Investor Coalitions Through an Antitrust Lens

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This Article offers a novel—antitrust—perspective on a growing phenomenon in capital markets: institutional investor coalitions. In recent years, a large group of powerful institutional investors, who collectively own significant equity stakes in most public companies, have created alliances on various corporate governance issues. Traditionally, corporate law has encouraged investor cooperation on these issues, regarding it as the solution to the well-known collective-action problem facing shareholders in public companies. As this Article shows, however, the prevailing positive view underscores a crucial point: members of the coalition are not only co-owners of companies but also competitors in capital markets. In the primary markets, institutional investors are competing buyers of shares, vying for share allocation. In the secondary market, they compete as asset managers, using their portfolio performances to attract retail investors and sponsors. The concern raised in this Article is that cooperation among institutional investors—even on seemingly benign governance matters—could facilitate tacit collusion and grant coalition members an unfair advantage in capital markets.

Focusing on one powerful investor coalition that emerged in recent years with the goal of limiting the use of dual-class stock in initial public offerings (IPOs), this Article demonstrates that when competing buyers of shares coordinate their response to a governance term at the IPO juncture, they effectively form a buyers' cartel. Due to the coalition members' collective dominance over the demand for public offerings, their orchestrated efforts lead to two potential economic distortions. First, abnormal underpricing of dual-class stock, which allows members to buy shares in the primary market below their fair market value. This price distortion explains the significant amounts of money often being "left on the table" by dual-class issuers. Second, the coalition can pressure issuers into adopting suboptimal governance arrangements, such as mandatory time-based sunset provisions, which may be value-decreasing. Both distortions can lead to the same sort of economic harm that antitrust law is designed to prevent.

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* Assistant Professor, Bar-Ilan University. For helpful conversations and comments, I thank Zohar Goshen, Ed Rock, Alex Raskolnikov, Patrick Corrigan, Daniel Sokol, Ronald Gilson, Tobias H. Troeger, Jeffery Gordon, Bernard Sharfman, Gideon Parchomovsky, Adi Libson, Joshua Mitts, Luca Enriques, Kobi Kastiel, Roberto Tallarita, Alessandro Romano, Marco Corradi, and participants in the following events: the sixth IBCI International Competition and Innovation Annual Conference, the American Law and Economic Association 2023 Annual Conference, the Third Women in Law & Finance Workshop, the Cambridge-USC Antitrust Workshop, the Fourteenth Annual Columbia-Ono Conference on Corporate Law and Governance, the Tenth Annual National SJD Roundtable, Cornell's Inter-University Graduate Conference, the Annual National Business Law Scholars Conference, and the Bocconi-Oxford Workshop in Corporate Law. I am personally grateful to Lilach Zandberg for her superb research assistance. This research project was made possible thanks to the generous financial support of the E. David Fischman Scholarship Fund.

The potential anticompetitive effects of investor coalitions require an immediate policy response. This Article thus proposes a multi-faceted regulatory reform aimed at curbing institutional investors' collective actions that may limit competition. The suggestions include restricting collective actions in the primary market and, under certain circumstances, banning communication between institutional investors during IPOs. Furthermore, the Article emphasizes the need for targeted antitrust scrutiny of institutional investor consortia—advocacy groups that coordinate governance initiatives on behalf of their members—given their demonstrated capacity to facilitate communication and sustain collusive practices. The proposed policy measures seek to strike a delicate balance between the goal of corporate law to encourage cooperation among shareholders and the goal of antitrust law to restrain collaboration among competitors.

INTRODUCTION

Recent years have witnessed a new phenomenon emerging in capital markets: institutional investor coalitions. Thanks to these alliances, powerful institutional investors now vote in lockstep on a variety of corporate issues, jointly lead governance initiatives, and support each other in key proxy resolutions.[1] Since these

1. *See, e.g.*, Lucian A. Bebchuk & Scott Hirst, *Big Three Power & Why It Matters*, 102 B.U. L. REV. 1547, 1565 (2022) (showing empirically that the votes of the "Big Three"—the three largest asset management institutions—show significant correlation); Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, 83 ANTITRUST L.J. 201, 202 (2020) ("[M]ost of the largest institutional investors [create] proxy voting groups that meet regularly with the management of the portfolio companies they own."); *see also* The Editorial Board, *The BlackRock Backlash*, WALL ST. J. (Feb. 27, 2020), https://www.wsj.com/articles/the-blackrock-backlash-11582849130 [web.archive.org/web/20200228065030/https://www.wsj.com/articles/the-blackrock-backlash-11582849130] ("One ASA concern is what it calls 'groupthink' among asset managers, proxy firms and pension funds. Many now vote in lockstep on environmental, social and governance (ESG) issues."). Moreover, a recent study by Morningstar Inc. analyzed 177 separate proposals related to environmental and social issues from the 2019 proxy season and found that funds owned by the Big Three voted in lockstep on all 177. *See* Jackie Cook, *How Can Fund Providers Protect the Future for Worker-Investors?*, MORNINGSTAR (Jan. 9,

investors collectively account for a large proportion of the shareholder base in public companies, commentators have begun to recognize the capacity of these coalitions to wield unprecedented governance power over corporate America and beyond.[2] Some even argue that the joint initiatives led by the largest institutional investors in the country can be seen as a kind of privatized regulation in the form of "standards and mandates that [are] more stringent than existing law, enforced with penalties."[3]

For example, over the last decade, a growing number of companies have been voluntarily choosing to align their intra-firm arrangements with the preferences of institutional investors.[4] Companies that opt *not* to do so are often subject to backlash from these investors, which can lead to governance intervention through engagement with management[5] or activist campaigns.[6] Moreover, since the stewardship and proxy guidelines of many institutional investors are almost identical, voting outcomes increasingly reflect the shared views of dominant market actors.[7]

This unprecedented surge in cooperation among institutional investors has been boosted by the emergence of institutional investor consortia, which constitute a more official type of investor alliance that aggregates the power of larger numbers of institutional investors and operates on a wider and more public scale. These consortia are essentially advocacy groups and trade associations that represent their members' collective interests. Chief among such actors is the Council of Institutional Investors (CII), a United States trade association that represents asset managers, pension funds, and union funds with combined assets of approximately

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2020), https://www.morningstar.com/sustainable-investing/how-can-fund-providers-protect-future-worker-investors [perma.cc/4R3L-EN9M].

2. *See* Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* (N.Y.U. Law & Econ., Working Paper No. 467, 2019), https://ecgi.global/sites/default/files/working_papers/documents/kahanrockfinal.pdf [perma.cc/X9WC-5XYU].

3. *See* Dorothy S. Lund, *Asset Managers as Regulators*, 123 U. PA. L. REV. 77, 80 (2023).

4. *See, e.g.*, Asaf Eckstein, *The Rise of Corporate Guidelines in the United States, 2005–2021: Theory and Evidence*, 98 IND. L.J. 921 (2023) (showing that the stewardship and governance guidelines of many of the largest institutional investors are almost identical and describing how companies align their governance arrangements with these mutually supportive stances); Lund, *supra* note 3, at 105–109 (explaining how the policies of the Big Three caused companies across the market to improve board gender diversity and reduce climate risk).

5. *See, e.g.*, BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP (2022), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf [web.archive.org/web/20220512041435/https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global.pdf] ("If we have concerns about a company's approach, we may choose to explain our expectations to the company's board and management. Following our engagement, we may signal through our voting that we have outstanding concerns, generally by voting against the reelection of directors we view as having responsibility for an issue.").

6. *See*, *e.g.*, Eckstein, *supra* note 4, at 61–63 (providing examples of instances where shareholders' proposals submitted by hedge funds and "corporate gadflies" made specific reference to guidelines published by institutional investors); *see also* Ian R. Appel, Todd A. Gormley, & Donald B. Klein, *Passive Investors, Not Passive Owners*, 121 J. FIN. ECON. 111 (2016) (explaining how passive institutional investors facilitate activism by other investors).

7. *See supra* note 1; *see also* Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* (Eur. Corp. Governance Inst., Finance Working Paper No. 601, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101473] (demonstrating the pivotal role of institutional investors in initiating and dictating the outcomes of proxy contests).

$55 trillion.[8] Another prominent investor consortium is the international Investor Stewardship Group (ISG), a coalition of more than 70 of the largest American-based and global institutional investors with combined assets worth over $32 trillion.[9] These powerful groups now actively promote governance principles that their members view as "best practices."[10] In fact, these groups not only urge uniformity among their institutional members[11] but also pressure corporations to conform to the designated principles,[12] further amplifying the collective governance power of institutional investors in today's capital markets.

From a corporate law perspective, the recent growth in investor coalitions, which are now more prolific and vocal than ever before, has generally been viewed as a positive trend.[13] This is because, for over a century, one of the most significant challenges corporate law scholars have sought to address is the collective action problem of public share-ownership, which is known to lead to rational apathy.[14] In fact, much of corporate law can be seen as a system of mechanisms designed to minimize this very problem.[15] Cooperation among shareholders whose combined equity stakes provide an adequate incentive for them to engage in stewardship may be the ultimate solution. By acting in concert, these shareholders can compel corporations to align their practices with the investors' governance preferences. Ideally, these collective efforts would help discipline management and control managerial agency costs.[16]

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8. *About CII*, COUNCIL INSTITUTIONAL INVS., https://www.cii.org/about [web.archive.org/web/20250501074354/https://www.cii.org/about] (last visited Dec. 15, 2023).

9. INVESTOR STEWARDSHIP GROUP, https://isgframework.org [web.archive.org/web/20250318041805/https://isgframework.org] (last visited Dec. 15, 2023).

10. *Id.* ("The ISG was formed as a sustained initiative to establish a framework of basic investment stewardship and corporate governance standards for U.S. institutional investors and boardroom conduct. The result is the framework for U.S. Stewardship and Governance comprising of a set of stewardship principles for institutional investors and corporate governance principles for U.S. listed companies.").

11. *Id.* ("The ISG encourages institutional investors to be transparent in their proxy voting and engagement guidelines and to align them with the stewardship principles.").

12. *Id.* ("The ISG encourages shareholders' elected representatives—company directors—to apply the corporate governance principles at the companies on whose boards they serve. The ISG will evaluate companies' alignment with these principles, as well as any discussion/disclosure of alternative approaches that directors maintain are in a company's best interests.").

13. *See, e.g.*, Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992) (explaining how the rise of major institutional investors can help overcome the shareholder collective-action problem, providing a greater incentive for these investors to become involved in governance affairs and monitoring); Marco Becht, Patrick Bolton & Ailsa A. Röell, *Corporate Governance and Control* (Eur. Corp. Governance Inst., Finance Working Paper No. 2, 2002), https://ssrn.com/abstract=343461 [web.archive.org/web/20250520040305/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=343461] (reviewing the theoretical and empirical research on the main mechanisms for the resolution of the collective actions of shareholders); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 2 J. FIN. 737 (1997) (discussing the common approaches to corporate governance and explaining that ownership by large investors helps reduce agency costs).

14. *See* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 81 (1932) ("[T]he normal apathy of the small stockholder is such that he will either fail to return his proxy vote, or will sign on the dotted line, returning his proxy to the [management] of the corporation.").

15. *See* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 501 (1992).

16. *Id.* at 502.

In this Article, I take a novel approach to studying this recent proliferation of collective action in the corporate governance arena, through an antitrust analysis.[17] I argue that the traditional corporate law analysis of institutional shareholder collaboration overlooks the fact that these investors are not merely co-owners in public companies but also competitors in primary and secondary capital markets. In the primary market, institutional investors are potential buyers of shares and compete with each other over share allocation. In this market, institutional investors are not even co-owners, but rather, mere competitors. In the secondary market, they compete as asset managers, using their relative portfolio performances to attract retail investors and large sponsors.

In the paradigmatic corporate governance context, the coordinated actions of investors are tied to the companies of which they are co-owners, rather than to the markets in which they compete. Under that circumscribed framing, no anticompetitive risks emerge.[18] In the antitrust context, on the other hand, I demonstrate that the coalitions' power to agree on certain agendas or common courses of action can affect markets directly, via the terms or pricing of securities, for instance. Clearly, this gives members a competitive advantage in markets in which they compete with each other.

The capacity of these coordinated actions to affect not only public companies in which investors own stock but markets as well often disrupts competition therein, causing the sort of economic harm that antitrust laws are designed to prevent. In such circumstances, collaboration among institutional investors—even if it revolves around governance issues that are ostensibly benign, from a corporate perspective—provides an opportunity for collusive behavior.

