that this combination was unreasonable.[39] The dissenters, led by Justice Holmes, essentially agreed with Brewer that the "reasonableness" standard should be applied, but disagreed with the outcome. Holmes argued that the Sherman Act was of a "very sweeping and general character," and only covered restraints on trade that would be invalid at common law.[40] The theory of Brewer and the dissenters finally prevailed seven years later in *Standard Oil Co. v. United States*, in which the Court adopted the "rule of reason" approach to antitrust, whereby only "unreasonable" restraints on trade were prohibited.[41]

The period between 1890 and 1911 thus laid the groundwork for a market-based approach to antitrust. The courts would look at the effect of completed or proposed transactions on the market; they would not

35. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240 (1899).
36. Swift & Co. v. United States, 196 U.S. 375, 398–99 (1905).
37. N. Sec. Co. v. United States, 193 U.S. 197, 354 (1904).
38. *Id.* at 331 (plurality opinion) (emphasis added).
39. *Id.* at 361.
40. *Id.* at 402 (Holmes, J., dissenting).
41. 221 U.S. 1 (1911).

automatically invalidate particular kinds of transactions. This was not an inevitable result. In *Northern Securities*, the Court could have adopted a formalistic approach, under which a combination through a holding company, rather than a direct combination of corporate interests, would be considered immune from attack under the antitrust laws. But the lower court refused to do so, observing that "the law . . . looks always at the substance of things . . . rather than upon the particular devices or means by which [a transaction] has been accomplished,"[42] and the Supreme Court agreed.[43] The decisions in *E.C. Knight* and *Addyston Pipe*, predating *Northern Securities*, have been interpreted as encouraging corporations to enter into mergers rather than cartels: Manufacturing was initially not covered by the Sherman Act, whereas price-fixing certainly was.[44] But the weight of the evidence is against this assertion, and whatever truth there is in it,[45] it was clear by 1911 that the Court was generally concerned not with the structure of transactions, but their substance.[46]

The "rule of reason" approach to antitrust law held sway until about 1940. Soon after the Court endorsed this approach, Congress in 1914 enacted the Clayton Act in order to "reach conduct that did not rise to the level of a Sherman Act violation."[47] The Clayton Act covers potentially anticompetitive behavior such as price discrimination,[48] tying arrangements,[49] stock acquisitions,[50] and interlocking directorates.[51] Instead of regulating the market as a whole, like the Sherman Act, the

42. United States v. N. Sec. Co., 120 F. 721, 726 (C.C. D. Minn. 1903).

43. N. Sec. Co. v. United States, 193 U.S. 197, 332 (1904).

44. George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77, 86–89, 97 (1985); Tony Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880–1920*, 74 IOWA L. REV. 991, 1006–07 (1989).

45. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 95 (2005).

46. The case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.* is an example of this. The *Dr. Miles* Court struck down a vertical price maintenance agreement as against the rule of reason, noting that it was in "restrain[t of] trade" and "injurious to the public interest . . . ." 220 U.S. 373, 400, 409 (1911). The Court applied the same logic that had animated its previous cases, such as *Addyston Pipe*, and did not place weight on the precise form of the restraint. *See, e.g.*, *id.* at 409 ("The complainant's plan falls within the principle which condemns contracts of this class. It, *in effect*, creates a combination for the prohibited purposes.") (emphasis added).

47. Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53; Milton Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 945 (1962).

48. 15 U.S.C. § 13 (2006).

49. *Id.* § 14.

50. *Id.* § 18.

51. *Id.* § 19.

Clayton Act seeks to regulate specific conduct engaged in by corporate entities.[52] In the future, for example, boards of competing corporations could not share directors, regardless of whether or not such sharing would be deemed reasonable by a court.[53] The market-based approach of the Sherman Act, on the one hand, and the transaction- or firm-based approach of the Clayton Act, on the other, were complementary. Indeed, the Clayton Act was designed to fill gaps in the Sherman Act's system of market regulation.[54]

Even though the "rule of reason" period is generally considered to last up to 1940 or well beyond, it quickly began to show cracks.[55] In the 1927 case of *United States v. Trenton Potteries Co.*, the Court ruled that even though a suspect business practice—here, price-fixing—might pass muster under the rule of reason now, there was no guarantee that it would do so in the future.[56] Therefore, in some situations, it might be necessary for the Court to hold that a certain practice was automatically illegal. The Court held:

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as

52. Not all of the Clayton Act was transaction-based. For example, section 6 of the Act exempted labor unions from the scope of the act. 15 U.S.C. § 17 (2006) ("The labor of a human being is not a commodity or article of commerce . . . .").

53. A court must still determine that the corporations whose directors are being shared are competitors, which is not necessarily an easy analysis. *See* Benjamin M. Gerber, *Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act*, 24 YALE J. ON REG. 107, 118 (2007) (explaining that the ambiguity surrounding the definition of "competitors" results from infrequent litigation on the issue).

54. The Senate Report on the Clayton Act stated that: "It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill." S. REP. NO. 63-698, at 1 (1914). The act was also intended to supplement various state laws. *See, e.g.*, H. REP. NO. 63-627, at 9 (1914) (listing state laws on price discrimination).

55. *Compare* THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 118–230 (4th ed. 2009) (describing the rule of reason period as lasting until 1940), *with* Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 279–85 (describing the rule of reason period as a middle period lasting until 1965).

56. 273 U.S. 392, 396–97 (1927).

fixed . . . .[57]

Trenton Potteries was an early harbinger of the "per se" period of antitrust enforcement. The "per se" period is so called because, during this period, certain types of activity were ruled illegal in and of themselves. These activities included price-fixing (again),[58] group boycotts,[59] geographic divisions of territory,[60] and monopolization.[61] However, not every potentially anticompetitive activity was considered per se illegal, and the Court had difficulty at times determining what should be per se illegal and what should not.[62]

In doing so, courts sought to regulate the market by proscribing certain kinds of transactions. Congress also took a transaction-based approach in its antitrust legislation. The Celler-Kefauver Act of 1950 prevented firms from escaping the requirements of the Clayton Act by acquiring all of the assets, rather than the stock, of another company. This act, like the Clayton Act, sought to govern the behavior of corporations directly.[63]

The "per se" period is usually considered to last until the 1970s, when the Court decided *Continental TV v. GTE Sylvania*.[64] But, the courts did not wholly disregard the market-based approach to antitrust in this time.

57. *Id.* at 397.

58. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

59. Fashion Originators Guild of America v. Fed. Trade Comm'n, 312 U.S. 457, 464 (1941).

60. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951).

61. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

62. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967) (declaring that vertical territorial restrictions on resales imposed by a manufacturer on a distributor were per se illegal), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977).

63. Celler-Kefauver Anti-Merger Act, Pub. L. No. 81-899, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18). The Celler-Kefauver Act closed the "assets loophole" of the Clayton Act: Section 7 of the Clayton Act, as originally drafted, prevented one corporation from acquiring "the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition . . . ." Antitrust Act of 1914, 38 Stat. 730, 731. As a result, it was possible for corporations instead to acquire all the *assets* of other corporations, and avoid the antitrust restriction. The judiciary acquiesced in the executive's interpretation and enforcement of Celler-Kefauver. In *United States v. Von's Grocery Co.*, for example, the Court held that the acquisition by one Los Angeles grocery retailer of the assets of another L.A. grocery retailer violated Celler-Kefauver. United States v. Von's Grocery Co., 384 U.S. 270 (1966). Justice Stewart dissented, writing that "[t]he sole consistency that I can find is that in litigation under [Celler-Kefauver] the Government always wins." *Id.* at 301 (Stewart, J., dissenting).

64. 433 U.S. 36 (1977).

This period is also known for its focus on market structure,[65] and courts would enjoin supposedly anticompetitive practices because the perpetrators possessed too much market power, rather than because there was strong evidence of anticompetitive conduct.[66] The market-based and transaction-based approaches of antitrust law thus complemented each other.

And, to some extent, they bled into each other. "Per se" rules became increasingly rare, as courts looked harder at whether certain practices really should be enjoined. Often, courts would analyze the market effect of the allegedly anticompetitive practice before applying the per se rule to a practice that had already been held to be per se anticompetivie practice—which thereby rendered the rule in effect not a per se rule at all.[67] Courts also sought to adopt a more sophisticated approach than the "rule of reason" standard. They frequently resorted to Robert Bork's "consumer welfare" formulation, according to which the goal of antitrust law was to "improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[68]

About the time Bork introduced this famous principle, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).[69] This act came at the end of what has been termed a "Golden Age" of antitrust enforcement.[70] One of the authors of HSR, Senator Phil Hart, sponsored the "Industrial Reorganization Act," which would grant a regulatory tribunal the power to "deconcentrat[e]" specific industries.[71] He proposed an amendment of the Sherman Act that would have prohibited

65. *See* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 MINN. L. REV. 311, 355–56 (2009) (explaining the market-based approach to antitrust law taken by the courts during the relevant time period).

66. *See Aluminum Co. of Am.*, 148 F.2d at 448 (reversing judgment of lower court dismissing complaint of monopolistic practices).

67. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 19 (1984) (explaining the evolving approach to the application of the per se rule). In the same year as publishing the Article, Easterbrook successfully argued before the Supreme Court *Jefferson Parish Hospital District No. 2 v. Hyde*, where the Court declined to overturn its longstanding holding that tying arrangements were illegal per se, but modified its holding so that any inquiry into their "per se condemnation" must be based on a finding that there was market-forcing. 466 U.S. 2, 15–16 (1984). As four concurring Justices pointed out, this was akin to analyzing tying arrangements under a rule of reason standard. *Id.* at 34–35 (O'Connor, J., concurring).

68. BORK, *supra* note 31, at 91; *see also* Stucke, *supra* note 27, at 574 (discussing the adoption of this standard by courts).

69. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in 15 U.S.C. § 18a).

70. Joe Sims & Deborah P. Harman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Litigation*, 65 ANTITRUST L.J. 865, 872 (1997).

71. *Id.* at 873.

monopoly possession, regardless of the manner of acquisition.[72] Nevertheless, HSR—as it was enacted—was only intended to make a modest change to the existing regime of federal antitrust regulation. The act created a system of premerger review for the "very largest corporate mergers,"[73] as well as giving states the right to sue for antitrust violations on behalf of their citizens,[74] and granting the Department of Justice the power to undertake civil antitrust investigations.[75] Insofar as HSR was intended to affect the market for corporate control, it has been described as "modest medicine for a modest problem."[76]

In sum, federal antitrust law has grown incrementally, and somewhat inconsistently, since the Sherman Act was passed over 120 years ago. The courts have interpreted the Sherman Act to regulate the market as a whole, and as part of this regulation, they have also prohibited specific kinds of transactions by individual firms. Congress has passed legislation with a focus on both the market and transactions. With this foundation, I now move on to corporate law.

B. The Path of Corporate Law

Corporate law is, of course, older than federal antitrust law. But before the nineteenth century, its most salient feature was its rarity. Corporations (in the modern commercial sense) were scarce, and those that did exist were chartered specially.[77] As a result of these special charters, up to the 1830s a corporate charter was taken to imply a grant of monopoly privileges.[78]

In the nineteenth century, the scope of corporate law became increasingly narrow, and focused on the rights and duties of managers and shareholders. Competition and utility regulation were seen as separate

72. *Id.*

73. H.R. REP. NO. 94-1373, at 11 (1976).

74. 15 U.S.C. §§ 15c-15h (2006).

75. 15 U.S.C. §§ 1311-14 (2006).

76. Sims & Harman, *supra* note 70, at 878.

77. ROBERT E. WRIGHT, CORPORATION NATION: RISE AND DEMISE OF THE AMERICAN ECONOMIC JUGGERNAUT (forthcoming 2013); *see also id.* at ch. 8 (explaining that, with few exceptions, general incorporation laws were only enacted after the turn of the nineteenth century).

78. This implied monopoly ended with the case of *Proprietors of the Charles River Bridge v. Proprietors of the Warren River Bridge*, in which the Court held, "The complainants' charter has been called a monopoly; but in no just sense can it be so considered." 36 U.S. 420, 567 (1837). *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 109–39 (1977) (discussing the state's power to charter monopolies, with particular reference to *Charles River Bridge*).

areas outside corporate law's purview.[79] As corporate law became increasingly specialized, there was also a shift in the nature of the voting rights in the corporation. Many corporations in the nineteenth century—in particular, turnpikes, canals, railroads, banks, and insurance companies—had regressive voting structures, whereby the voting rights of large shareholders were limited. The different explanations that have been offered for this phenomenon include a desire to grant small shareholders protection, which they would not otherwise have,[80] and a "democratic" rather than "plutocratic" conception of the corporation.[81]

These regressive voting structures largely died out by the twentieth century, and voting rights were henceforth more closely tied to economic rights.[82] By this time, the idea that corporations should be managed primarily for the benefit of their shareholders (the "shareholder primacy" view) was commonplace.[83] Nevertheless, many states have enacted "constituency statutes" providing that, either in the general course of business or in specific takeover situations, the corporation must be managed with general community interests in mind.[84] Delaware has not, although the Delaware Supreme Court suggested that boards may take the interests of "the community generally" in determining whether to take defensive measures against takeover bids.[85] But despite the "ad nauseam" debate on the proper goals of corporate governance,[86] it is true to say that the corporation is managed primarily for the interests of its shareholders.[87]

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79. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 126, 243 (1991) (explaining the narrow scope of early corporate law).

80. *See* Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HISTORY 645, 660 (2008) ("One might imagine that the charters of firms in these industries were designed to attract the participation of small shareholders by offering them some measure of protection from dominance by large shareholders.").

81. Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354–56 (2006).

82. *See, e.g.*, *id*. at 1358 ("The change came in the middle decades of the [nineteenth] century when the voting rights of American shareholders shifted decisively toward plutocracy.").

83. *See generally* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1988) (discussing the origin of the view that corporations should be managed for the benefit of the shareholders).

84. *See generally* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999) (surveying different corporate constituency statutes).

85. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

86. *See generally* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 651 (2004) (outlining the debate over the proper goals of corporate governance).

87. One piece of evidence for this is that universally, it is shareholders, and not any

We can thus describe American corporate law as consciously "firm-focused," in that it looks at the relations that bind the firm, rather than the corporation's place in the wider market.[88] Apart from in certain situations where community interests are implicated, corporate law is concerned with the relations of managers, shareholders, and (where relevant) creditors. Importantly, corporate law does not aim at regulating whole markets. A court will scrutinize a transaction to determine whether the directors have breached a duty to shareholders, not to analyze its wider impact on the market for corporate control.[89]

As noted, I take a broad view of corporate law in this Article, and include in it key features of securities regulation that affect corporate governance. Federal securities regulation begins with the Securities Act of 1933[90] and the Securities Exchange Act of 1934.[91] The 1933 Act aimed to improve the market in securities by adopting disclosure-based reporting requirements for issuers of securities,[92] and the 1934 Act regulates the secondary trading of those securities.[93] For the purposes of this Article, the key piece of securities regulation that I will consider as corporate law is the Williams Act of 1968, which regulates the tender offer process.[94] The Williams Act was the congressional response to coercive tender offers,

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other group, who have the power to elect directors. *See, e.g.*, MODEL BUS. CORP. ACT § 8.03(c) (2010) (providing that directors are elected at the annual shareholders' meeting). Although this may be taken for granted in the United States, other countries permit nonshareholder constituencies to be involved in electing directors and board members. *See, e.g.,* Ángel R. Orquendo, *Breaking on Through to the Other Side: Understanding Continental European Corporate Governance*, 22 U. PA. J. INT'L ECON. L. 975, 980–81 (2001) (discussing the structure of German boards).

88. In describing American corporate law as "firm-focused," I do not mean to argue that the managers of a corporation owe duties to the corporation, rather than the shareholders. In this context, I am contrasting corporate law's focus on the corporation alone with the possibility that it might look to the broader market.

89. In this regard, American corporate law may be contrasted with British corporate law, which appears more interested in maintaining a fluid market in corporate control. For example, litigation in U.K. hostile takeovers is very rare, and the cost of a hostile bid is much cheaper. *See* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1745-52 (2007) (contrasting the focuses of American corporate law with those of British corporate law).

90. Securities Act of 1933, 15 U.S.C. §§ 77a–aa (2006).

91. Securities Exchange Act of 1934, 15 U.S.C. § 78a (2006).

92. *See, e.g.*, THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 1.2[3][A], at 22 (rev. 5th ed. 2006) ("The theory behind [the regulatory framework of the Securities Act] is that investors are adequately protected if all relevant aspects of the securities being marketed are fully and fairly disclosed.").

93. *See id.* § 1.2[3][A], at 23 ("The Securities Exchange Act of 1934 is directed at regulating all aspects of public trading of securities.").

94. Williams Act of 1968, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2006).

under which offerors were able to force shareholders into rushing to tender, sometimes on the basis of misinformation.[95] Although the Act has had a major impact on the market for corporate control, it has a transaction-based approach: It governs the process by which firms may make and accept tender offers. Apart from setting out the rules for tender offers, the Act sought to be "neutral" and not to favor bidders or target shareholders.[96] Broadly conceived, corporate law thus has a transaction- or firm-based approach.

II. CONFLICTS BETWEEN CORPORATE LAW AND ANTITRUST LAW

A. The Nature of the Conflict

Antitrust law, as we have seen, seeks to regulate the market, and blends a transaction-focused approach with a market-oriented approach. Certain transaction-based elements of antitrust law have the potential to clash with corporate law, whose firm-based approach governs whether corporations are permitted to engage in particular transactions, and does not regulate the market as a whole. It is not hard to see the potential for tension between corporate and antitrust law. To use a basic example of anticompetitive behavior that antitrust law prohibits, a firm may be able to obtain higher profits if it engages in horizontal price-fixing with another firm. These higher profits may lead to higher returns to shareholders, and therefore, corporate directors and officers might be tempted to engage in it. But antitrust law enjoins such price-fixing per se.[97] The interests of the public at large trump the interests of the shareholders of the firm.[98]

There could, of course, be a perfect overlap between the class of shareholders and class of customers of a firm.[99] In such a situation, corporate law and antitrust law could not be in conflict: Maximizing shareholder value would be no different from maximizing "consumer welfare," for all the consumers would be shareholders. In the market for

95. William C. Tyson, *The Proper Relationship Between Federal and State Law in the Regulation of Tender Offers*, 66 NOTRE DAME L. REV. 241, 249–53 (1990) (explaining the purpose of the Williams Act was to eliminate tender offer abuses).

96. *Id.* at 252.

97. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints . . . .").

98. *See id.* ("[T]he *public interest* is best protected from the evils of monopoly and price control by the maintenance of competition.") (emphasis added).

99. This was the historical operation of some corporations, such as insurance companies founded to serve their local market.

corporate control, the consumers whose "welfare" is to be "maximized" are shareholders. Insofar as *this* market is concerned, we should expect corporate and antitrust law to be well-aligned.

There are reasons to be skeptical about this alignment. Most corporate law, with the exception of securities regulation, is state law. The most important antitrust legislation, on the other hand, is federal law. Therefore, two different sets of institutions—state and federal—are responsible for producing law that maximizes shareholder value. If only one of these errs, or has a different notion of what constitutes "consumer welfare" or "shareholder value," antitrust law and corporate law could be in conflict. Furthermore, when antitrust law seeks to regulate at the level of the firm—as opposed to the market—there is a higher risk of a conflict with corporate law, which also regulates firms.

To be sure, conflicts are not necessarily problematic. Antitrust law can conflict with many areas of law, and courts can resolve these tensions. The doctrine of intra-enterprise conspiracy is one such example. Until 1984, it was theoretically possible for a parent corporation to be held liable for conspiring with its wholly-owned subsidiary.[100] The effect of this was to encourage corporations to merge subsidiaries into themselves and operate them as divisions. Antitrust law thus took a firm-based approach that conflicted squarely with the firm-based approach of corporate law: The intra-enterprise conspiracy doctrine affected the structure of corporations, and made it less desirable for a parent company to spin out a division, as it might be held liable for conspiracy.[101] But, in 1984, the Supreme Court repudiated the doctrine, stating that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act."[102] Corporate law is still free to treat parents and subsidiaries as being able to conspire with one another, which is fitting, as they have "presumptively separate legal dignities."[103] Thus, corporate law has free rein, without interference from antitrust law.