While certainly not all institutional investor coalitions present a degree of orchestration or reach that can be considered problematic, here, I deal with those that do hold a worrying capacity to rally powerful members, exert pressure on other market players, and distort competition. More specifically, I present here an antitrust analysis of one recent example of an investor alliance: the coalition against the dual-class structure (a share structure that features two classes of stock with unequal voting rights).[19] Over the last five years or so, a large group of institutional investors, including prominent asset management institutions, pension funds, and union-related funds, have joined forces against issuers of dual-class stock.[20] With

17. Note that I assume in this Article that antitrust laws apply to capital markets as well as to corporate law and governance. Elsewhere, I analyze the potential conflict between these different sets of legal rules and regulations and offer a more nuanced approach to determining under what circumstances competition laws are not repealed by federal regulations or state laws, such that antitrust violations are not immune to antitrust scrutiny.

18. *See* Rock, *supra* note 15. In his article, Rock identified the borderline between firms and markets at which cooperation between shareholders should be analyzed under antitrust law rather than corporate law.

19. In this Article, the terms "dual-class structure" or "dual-class stock" refer to a share structure with multiple (not necessarily limited to two) classes of stock, each carrying different voting rights compared to their cash-flow rights.

20. *See, e.g.*, Joann S. Lublin, *Big Investor Group to Push for End of Dual-Class Shares*, WALL ST. J. (Jan. 31, 2017), https://www.wsj.com/articles/big-investor-group-to-push-for-end-to-dual-class-shares-1485817380 [web.archive.org/web/20220926005040/https://www.wsj.com/articles/big-investor-group-to-push-for-end-to-dual-class-shares-1485817380] (describing how the world's largest asset managers and pension funds, collectively overseeing assets valued at over $17 trillion, have joined forces to form a coalition with the aim of advocating for the prohibition of dual-class structures).

the backing of their consortia, they called upon the Securities and Exchange Commission (SEC) and stock exchanges worldwide to ban the listing of such stock. They also successfully persuaded stock market index providers to exclude it from leading indices. Moreover, they published open letters condemning companies contemplating going public with a dual-class structure. These initiatives were recently formalized with the official launch of the Investor Coalition for Equal Votes (ICEV) in 2022. The primary goal of those joint efforts, as stated by the ICEV, is to prevent the further enabling of dual-class shares in IPOs.[21]

Such organized responses to discredit the dual-class arrangement increase institutional investors' capacity to act in concert as competing bidders in IPOs.[22] By coordinating their stance on this corporate governance arrangement, institutional investors (which, between them, account for most of the expected market demand for public offerings)[23] can leverage their bargaining power against issuers. As in the case of a classic buyers' cartel, this enables the members to negotiate more favorable price- and non-price terms with issuers.

In turn, the coalition against the dual-class structure has the potential to produce two remarkable distortions: the price effect and the governance-terms effect. My reading of the price effect is that the coalition artificially inflates the penalty paid by issuers of dual-class stock by disingenuously creating a collective understanding that a dual-class structure is flawed. For example, the coalition's claim, vigorously promoted, that a dual-class structure imposes a governance risk or deviates from the institutional investors' best practices promulgates a belief that dual-class shares should be priced significantly lower than single-class shares. Given that the price of an offering reflects a negotiated valuation,[24] this negative view shared by institutional investors vis-à-vis the dual-class structure would indirectly influence the ultimate issuance price, undermining the competitive process in IPOs.[25] Due to the macrostructure of the primary market and the critical role that institutional investors play in building confidence in such offerings,[26] this anticompetitive price effect is almost unavoidable. And, indeed, the empirical data

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21. Caroline Escott, *$1tn Global Investor Group Launches Equal Voting Rights Campaign*, RAILPEN (June 13, 2022), https://www.railpen.com/news/2022/1tn-global-investor-group-launches-equal-voting-rights-campaign/ [perma.cc/UCF9-6AY9].

22. *See* Section III.A.

23. *Understanding the IPO Share Allocation Process*, FIDELITY, https://www.fidelity.com/learning-center/trading-investing/trading/ipo-share-allocation-process [perma.cc/Q9PU-C9BA] (explaining that institutional investors usually receive the lion's share in any IPO and that the split between institutional investors and retail investors is typically 90/10).

24. *See*, *e.g.*, U.S. SEC. & EXCH. COMMISSION, INVESTING IN AN IPO, https://www.sec.gov/files/ipo-investorbulletin.pdf [perma.cc/2KXV-AE2L] ("Whether you have an opportunity to participate directly in an IPO or are buying shares in the open market, it is important to realize that the offering price reflects a negotiated estimate as to the value of the company. The offering price may bear little relationship to the trading price of the securities, and it is not uncommon for the closing price of the shares shortly after the IPO to be well above or below the offering price.").

25. Carlton and Perloff explain the economics of monopsony, according to which buyers with significant market power are able to force the price of an input below its competitive level. *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 107-110 (Pearson Addison Wesley 4th ed., 2005). As I show, the coalition creates a monopsony in the primary market.

26. *See*, *e.g.*, Lawrence M. Benveniste & Paul A. Spindt, *How Investment Bankers Determine the Offer Price and Allocation of New Issues*, 24 J. FIN. ECON. 343 (1989) (describing the role of institutional investors as providers of pricing feedback that is essential for determining the offer price); *see also infra* Part III.

support the existence of such an effect. For example, a recent study shows that the average first-day "price bump"—the difference between the offer price and the closing price of stock on the first day of trading—is almost twice as large as for that of single-class companies' stock.[27] Even more strikingly, Jay Ritter's list of IPOs that left the most money on the table since 1985 shows that nine of the 10 most-underpriced IPOs are of dual-class stock.[28] In aggregate, issuers in these IPOs, which include companies such as Visa, Airbnb and Snap, left over $26 billion on the table when going public.[29]

The governance-terms effect refers to the capacity of the coalition to nudge issuers into adopting governance terms that are aligned with the institutional investors' preferences, such as the inclusion of a sunset provision. In any antitrust analysis, a process in which competitors collaborate to create a market standard is subject to zealous scrutiny, particularly if the procedure involves competitors that possess a significant degree of market power on the demand side.[30] The main concern is that collaborative standard-setting might be used to unlawfully affect the price or quantity of an output or exclude specific market actors.[31] As I will demonstrate, all of these concerns are likely to materialize, sooner or later, in the wake of the coalition against the dual-class structure.

The novel use of an antitrust framework to analyze investor coalitions makes several contributions to the contemporary literature. First, it reveals a tension between two competing goals: that of corporate law (to solve the shareholder collective-action problem) versus that of antitrust law (to frustrate the collective action of cartelists).[32] By forming coalitions, institutional investors solved their collective-action problem in their capacity as co-investors—but they also created a new anticompetitive problem in capital markets that, to date and the best of my knowledge, has not been identified in the scholarship. Indeed, the very nature of such markets, where confidentiality is key and many processes are necessarily conducted behind closed doors, renders empirical analysis of the phenomena explored in the present study particularly challenging.

I show here that, to the extent that investor coalitions affect markets—and not just the companies that the coalition members jointly own—they may function as cartels in disguise. This concern intensifies when a coalition emerges at the IPO stage, considering that it functions solely as a *competitor* coalition rather than a *shareholder* coalition. In these circumstances, I believe the conceptual framework offered by corporate law—which emphasizes the importance of cooperation

27. *See* Roberto Tallarita, *High Tech, Low Voice: Dual-Class IPOs in the Technology Industry* (Harv. L. Sch. Discussion Paper, 2018), https://laweconcenter.law.harvard.edu/wp-content/uploads/2025/01/Tallarita_77.pdf [perma.cc/AQH6-QKBE].

28. *See* JAY R. RITTER, MONEY LEFT ON THE TABLE IN IPOS BY FIRM (2022), https://site.warrington.ufl.edu/ritter/files/money-left-on-the-table.pdf [web.archive.org/web/20220630201726/https://site.warrington.ufl.edu/ritter/files/money-left-on-the-table.pdf].

29. *Id.*

30. *See*, *e.g.*, David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1927–1928 (2003).

31. *See* OECD, POLICY ROUNDTABLE ON STANDARD SETTING 10 (2010), https://www.oecd.org/daf/competition/47381304.pdf [perma.cc/BAN6-GMCS] (explaining that collusion in the context of standard-setting can lead to market exclusion, output restraints, and higher prices).

32. *See* Rock, *supra* note 15, at 501 (arguing that, at the firm/market borderline, the goal of corporate law to solve the shareholder collective-action problem inevitably clashes with the purpose of antitrust law: to frustrate the ability of competitors to communicate with each other).

between shareholders as a means to enhance firm value—is inadequate in terms of analyzing coalitions. This is because corporate law's historical bias in favor of collective action may prove to be an impediment, given that, when cooperation starts to impact capital markets, it can be used to undermine competition.

Second, adopting an antitrust framework to identify an anticompetitive problem in the IPO setting reveals a monopsony power at play in capital markets. This Article is the first piece of scholarship to observe this worrying trend. In the past, scholars have suggested that IPO prices might be affected by the monopsony power of underwriters—the investment banks that manage and sell the IPO on behalf of the company.[33] However, I show that monopsony power actually exists on the investors' side, distorting the prices and terms of holdings sold in public offerings.[34] Ultimately, I claim, this distortive effect will generate the inefficiencies in allocation and distribution typically associated with a buyers' cartel.

Third, on the premise that institutional investors can depress competition in capital markets, antitrust scholarship has been unduly narrow in its examination of the anticompetitive consequences associated with the rise of institutional ownership. The extant scholarship concentrates on the potential effect of the overlapping ownership by institutional investors in public companies (i.e., "common ownership") on product markets.[35] Antitrust researchers argue that, due to common ownership, potent institutional investors may cause price increases in concentrated markets. However, I theorize that such anticompetitive harms may also be triggered, and perhaps on a much greater scale, in a completely different dimension: the markets where institutional investors compete with *each other*, rather than the markets where their portfolio companies compete.

The Article is structured as follows: Part I explores the evolution of institutional investor coalitions and reveals the oft-neglected antitrust concerns they prompt. Part II presents the orchestrated attack by institutional investors and their consortia against the dual-class share structure, particularly against prospective dual-class issuers. Part III analyzes the coalition against the dual-class structure from an antitrust perspective. I contend here that the coalition facilitates a buyers' cartel in the primary market, leading to bargaining inefficiencies between issuers and investors. Part III also assesses the focal market effects of the coalitions and their social welfare implications.

Finally, Part IV discusses the policy implications that can be gleaned from an antitrust analysis of the coalition against the dual-class structure. I argue here that public officials should scrutinize institutional investor coalitions and restrict collective actions that affect markets in which institutional investors compete. I also maintain that special antitrust attention should be given to investor consortia,

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33. *See*, *e.g.*, Jay R. Ritter, *The 'Hot Issue' Market of 1980*, 57 J. BUS. 215 (1984) (suggesting that gross underpricing may be attributed to the monopsonic power of underwriters in issues of common stocks by small firms).

34. While, traditionally, a monopsony is defined as an oligopsony limited to one buyer, here, I use both terms interchangeably, consistent with contemporary antitrust literature and case law. *See also infra* note 195.

35. *See* José Azar, Isabel Tecu & Martin C. Schmeltz, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513 (2018) (empirically showing how common ownership leads to price increases in the airline industry). For a general review of the theories underlying the anticompetitive effects of common ownership, *see* Scott C. Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392 (2020).

considering their demonstrated ability to create credible mutual commitments among members and act as cartel ringmasters. Applying antitrust standards to such associations, which are currently on the rise, is a necessary step. In particular, since they attempt to set market-wide governance standards and best practices on behalf of their members, they should be viewed as standard-setting organizations (SSOs) for antitrust purposes. Accordingly, to the extent that they fail to develop policies or procedures to ensure a competitive-standard selection process prescribed by antitrust laws, I make the case for subjecting these consortia and their members to antitrust liability.

I. FROM COLLECTIVE-ACTION PROBLEM TO COLLECTIVE-COALITION PROBLEM

Historically, retail shareholders of public corporations faced a well-known collective-action problem: due to each shareholder's relatively small percentage holding, they had only a marginal incentive to pursue activities that would benefit the whole group of retail shareholders. In this Part, I show how the reconcentration of share ownership in the hands of institutional investors has helped overcome that collective-action problem. I also contend that this situation represents an antitrust failure and points to a darker side of these coalitions: when institutional investors play the role of competitors, these coalitions can be used to facilitate anticompetitive behavior.