Another conflict that has been resolved—at least partially—is the use of antitrust derivative suits to obstruct takeovers.[104] The idea is simple: If

100. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (finding the very idea of an agreement between a parent and subsidiary to be meaningless).

101. *See* Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 453–54 (1983) (discussing the history of the intra-enterprise conspiracy doctrine).

102. *Copperweld*, 467 U.S. at 771.

103. Allied Capital Corp. v. G-C Sun Holdings, L.P., 910 A.2d 1020, 1039 (Del. Ch. 2006). *But see In re* Transamerica Airlines, Inc., No. Civ. A. 1039-N, 2006 WL 587846, at *7 (Del. Ch. Feb. 28, 2006) (holding "the general principle that a corporate parent and its wholly-owned subsidiary cannot conspire together to be controlling").

104. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender*

the target company is in the same business as the acquirer, it may seek to enjoin the takeover on the grounds that the takeover will reduce competition in the business. The target may demand injunctive relief under section 16 of the Clayton Act because the merger would violate section 7 of the Act.[105] This strategy is of most use in the case of horizontal mergers, though it can also be used in instances of vertical integration. Such actions are anomalous, because what they allow, in effect, is for the company to assert rights that would traditionally belong to the persons that are harmed by the antitrust violation.[106] The target company and its shareholders are not victims of the antitrust injury; rather, the target's shareholders profit by the alleged violation, assuming that the acquiring company pays a premium for the merger. Therefore, the purpose of antitrust derivative suits in such a situation is solely to obstruct a takeover, not to remedy a harm suffered by the plaintiff. Because of the lack of "antitrust standing" in such a situation, many courts have blocked the use of such actions, which has resolved the conflict.[107]

B. Resolving Conflicts Between Corporate and Antitrust Law

Nevertheless, the potential for conflicts between antitrust law and corporate law remains. These conflicts are inefficient and socially wasteful: Directors and managers of organizations are forced to try to abide by contradictory rules. This Article proposes a way of resolving these conflicts: Antitrust law should only step in to solve a problem of competition in the market for corporate control when the existing modes of

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Offers, 80 MICH. L. REV. 1155 (1982) (detailing potential defensive strategies in the case of a takeover).

105. 15 U.S.C. §§ 18, 26 (2006). Section 7 of the Clayton Act provides that "[n]o person . . . shall acquire . . . the whole or any part of the stock or other share capital . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

106. Easterbrook & Fischel, *supra* note 104, at 1156; *cf. supra* note 74 and accompanying text (noting the provision of the Hart-Scott-Rodino Act that gave states standing to sue).

107. Despite the criticism of such suits, see Easterbrook & Fischel, *supra* note 104, the Second Circuit permitted such an action to proceed in *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989). The court noted that the antitrust laws were enacted for the "protection of *competition*, not *competitors*," and thus permitted the suit to proceed. *Consolidated Gold Fields PLC*, 871 F.2d at 257 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)). Other courts have expressly criticized this result. *See, e.g.*, Anago, Inc. v. Tecnol Med. Prods., Inc., 976 F.2d 248, 250 (5th Cir. 1992) (declining to follow *Gold Fields* and instead "adher[ing] to the line of cases . . . that require antitrust injury" in order to possess standing to sue for injunctive relief).

governance for that market—state corporate law, together with federal securities regulation—are incapable of resolving the problem on their own.

This principle is, in part, common sense. Having two bodies of law regulate one area increases the risk of inconsistent regulatory schemes and modes of governance, and therefore, this should be avoided. Courts and scholars may find ways of resolving these inconsistencies—for example, by holding that one body of law preempts the other.[108] Nevertheless, it is undoubtedly true that overlapping regulatory schemes creates the possibility of inconsistent regulation.

But the principle also has a broader policy foundation, which is the view that the current system of state corporate law, supported by federal securities regulation, is successful. Although there is certainly a role for federal regulation in corporate law, as under the current system, we should be wary before increasing federal oversight of the market for corporate control when state systems of corporate governance have historically been successful.[109] The acceptance by the judiciary of the view that corporate governance should be left to the states was most definitively expressed in 1977 in *Santa Fe Industries, Inc. v. Green*, where the Court ruled that a federal action, under Rule 10b-5, could not be used to obtain redress for an alleged breach of corporate law fiduciary duty.[110] The Court noted that permitting Rule 10b-5 to be used in this way "would . . . bring within the Rule a wide variety of corporate conduct traditionally left to state regulation."[111] The D.C. Circuit echoed this reasoning in the 1990 case of *Business Roundtable v. SEC*, where the court struck down a new corporate voting regulation on the grounds that it exceeded the SEC's authority under the Exchange Act and trespassed on "a part of corporate governance traditionally left to the states."[112] Congress likely does have the power to regulate every aspect of corporate governance, under the Commerce

108. *See, e.g.*, Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264 (2007) (finding that securities law precluded the application of antitrust law in a suit concerning initial public offerings); Finnegan v. Campeau Corp., 915 F.2d 824, 829 (2d Cir. 1990) (finding that the antitrust laws were inconsistent with the securities law in a takeover case); Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112 (D. Mass. 2008) (holding that securities law does not preempt antitrust law in going private transactions); Piraino, *supra* note 11, at 992 (arguing that *Finnegan* is no longer good law after *Credit Suisse*).

109. In fact, some scholars have argued that there need not even be a role for federal securities regulation. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2401–12 (1998) (suggesting that federal securities laws be made optional). For this Article, I simply suggest that there is generally no further need for federal intervention in the market for corporate control in the form of antitrust enforcement.

110. 430 U.S. 462 (1977).

111. *Id.* at 479.

112. 905 F.2d 406, 408 (D.C. Cir. 1990).

Clause, but it has chosen not to. In the Securities Litigation Uniform Standards Act of 1998, for example, Congress sought to prevent shareholders from using state courts to bring securities class actions.[113] At the same time, however, it created a carve-out for claims that are based on state law, and permitted these actions to continue in state courts.[114] And even in the Class Action Fairness Act of 2005, Congress exempted corporate lawsuits from the scope of the law.[115]

As a normative matter, the federalist structure of corporate law is praised by some, though not all, academics. Scholars such as William Cary and Lucian Bebchuk have argued that state corporate law is a "race to the bottom," with each state seeking to enact laws that are more and more pro-management in order to attract companies to their state.[116] According to this theory, all that can stop the continued deterioration in the quality of the internal governance of corporations is federal intervention. This argument has been rebutted by others who believe that state corporate law is, if anything, a race (or "leisurely walk") to the top, and that states compete to improve their laws, not weaken them.[117] This theory relies on the fact that shareholders can choose where to incorporate new companies, and can oblige a company to reincorporate in a different state if they would prefer it to be governed by a different legal regime.

It is clear that the current system of corporate law provides meaningful choice to shareholders. Delaware provides a system of corporate governance based on what one scholar has called "director primacy": The directors manage the corporation for the benefit of the shareholders.[118] North Dakota has taken (with limited success) the opposite approach,

113. Pub. L. No. 105-353, § 2(2)-(5), 112 Stat. 3227, 3227 (1998).

114. 15 U.S.C. §§ 77p(d)(1)(B), 78bb(f)(1) (2006) (permitting certain state law claims to continue in state courts).

115. 28 U.S.C. § 1332(d)(9)(B) (2006) (exempting claims that relate to the internal affairs or governance of corporations).

116. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (describing the deterioration of corporate law in Delaware); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (analyzing the nature of state charter competition).

117. The original proponent of this theory was Professor (and now Judge) Ralph Winter in his article, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). His thesis was expanded upon and strengthened by Roberta Romano. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); *see also* Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526, 1529 (1989) (re-characterizing the "race to the top" as a "leisurely walk").

118. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

adopting a "shareholder-centric" corporation law.[119] Nevada has followed Delaware's director-centered approach, and has adopted a statute that significantly reduces the fiduciary duties owed by the directors of a firm to its shareholders.[120] And the arguments in favor of federalism in corporate law have attracted considerable support over the last two decades, even despite corporate fiascos such as the Enron debacle, which led to the passage of the Sarbanes-Oxley Act.[121] Outside of the United States, another group of jurisdictions that is able to mimic the American approach–the European Union–has begun to do so.[122] Scholars studying the European market have come to assume the superiority of competitive federalism,[123] business groups have lobbied for it,[124] and the European Commission has even studied the adoption of a regulation that would enshrine competitive

119. Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 24 n.116 (2011).

120. Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165 (2012) (detailing Nevada's approach to corporate law).

121. For a summary of the debate, see Fenner Stewart, Jr., *The Place of Corporate Lawmaking in American Society*, 23 LOY. CONSUMER L. REV. 147, 155–65 (2010).

122. The European progression toward an American system of competition for charters has been slow, but significant. In 1999, the European Court of Justice (ECJ) ruled that a company that had incorporated itself in a jurisdiction in order to take advantage of that jurisdiction's low share capital requirements could not be prevented from carrying on all its business in another jurisdiction. Case C-212/97, Centros v. Erhvervs-og Selskabsstyrelsen, 1999, E.C.R. I-1484. This reasoning was extended in Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, 2002, E.C.R. I-9943, which held that a corporation incorporated in one jurisdiction could not be denied access to the courts of another jurisdiction that was its only possible forum, and in Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, 2003, E.C.R. I-10195, which held that a foreign corporation could not be subjected to different requirements from domestic corporations. The "real seat" theory is still permitted under European law, which acts as a restraint on a fluid market for charters. Case C-210/06, Cartesio Oktató és Szolgáltató bt, 2008, E.C.R. I-09641. However, more and more states are abandoning the "real seat" theory in favor of the registration theory, and so it is possible that the European market for incorporations may become fluid without any legislative or judicial action. *See* Stefano Lombardo, *Regulatory Competition in Company Law in the EU after* Cartesio, 10 EUR. BUS. ORG. L. REV. 627, 637 (2009) (detailing the role of the registration theory in the European market).

123. Lombardo, *supra* note 122 (arguing that shareholders should be able to change easily the seats of incorporation of their companies); Andrzej W. Wiśniewski & Adam Opalski, *Companies' Freedom of Establishment after the ECJ* Cartesio *Judgment*, 10 EUR. BUS. ORG. L. REV. 595, 621 (2009) ("[Cross-border conversion of corporate form] is a useful supplement to the right to move their centre of administration, allowing them to more freely select the most convenient legal system and stimulating competition between Member States' company law systems.").

124. *See* EUROPEAN CORPORATE GOVERNANCE INST., REPORT OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (Nov. 4, 2002), *available at* http://www.ecgi.org/publications/documents/report_en.pdf (urging the Commission to propose legal changes to promote competitive federalism).

federalism in European law.[125]

The conscious decision that the courts and Congress have made that corporate governance should be the domain of the states, and the advantages of that system from a policy perspective, provide support for the notion that antitrust law should be confined to correcting problems in the market for corporate control that state corporate law cannot fix. Where state corporate law, working in conjunction with federal securities law, cannot fix a problem, antitrust law should step in. This is largely how the system operates. I return to the example at the beginning of this Part—that of a corporation engaging in horizontal price-fixing.[126] Corporate law has nothing to say about horizontal price-fixing. It would be difficult for corporate law, which focuses on wealth maximization, to say anything about this. In theory, the directors and officers of a firm, given the opportunity, might seek to engage in such conduct in order to maximize shareholder value. But antitrust law prohibits this anticompetitive conduct.[127] Corporate law, relying on antitrust law, addresses this issue indirectly: A willful breach of antitrust law would also constitute a breach of a director's duty of loyalty in corporate law.[128] Thus, corporate law effectively yields to antitrust law.

But when there is a problem that corporate law can solve, either on its own or in conjunction with federal securities law, antitrust law need not be involved. The next Part discusses how corporate law manages to resolve issues in the market for corporate control.

III. CORPORATE LAW RESOLVING ISSUES ON ITS OWN

I now move to three areas where it has been suggested that the market for corporate control is anticompetitive, and where it has been suggested that federal antitrust law should step in to restore competition. Currently, federal antitrust law does not operate in these areas. I argue that this is

125. *See* COMM'N OF EUROPEAN CMTYS., IMPACT ASSESSMENT ON THE DIRECTIVE ON THE CROSS-BORDER TRANSFER OF REGISTERED OFFICE (2007), *available at* http://ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf (analyzing the potential impact of cross-border transfer regulation).

126. *See supra* text accompanying notes 97–98.

127. United States v. Trenton Potteries, 273 U.S. 392 (1927) (prohibiting horizontal price-fixing).

128. *See* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 652 (2010) ("[C]ourts . . . have had little difficulty in concluding that directors breach their fiduciary duty when they knowingly cause the corporation to violate the law and are responsible for any harm suffered by the corporation as a result.").

desirable: There is no need for federal antitrust law to do so. Thus, federal antitrust law and corporate law are working together as they should.

A. Tender Offers: Collusion Between Buyers

In his seminal 1989 article, *Antitrust and the Market for Corporate Control*, Edward Rock argued that collusion in hostile tender offers should be scrutinized under the antitrust laws in the same way as collusion in any other market.[129] The article was triggered by 1980s bidding battles in which private equity firms had agreed to bid jointly for targets, rather than against each other.[130] The United States Court of Appeals for the Third Circuit endorsed this behavior in the 1985 case, *Kalmanovitz v. G. Heileman Brewing Co*.[131] In *Kalmanovitz*, two bidders for the Pabst Brewing Company initially competed against each other to gain control of the company, but then ceased competition and agreed to bid with each other and divide the company's assets.[132] The Third Circuit held that bidders for a company were permitted to collude in a tender offer auction, since such behavior did not implicate "trade or commerce," and so was not covered by the Sherman Act.[133]

The Rock article noted that if the object of the bidding in *Kalmanovitz* was not corporate stock, but goods or services, such collusion would be illegal.[134] This argument has been taken up more recently in an article by another scholar and practitioner, Thomas Piraino, who has claimed that collusion by bidders in "going private" transactions has lost shareholders billions of dollars in the last few years.[135] Piraino's focus is on change-of-control transactions in the private equity business: He argues that the small number of firms in the industry has allowed private equity houses to "take turns" in bidding for companies and thus reduce the price that they would pay.[136] As an alternative to taking turns, the private equity houses may also form consortiums—or "clubs"—to bid for a target. This behavior prevents the target from enjoying the benefit of multiple, competitive, bids.[137]

The argument concerning collusion in tender offers has two main

129. Rock, *Corporate Control*, *supra* note 10.
130. *Id.* at 1368, 1402, 1411.
131. Kalmanovitz v. G. Heileman Brewing Co., 769 F.2d 152 (3d Cir. 1985).
132. *Id.* at 157.
133. *Id*. at 156.
134. Rock, *Corporate Control*, *supra* note 10.
135. Piraino, *supra* note 11.
136. *Id.* at 973.
137. *Id.* at 978.

prongs. First, it is claimed that bidders in tender offers explicitly collude and refuse to compete against each other.[138] This collusion can be seen as a form of horizontal price-fixing, which is illegal per se.[139] Second, it is claimed that implicit collusion between private equity firms is rife: Even if private equity bidders do not agree explicitly to collude in a bid, they are able to signal to each other that they do not wish to bid against each other.[140] Such signaling is not illegal per se, but would still be illegal if it had an anticompetitive effect.[141] Both implicit and explicit collusion are at issue in the ongoing litigation in federal district court, *Dahl v. Bain Capital*, on alleged collusion between private equity firms in club deals.[142]

One proposed remedy to these perceived problems—and the remedy sought in the lawsuit—is more stringent application of the federal antitrust laws. According to this thinking, state corporate law and federal securities laws are not equal to the task of correcting this anticompetitive behavior. Under state corporate law, managers have a fiduciary duty to obtain the best possible price for a corporation's stock when a sale is inevitable.[143] But, managers "can avoid the application of state fiduciary laws entirely simply by proving that they made their best efforts to obtain the highest available price in a change-of-control transaction."[144] Therefore, if private equity firms collude in bidding, shareholders have no recourse against management for failing to obtain a better price; managers cannot prevent bidders from colluding, and their best efforts may come to naught. The federal securities laws, on the other hand, force bidders to disclose any agreements to bid jointly for a company, but do not prohibit joint bidding arrangements.[145] They therefore provide no remedy against collusive

138. Piraino, *supra* note 11, at 1001–04.

139. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.").

140. Piraino, *supra* note 11, at 1004–11.

141. United States v. U.S. Gypsum Co., 438 U.S. 422 (1978); *see also* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 240–41 (2000) (stating that *Gypsum*'s analysis shows how price information exchanges should be subject to the conventional antitrust analysis).

142. *E.g.*, Third Amended Class Action Complaint ¶¶ 40–47, Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112 (D. Mass. 2008) (No. 07-12388-EFH), *available at* 2008 WL 5679238 (describing defendants' scheme to collude, and citing the leveraged buyouts of SunGard and Neiman Marcus Group as recent examples of defendants' collusive behavior).

143. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).

144. Piraino, *supra* note 11, at 989; *see, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) ("No court can tell directors exactly how to accomplish that goal [of getting the best price in a sale].").

145. 17 C.F.R. § 240.14d-100 (2012); *see also* Piraino, *supra* note 11, at 990 (citing

behavior, even if this behavior would be illegal under the Sherman Act.[146]

The argument above is not ironclad. The threshold problem is that it is not clear that shareholders are being harmed through such allegedly anticompetitive practices. One study that compared private deals and public deals between 1990 and 2005 concluded that target company shareholders received an acquisition premium that was forty-three percent higher if a public firm rather than a private firm made the acquisition, and fifty-five percent higher if a public firm rather than a private equity firm makes the acquisition.[147] But the conclusion drawn by the study researchers was that public firms are overpaying—not that private equity firms are underpaying.[148] The explanation for this overpayment was that publicly owned companies have diffuse ownership, and that managers thus have less incentive to ensure that they do not overpay for targets.[149] Other research has shown that private equity firms are prone to overpaying for firms as well as for underpaying for them, and also that private equity buyouts create permanent economic value, which would help explain why private equity investors can gain high returns on capital.[150]

But this threshold issue is not fatal for the argument that the market for control does not suffer a problem of competition. Even if private equity on balance adds significant value to firms, and target shareholders receive fair prices for their stock, instances of collusion that reduce target shareholder return in individual cases should still not be tolerated. For example, the plaintiffs in the ongoing *Dahl* litigation in Massachusetts

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Finnegan v. Campeau Corp., 915 F.2d 824, 831 (2d Cir. 1990) ("[T]he SEC . . . has 'chosen not to prohibit agreements between rival bidders as fraudulent or manipulative practices once shareholders are properly informed of them.'")).

146. Piraino, *supra* note 11, at 990.

147. Leonce Bargeron et al., *Why Do Private Acquirers Pay So Little Compared to Public Acquirers?* 1, 22 (Nat'l Bureau of Econ. Research, Working Paper No. 13061, 2007); Piraino, *supra* note 11, at 987 n. 111.

148. Bargeron et al., *supra* note 147, at 23.

149. *Id.*

150. Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121, 135 (2009) ("[I]t seems likely that at times in the boom-and-bust cycle, private equity firms have overpaid in their leveraged buyouts and experienced losses."). Kaplan and Strömberg do acknowledge the Bargeron paper and other research that show that "there is some evidence that private equity funds are able to acquire firms more cheaply than other bidders." *Id.* However, they note that there are various possible explanations for this: Private equity firms may be exceptionally skillful negotiators, and private equity firms are better than public firms are timing the market well, both on entering and exiting their investment. These explanations are plausible, given that the business model of private equity is to some extent predicated upon private equity fund managers being good bargainers and knowing how to time the market. *See also id.* at 143 ("[P]rivate equity creates economic value . . . . ").

claim to identify up to thirty-six such transactions.[151] And there are certainly instances where bidders appear to have managed to collude to avoid paying the price that they would pay if bidding against each other in a competitive auction process.[152] If shareholders are being harmed, then corporate law and securities law have failed, and antitrust law may be the only solution to prevent further harms.