A. The Rise of Institutional Investor Coalitions

In their seminal work, *The Modern Corporation and Private Property*, written nearly a century ago, Berle and Means identified one of the main concerns associated with modern corporations in the United States: the separation of ownership from control.[36] They argued that, given the dispersed nature of ownership in large public corporations, the typical shareholder is uninterested in undertaking the monitoring and stewardship activities that would benefit the entire group of shareholders. This passivity, they argued, would enable corporate managers to operate companies without meaningful shareholder scrutiny.[37] Berle and Means' thesis emphasized the shareholder collective-action problem and illuminated related principal-agent issues.

Over the years, these predictions have proven to be well founded. Such issues have long occupied the minds of legal scholars, economists, and policymakers who have attempted to develop the necessary institutional arrangements to resolve this collective-action problem and protect investors from managerial opportunism.[38] Proxy regulations, class actions, attorneys' fee provisions, and even regulatory guidance designed to render shareholder voting by certain financial intermediaries a fiduciary duty can be seen as attempts to increase the incentive of public shareholders to monitor managers, thereby minimizing the collective-action problem.[39]

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36. *See* Berle & Means, *supra* note 14.
37. *Id.*
38. *See supra* note 13 and accompanying text.
39. *See* Hemphill & Kahan, *supra* note 35, at 1397 ("Thus, an important goal of corporate governance reformers has been to increase the activity level of institutional investors.").

In the last few decades, however, there has been a dramatic shift in the composition of the shareholder base. The classic "Berle-and-Means" corporation, owned by thousands of dispersed retail shareholders, has given way to corporations with substantial shareholdings held by sophisticated institutional investors.[40] Such investors now collectively own approximately three-quarters of the entire U.S. capital market,[41] accounting for shares worth over $28 trillion in 2024.[42] In a further shift, the asset management industry became highly concentrated. A group of just twenty-five institutional investors now holds more than 30 percent of the entire U.S. capital market,[43] while the ten largest institutional investors hold the vast majority of those assets.[44] Together, the world's "Big Four" asset management institutions—the BlackRock Group, the Vanguard Group, Fidelity Investments, and State Street Global Advisors—oversee more than $28 trillion in assets under management (AUM).[45] Collectively, the Big Four own over 20 percent of the voting power in S&P 500 companies.[46]

Given this changing landscape, I argue that the shift to concentrated capital markets in which institutional investors own significant blocks of stock in their portfolio companies demands a change in how one analyzes the collective action problem. As institutional investors began to take increasingly large stakes in public corporations, so too did the benefits of collective action for each shareholder increase, since they received a greater proportion of any collective benefit. Moreover, thanks to the sheer extent of the equity stakes held by institutional investors, their vote and voice count, resulting in a higher likelihood of such investors being able to influence corporate actions. These circumstances render it more worthwhile for institutional investors to undertake the costs of monitoring.[47]

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40. For an overview of the rising ownership of institutional investors, *see* Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three?: Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POLS. 298, 313 (2017).

41. Eric A. Posner, Fiona Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 671 (2017).

42. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FINANCIAL ACCOUNTS OF THE UNITED STATES, SECOND QUARTER 2024 130 (2024) https://www.federalreserve.gov/releases/z1/20240912/z1.pdf [perma.cc/5RGR-5FD5].

43. *See* Marcel Kahan & Edward B. Rock, *Anti-Activist Poison Pills* 20 (N.Y.U. Sch. L., L. & Econ. Res. Paper Series, Working Paper No. 17-08, 2017), https://ssrn.com/abstract=2928883 [perma.cc/89P9-NWQW].

44. Itzhak Ben-David et al., *The Granular Nature of Large Institutional Investors* 1 (Nat'l Bureau Econ. Res. Working Paper No. 22247, 2017), http://www.nber.org/papers/w22247.pdf [perma.cc/G8FE-CJMX].

45. BlackRock holds approximately $10.4 trillion, Vanguard holds $8.6 trillion, Fidelity holds $5.3 trillion, and State Street Global holds $4.3 trillion. Marc Guberti, *7 Top Financial Advisor Firms by AUM*, U.S. NEWS (May 14, 2024), https://money.usnews.com/financial-advisors/articles/7-top-financial-advisor-firms-by-aum [web.archive.org/web/20240920151431/https://money.usnews.com/financial-advisors/articles/7-top-financial-advisor-firms-by-aum]. *See also* Fichtner et al., *supra* note 40 (documenting the power of the three largest asset management institutions); Stephen Choi, Jill E. Fisch & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 55 (2013) (explaining how three mutual-funds complexes oversee significantly more assets than other institutional investors).

46. JOHN COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING (2023).

47. *See*, *e.g.*, Black, *supra* note 13; Bernard S. Black, *The Value of Institutional Investor Monitoring: The Empirical Evidence*, 39 UCLA L. REV. 895 (1992) (surveying the empirical evidence on the value of large institutional shareholder oversight of corporate management); Hemphill & Kahan, *supra* note 35,

A natural by-product of this change in the capital markets landscape was that institutional investors became more involved in the governance affairs of their portfolio companies. Now, they regularly vote their shares and, increasingly, engage in direct dialogue with public companies.[48] In fact, commentators are recognizing the capacity of these dominant market actors to set market-wide governance standards for corporate America.[49]

This more active involvement in governance affairs has revealed a striking similarity across the views of these influential investors, which can be discerned, for example, from the institutions' voting records, public statements, and stewardship guidelines.[50] Recently, these harmonious views have given rise to the formation of institutional investor alliances, where institutional investors now vote in lockstep on various issues,[51] support each other in proxy battles,[52] and lead corporate initiatives to promote their mutual governance preferences.[53] This behavior is believed to

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at 1397 ("Institutional investors—due to their large shareholdings, access to sophisticated advice, and economies of scope—have the capacity to help overcome the collective action problems that plague corporate America."). Another important regulatory change that helped mitigate corporations' collective-action problem was enshrined in the SEC and Department of Labor regulatory guidance that made shareholder voting a fiduciary duty. *See* Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585 (Feb. 7, 2003) (codified at 17 C.F.R. §§ 275.204-2, 275.206(4)-(6)). Following this change, institutional investors, including investment advisors and retirement plan managers, began to regard voting as an obligation and started casting their votes on nearly all issues subject to a shareholder vote. *But see* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and The Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013) (discussing the fact that many institutional investors are evaluated according to their relative performance compared to that of their competitors, and how this state of affairs reduces their incentive to invest resources in monitoring that would eventually benefit their competitors as well).

48. *See*, *e.g.*, Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 101, 134 (2018) (arguing that mutual funds now cast all their votes); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019) (showing that the Big Three collectively cast approximately a quarter of the votes of S&P 500 companies); Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk-Strine Debate*, 12 NYU J. L. & BUS. 385 (2016) (describing the increasing tendency of asset management institutions to engage in direct dialogue with corporate management).

49. *See supra* note 2 and accompanying text.

50. *See supra* note 1 and accompanying text.

51. *Id.*

52. *See* The Editorial Board, *supra* note 1 (discussing the support of large asset managers, such as State Street Global Advisors and other pension funds, for BlackRock's initiative to vote against directors who serve on boards of companies that fail to disclose ESG risks).

53. *See*, *e.g.*, Lublin, *supra* note 20; *see also* Amelia Miazad, *Investor Alliances: The Infrastructure for Climate Stewardship*, 102 WASH U. L. REV. 797 (2025) (demonstrating how the intersection of climate change risk and the emergence of institutional investors with diversified portfolios has paved the way for collaborative climate risk governance); Sarah Krouse & Joann S. Lublin, *Big Investors Want Directors to Stop Sitting on So Many Boards*, WALL ST. J. (Sep. 26, 2017), https://www.wsj.com/articles/big-investors-want-directors-to-stop-sitting-on-so-many-boards-1506418201 [web.archive.org/web/20230526034343/http://www.wsj.com/articles/big-investors-want-directors-to-stop-sitting-on-so-many-boards-1506418201] (describing how major institutional investors, followed by proxy advisors, cracked down on so-called "overboarding," endeavoring to ensure that directors do not overstretch themselves in a way that prevents them from adequately monitoring management); Saijel Kishan, *Vanguard to Push Companies on Racial Diversity Next Year*, BLOOMBERG (Dec. 16, 2020), https://www.bloombergquint.com/markets/vanguard-to-push-companies-on-racial-diversity-next-year [perma.cc/JC7L-MHYA] (describing how Vanguard joined BlackRock and State Street Global in their efforts to press companies for more data on their metrics to boost racial diversity within their ranks).

reflect a powerful "groupthink"[54] that leaves very little choice for public companies but to conform.

Another phenomenon that has accompanied the rise in institutional ownership is the emergence of institutional investor consortia—nonprofit trade associations and advocacy groups that represent the interests of institutional investors.[55] These umbrella associations primarily focus on coordinating governance initiatives and promoting corporate governance policies and principles to be endorsed by their institutional members and adopted by their members' portfolio companies. Over the years, these consortia have gained substantial power, resources, and access to policymaking.

One prominent example is the aforementioned CII, which was founded in 1985 with the goal of expanding shareholder voices among pension funds and union funds.[56] This drive led to "a collaborative effort by members to compel corporate managers to step up efforts to improve performance."[57] The CII currently has over 140 voting members with combined assets of approximately $4 trillion and associate members with over $40 trillion in AUM.[58]

Since its foundation, the CII has established a high profile as a corporate monitor and the initiator of successfully coordinated governance initiatives. Notably, it has a record of targeting companies that are performing badly and those it views as having poor corporate governance, in some cases by issuing a "Focus Listing" of such companies.[59] It has also successfully lobbied for several policy reforms regarding corporate governance and securities regulation. For example, the CII has pushed to amend the proxy access rules to improve shareholders' ability to engage in firm-level collective action. These efforts led the chairman of the Securities Exchange Commission (SEC) to announce that it would undertake a major review of the proxy rules.[60] Notably, the SEC made this announcement at CII's 1990 annual meeting—a striking demonstration of the latter's regulatory influence.[61] Two years later, the rules were amended to provide greater opportunity for communication between investors—without prompting a regulatory burden.[62]

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54. *See* The Editorial Board *supra* note 1.

55. For further discussion on the rise of institutional investor consortia and their role in solving the shareholder collective-action problem, see, e.g., Black, *supra* note 13, at 846; Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective* 24-25, (Eur. Cor. Governance Inst. L. Working Paper No. 393, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157708 [web.archive.org/web/20250612232057/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157708].

56. *See* About CII, *supra* note 8.

57. Gary L. Caton, Jeremy Goh & Jeffrey Donaldson, *The Effectiveness of Institutional Activism*, 57 FIN. ANALYSTS J. 21, 21 (2001).

58. *See supra* note 8.

59. Jill A. Brown, Scott D. Graffin & Andrew J. Ward, *Under the Spotlight: Institutional Investors and Firm Responses to the Council of Institutional Investors' Annual Focus List*, 7 STRATEGIC ORG. 107 (2009).

60. Regulation of Securityholder Communications, 56 Fed. Reg. 28987 (June 25, 1991) (to be codified at 17 C.F.R pt. 240).

61. Gerald F. Davis & Tracy A. Thompson, *A Social Coalition Perspective on Corporate Control*, 39 ADMIN. SCI. Q. 141, 153 (1994).

62. Regulation of Communication Rules, Exchange Act Release No. 30,147, 1992 WL 6116 (Jan. 6, 1992); Regulation of Communications Among Shareholders, Exchange Act Release No. 31,326, 1992 WL 301258 (Oct. 16, 1992); *see also* Robert Rosenbaum, *Big Investors' Push for Power*, CONN. L. TRIB. Dec. 16, 1991, at 16.