But it is not inevitable that shareholders would be harmed by any of the three practices that are condemned, namely, express collusion, tacit collusion, and use of consortia. In theory, shareholders may be harmed by receiving an offer price from a collusive bid that is lower than the price that they would receive if the target were the subject of a competitive bidding process. But shareholders retain the right to approve, or vote against, the sale of the company. In a publicly owned corporation without a majority shareholder, there is no single owner who can force a sale.[153] If shareholders know that one bidder is refusing to compete with another bidder, or that two bidders have decided to form a consortium, the shareholders have no obligation to sell the corporation at all, and they might well choose not to. As noted above, the federal securities regulations mandate disclosure of such bidding agreements;[154] shareholders will be able to make an informed choice.

This "informed choice" is not idle fantasy. Shareholders are, by and large, not the uninformed and powerless individuals of the Berle and Means corporation.[155] Instead, individuals choose generally to invest through intermediaries—institutional investors such as mutual funds and pension funds.[156] These institutional investors, by contrast, can agitate to

151. Dahl v. Bain Capital Partners, LLC, 589 F. Supp. 2d 112 (D. Mass. 2008).

152. Piraino, *supra* note 11, at 1003–04.

153. If there is a majority shareholder, that shareholder will always be able to force a sale of the entire company, because it will be able to purchase the shares of the minority through a "squeeze-out." Since *Weinberger v. UOP, Inc.*, the Delaware Supreme Court held that there was no business purpose requirement for such a transaction. 457 A.2d 701 (Del. 1983).

154. *See supra* note 145.

155. The "Berle and Means corporation" denotes a corporation whose stock is diffusely owned by individuals. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 117 (1932). As a result of this diffuse ownership, all economic power rests in the hands of the management. *See, e.g.*, *id.* at 124 ("[I]t is therefore evident that we are dealing not only with distinct but often with opposing groups, ownership on the one side, control on the other—a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position.").

156. *See, e.g.*, Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 114 (1979); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 4–5 (2007).

ensure that they achieve the best possible return on their investment. They can either research and study stocks themselves, or they can canvass an opinion from professional advisors who will tell them whether an offer should be accepted or not.[157] Delaware law places such faith in shareholders' ability to decide what is in their best interests that conditioning an "interested" transaction on the approval of a group of shareholders may help insulate that transaction from the most rigorous form of judicial scrutiny.[158]

The ability of shareholders to refuse to sell their stock does not, on its own, eliminate all harms that may arise from collusion between bidders.[159] For example, shareholders may note that the offer they receive from the colluding bidders is still higher than the pre-bid price of their stock, and therefore choose to sell, even though the price they receive is not as high as it would be if there had been no collusion between bidders. The harm to shareholders in this case is not receiving the premium that they would have obtained had there been no collusion.

Nevertheless, it appears that corporate law already has a remedy for this problem. Under the *Revlon* doctrine, a corporation's board must make an effort to obtain the highest possible price for the corporation's shares, when a change of control is inevitable.[160] If the board, or its financial advisor, believes that a club deal will depress the price obtained for the shares, the board may choose not to permit such deals.[161] The management may also prevent bidders from sharing information more generally.[162] If shareholders who are faced with a deal believe that the management and directors have improperly permitted collusion between bidders, and have

157. Strine, *supra* note 156, at 8; *see also* Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1874 (2008) (describing the role of Institutional Shareholder Services in advising institutional investors how they should vote).

158. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 643–44 (Del. Ch. 2005) (advocating a standard of review for "going private" mergers whereby, if the deal was negotiated by an independent special committee and conditioned on the approval of a majority of the disinterested shareholders, the transaction would be reviewed under the deferential "business judgment" rule).

159. As will be discussed below, *see infra* section II.B, this remedy has itself been attacked on the grounds that it raises antitrust problems: Shareholders are colluding with each other and distorting the market. I argue below that such a remedy would be procompetitive, not anticompetitive, and so presents no problems of antitrust law.

160. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).

161. *See, e.g.*, In re Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 821 (2011) (discussing a "no teaming" provision that allowed the board to "determine whether any bidders would be allowed to work together on a joint bid").

162. *E.g.*, *id*.

not obtained the best price, they can sue under *Revlon* for equitable relief, and may later seek damages.[163] They may also sue the allegedly collusive bidders for aiding and abetting the directors' purported breach of fiduciary duty.[164] Therefore, corporate law seems to have a mechanism to prevent, and remedy, any harm shareholders may suffer. To be sure, antitrust law can provide a strong deterrent, including triple damages and criminal liability.[165] But, corporate law is not without its own remedy.

The case of *tacit* collusion, on the other hand, is more problematic. In such cases, shareholders are not given all the information they need to decide whether or not to accept the bid. Furthermore, even if management seeks to prevent bidders from communicating with each other, the bidders may disregard such instructions. But, such behavior is already a breach of the federal securities laws: Information about the collusion is not being disclosed to shareholders.[166] Shareholders possess a private right of action for a failure to disclose such information, and of course the SEC can enforce the securities law also.[167] Therefore, there does not seem to be any need for federal antitrust law to make any special provision to deal with tender offers.

B. Tender Offers: Collusion Between Sellers

Tender offers have also been criticized on antitrust grounds because of the potential for collusion between sellers. In a tender offer, the bidder seeks to gain more than fifty percent of the shares of the target company; once this is done, the bidder will be able to buy the remainder of the shares, whether or not the sellers agree.[168] This has the potential to create a "shareholders' dilemma."[169] If all the shareholders cooperate with each

163. *See, e.g.*, In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 208 (Del. Ch. 2007) (discussing injunctive relief and damages under *Revlon*).

164. *See, e.g.*, *Del Monte*, 25 A.3d at 836-37 (noting that a bidder may be liable for aiding and abetting a breach of fiduciary duty by the board).

165. *E.g.*, 15 U.S.C. § 1 (2006) (providing for criminal liability for cartelization); *id.* § 15(a) (2006) (providing for triple damages for violations of the antitrust laws).

166. Securities and Exchange Act of 1934 § 14(e), 15 U.S.C. § 78n(e) (2006).

167. *See, e.g.*, HAZEN, *supra* note 92, § 11.10, at 436-39 (discussing private rights of action under section 14(e) of the Securities Exchange Act of 1934).

168. The bidder may do this in two ways. If the bidder has fifty percent of the stock of the company that it wishes to acquire, it can merge the target company into a wholly-owned subsidiary. DEL. CODE. ANN. tit. 8, § 251 (2013). If the bidder has over ninety percent of the stock that it wishes to acquire, it may simply "freeze out" the minority shareholders, in return for cash payments. DEL. CODE. ANN. tit. 8, § 253 (2013).

169. *See* David W. Leebron, *Games Corporations Play: A Theory of Tender Offers*, 61 N.Y.U. L. REV. 153, 184–91 (1986) (discussing tender offers, and noting how they differ

other, they collectively will be able to get a higher price than if they do not cooperate. But it is tempting for shareholders not to cooperate. Some of them may choose to sell their shares before an agreement is reached; if the bidder obtains a stake of over fifty percent, it may be able to pick up the remainder at a lower price.[170] And some shareholders may renege from the agreement at the last moment by refusing to tender their shares; they may be able to extract a higher price than their fellow shareholders.

Three mechanisms prohibit such behavior and "solve" the dilemma. The first is the Williams Act, which regulates tender offers.[171] Under the Williams Act, it is not possible for a bidder to make incremental tender offers by first offering a low price, at which some shareholders tender their shares, and then offering a higher price, at which more shareholders tender, until the bidder has acquired the total number required. Instead, the bidder must offer the later, higher price to all bidders.[172]

The second mechanism is corporate law, which has set down standards for tender offers. If a bidder that owns more than fifty percent of the stock of a company wishes to acquire the remainder that it does not own via a tender offer and then a "freeze-out," it must agree to pay in the freeze-out the same price that it offered in the tender offer.[173] On the other hand, if a non-controlling shareholder launches a tender offer, gains over fifty percent of the target, and then uses a merger to take full control, the second stage of the transaction is reviewed under an "entire fairness" standard, which ensures that those shareholders who do not tender their shares are paid a fair price.[174]

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from typical prisoner's dilemmas).

170. *See id.* at 163 n.41 (hypothesizing a world without state appraisal statutes, in which coercive tender offer structures could induce a shareholder to tender where he or she would not otherwise, in order to maximize the minimum amount the shareholder will receive).

171. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (adding new sections 13(d), 13(e) and 14(d)-(f) (1968) to the Securities and Exchange Act of 1934, codified as amended at 15 U.S.C. § 78m(d)-(e) and 78n(d)-(f) (2012)).

172. 15 U.S.C § 78n(d)(7) (2006). The Williams Act also mandates a minimum offering time for a tender offer, which makes it possible for competitors to challenge the offer. Unlawful Tender Offer Practices, 17 C.F.R. § 240.14e-1(a) (2012); Leebron, *supra* note 169, at 185 n.111.

173. *See In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (holding that a controlling shareholder's tender offer for the company's remaining shares is only considered non-coercive if the shareholder agrees to "freeze out" the non-tendering shareholders at the same price once it obtains more than 90% of the shares).

174. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994) (holding that "entire fairness" is the appropriate standard in a merger consummated by a controlling shareholder). The entire fairness standard implicates both "fair dealing and fair price." *Id.* at 1115 (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Of these two, fair price is generally the more important one. *See, e.g.*, Del. Open MRI Radiology Assocs., P.A. v. Kessler, 898 A.2d 290, 311 (Del. Ch. 2006) (noting that the requirement of

The third mechanism is the "poison pill," which effectively forces a bidder to negotiate directly with management rather than directly with shareholders. The poison pill thus can be seen as correcting an anomaly in Delaware corporation law under which merger transactions, which lead to a change of control, require board approval, but tender offers do not.[175] Although there are many forms of pills, the most common permit management to issue new securities if a bidder reaches a certain ownership stake in the target, or grant the target shareholders the right to buy shares in the acquiring company.[176] This makes it very expensive, or impossible, for a bidder to take over a company with a pill without the approval of the management, who speak for all the shareholders.[177]

These three mechanisms have the effect of solving the shareholder's dilemma. Instead of competing with each other, shareholders are forced to cooperate with each other. This behavior, however, might be illegal in other contexts; as noted above, if the good being sold was not stock but widgets, such collusive behavior would be prohibited by the Sherman Act.[178] Collusion between shareholders in responding to tender offers is, it has been claimed, "deeply problematic from the antitrust perspective," and corporate law appears to be in conflict with antitrust law.[179]

Various arguments have been put forward in support of this proposition, and I shall take the two most salient.[180] First, collusion cannot

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procedural and substantive fairness "is more than a bit of a misnomer, as the overriding consideration is whether the substantive terms of the transaction were fair").

175. *See* Air Prods. & Chemicals, Inc. v. Airgas, 16 A.3d 48, 94–95 (Del. Ch. 2011) (pointing out the anomaly in Delaware corporation law and noting that the poison pill was created as an attempt to address this flaw).

176. Brian J. McTear, Comment, *Has the Evolution of the Poison Pill Come to an End?*—Carmody v. Toll Brothers, Inc.; Mentor Graphics, Inc. v. Quickturn Design Systems, Inc., 24 DEL. J. CORP. L. 881, 884–85 (1999).

177. Courts differ on how difficult a poison pill may make a takeover while still being permissible under Delaware law. *Compare* Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310, 337 n.182 (Del. Ch. 2010) (holding that an acceptable defensive measure should "leave a proxy insurgent with a fair chance for victory . . . ."), *with* Selectica, Inc. v. Versata Enters., Inc., C.A. No. 4241-VCN, 2010 WL 703062, at *20 (Del. Ch. Feb. 26, 2010) (applying a stricter standard and holding that, for a pill to be impermissible, the chance of defeating the defensive measure must be "'mathematically impossible' or 'realistically unattainable.'") (quoting Carmody v. Toll Bros., 732 A.2d 1180, 1195 (Del. Ch. 1998)).

178. Rock, *Antitrust Lens*, *supra* note 10, at 544–45.

179. *Id.* at 544.

180. These arguments are, like much else in this Article, drawn from Professor Rock's work. *See id.* I only discuss two of Professor Rock's five arguments on this point. First, I pass over his argument based on "allocational efficiency." This argument recognizes that joint bargaining by shareholders may be beneficial because, if shareholders were not able to force bidders to buy them out at a higher price by colluding, they would be less likely to invest in the corporation in the first place—which would lead to suboptimal amounts of investment. *Id.* at 540. I pass over this argument because although Rock recognizes its

be defended on the grounds that the shareholders are all co-owners; acting as co-owners "does not provide any sort of blanket license for engaging in concerted activities."[181] Second, despite the fact that small shareholders can be "frozen out," they should not be permitted to bargain jointly.[182] The position of shareholders can be analogized to that of unitholders in oil unitization fields. Unitholders would likely not be permitted to bargain jointly to sell their units—and so why should shareholders?[183]

The first argument is particularly worthy of examination: The contention that collusion between shareholders cannot be justified on grounds of co-ownership appears dubious. Collusion between shareholders as co-owners is a form of joint bargaining, and thus functions as a horizontal restraint. The Court's jurisprudence on joint bargaining is not extensive: It has only investigated such agreements once since the 1930s. However, it has found that joint sales agreements are subject to the rule of reason.[184] The question is therefore whether it is procompetitive or

validity, he notes that there is insufficient empirical evidence to evaluate it. Second, I pass over Rock's "populist" or "distributional" argument, that sellers are no weaker than buyers and do not deserve an exemption from the antitrust law. *Id.* at 542. I leave this argument aside because I am approaching this question from the opposite direction to Rock, and it is not an affirmative argument that sellers of stock should not be allowed to cooperate. Third, I pass over Rock's "doctrinal" argument, which is that the Williams Act should not be seen as repealing the Sherman Act in the market for corporate control. *Id.* at 544. I do not deal with this argument because I am trying to establish that antitrust law need not be involved in the market for corporate control, not that it is *impossible* for antitrust law to operate in this space.

181. *Id.* at 533. Rock relied for support here on the case of *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), in which the Court held that the National College Athletic Association had violated the Sherman and Clayton Acts by restricting college football teams from negotiating their own television rights agreements with broadcasters. The Court used *NCAA* in its unanimous ruling in *American Needle, Inc. v. NFL*, 130 S.Ct. 2201 (2010), when it held that collective licensing agreements by teams that made up the National Football League breached section 1 of the Sherman Act.

182. *Id.* at 533.

183. *Id.* at 536–37.

184. Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979). *Broadcast Music* held that record companies, composers and musicians were permitted to license the copyright for their works through agencies that negotiated on behalf of their members as a group. The previous time when the Court had examined a joint sales agreement was *Appalachian Coals, Inc. v. United States*, in which it held that it was legal for coal producers east of the Mississippi to form an agency to achieve "the best prices obtainable and, if all [the coal] cannot be sold, to apportion orders upon a stated basis." 288 U.S. 344, 358 (1933). *Broadcast Music* relied directly on a modern conception of the "rule of reason": on remand, the Second Circuit Court of Appeals was directed to "include [in its analysis] an assessment under the rule of reason of the blanket license as employed in the television industry . . . ." *Broad. Music*, 441 U.S. at 24–25. The rationale of *Appalachian Coals* can be squared with that used in *Broadcast Music*, but only just. Chief Justice Hughes, for the majority, wrote that "[t]he mere fact that the parties to an agreement eliminate competition between

anticompetitive for shareholders to collude with each other.

It has been argued that it is efficient for shareholders to collude when they act as co-owners—for example, when they wish to monitor the management board.[185] On the other hand, when they are considering whether to sell their shares, they act as competitors—and there is no economic justification why they should cooperate. But this analysis, although tempting, is not ironclad. The division between shareholders as "co-owners" and "competitors" is not so precise.

Shareholders in public companies usually do not see themselves as being either a "holder" of stock, or a "seller," as the above analysis implies. It is true that in some circumstances, shareholders may be determined to sell the corporation (if it is facing bankruptcy, for example), and in others the shareholders may be intent on keeping it (for example, if it is a family-controlled business). However, many shareholders will be happy to sell their stock if the price is high enough, or to keep it if that is the financially more attractive option.[186] Like members in any organization, shareholders are faced with the continual question of whether they should keep their membership or "exit" from it.[187] Seen like this, the decision to cash out an investment in a firm is qualitatively no different from any other decision that shareholders may take collectively as "co-owners." If shareholders may combine to elect management as part of their efforts to achieve a return on their investment, it is hard to see why they also may not cooperate in making decisions whether to sell the company to achieve a return. This argument is particularly forceful when we recall that one of the benefits of shareholder cooperation may be to defeat potentially anticompetitive

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themselves is not enough to condemn it." *Appalachian Coals*, 288 U.S. at 260. However, the overwhelming tone of the opinion is not one of economic analysis, but concern for the social conditions produced by "injurious and destructive [trade] practices." *Id.* *Appalachian Coals* is therefore of dubious authority, and part of its holding in another context has been overruled. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984) (holding, contrary to *Appalachian Coals*, that a parent and its subsidiary must be seen as a single enterprise for purposes of Section 1 of the Sherman Act).

185. Rock, *Antitrust Lens*, *supra* note 10, at 533.

186. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (postulating that the only utility gained by shareholders from ownership in a company is the positive effect that it has on their wealth and cash flow).

187. This was pointed out most famously by Albert Hirschman in 1970. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 46 (1970). The shareholder is faced with the continual question of whether he should retain his shareholding, or sell it. *Id.*; *see also* John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84 (2010) (discussing this framework as applied to mutual fund shareholders).

practices among sellers.[188]

At a more fundamental level, the contention that fixing the price of shares of a company in a tender offer can be compared to a cartel of manufacturers fixing the price of widgets seems mistaken.[189] Price-fixing in a cartel assumes that the entire market (or almost the entire market) is subject to the cartel; otherwise, the cartel has no effect and would be destroyed as soon as it had begun. On the other hand, the wide variety of substitutes available in companies means that the shareholders of one company, by grouping together, do not have the power to raise prices in the entire market. If the price of a target company is too high, the acquirer may bid for another company instead.[190] And although it is true that if every company in a given sector adopts a poison pill or another device that raises the price that must be paid for the company, there is still a competitive market for corporate control. This competitive market could only be defeated if shareholders *in different companies* were to collude to fix the prices of their shares—a situation that is almost inconceivable.

The second argument outlined above, in my view, is less persuasive. According to this argument, selling shareholders are in a better position than unitholders in oil fields, because the freezeout rule solves the "free rider" and the "holdout" problems caused by shareholders who refuse to tender.[191] Because shareholders are in a better position than unitholders, the fact that they can be "frozen out" does not mean that they should be permitted to undertake collective bargaining activities that unitholders cannot. But the rules for oil unitization fields in fact place unitholders in a situation that is remarkably similar to that of shareholders who are the subject of freezeouts. There is no restriction on collective bargaining by oil unitholders to obtain a better price, but the force of this collective bargaining is weakened by the fact that it is usually only necessary for an oil extractor to obtain consents from a supermajority of unitholders in order

188. *See supra* note 159 (arguing that the practice of shareholder collusion in tender offers is in fact procompetitive, not anticompetitive).

189. Rock, *Antitrust Lens*, *supra* note 10, at 527.

190. Rock responds to this point by arguing that "collectively shareholders do in fact possess market power, within what one might characterize as the *submarket* for the shares of a given target." *Id.* at 529 (emphasis added). This seems rather unlikely: There are usually many substitutes available for any given company. *See, e.g.*, Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235 (2001) (noting that it may be possible to replicate the effects of insider trading by trading in "stock substitutes"); Amanda M. Rose & Richard Squire, *Intraportfolio Litigation*, 105 NW. U. L. REV. 1679 (2011) (noting that shareholders of one corporation are likely to be diversified and hold stock in rival corporations).