Another powerful consortium, the ISG,[63] has developed several consensus positions on corporate governance matters over the years.[64] In 2019, it issued its Framework for United States. Stewardship and Governance (ISG Framework), which sets out corporate governance best practices for corporations.[65] The ISG Framework also includes a set of principles for institutions, one of which states that "institutional investors should work together, where appropriate, to encourage the adoption and implementation" of the advocated practices.[66]

Investor consortia have unquestionably helped institutional investors overcome the shareholder collective-action problem. Their formation confers a shared identity, provides a springboard for collective action, and offers economies of scale, especially when it comes to shareholder activism.[67] The cooperation among the members of the consortia also grants them a better chance of influencing voting outcomes and exercising their disciplinary power over corporate managers.[68] Moreover, because members can observe the extent to which others are contributing to the collective good, free-riding is discouraged and the enforcement of the alliance becomes simpler and cheaper.[69]

A vivid illustration of these consortia's capabilities in addressing the collective-action problem and effectively influencing corporate affairs can be seen in the recent efforts of the ISG. When the coalition released its Framework, it issued a public statement to the effect that corporations "should recognize that some of their largest investors now stand together behind these principles."[70] The publication of those principles, coupled with the fact that the ISG was signaling that some of its

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63. *See supra* note 8. Another initiative that was launched on similar grounds was that of the United Nations Principles for Responsible Investment (PRI). 63 investment companies with $6.5 trillion in AUM signed a commitment to incorporate ESG principles into their stewardship activities and voting decisions. By 2018, the number of signatories had increased to 1,715, representing $81.7 trillion in AUM. *See What Are the Principals for Responsible Investment?*, PRI, https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment [perma.cc/7M77-Y98R] (last visited Dec. 18, 2023).

64. Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion*, 99 B.U. L. REV. 1229, 1277 (2019).

65. *Corporate Governance Principles for US Listed Companies*, INVESTOR STEWARDSHIP GROUP, https://isgframework.org/corporate-governance-principles/ [web.archive.org/web/20250318042732/https://isgframework.org/corporate-governance-principles/] (last visited Dec. 18, 2023).

66. *The Principles*, INVESTOR STEWARDSHIP GROUP, https://isgframework.org/stewardship-principles/ [https://web.archive.org/web/20250318035722/https://isgframework.org/stewardship-principles/] (last visited Dec. 18, 2023).

67. Tim C. Opler & Jonathan Sokobin, *Does Coordinated Institutional Activism Work? An Analysis of the Activities of the Council of Institutional Investors* (Dice Ctr. for Res. in Fin. Econ., Working Papers Series 95-5, 1995), https://ssrn.com/abstract=46880 [web.archive.org/web/20240801164151/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=46880]; *see also* Davis & Thompson, *supra* note 61, at 163–164.

68. Opler & Sokobin, *supra* note 67. *See also* Manuel A. Utset, *Disciplining Managers: Shareholder Cooperation in the Shadow of Shareholder Competition*, 44 EMORY L.J. 71 (1995). Jiekun Huang, *Coordination Costs, Institutional Investors, and Firm Value* (U. Ill. Working Paper 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991543 [perma.cc/3Z9F-PQET]] (showing that the ease of coordination between institutional investors enhances the governance role of institutional investors).

69. *See* Huang, *supra* note 68.

70. *About the Investor Stewardship Group and the Framework for U.S. Stewardship and Governance*, INVESTOR STEWARDSHIP GROUP, https://isgframework.org/ [web.archive.org/web/20250318041805/https://isgframework.org/] (last visited Dec. 19, 2023).

largest members were behind the effort, could be read as a veiled threat.[71] In other words, even though corporate governance principles are not mandatory, companies would have difficulty ignoring them, knowing that they were backed by the largest institutional members of the ISG.

The upshot of the rise of institutional ownership and their coalitions is that we now have a group of investors with enormous influence and market power that seem to think, talk, and vote in unison.[72] And, until now, the sweeping market implications associated with this homogeneity have escaped scholarly attention.

B. The Dark Side of Investor Coalitions

Institutional investors' collective action has traditionally been viewed as a desirable phenomenon, with such investors being framed as sophisticated market players that promote governance principles to help protect public shareholders from managerial agency costs. However, an unnuanced view of investor alliances (and, specifically, coalitions) simply as harmless, value-enhancing impulses fails to consider that their members are not solely co-owners in public companies but also *competitors*.[73] For example, in the primary market, these same investors are potential buyers of newly issued shares, competing over share allocation. In the secondary market, they compete as asset managers, using their outstanding portfolio results to attract retail investors and large sponsors.

Given their status as competitors, then, these powerful investors, acting through alliances, can effectively form cartels in markets where they compete by using mechanisms designed to solve the shareholder collective-action problem. Yet, the notion that shareholders are also competitors and that their cooperation on governance arrangements may introduce antitrust concerns has been largely overlooked in both the antitrust and the corporate law literature.[74] This oversight is likely due to the widespread belief that governance arrangements are generally confined to the portfolio company's domain and are unlikely to affect markets. In the absence of market ramifications, the thinking goes, those concerned with competition laws should have very little reason to worry.

I seek to challenge the assumptions that underlie that logic—specifically, the taken-for-granted benign nature of the governance arrangements promoted by investor coalitions. When, under certain circumstances, these arrangements affect

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71. *See* Eckstein, *supra* note 4, at 39 ("The ISG's position reflects a threat that if corporations choose not to follow the principles perceived by investors to be good corporate governance, they should have good reasons.").

72. *See supra* note 1 and accompanying text; *see also* Annie Massa & Emily Chasan, *BlackRock, Vanguard Voting Habits Show Why Some Fear Their Power*, BLOOMBERG (Feb. 28, 2020), https://www.bloomberg.com/news/articles/2020-02-28/blackrock-vanguard-voting-habits-show-why-some-fear-their-power [web.archive.org/web/20250212183433/https://www.bloomberg.com/news/articles/2020-02-28/blackrock-vanguard-voting-habits-show-why-some-fear-their-power].

73. *See* Rock, *supra* note 15. In his article, Rock provides several examples of circumstances in which institutional investors are competitors and not merely co-investors, focusing on joint bargaining agreements among target shareholders in tender offers. He explains that, in the case of a tender offer, shareholders compete to sell shares on the secondary market.

74. An exception is Rock's article, written nearly three decades ago, which identified the potential anticompetitive risks that emerge when shareholders coordinate their response to a tender offer. Rock explained that such agreements between potential tenderees could inflate the price a bidder would be required to pay to buy shares in secondary markets, in violation of competition laws. *See* Rock, *supra* note 15.

markets in which institutional investors compete, investor coalitions can work to distort competition. In particular, by coordinating their positions on a governance matter, institutional investors can effectively use their collective demands as a bargaining chip to secure better terms when dealing with share issuers. This "cartelesque" collective action increases the investors' capacity to depress the *prices* of securities sold in capital markets or secure more favorable *governance* arrangements. Such anticompetitive outcomes are particularly profound in primary markets where institutional investors have significant buying power.[75] This, coupled with their status as providers of valuable pricing feedback in public offerings,[76] makes it almost inevitable that their mutual governance preferences will affect IPO stock prices, the governance terms attached to the stock, or both. In light of the forces at play in this panorama, I believe it demands scrutiny from an antitrust perspective.

Let us now turn, then, to analyze one particular investor alliance that has emerged in the primary market, the coalition against the dual-class share structure, and apply the antitrust lens.

II. THE COALITION AGAINST THE DUAL-CLASS SHARE STRUCTURE

Recent years have seen an orchestrated, sustained attack by institutional investors on companies with dual-class structures, particularly companies that choose to go public with this structure in their IPOs. In Section A, I describe the dual-class model and present the different scholarly views on it. In Section B, I explain how the coalition against dual-class came to be, and highlight the main joint actions it has taken, showing that some of these actions may satisfy the "concert of action" requirement under antitrust laws.[77]

A. The Dual-Class Structure

A dual-class structure provides that all the shares of an issuer have equal cash-flow rights and, thus, are deemed to be "common" shares—but that one class of stock has "super-voting" rights. The class with superior voting rights is often held by founders or other insiders, while the class of stock with inferior voting rights is usually sold to the public. This share structure enables the holders of the super-voting common stock to effectively control the company without having to own the majority of its shares.

Although the dual-class structure has existed in the United States since the nineteenth century, until recently, only a small fraction of American corporations chose this option.[78] During the past decade, however, an increasing number of companies have used some variation of the dual-class structure to create two or more common stock classes in their IPOs.[79] One generally accepted explanation for this trend is the increasing concentration of public stock in the hands of institutional investors and the concurrent rise of activist investors. These market shifts have

75. *See* Section III.A.

76. *See supra* note 26; *see also infra* notes 239–240 and accompanying text.

77 15 U.S.C. § 1 (1988).

78. Andrew Winden & Andrew Baker, *Dual Class Index Exclusion*, 13 VA. L. & BUS. REV. 101, 108 (2019).

79. *See* U.S. SEC. & EXCH. COMMISSION, *supra* note 24.

prompted founders to limit the intervention power of these influential investors by retaining control through a dual-class structure.[80] And this trend has been exacerbated by the surge in IPOs in the technology sector, which made the need for isolation from outside shareholder pressure even more pronounced. Technology companies, especially in the first years following an IPO, tend to have high levels of information asymmetry, and founders worry that outside investors will attempt to discipline management if they are unsatisfied with the company's short-term performance.[81]

The prevalence of dual-class IPOs has sparked a heated academic debate on the merits and drawbacks of this capital structure. On one side is a group of scholars, including Bebchuk and Kastiel, who oppose it, citing governance risks and management entrenchment.[82] These scholars focus primarily on the private benefits of control and raise concerns that the dual-class structure can shield management from accountability. Accordingly, they advocate a ban or, at the very least, a sunset limitation on the use of dual-class.[83]

On the other side of the debate are scholars such as Goshen and Lund, who recognize the potential benefits of the dual-class structure and advocate against regulation that would restrict it.[84] Supporters of dual-class also point to the fact that

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80. *See, e.g.*, Claire A. Hill & Alessio M. Pacces, *The Neglected Role of Justification Under Uncertainty in Corporate Governance and Finance* 67 (Eur. Cor. Governance Inst., Law Working Paper No. 492, 2018), https://ecgi.global/sites/default/files/working_papers/documents/finalhillpaccess.pdf [perma.cc/C9JZ-BKWT] (noting that, in the United States, dual-class shares "may be the only effective defense against activists, and are regarded by activists as a major hurdle").

81. *See, e.g.*, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 5 AM. ECON. REV. 777 (1972) (discussing the advantage of the dual-class structure under circumstances in which public shareholders are less informed than the controlling shareholders).

82. *See, e.g.*, Lucian Arye Bebchuk, Reinier Kraakman & George G. Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP, 295, 310–11 (Randall K. Morck ed., 2000) ("[T]he agency costs associated with [controlling-minority-structure] firms increase very rapidly as the fraction of equity cash-flow rights held by controllers declines."); Lucian Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019) (analyzing the perils of small-minority controllers and explaining how they generate considerable governance costs and risks, which are likely to be exacerbated as the controller's stake decreases); Charles Elson & Craig Ferrere, *Unequal Voting and the Business Judgment Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 7, 2018), https://corpgov.law.harvard.edu/2018/04/07/unequal-voting-and-the-business-judgment-rule/ [perma.cc/ME6L-5DMN] (arguing that the surge in dual-class companies is likely to result in a weakening of corporate accountability to shareholders, the markets, and the courts).

83. *See, e.g.*, Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 4 VA. L. REV. 585 (2017); Elson & Ferrere, *supra* note 82.

84. *See, e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560, 591 (2016) (maintaining that, under the dual-class structure, the entrepreneur's uncontestable control gives them the freedom to pursue their idiosyncratic vision); Dorothy S. Lund, *Non-Voting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 717 (2019) (suggesting that dual-class shares can be used by management to incentivize informed investors to buy stock with super-voting rights, thereby reducing agency costs); *see also* Bobby Reddy, *More than Meets the Eye: Reassessing the Empirical Evidence on US Dual-Class Stock*, 23 U. PA. J. BUS. L. 955, 956 (2021) (surveying empirical studies showing that dual-class firms often outperform single-class firms both in terms of buy-and-hold stock returns and financial performance, and concluding that a presumption that dual-class stock is harmful to outside stockholders should not guide policy formulation).

many of the most successful companies in the United States—including Alphabet, Berkshire Hathaway, Visa, and Facebook—have this kind of share structure.[85]

The empirical evidence on the performance of dual-class stock, however, is inconclusive.[86] While several empirical studies indicate that dual-class companies perform worse than single-class,[87] especially as they mature,[88] others indicate the contrary.[89] Notably, one line of empirical studies shows that the financial performance of dual-class companies is actually superior and that, compared to fundamentals, they are traded at a discount.[90] Moreover, because the market over-discounts dual-class stock, investors in dual-class corporations receive higher stock returns than those who invest in single-class companies.[91] Thus, some scholars have hypothesized that the markets are "systematically discounting dual-class corporations in anticipation of future poor performance that does not actually emerge."[92]

The SEC's view of the dual-class structure likewise reflects two different approaches. This structure was always permitted by the SEC, although, for a short period during the 1990s, it amended the rules of self-regulatory organizations (such as stock exchanges) to prohibit the ability of public companies to undertake "actions having the effect of nullifying, restricting, or disparately reducing the per-share

85. *See, e.g.*, Bernard S. Sharfman, *A Private Ordering Defense of a Company's Rights to Use Dual Class Share Structures in IPOs*, 63 VILL. L. REV. 1, 32-33 (2018).

86. *See, e.g.*, Zohar Goshen & Richard Squire, Essay, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 815–816 (2017) (summarizing the empirical literature on the performance of dual-class and explaining that "while some studies have linked the dual-class share structure to lower firm value, others have found no correlation once firm-specific attributes are taken into account, as principal-cost theory predicts") (quoting Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1051 (2010) and Renée B. Adams & João A.C. Santos, *Identifying the Effect of Managerial Control on Firm Performance*, 41 J. ACCT. & ECON. 55, 55 (2006)).

87. *See, e.g.*, Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051 (2010); Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697 (2009).

88. *See, e.g.*, Martijn K. J. Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation* (Eur. Corp. Governance Inst. Fin. Working Paper No. 550/2018, 2020), https://ssrn.com/abstract=3062895 [web.archive.org/web/20250505200950/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895] (finding empirical support for the claim that, as firms age, valuation premiums for dual-class firms dissipates, and attributing these findings to the widening gulf).

89. *See, e.g.*, Ugur Lel, Jeffrey M. Netter, Annette B. Poulsen & Zhongling Qin, *Dual-Class Shares and Firm Valuation: Market-Wide Evidence from Regulatory Events* (Eur. Corp. Governance Inst. Fin. Working Paper No. 807, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729297 [perma.cc/N4PQ-NLT2] (showing that dual-class shares facilitate innovation and increase valuations, and that banning such shares could lead to lower research output, growth, and profitability); Vincent Deluard, *A Costly Mistake for Investors, US Capital Markets, and Growth: Evidence from the Exclusion of Dual-Class Stocks from Popular Indices* (Apr. 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060296 [perma.cc/7VR9-MB7N] (finding that, over the past twenty years, an equal-weighted composite of stocks with multi-class stock outperformed the equal-weighted Russell 3000 index by 7.2 percent).

90. For a comprehensive overview of these studies, see Reddy, *supra* note 84, at 994–1004. Reddy surveyed numerous empirical studies and found that, while dual-class firms are generally valued lower than comparable one-share-one-vote firms, they perform as well as—and, in many cases, outperform—such firms in terms of operating results.

91. *Id.* at 986–993.

92. *Id.* at 960.

voting rights of existing common stock shareholders of the company."[93] However, this prohibition was quickly overturned by the U.S. Court of Appeals for the District of Columbia, which invalidated the rule on the grounds that the SEC had exceeded its statutory authority.[94]

Since then, the SEC has been reluctant to regulate companies' dual-class structures despite rising calls from institutional investors to restrict their use.[95] Among other reasons, the SEC has noted that the empirical evidence regarding the wealth implications of this structure is unclear or inconclusive.[96] In addition, it has acknowledged that dual-class stock has legitimate uses.[97]

B. The Coalition's Opposition and the "Concert of Action" Requirement

While the regulatory and scholarly views, as well as the empirical evidence on dual-class, are divergent, institutional investors have always expressed, at least publicly, a solid objection to the dual-class structure.[98] They argue that this structure exacerbates agency costs and entrenches control in the hands of the founders.[99] And the recent surge in dual-class IPOs has only intensified this opposition. A large group of institutional investors, together with their advocacy groups and proxy advisors, have therefore orchestrated a coalition against dual-class—a synchronized and overt assault on companies that opt to utilize the dual-class structure in their IPOs.

I hold that, from an antitrust perspective, the practice by which institutional investors, as competing buyers of shares in the primary market, coordinate their position on a governance term is problematic. As I explain in this Section, many of the coalition's initiatives and actions can be viewed as agreements among competitors, either implicit or explicit, that satisfy the "concert of action" requirement under section 1 of the Sherman Act. That requirement proscribes every "contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ."[100]

Identifying when an illegal behavior, which violates section 1 of the Sherman Act, occurs, is not an easy task.[101] The easiest agreements to prosecute are express agreements with direct evidence of wrongdoing.[102] Things become more complicated in the absence of an express agreement, as courts are tasked with determining whether an anticompetitive action has been carried out despite the lack of a formal accord.[103] In such cases, courts have traditionally required less than a

93. Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L.Q. 565, 578 (1991).

94. Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

95. *See infra* notes 108–113 and accompanying text.

96. Bainbridge, *supra* note 93, at 578.

97. *Id.*

98. Reddy, *supra* note 84.

99. *See Dual-Class Stock*, COUNCIL INSTITUTIONAL INVS., https://www.cii.org/dualclass_stock [web.archive.org/web/20250104230846/https://www.cii.org/dualclass_stock] (last visited Dec. 20, 2023).

100. 15 U.S.C. § 1 (1988). This Part solely analyzes the "concert of action" requirement, while Part III shows how such actions are capable of restraining trade, in violation of section 1 of the Sherman Act.

101. *See* Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CALIF. L. REV. 683, 688 (2011).

102. *See* Daniel Sokol, *Debt, Control, and Collusion*, 71 EMORY L. J. 695, 719 (2022).

103. *Id.* at 720.

formal agreement to establish a violation.[104] In fact, it is usually the case that courts infer an agreement from conduct.[105] For example, in the Supreme Court's *Socony* decision, a violation of section 1 of the Sherman Act was established by an inference of an informal "gentleman's agreement" between competing oil companies, according to which each would purchase an unspecified quantity of oil from other specified suppliers.[106] In *Strobl v. New York Mercantile Exchange*, the Southern District of New York concluded that the "unusual parallel conduct" of competitors satisfied the "concert of action" requirement under antitrust law.[107] Thus, even implicit arrangements that fall short of an actual contract, such as those described here, may violate section 1 of the Sherman Act.[108]

Let us consider, then, four initiatives that the coalition against dual-class has undertaken that can all be deemed to satisfy this "concert of action" requirement.

1. Regulatory Lobbying Efforts

Some of the more intense anti-dual-class lobbying initiatives have been undertaken by the CII on behalf of, and with the express endorsement of, its members. For example, in 2017, the CII lobbied the SEC to foreclose IPO listings of dual-class stock.[109] In response, the SEC's Investor Advisory Committee held a hearing on the topic of unequal voting rights among common stockholders, where the CII claimed it was "time for the SEC to revisit . . . the rules on new offerings of multi-class common structure with differential voting rights."[110]

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104. Usually in such cases, courts require "plus factors" to establish an antitrust violation through tacit collusion. *See* William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 399, 405 (2011). *See also* Sokol, *supra* note 102 (explaining that there is lack of clarity as to which plus factors prove tacit agreement, which make the law of tacit collusion inconsistent).

105. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (a violation of section 1 of the Sherman Act was established under circumstances in which the Court inferred that the defendants had formed a "gentleman's agreement" between competing oil companies to each purchase an unspecified quantity of excess "distress" oil from other specified suppliers); Strobl v. New York Mercantile Exch., 582 F. Supp. 770 (S.D.N.Y. 1984) (upholding a verdict of antitrust conspiracy on the basis of "unusual parallel conduct"); In re Petroleum Prods. Antitrust Litig., 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991) ("[W]e believe that the evidence concerning the purpose and effect of price announcements, when considered together with the evidence concerning the parallel pattern of price restorations, is sufficient to support a reasonable and permissible inference of an agreement, whether express or implicit, to raise or stabilize prices. . . . [A]t the very least, a jury could conclude that the appellees implicitly agreed to engage in practices that they knew and hoped would lead to greater price coordination.").

106. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

107. *Strobl*, 582 F. Supp. 770.

108. *See infra* notes 175–176.

109. *See, e.g.*, Blair Nicholas & Brandon Marsh, *Dual-Class: The Consequences of Depriving Institutional Investors of Corporate Voting*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 17, 2017), https://corpgov.law.harvard.edu/2017/05/17/dual-class-the-consequences-of-depriving-institutional-investors-of-corporate-voting-rights/ [perma.cc/GT59-TJYF] ("In the wake of the Snap IPO, CII Executive Director Ken Bertsch and other investors met with the SEC Investor Advisory Committee. They encouraged the SEC to work with U.S.-based exchanges to (1) bar future no-vote share classes; (2) require sunset provisions for differential common stock voting rights; and (3) consider enhanced board requirements for dual-class companies in order to discourage rubber-stamp boards.").

110. COUNCIL INSTITUTIONAL INV., REMARKS TO THE SEC INVESTOR ADVISORY COMMITTEE, (2017), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_09

Although this initiative did lead Professor Robert Jackson, the then-Commissioner of the SEC, to empirically evaluate the performance of dual-class companies with differing sunset provisions,[111] it later proved unfruitful. The SEC refused to change its rules or restrict the ability of companies with dual-class structures to list their stock. In fact, at one of the CII's annual conferences, the previous SEC Chairman, Jay Clayton, stated that regulating dual-class stock structures was not at the top of the SEC's priority list.[112] Clayton also revealed that the exclusion of dual-class stock from market indices—another initiative that institutional investors pursued—did not "sit really well" with him.[113]

The efforts of the CII to push for legislation that would prohibit the listing of dual-class companies did not end there. In the fall of 2021, the CII submitted draft federal legislation that would amend the Securities Exchange Act of 1934 and require issuers to eliminate the dual-class structure within seven years following the IPO.[114] Many institutional investors have written open letters supporting the policy recommendation reflected in that bill.[115]

Besides lobbying the SEC, institutional investors and their organizations endeavored to lobby the U.S. stock exchanges. In 2012, following Facebook's IPO, the CII petitioned Nasdaq and the New York Stock Exchange (NYSE) to amend their listing requirements by instituting a one-share-one-vote policy for newly public companies.[116] It also asked the exchanges to bar a listing if the company had two or

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_17_IAC_testimony.pdf [web.archive.org/web/20220901221054/https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_09_17_IAC_testimony.pdf].

111. *See* Robert J. Jackson, Comm'r, U.S. Sec. & Exch. Comm'n, Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty [web.archive.org/web/20250109020326/https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty].

112. *See* Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investor Advisory Committee (Mar. 8, 2018), https://www.sec.gov/news/public-statement/statement-clayton-2018-3-8 [web.archive.org/web/20241012031213/https://www.sec.gov/newsroom/speeches-statements/statement-clayton-2018-3-8].

113. *See* Andrea Vittorio, *FTSE Russell to Revisit Voting Power One Year After Snap IPO*, BLOOMBERG L. (Mar. 14, 2018), https://news.bloomberglaw.com/business-and-practice/ftse-russell-to-revisit-voting-power-one-year-after-snap-ipo [perma.cc/7B6Y-KE83].

114. *See* Letter from Jeff Mahoney, Gen. Counsel, Council Inst. Inv., to Maxine Waters, Chairman of the Committee on Financial Services (Oct. 1, 2021), https://www.cii.org/files/issues_and_advocacy/correspondence/2021/October%201,%202021%20letter%20to%20Committee%20on%20Financial%20Services%20(final).pdf [web.archive.org/web/20240821170941/https://www.cii.org/files/issues_and_advocacy/correspondence/2021/October%201,%202021%20letter%20to%20Committee%20on%20Financial%20Services%20(final).pdf].

115. *See* Jessica DiNapoli, *U.S. House Panel Considers Bill Curbing Dual-Class Stock*, REUTERS (Oct. 1, 2021), https://www.reuters.com/business/us-house-panel-considers-bill-curbing-dual-class-stock-2021-10-01/ [web.archive.org/web/20220818085922/http://www.reuters.com/business/us-house-panel-considers-bill-curbing-dual-class-stock-2021-10-01/].