191. Rock, *Antitrust Lens*, *supra* note 10, at 536.

to proceed with the extraction.[192] Once the extractor has obtained consents from a supermajority, it is permitted effectively to "freeze out" the remaining unitholders and pay them royalties for the extraction of their resources.[193] Therefore, the freezeout rule places shareholders in a similar position as unitholders. For these reasons, it does not seem that corporate shareholders get any kind of "special treatment" compared to those who are subject to antitrust law, and we should therefore not conclude that there is a conflict between antitrust and corporate law in the field of tender offers.

C. Constituency Statutes

State takeover statutes and constituency statutes are other examples of where corporate law appears to violate federal antitrust law. I treat these two types of statutes together because constituency statutes can be seen as a form of takeover statute.[194]

The "first generation" of state takeover statutes was developed in the 1970s. States sought to intervene in takeovers for domestic companies in order to protect local management.[195] The definition of "domestic company" was extremely broad: For example, Illinois's statute covered not only companies incorporated within the state, but any company of which ten percent of the shareholders were located in Illinois, or which had a main office in the state and had ten percent of its capital and surplus represented within the state.[196] A corporation could thus be incorporated within another state, and conduct almost all of its business in other states, yet be subject to Illinois's laws. The takeover statutes required bidders to submit plans to a state agency and get approval before proceeding with a bid; because state review was so protracted, management was put in a strong position to resist the takeover.[197]

It is unsurprising that these statutes were challenged as burdening interstate commerce. In the case that struck down the first generation of takeover statutes, *Edgar v. MITE Corp.*, the Court held that Illinois was

192. *See, e.g.*, OKLA. STAT. tit. 52, § 287.4 (2010). I cite the example of Oklahoma because it was the first state to adopt an oil unitization statute.

193. *Id.*

194. Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race To Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1179 (1999).

195. ROMANO, *supra* note 117, at 54.

196. *See* Edgar v. Mite Corp., 457 U.S. 624, 627 (1982) (defining a "target company" and a registered offer under the Illinois statute).

197. ROMANO, *supra* note 117, at 54; *see also Edgar*, 457 U.S. at 627 (describing procedure instituted by Illinois's takeover law).

placing an unwarranted burden on out-of-state transactions.[198] Illinois had a legitimate interest in protecting *resident* shareholders, but had no such legitimate interest in protecting nonresident shareholders.[199] States responded to *Edgar* by producing a "second generation" of takeover statutes that had narrower bases of jurisdiction, less sweeping extraterritorial reach, and were modeled as state regulation of corporate governance.[200] These statutes have various forms. The most common type, "control share acquisition statutes," provide that a bidder who acquires a controlling stake in a corporation is not permitted to vote those shares unless a majority of the other (non-controlling) shareholders permits it to.[201] Other statutes provide that a party has to pay a "fair price," dictated by statute, in a merger where the party already owns a significant proportion of the target company, while still others prevent a bidder from engaging in a business combination with an acquired company for a certain period of time.[202] The constitutionality of such statutes was upheld in 1987, in *CTS Corp. v. Dynamics Corp.*[203] Delaware adopted its own takeover statute the following year.[204]

Finally, states adopted constituency statutes, discussed above. These allow directors to consider the interests of non-shareholders in exercising their authority as to whether or not to accept a bid for a company. Scholars have pointed out that they give managers "an even greater ability to formulate a legally acceptable reason not to dismantle a poison pill or refrain from whatever other defensive maneuvers they might wish to engage in."[205] Constituency statutes, along with takeover statutes, make it harder for bidders to acquire target companies in a hostile takeover.

Because of their operation, takeover statutes and constituency statutes can be seen as posing problems under the antitrust laws. Control share acquisition statutes and constituency statutes in particular present the same problem as poison pills: They force a potential bidder to negotiate directly with the directors of a company, and not with individual shareholders. Because the directors are elected by all the shareholders, these laws can be

198. *Edgar*, 457 U.S. at 644.

199. *Id.*

200. William C. Tyson, *The Proper Relationship Between Federal and State Law in the Regulation of Tender Offers*, 66 NOTRE DAME L. REV. 241, 247 (1990).

201. Bebchuk & Ferrell, *supra* note 194, at 1178.

202. *Id.* at 1178.

203. 481 U.S. 69 (1987).

204. DEL. CODE ANN. tit. 8, § 203 (2012); *see* Guhan Subramanian et al., *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988-2008*, 65 BUS. LAW. 685, 694-98 (2010) (describing the background of legislative action of the Delaware bar to design an antitakeover statute that would survive constitutional challenge).

205. Bebchuk & Ferrell, *supra* note 194, at 1180.

seen as creating a cartel of shareholders who bargain jointly rather than in competition with each other. Under antitrust law, this could be considered illegal.

These laws are saved, however, under the *Parker* doctrine, which provides one of the exemptions to the nation's federal antitrust laws. The doctrine holds that "when a state acting in its sovereign capacity announces a public policy against free competition in a *privately* owned industry, then state control and regulation thereof, even to the extent of eliminating competition, is permissible . . . ."[206] The doctrine was named after the case of *Parker v. Brown*, in which the appellee challenged the right of California to pass regulations concerning the marketing of raisins that would force prices up and enrich farmers.[207] The Court, in upholding the Californian regulation, held that there was no violation of the Sherman Act: "The state in adopting and enforcing the [marketing and distribution] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."[208]

This was entirely correct—but, as scholars have pointed out, was not the question that the *Parker* Court was asked.[209] Brown, a farmer of raisins, had claimed in the lower court that California's regulation was preempted under the dormant Commerce Clause.[210] The Supreme Court, taking a direct appeal from the three-judge district court, requested additional briefing on the question of whether the California regulation violated the Sherman Act.[211] In the event, the Court found that there was no Sherman Act violation, and ignored the preemption question altogether.[212]

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206. LOUIS ALTMAN & MALLA POLLACK, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:4 (4th ed. 2011).

207. 317 U.S. 341 (1943).

208. *Id.* at 352.

209. *See, e.g.*, Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 81-82 (2006) (arguing that the only question in Parker was whether federal law preempted state regulation).

210. Brown v. Parker, 39 F. Supp. 895, 896 (1941).

211. Squire, *supra* note 209, at 82.

212. This was observed by three dissenting Justices some thirty years later, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). *See id*. at 618 (Stewart, J., dissenting). In *Cantor*, the petitioner had sued Detroit Edison, a monopoly provider of electricity that provided power to southeastern Michigan, for violating the antitrust laws through its practice of handing out replacement light bulbs to customers free of charge. This "tying" arrangement could not be changed without the approval of the state of Michigan: The distribution of light bulbs was approved by the state Public Service Commission, and the cost of the replacement light bulbs was included in the electricity rates, which could only be changed with state permission. *Id*. at 582–83.

Nevertheless, courts have continued to treat the question of state Sherman Act violations and preemption under the Commerce Clause as one and the same. The Court articulated the state action doctrine in its current form in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc*.[213] The appellee, Midcal, was a wine wholesaler that wished to sell wine for prices lower than those posted on schedules by state wine producers, in contravention of state regulation.[214] The Court laid down two requirements for state action to receive immunity under the *Parker* doctrine: The "challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,'" and "the policy must be 'actively supervised' by the State itself."[215]

The *Parker* doctrine protects state takeover statutes from antitrust law. State takeover laws are "clearly not prohibited by the Sherman Act."[216] The logic of the *Parker* doctrine has been challenged.[217] However, the result—in the market for corporate control, at least—is not objectionable. In the case of takeover statutes, corporations may often choose to opt out of the takeover statute altogether,[218] and shareholders who are unhappy with their corporation's use of a state takeover statute may even force the corporation to reincorporate in a state with a less stringent statute.[219] Delaware's statute has not had a significant effect on preventing changes in control, and it is highly dubious that any federal regulation is required.[220]

IV. ANTITRUST LAW STEPPING IN: THE HART-SCOTT-RODINO ACT

The discussion above argued that, in three areas, the market for

213. 445 U.S. 97 (1980).

214. *Id*. at 99–100.

215. *Id*. at 105.

216. Rock, *Antitrust Lens*, *supra* note 10, at 558.

217. *E.g.*, Squire, *supra* note 209 (arguing that the Supreme Court has confused whether market conduct encouraged by state law violates the Sherman Act, and whether state law conflicts with the Sherman Act and is thus pre-empted); Dirk C. Phillips, Note, *Putting* Parker v. Brown *and Its Progeny in Perspective: An Assessment of the Supreme Court's Role in Development of Antitrust Federalism*, 16 J. L. & POL. 193 (2000) (examining jurisprudence in wake of the *Parker* decision).

218. *See* Springer, *supra* 84, at 101–02 (detailing opt-in and opt-out provisions).

219. ROMANO, *supra* note 117, at 57. Moving states does not guarantee that hostile bidders will be able to overcome the takeover statute. *See* Subramanian et al., *supra* note 204 (showing that, in twenty years, no hostile bidder had managed to overcome the hurdles imposed by Delaware's takeover statute). However, shareholders may be able to force the corporation to opt out of it.

220. Subramanian et al., *supra* note 204, at 705 (noting that poison pill is a much more important defense to hostile bids for Delaware corporations than section 203).

corporate control is functioning adequately without antitrust law. I now move to a final area, where it has been necessary for antitrust law to step in. This is merger activity regulated by the Hart-Scott-Rodino Act (HSR).

A. The Effect of HSR

HSR was enacted in 1976. At this time, the Court was beginning to apply the principles of the Chicago school to its jurisprudence, which focused on economic efficiency rather than a doctrinal approach that "big is bad."[221] The economy was also becoming globalized, reducing the force of the populist appeal for small companies over large, and HSR can be seen as a backlash against this.[222] HSR was divided into three titles. The first title was "Antitrust Civil Process Act Amendments;" the second, "Premerger Notification;" and the third, "Parens Patriae."[223] Of these, it is the second title that is the focus of the following discussion.