116. *See* Letter from Jeff Mahoney, Gen. Couns., Council of Institutional Invs., to Edward S. Knight, Exec. Vice President, Gen. Couns. & Chief Regul. Officer, NASDAQ OMX Group, (Oct. 2, 2012), http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_02_12_cii_letter_to_nasdaq_dual_class_stock.pdf [web.archive.org/web/20230311185133/https://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_02_12_cii_letter_to_nasdaq_dual_class_stock.pdf]. *See also* Letter from Jeff Mahoney, Gen. Couns., Council of Institutional Invs., to Claudia Crowley, CEO & Chief Regul. Officer, NYSE Regul. (Oct. 2, 2012), https://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_2_12_cii_letter_to_nyse_dual_class_stock.pdf [web.archive.org/web/20230311185058/https://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_2_12_cii_letter_to_nyse_dual_class_stock.pdf].

more classes of common stock with unequal voting rights.[117] But both exchanges effectively refused. Nasdaq explicitly rejected the calls for stricter rules regarding multi-class stock and underlined the importance of the structure in encouraging innovators to access public markets.[118] The NYSE simply chose not to respond at all.[119]

Following Snapchat's IPO six years later, which, in an unprecedented move, offered only non-voting common shares, the CII again petitioned Nasdaq and the NYSE. This time, it asked the exchanges to amend their listing standards and accept newly listed companies with a dual-class structure only if their governing documents included a mandatory seven-year sunset for any unequal voting rights.[120] The CII's press release outlined the endorsements it had garnered from several large asset managers, such as BlackRock and T. Rowe Price, as well as the largest institutional pension funds, such as California Public Employees' Retirement System (CalPERS) and California State Teacher Retirement System (CalSTRS).[121] Note that all of this activity would satisfy the "concert of action" requirement. But, once again, the exchanges rejected the CII's move to impose restrictions on the dual-class structure.

In 2019, the CII tried again, this time submitting letters to the Delaware Bar and the American Bar Association requesting amendments to the corporate law in those jurisdictions which would ban multi-class share structures that extended beyond seven years following an IPO.[122] Both entities rejected the CII's petition.[123]

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117. For a thorough review of past attempts to limit the listing of dual-class companies, *see* Lund, *supra* note 82, at 702–703.

118. Winden & Baker, *supra* note 78, at 114.

119. *Id.*

120. *See* Letter from Ash Williams, Chair, Kenneth Bertch, Exec. Dir. & Jeff Mahoney, Gen. Couns., Council Institutional Invs., to John Zecca, Senior Vice President, Gen. Couns. North Am. & Chief Regul. Officer, NASDAQ Stock Market (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf [web.archive.org/web/20240807182437/https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf]; Letter from Ash Williams, Chair, Kenneth Bertch, Exec. Dir. & Jeff Mahoney, Gen. Couns., Council Institutional Invs., to Elizabeth King, Chief Regulatory Officer, NYSE Regulation (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf [web.archive.org/web/20220901024027/https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NYSE%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf].

121. *See* Press Release, Council Inst. Inv., Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 2, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf [web.archive.org/web/20220119155819/https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGCL%20letter.pdf].

122. *See* Letter from Kenneth Bertsch, Exec. Dir. & Jeff Mahoney, Gen. Couns., Council Inst. Inv., to Laurie A. Smiley, Chair, Am. Bar Ass'n Corp. L. Committee, (Sep. 13, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20MBCA%20letter.pdf [web.archive.org/web/20231029015640/https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20MBCA%20letter.pdf]; Letter from Ken Bertsch, Executive Director & Jeff Mahoney, Gen. Counsel, Council Inst. Inv., to Henry E. Gallagher, Council Chair, Corp. L. Sec. Del. State Bar Ass'n (Sep. 13, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGCL%20letter.pdf [web.archive.org/web/20220119155819/https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGCL%20letter.pdf].

123. *See* Letter from Laurie A. Smiley, Chair, Am. Bar Ass'n Corp. L. Comm. to Kenneth Bertsch, Exec. Dir. & Jeff Mahoney, Gen. Couns., Council of Inst. Invs. (Dec. 13, 2019), https://w

The regulatory initiatives described thus far reflect the agreed understanding of institutional investors regarding the dual-class structure, as conveyed by the most prominent investor consortia. Because these efforts have mainly been targeted against issuers in the primary market, a market in which institutional investors compete, I contend that they should be seen as de facto agreements between competitors. Thus, as noted earlier, such regulatory efforts can lead to anticompetitive distortions.

According to the Noerr-Pennington doctrine, antitrust laws do not prohibit joint lobbying activities undertaken in an attempt to influence the passing of laws.[124] However, while this doctrine might prevent lobbying of the SEC—a government agency—it does not necessarily shield self-regulated organizations (such as stock exchanges) from such pressures.[125] Moreover, even protected lobbying activities must respect certain safeguards designed to ensure they do not spill over into unlawful competitor coordination.[126] For example, several types of communication with a government body on behalf of a group of competitors may still face antitrust scrutiny. In fact, in the *Noerr* case itself, the Supreme Court stated that "there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."[127] Arguably, given the potential anticompetitive consequences of these petitions, they may fail to meet the threshold for exemption. Moreover, even if these petitions are considered exempt from antitrust enforcement, other concerted efforts by institutional investors and their consortia described in the remainder of this section are likely *not* exempt.

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ww.cii.org/files/issues_and_advocacy/correspondence/2019/ABA%20Response%20to%20CII%20request%20to%20reform%20MBCA.pdf [web.archive.org/web/20220415130807/https://www.cii.org/files/issues_and_advocacy/correspondence/2019/ABA%20Response%20to%20CII%20request%20to%20reform%20MBCA.pdf]; Letter from Henry E. Gallagher, Council Chair, Corp. L. Sec. Del. State Bar Ass'n to Kenneth Bertsch, Exec. Dir. & Jeff Mahoney, Gen. Counsel, Council of Inst. Inv. (Jan. 28, 2020), https://www.cii.org/files/1-28-2020%20Letter%20to%20CII%20(05512328xCCC1C).pdf [web.archive.org/web/20200823185049/https://www.cii.org/files/1-28-2020%20Letter%20to%20CII%20(05512328xCCC1C).pdf]. In its response letter, the Delaware Bar expressed concerns regarding the possibility of applying "a mandatory rule to a subset of Delaware corporations with a particular voting structure."

124. E. R.R. Presidents' Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

125. For a general discussion on the reasons for and against the classification of securities industry self-regulatory organizations (such as stock exchanges) as government agencies, see Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations be Considered Government Agencies?*, 14 STAN. J. L. BUS. & FIN. 151 (2008).

126. *See, e.g.*, Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982); *Noerr Motor*, 365 U.S. at 144. The Federal Trade Commission (FTC) has also interpreted case law to provide "ample room to conclude that, outside of the political arena, a pattern of repetitive petitions filed without regard to merit and for the sole purpose of using the government process, rather than the outcome of the process, to harm marketplace rivals directly and suppress competition should be subject to antitrust liability without the requirement that each underlying filing meets PRE's standard for objective baselessness." *See* ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE, AN FTC STAFF REPORT 35 (2006), https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf [web.archive.org/web/20250417022422/https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf].

127. *Noerr Motor*, 365 U.S. 127.

2. Calls for Index Exclusion

Having failed to convince regulators and stock exchanges to restrict the issuance of dual-class stock, institutional investors, acting through their consortia, then focused their advocacy efforts on index providers. In 2017, the CII pushed prominent index providers (such as the S&P Dow Jones Indices, MSCI Inc., and FTSE Russell) to exclude companies with multi-class share structures unless they offered corresponding sunset provisions.[128]

According to the CII, index exclusion was necessary to provide public shareholders "a viable mechanism, outside of litigation, to protect against insider entrenchment and the associated risk to long-term performance."[129] The Corporate Finance Institute (CFI), another organization that represents investment professionals, weighed in as well, stating that "indexed investors would largely be relieved of the requirement to own companies with what would be deemed to be poor governance practices as sub-optimal shareholder rights."[130]

Because index providers are beholden to their clients—and institutional investors comprise the vast majority of their potential client base when it comes to licensing indices—I maintain that they have an economic incentive to accommodate the preferences of such institutions.[131] Thus, it should come as no surprise that the most prominent index providers did, indeed, opt to change their inclusion standards in response to these demands. The Dow Jones, for example, announced that it would no longer add companies to its S&P Composite 1500 and its component indices if they had a multiple share class structure.[132] Existing index constituents with a dual-class structure would be grandfathered and would not be affected by the

128. *See* Letter from Kenneth Bertch, Exec. Dir., Council of Inst. Inv., to FTSE Russell Governance Bd. (Mar. 24, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_24_17_letter_ftse.pdf [web.archive.org/web/20240807183450/https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_24_17_letter_ftse.pdf]; Letter from Kenneth Bertch, Exec. Dir., Council Inst. Inv., to MSCI Equity Index Comm. (Mar. 29, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_29_17_MSCI_letter_request_for_consultation .pdf [web.archive.org/web/20240807180837/https://www.cii.org/files/issues_and_advocacy/correspondence/2017/03_29_17_MSCI_letter_request_for_consultation.pdf]; Letter from Kenneth Bertch, Exec. Dir., Council Inst. Inv., to S&P Dow Jones Indices (Apr. 27, 2017), https://www.cii.org/files/20170426%20CII%20comment%20S&P%20no%20vote%20share(1).pdf [web.archive.org/web/20220430025622/https://www.cii.org/files/20170426%20CII%20comment%20S&P%20no%20vote%20share(1).pdf].

129. *Id.*

130. *See* Letter from James Allen, Head, Capital Mkts. Pol'y & Matt Orsagh, Dir., Capital Mkts. Pol'y, Corp. Fin. Inst. to S&P Dow Jones Indices, Corp. Fin. Inst. (June 29, 2017), https://rpc.cfainstitute.org/-/media/documents/comment-letter/2015-2019/20170629.pdf [perma.cc/BNT7-8X33]. The CFA Institute suggested that companies with no voting rights could be placed in a new "governance light" index, but not "commingled with issuers who adhere to full governance/shareholder accountability standards."

131. *See* Hirst & Kastiel, *supra* note 64, at 1242.

132. *See* Press Release, S&P Dow Jones Indices, S&P Dow Jones Indices Announces Decision on Multi-Class Shares and Voting Rules (July 31, 2017), https://press.spglobal.com/2017-07-31-S-P-Dow-Jones-Indices-Announces-Decision-on-Multi-Class-Shares-and-Voting-Rules [perma.cc/DS4F-3UKU]. Note that in April 2023, S&P Dow Jones announced that it would reopen its indices to companies with multiple share classes. *See* Press Release, S&P Dow Jones Indices, S&P Dow Jones Indices Announces Results of S&P Composite 1500 Index Consultation on Share Class Eligibility Rules (Apr. 17, 2023), https://www.spglobal.com/spdji/en/documents/indexnews/announcements/20230417-1463543/1463543_prapril20231500shareclassconsultresults.pdf [perma.cc/T2HF-LK37].

exclusion.[133] FTSE Russell announced that, starting in 2017, it would exclude dual-class stock from the Russell 3000 indices if less than five percent of the company's voting rights were held by unrestricted, public shareholders.[134] Notably, unlike the S&P Composite 1500 rule, this new restriction does not grandfather existing companies.[135]

The MSCI index, however, was less responsive to the calls for exclusion. In early 2018, MSCI published a consultation paper that concluded "unequal voting shares should be eligible for inclusion in indexes because they meet the definition of equity."[136] A few months later, MSCI slightly modified its stance, recognizing that low-voting shares cause a dilemma for index-trackers. Thus, it conceded that it would adjust the weights of dual-class stock in its indices to reflect the level of voting power in the hands of outside shareholders.[137] However, this change in index-weighting was soon abandoned by the MSCI, apparently because it was a polarizing issue among international institutional investors.[138]

In their article on governance by indexation, Hirst and Kastiel argue that the effort to exclude the dual-class structure from the various indices, although purportedly carried out by the index providers themselves, was almost certainly imposed at the behest of their institutional clients.[139] The authors provide three pieces of evidence to support that conclusion. First, they explain that this proposal did not reflect the index providers' views or their fundamental business goal of catering to the whole investable market.[140] Second, they cite anecdotal evidence that only a few years before the coalition declared its public opposition, some of the larger index providers had been perfectly open to adding dual-class stock to their indices. For example, in 2014, S&P Dow Jones allowed Google to include both its

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133. *Id.* Other S&P and Dow Jones-branded indices, such as the S&P Total Market Index, continue to include companies with multiple share structures.

134. *See* FTSE RUSSELL, FTSE RUSSELL VOTING RIGHTS CONSULTATION – NEXT STEPS (2017), https://www.ftse.com/products/downloads/FTSE_Russell_Voting_Rights_Consultation_ Next_Steps.pdf [perma.cc/65RL-FFRG]. Given the low threshold set by the FTSE Russell, the exclusion does not affect most dual-class companies.

135. *See* FTSE RUSSELL, MINIMUM VOTING RIGHTS HURDLE 4 (2018), https://research.ftserussell.com/products/downloads/Minimum_Voting_Rights_Hurdle_FAQ.pdf [perma.cc/S46S-NGGD]. However, a five-year grace period was granted to existing constituents to comply with the new rules.

136. *See* MSCI, SHOULD EQUITY INDEXES INCLUDE STOCKS OF COMPANIES WITH SHARE CLASSES HAVING UNEQUAL VOTING RIGHTS? 3 (2018) https://www.msci.com/documents/1296102/8328554/Discussion+Paper_Voting+rights.pdf/d3ba68f1-856a-4e76-85b6-af580c5420d7 [perma.cc/MN2M-6BFT].

137. *See* MSCI, CONSULTATION ON THE TREATMENT OF UNEQUAL VOTING STRUCTURES IN THE MSCI EQUITY INDEXES (2018), https://www.msci.com/documents/1296102/8328554/Consultation_ Voting+Rights.pdf/15d99336-9346-4e42-9cd3-a4a03ecff339 [perma.cc/986L-A9PT].

138. *See* Press Release, MSCI, MSCI Will Retain the MSCI Global Investable Market Indexes Unchanged and Launch a New Index Series Reflecting the Preferences of Investors on Unequal Voting Structures (Oct. 30, 2018), https://www.msci.com/documents/10199/238444/PR_Voting_Results.pdf/0b548379-fbe7-71c7-b392-7140b2215cc9 [WG94-THYX].

139. *See* Hirst & Kastiel, *supra* note 64, at 1242–1246. Following the change in the index-inclusion rules, several prominent institutional investors stated that, although they opposed the dual-class structure, the index-exclusion sanction was problematic for that exact reason (*see, e.g.*, Letter from Barbara Novick, Vice Chairman, BlackRock to Baer Pettit, President, MSCI, Inc. 1 (Apr. 19, 2018), https://corpgov.law.harvard.edu/2018/05/03/open-letter-regarding-consultation-on-the-treatment-of-unequal-voting-structures-in-the-msci-equity-indexes/) [perma.cc/UW66-4YXX]. The other two largest index fund managers, Vanguard and State Street Global Advisors, echoed this view.

140. *See* Hirst & Kastiel, *supra* note 62, at 1242–1246.

Class A and Class C shares in the S&P 500 index.[141] Similarly, in the years preceding the coalition's lobbying efforts, S&P indices also agreed to include two classes of shares pertaining to two well-known media companies: Fox and Comcast.[142] And, third, the CEO and Chairman of MSCI admitted as much when, addressing institutional investors directly, he said, "you pushed it on us."[143]

Putting aside the genesis of the exclusion effort, it is important to note that the allegedly negative financial impact of dual-class stock cited by the indices as the reason for exclusion has not been borne out by the data. A number of recent studies have actually shown that the returns of several major indices would have fallen significantly over the last decade had dual-class companies been excluded from the indices.[144] Moreover, the study utilized by the CII in its advocacy in favor of banning the dual-class share structure in IPOs was later described as "sloppy in design, *amateurish and misleading* in its statistics, and *biased* in its interpretation."[145]

Unlike lobbying activity before a government authority that enjoys the *Noerr* protection, lobbying activity around index exclusion is not exempt from antitrust scrutiny. Indeed, in light of the emergent view in the corporate law scholarship that index investing is essentially a form of delegated management—whereby index-fund managers (the principals) empower the index providers (the agents) to make decisions on their behalf and for their benefit[146]—antitrust scrutiny is demanded. I believe that pressurizing index providers under the aforementioned circumstances to use their products as an enforcement device against issuers may well constitute an antitrust violation. Given the potential anticompetitive impact of the index-exclusion initiative on price- and non-price terms of securities sold in IPOs, as described in the following section, an antitrust violation is particularly likely.

3. A New Blacklist: "Dual-Class Enablers"

A third, more recent, initiative taken by the coalition that appears to satisfy the "concert of action" requirement is the CII's recent publication of a list of what it terms "dual-class enablers."[147] The list is updated regularly and includes the names of all board members who have been involved in IPOs of companies that went public with an open-ended dual-class structure since 2018 (that is, a dual-class

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141. *Id.*

142. *Id.*

143. *Id.*

144. According to Melas, excluding dual-class shares from indices would have reduced the indices' total returns by approximately 30 basis points per year over the ten-year period starting in 1997. *See* Dimitris Melas, *Putting the Spotlight on Spotify: Why Have Stocks with Unequal Voting Rights Outperformed?* MSCI (Apr. 3, 2018), https://www.msci.com/www/blog-posts/putting-the-spotlight-on/0898078592 [perma.cc/A6KQ-SKZ5]. Another study sponsored by State Street Global Advisors found that excluding dual-class firms from indices during the years 1996–2006 would have reduced the returns on those indices from 86.5 percent to 84.6 percent. *See* Winden & Baker, *supra* note 78, at 150 n.175; *See also* Vincent Deluard, *supra* note 89.

145. Sharfman, *supra* note 85, at 17 n.87 (quoting YVAN ALLAIRE & FRANÇOIS DAUPHIN, INST. FOR GOVERNANCE OF PRIVATE & PUB. ORGS, TWO FLAWED STUDIES ABOUT CONTROLLED CORPORATIONS BY ISS AND IRRCI 2 (2016) (emphasis omitted), https://igopp.org/wp-content/uploads/2016/04/IGOPP_Article_2flawedStudiesControlledCorpoISSandIRRC_EN_vf.pdf [perma.cc/7GXA-Y3CZ].

146. *See* Adriana Z. Robertson, *Passive in Name Only: Delegated Management and Index Investing*, 36 YALE J. REG. 795 (2019).

147. *Dual-Class Enablers*, COUNCIL INSTITUTIONAL INV., https://www.cii.org/dualclassenablers.

structure that does not include a sunset provision).[148] As the CII itself stated, the goal of this list is to sanction dual-class enablers "by voting against them or withholding support from these same individuals at other, single-class boards on which they sit."[149]

This initiative carries significant implications for board members of companies approaching an IPO, as it negatively affects their reputation and may even limit their career opportunities. Using their collective power, institutional investors have been able to put in place mechanisms that effectively deter board members from supporting a dual-class offering, even if the latter would otherwise have endorsed it. These likely outcomes are precisely what motivated the CII to dream up this initiative in the first place. As Kenneth Bertch, the then-Executive Director of the CII, explained, one of the impacts of such a list is that it will "cause directors of private companies that are considering an IPO to think more carefully about the benefits and costs of adopting a dual-class structure."[150]

My contention is that the dual-class enablers initiative constitutes a clear use of market power by the CII on behalf of its members. Essentially, institutional investors, acting through the CII, are using their collective power to sanction individual directors solely because they support this voting structure.

4. Widespread Backlash Against Dual-Class Companies

Against this backdrop, leading asset management institutions, including the Big Four, now adhere to the one-share-one-vote share structure in their corporate governance guidelines[151] and have repeatedly stated that all companies should only offer shares with equal voting rights.[152] Moreover, the proxy guidelines of these asset management institutions explicitly state that they expect private companies to refrain from going public with a dual-class structure.[153] A spokesperson for Vanguard, for example, commented: "We are increasingly troubled by the rise of nonvoting and low-voting shares. These structures contradict our fundamental belief that shareholders' economic interests and voting rights should be aligned."[154]

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148. *Id.*

149. *Id.*

150. Hazel Bradford, *CII Identifies Directors of Companies with Dual-Class Shares*, PENSIONS & INVS. (Aug. 7, 2019), https://www.pionline.com/governance/cii-identifies-directors-companies-dual-class-shares [perma.cc/MHR3-J6N7].

151. BLACKROCK, PROXY VOTING GUIDELINES FOR BENCHMARK POLICIES - U.S. SECURITIES (2025), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [perma.cc/L3VV-2CB6]; STATE STREET GLOBAL ADVISORS, PROXY VOTING AND ENGAGEMENT GUIDELINES: NORTH AMERICA, https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-guidelines-us-canada.pdf; Vanguard Advised Funds, PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES, https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_policy_2024.pdf; PROXY VOTING GUIDELINES, FIDELITY (2022), https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-and-SelectCo.pdf [perma.cc/P4GR-6J6M].

152. Alicia McElhaney, *Investor Group Pushes for 'One Share, One Vote' Policy at Stock Exchanges*, INSTITUTIONAL INVS. (Oct. 24, 2018), https://www.institutionalinvestor.com/article/b1bjdfmdfjxh6h/Investor-Group-Pushes-for-One-Share-One-Vote-Policy-at-Stock-Exchanges [perma.cc/3MUF-75GH].

153. *See supra* note 151.

154. Richard Teitelbaum, *Index Firms Take Issue with Nonvoting Rights*, WALL ST. J. (Apr. 9, 2017), https://www.wsj.com/articles/index-firms-take-issue-with-nonvoting-rights-1491739227 [we

In addition, T. Rowe Price's stated policy is to vote against independent directors and Nominating and Corporate Governance Committee members in dual-class companies.[155] The two largest United States pension funds, CalPERS and CalSTRS, also objected to the structure in their public statements.[156] Both of them called for stock with unequal voting rights to be eliminated and threatened to veto any dual-class company in which a minority shareholder controlled the majority of the votes.[157]

Investor advocacy groups and proxy advisors have also voiced opposition to the dual-class structure. Aside from the CII's lobbying efforts, the opposition to the dual-class structure was also incorporated into the set of consensus governance principles developed by the ISG. The ISG Framework asserts that newly public companies should adopt a single-class structure.[158] According to the Framework, dual-class voting is not a best practice, and directors of existing dual-class companies should phase out that controlling structure.[159] These investor consortia, the CII and the ISG, have also emphasized that their institutional members share the same objection to the dual-class structure.[160]

From an antitrust perspective, I believe such statements and threats are problematic as they only serve to confirm the power of the coalition. Moreover, by reducing the traditional uncertainty surrounding the institutional investors' stance toward dual-class, these practices and public statements render it easier for such investors to coordinate their behavior in an anticompetitive way and ensure that coalition members move towards a more profitable collusive outcome. Since uncertainty among competitors acts as a significant impediment to the formation of a cartel-like dynamic, this transparency renders tacit coordination of price and other terms associated with dual-class offerings more feasible.[161] Moreover, as antitrust scholars have already acknowledged, the ability to utilize public signals to stabilize a cartel is particularly profound when the cartel members interact with each other on a repeat basis,[162] as is the case with the coalition against dual-class. Thus, in my view, the practices described here can be understood as facilitating institutional investors' adherence to the consortia's stated position and reducing the chances of shirking.

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b.archive.org/web/20231029080826/http://www.wsj.com/articles/index-firms-take-issue-with-nonvoting-rights-1491739227].

155. Ross Kerber & Jessica Toonkel, *T. Rowe Price to Oppose Key Directors at Super-Voting Share Companies*, REUTERS (March 7, 2016), https://www.reuters.com/article/us-troweprice-directors/exclusive-t-rowe-price-to-oppose-key-directors-at-super-voting-share-companies-idUSKCN0W90F2 [web.archive.org/web/20230416150007/http://www.reuters.com/article/us-troweprice-directors/exclusive-t-rowe-price-to-oppose-key-directors-at-super-voting-share-companies-idUSKCN0W90F2]. *See also* PROXY VOTING GUIDELINES, *supra* note 151.

156. *See* Lund, *supra* note 84, at 710 & n.118.

157. *Id.*

158. *See, e.g.*, *Corporate Governance Principles for US Listed Companies*, INV. STEWARDSHIP GRP., https://isgframework.org/corporate-governance-principles/ [web.archive.org/web/20250318042732/https://isgframework.org/corporate-governance-principles/].

159. *Id.*

160. *See supra* note 68 and accompanying text.

161. *See* Thomas Bourveau, Guoman She & Alminas Žaldokas, *Corporate Disclosure as a Tacit Coordination Mechanism: Evidence from Cartel Enforcement Regulations*, 58 J. ACCT. RES. 295, 296 (2020).