The premerger notification requirement mandates that, provided that the transaction or either the acquirer or acquired corporation is of a certain size, the parties must inform the Federal Trade Commission and the Assistant Attorney General of the Department of Justice of the transaction.[224] The parties must then wait to obtain antitrust approval: This waiting period is thirty days long (fifteen days in the case of a cash tender offer), although it may be shortened if the FTC and DOJ determine that they do not wish to take any action in respect of the transaction, and may be lengthened if they decide that they need more time.[225] There are also various exceptions to the waiting requirement.[226]

The waiting period, and its exceptions, are examples of antitrust law

221. Sims & Harman, *supra* note 70, at 872.

222. *Id.* at 872–76.

223. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383, 1383, 1390, 1394 (1976).

224. 15 U.S.C. § 18a(a), (d) (2006). The requirements for the merger notification are somewhat complex. The acquirer must file if the total transaction is worth more than $283.6 million. *Id.* § 18a(a)(2)(A) (2006); 78 Fed. Reg. 2406 (Jan. 11, 2013). Alternatively, the acquirer must file if a transaction is worth $70.9 million, and either (i) the acquirer has annual net sales or assets greater than $141.8 million, and the acquired stock or assets are of a manufacturing enterprise that has net sales or assets greater than $14.2 million; or (ii) the acquirer has annual net sales or assets greater than $141.8 million, and the acquired assets are of a non-manufacturing enterprise that has total assets greater than $14.2 million; or (iii) any voting securities of a person with annual net sales or total assets of $141.8 million are being acquired by a person with total assets or net sales of at least $14.2 million. 15 U.S.C. § 18a(a)(2)(B) (2006); 78 Fed. Reg. 2406 (Jan. 11, 2013).

225. 15 U.S.C. § 18a(b), (e)(2) (2006).

226. *Id.* § 18a(c).

affecting corporate law. The effect of the HSR waiting period is to make it harder for bidders to acquire companies quickly and discreetly; any sizeable transaction will need to be reported to the authorities. This makes it easier for a competing bidder to attempt to "jump" the deal and make its own bid.[227] There is evidence that HSR has reduced the frequency of takeover bids; bidders are worried that they will fail to win their target, and so decline to go to the expense of bidding at all.[228] At the same time, premiums received by shareholders on account of these waiting periods have not necessarily increased.[229] In this way, HSR can be seen as cutting across the goals of corporate law. Corporate law aims at maximizing the value received by shareholders for their stock.[230] HSR makes it less likely that a bidder will attempt to buy the shareholders' stock, and does not compensate for this with an increase in the consideration offered if the bidder does decide to bid.

HSR contains twelve exceptions to the waiting period.[231] These cover a range of transactions, such as "acquisitions of goods or realty transferred in the ordinary course of business," and various kinds of acquisitions that are aimed at passive investment rather than active control.[232] One of these exceptions is particularly relevant. "[A]cquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition" are exempted from Hart-Scott-Rodino.[233] Under this exception, an acquirer that already has a majority stake in a corporation is able to squeeze out minority shareholders without causing antitrust concerns.

B. Assessing HSR Alongside Corporate Law

Given this Article's proposition for the correct interaction between antitrust and corporate law, what should we make of HSR? The waiting period that is mandated in certain circumstances by HSR interferes with the management of corporations and affects how likely a company is to bid for another corporation. However, the waiting period is designed to prevent a

227. *See* Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119, 156 (1992) ("Any regulation that delays the consummation of a hostile bid, for example, increases the likelihood of an auction by providing time for another bidder to enter the fray, upon the target's solicitation or otherwise.").

228. *Id*. at 178.

229. *Id*.

230. *See supra* note 87 and accompanying text.

231. 15 U.S.C. § 18(c) (2006).

232. *Id*. § 18(c)(1), (2).

233. *Id*. § 18(c)(3).

worse evil: The need to "unscramble" a consummated merger transaction. The proponents of HSR noted that it was "difficult at best, and frequently impossible" to reverse such transactions.[234] This fact both reflected the business realities of trying to disentangle two combined enterprises, and the fact that courts before the passage of HSR were reluctant to order the break-up of newly combined firms.[235] The Hart-Scott-Rodino Act can thus be seen as a necessary response to a problem that corporate law could not solve on its own. In this regard, HSR is similar to the Sherman Act, described above: It corrects for a failure in state corporate law.[236]

HSR takes a consciously transaction-focused approach: It interferes with certain classes of transactions that firms undertake. This is more successful than a "market-based" approach, which is effectively what existed before HSR was enacted, and is what provided the stimulus for HSR.[237] This approach led to long delays because it engendered litigation and did not have the certainty of HSR's bright-line rules.[238] In the particularly notorious *El Paso* case, it took seven years of litigation before the Supreme Court ordered the acquiring company to divest itself of the target company, and then another ten before the divestiture actually occurred.[239] Clearly, a bright-line rule has benefits.

Nevertheless, HSR should still avoid as much as possible distorting the market for corporate control. Ironically, the exemptions to HSR risk are causing this distortion. By excluding certain kinds of transactions that are not considered problematic from HSR's scope, they risk disproportionately encouraging these transactions over others.

The squeeze-out exception is a case in point. On its face, it makes sense. The acquirer already has majority control; it already has the voting power to cause the target company to collude with it and act in an anti-

234. H.R. REP. NO. 94-1373, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2640-41.

235. *See, e.g.*, Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43 (1969) (noting that, in the decade between 1950 and 1960, the government only managed to undo the effect of ten out of eighty-one mergers that it challenged under the Celler-Kefauver Act). Corporate law courts have also recognized the difficulties inherent in trying to unscramble takeovers. *See, e.g.*, *Coggins v. New Eng. Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1119 (Mass. 1986) (noting that appropriate relief granted for impermissible merger is usually rescission, but that specific performance may be impossible in some instances).

236. *See supra* notes 22–25 and accompanying text.

237. William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 826–28 (1997).

238. *See* Easterbrook, *supra* note 67 (noting the difficulty that judges have in applying flexible tests).

239. *See* Baer, *supra* note 237 (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964)).

competitive manner. The increase in shareholding, therefore, should make no change to the behavior of the controlled company. However, corporate law differs on this point. Just because a parent company has a majority stake in, and controls, a subsidiary does not mean that the parent can run the subsidiary in such a way as to benefit it and harm the subsidiary's minority shareholders. The directors of a corporation owe a fiduciary duty to all the shareholders of a corporation, not just the majority shareholders.[240]

The squeeze-out exception does not create a conflict between antitrust and corporate law. But the two bodies of law seem incoherent. A shareholder is typically reckoned to have a controlling stake in a corporation when its shareholding reaches about thirty percent.[241] Despite this, HSR approval is required for acquisitions of stakes much smaller than thirty percent, provided that they reach the bar above; but approval is *not* required when a corporation wants to close out a minority stake in order to take a subsidiary private.

This type of HSR review for transactions in which a shareholder increases its already-controlling stake appears to function more like the disclosure requirements of section 13(d) of the Williams Act, which requires any person who obtains more than five percent of a class of securities registered under the Exchange Act to file a beneficial ownership report with the SEC.[242] This provision of HSR thus imitates a feature of federal securities law that is an integral part of the broader corporate law regime. But, because the shareholder already has a controlling stake, HSR review seems to add little value. Furthermore, HSR review at this level

240. *See, e.g.*, *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) (stating that where majority shareholder ran a corporation to benefit itself rather than the entirety of the corporation's shareholders, that majority-minority relationship was potentially subject to increased scrutiny, in order to confirm intrinsic fairness of dealing).

241. This explains various aspects of takeover codes and accounting regulations. In the United Kingdom, for example, a bidder who obtains a thirty percent in a company is obliged to offer to bid for the remaining shares, as the other shareholders are deemed minority shareholders. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1763–64 (2007). In accounting, corporations may be obliged to consolidate the accounts of a subsidiary on their balance sheet if they have between twenty and fifty percent of the stock. FIN. ACCOUNTING STANDARDS BD., FASB INTERPRETATION NO. 35: CRITERIA FOR APPLYING THE EQUITY METHOD OF ACCOUNTING FOR INVESTMENTS IN COMMON STOCK (1981), *available at* http://www.gasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175820931007&blobheader=application%2Fpdf. *Cf. Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 359–60 (Del. Ch. 2010) (noting that a shareholder that has a stake greater than 20% in a company may be able to form a control bloc).

242. 15 U.S.C. § 78m(d) (2006).

potentially has a distorting effect on investments. Small purchases are closely scrutinized: An acquirer that wishes to take an initial five percent stake in a target may need to wait for approval. If a shareholder has a controlling stake of thirty-five pecent and wishes to raise it to forty percent, it may still need to wait. But if the shareholder has a stake of fifty percent and wishes to increase it further, it will not have to wait. At the margin, this discourages shareholders from investing until their stake reaches the magic—but, in terms of control, unimportant—number of fifty percent. The squeeze-out exception creates a tension with corporate law: This illustrates the risks of antitrust law regulating the market for corporate control by seeking to regulate certain transactions firms may carry out.

CONCLUSION

Professor Rock noted: "Antitrust is about markets; corporate law is about firms."[243] He then argued that this separation was unwarranted. This Article has suggested a different view: Antitrust law should only operate in the market for corporate control when there is a market dysfunction that corporate law cannot fix on its own. By and large, antitrust law, with its market-based approach, and corporate law, with its firm-based focus, coexist successfully. Antitrust law only interferes in the market for corporate control, as in the case of the Hart-Scott-Rodino Act, when there is a problem in the market for corporate control that corporate law cannot solve.

The role of antitrust law in the market for corporate control is currently being litigated in *Dahl v. Bain Capital*.[244] Notwithstanding the allegations in that case, this Article has argued that corporate law already has tools to ensure a competitive market for corporate control. This Article has identified one minor instance—the squeeze-out exception to HSR—in which antitrust law takes a transaction-based approach, and overlaps with corporate law in a way that does not appear to serve a useful purpose. This exception should be fixed; but, in the main, antitrust law and corporate law are coexisting well.

243. Rock, *Antitrust Lens*, *supra* note 10, at 498.

244. 589 F. Supp. 2d 112 (D. Mass. 2008); *see supra* note 13 (denying private equity funds' 12(b)(6) motion to dismiss on the basis that the pleadings sufficiently alleged a Sherman Act claim).