162. Richard Carrizosa & Stephen G. Ryan, *Borrower Private Information Covenants and Loan Contract Monitoring*, 64 J. ACCT. & ECON. 313, 314 (2017).

In the same vein, the two leading proxy advisory firms—the Institutional Shareholder Services (ISS) and Glass, Lewis & Co.—which collectively advise asset managers accounting for 97 percent of the asset management industry[163]—issued statements opposing the dual-class structure.[164] The ISS included an objection to the dual-class structure in its guidelines,[165] labeling it "an autocratic model of governance."[166] Glass Lewis announced it would vote against directors of companies with dual-class structures unless their charters included a reasonable sunset provision.[167] It further stated that it would generally recommend voting against all board members of any company launching an IPO with a multi-class share structure unless it had such a provision.[168]

Although the process by which proxy advisory firms came to oppose dual-class is not transparent, ample evidence indicates that institutional investors have often been involved in the process by which those firms develop their voting guidelines.[169] In my reading, then, the input received from institutional investors likely affected the proxy advisors' attitude toward dual-class. To the extent that the concerted efforts of institutional investors entice proxy advisors to toughen their stance on the dual-class structure, such efforts can also run afoul of antitrust laws. Here, again, institutional investors use their power to influence the policies of for-profit private companies—companies that cast millions of votes on behalf of these investors each year and largely shape the corporate governance of public companies. Thus, hitching proxy advisors to the coalition can also be seen as an overt wielding of market power.

The overt, sustained backlash of institutional investors and their advocacy groups against the dual-class structure was not just an abstract, generalized concern but also firm-specific, often targeting companies that planned to launch IPOs with a dual-class structure.[170] It has now become almost routine for the CII to write open

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163. *See* Eckstein, *supra* note 4, at 20.

164. *See, e.g.*, *United States Proxy Voting Guidelines*, INSTITUTIONAL S'HOLDER SERVS., https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [perma.cc/XU7L-K6 57].

165. *Id.*

166. Shayndi Raice, *Advisory Service Slams Facebook's Dual-Class Share Scheme*, WALL ST. J. (Feb. 13, 2012), https://www.wsj.com/articles/SB10001424052970204883304577221942476996760 [web.archive.org/web/20250525000616/https://www.wsj.com/articles/SB10001424052970204883304577221942476996760].

167. GLASS LEWIS, 2021 PROXY PAPER GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE, https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b [perma.cc/5D5C-WUE9]. Glass Lewis also announced that it would refrain from voting against board members if the board committed to submitting sunset provisions to a shareholder vote at the first shareholder meeting following the IPO.

168. *Id.*

169. Enriques & Romano, *supra* note 55, at 15–16 (arguing that the proxy advisors' policies tend to reflect institutional investors' corporate governance preferences); Eckstein, *supra* note 4, at 974 ("Interestingly, institutional investors do not just design their own guidelines, but are also involved in the process in which proxy advisory firms develop their voting guidelines.").

170. *See, e.g.*, Ronald Orol, *Activists Urge Exchanges to End No-Vote IPOs Like Snap*, STREET (Feb. 28, 2017), https://www.thestreet.com/markets/mergers-and-acquisitions/activists-urge-exchanges-to-end-no-vote-ipos-like-snap-14019899 [web.archive.org/web/20210203051314/https://www.thestreet.com/markets/mergers-and-acquisitions/activists-urge-exchanges-to-end-no-vote-ipos-like-snap-14019899]; Hazal Bradford, *Investors Intensify Fight Against Dual-class Shares*, PENSIONS & INVS.

letters to issuers, calling upon them to abandon a proposed dual-class IPO or include sunset provisions.[171] The likes of Snap, Airbnb, Blue Apron, Dropbox, Roku, Lyft, Pinterest, and Levi Strauss have all been targeted by such missives.[172] These letters emphasize the power of the CII, explicitly mentioning the vast number of institutional investors that it represents and the collective value of the members' AUM. As these communications are sent expressly on behalf of the members of the CII, I believe they should satisfy the "concerted action" requirement under the Sherman Act.

Moreover, prominent institutional members often publicly line up behind the CII following the issuance of such open letters.[173] Notably, several institutional members have even implied that a decision to issue shares with inferior voting rights would have significant pricing implications.[174] I contend that these types of public statements should also face antitrust scrutiny. Antitrust regulators and scholars alike have already recognized the possibility that competitors may make such public announcements as a warning signal to their rivals to chill competition.[175] For example, in the *Petroleum Products* antitrust litigation, the Ninth Circuit viewed price announcements from competing oil companies as tantamount to forming an agreement to raise or stabilize prices.[176] Likewise, the FTC decision in the Dupont case challenged unilaterally adopted practices such as advance announcements on the grounds that they constitute conduct that may facilitate anticompetitive ends.[177]

According to this view, the problem is that even the vaguest of shared understandings between competitors on a common course of action, which can be inferred from public announcements, involves both collective decision-making and some degree of express mutual assurance of compliance with that joint decision.[178] The main concern is that such public statements may indicate the desired direction of future price movements and pricing strategies in the market. Thus, while public

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(Apr. 1, 2019), https://www.pionline.com/article/20190401/PRINT/190409984/investors-intensify-fight-against-dual-class-shares [perma.cc/Q9G3-KH99].

171. For the list of recipients and links to all the letters sent by the CII to IPO companies since 2017, see *Older Correspondance*, COUNCIL INSTITUTIONAL INVS., https://www.cii.org/old_correspondence [web.archive.org/web/20250319090019/https://www.cii.org/old_correspondence].

172. *Id.*

173. *See, e.g.*, Stephen Foley & Hannah Kuckler, *Snap's Offer of Voteless Shares Angers Big Investors*, FIN. TIMES (Feb. 3, 2017), https://www.ft.com/content/17db65c0-e997-11e6-893c-082c54a7f539 [perma.cc/433X-WVFV].

174. *See infra* notes 202–203.

175. *See, e.g.*, Thomas A. Piraino, Jr., *The Antitrust Implications of "Going Private" and Other Changes of Corporate Control*, 49 B.C. L. REV. 971, 1005 (2008) (acknowledging the possibility that private equity firms may send subtle signals to each other about their competitive intentions, in a way that enables them to "establish a pattern in which they take turns bidding for companies, thus reducing the purchase price each firm has to pay in a particular transaction"). Piraino mentions interesting anecdotal evidence concerning the Department of Justice's investigation of the competitive practices of private equity funds in the context of going-private transactions as well as a *New York Times* article by Andrew Ross Sorkin, which referred to letters directed to four large private equity firms. Sorkin suggested that "[w]hile it was never asked directly, the letters could have been only one sentence long: 'Are you colluding to drive down buyout prices?'" *Id.* at 991.

176. In re Petroleum Prods. Antitrust Litig., 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991).

177. E.I. du Pont de Nemours & Co. v. FTC (Ethyl), 729 F.2d 128 (2d Cir. 1984).

178. *Id.*

statements against the dual-class structure may not be illegal per se, they might still be unlawful if they have anticompetitive effects.[179]

In sum, I argue that the coalition's efforts against dual-class help create an across-the-board understanding among institutional investors—some of which are the most influential investors in the United States—that dual-class stock is worth less and that issuers should either conform to the one-share-one-vote standard or bear a price discount. As I show in the next Part, this collective understanding undermines competition in the primary market.

III. AN ANTITRUST ANALYSIS OF THE COALITION AGAINST THE DUAL-CLASS STRUCTURE

In light of the suggestion that some consortia-driven initiatives could be viewed as implicit agreements between competitors that satisfy the "concert of action" requirement under antitrust law, in this Part I analyze these concerted efforts through an antitrust lens and demonstrate how they distort competition, in violation of competition laws.[180] In Section A, I maintain that the actions of the members of the coalition against dual-class help create a de facto cartel of buyers in the primary market and explore how the coalition affects the environment within which issuers and investors negotiate. In Section B, I pinpoint two of the distortions it creates: the price effect and the governance-terms effect. In Section C, I examine the distributional and allocational inefficiencies created by these two market effects.

A. The Coalition as a Buyers' Cartel

Although antitrust laws have traditionally focused on the market power of *sellers*, a core principle in economic theory is that powerful *buyers*, whether acting individually or in collusion with other buyers, are capable of causing the very economic harms that antitrust laws are designed to prevent.[181] This view has been articulated by U.S. courts in several well-known cases[182] and manifested in the Antitrust Guidelines.[183] According to these Guidelines, "The exercise of market

179. Nicholas Walter, *Antitrust and Corporate Law: Revisiting the Market for Corporate Control*, 15 U. PA. J. BUS. L. 755, 777 (2013) ("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. Such signaling is not illegal per se, but would still be illegal if it had an anticompetitive effect.").

180. *See id.* The standard of review adopted in this Article is the "rule of reason" analysis, which requires an analysis of the relevant market, the market power of the parties, and the existence of anticompetitive effects.

181. *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U. L. REV. 331, 331 (1992). The authors further explain that "there is little reason to believe, at least as an initial proposition, that the inefficiencies and misallocations resulting from monopsony are any less damaging than the harm flowing from monopoly." *See also* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?* 72 ANTITRUST L.J. 625 (2005).

182. For example, in *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984), the court explained that "[j]ust as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint." *See also* Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); FTC v. Morton Salt Co., 334 U.S. 37, 44 (1948); Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313 (6th Cir. 1989).

183. 1984 Merger Guidelines, 49 Fed. Reg. 26824 (June 29, 1984).

power by buyers has wealth transfer and resource misallocation effects analogous to those associated with the exercise of market power by sellers."[184]

Antitrust experts recognize that, to induce an anticompetitive outcome, a buyer or a group of buyers need not possess the mirror image of monopoly power. Instead, the monopsony must have "significant market power as a buyer in the form of bargaining power that it can exert against the seller of the input."[185] Stated another way, buyers' power becomes problematic if they have the ability to obtain a "concession from another party by threatening to impose a cost, or withdraw a benefit, if the party does not grant the concession."[186]

As I show in this Section, both necessary features—the possession of sufficient market power in the form of bargaining power and the capacity to obtain concessions by threatening to impose a cost on the other party—characterize the coalition against dual-class. Thus, the concerted actions of the coalition are capable of inducing the same anticompetitive harms typically associated with a monopsony.

1. The Market Power of the Coalition

In the primary market, institutional investors, which control the coalition, are the main buyers of shares.[187] On average, approximately 90 percent of IPO shares are allocated to institutions.[188] In fact, the vast majority of IPOs are offered through an "underwriting syndicate," which comprises a small, select group of broker-dealers,[189] many of which do not even have retail investors among their clients.[190] In "hot" IPOs, where demand significantly exceeds supply, it is almost impossible for retail investors to acquire shares since underwriters in those offerings usually allocate shares exclusively to institutional investors.[191]

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184. *Id.*

185. Kirkwood, *supra* note 181, at 636.

186. *Id.* at 638–39.

187. In this Article, I take the approach that the relevant context in which the coalition operates is the IPO market (the market in which private companies first sell their shares of stock to the public) and it does not differentiate between the market for single-class stock and the one for dual-class stock. Such an approach is consistent with contemporary literature on monopsony power in the IPO market. *See, e.g.*, Ritter, *supra* note 33.

188. *See Understanding the IPO Share Allocation Process*, *supra* note 23. This disproportional allocation is also attributed to the change in the investment style of retail shareholders. Instead of investing in individual firms, retail investors now invest in mutual funds. Consequently, individual retail shareholders today constitute only a tiny fraction of the shareholder-base of public corporations. *See* Lund, *supra* note 84, at 717. Note that the high allocation to institutional investors in IPOs is not limited to issues of single-class shares and seems to be the case for dual-class issues as well. *See*, *e.g.*, Benjamin Robertson & Andrea Tan, *Why Dual-Class Shares Catch On, Over Investor Worries*, BLOOMBERG (Mar. 4, 2021), https://www.bloomberg.com/news/articles/2021-03-04/why-dual-class-shares-catch-on-over-investor-worries-quicktake-klwbtryg [web.archive.org/web/20240702184117/https://www.bloomberg.com/tosv2.html?vid=&uuid=aaf55c62-38a2-11ef-b587-a5871773d9f1&url=L25ld3MvYXJ0aWNsZXMvMjAyMS0wMy0wNC93aHktZHVhbC1jbGFzcy1zaGFyZXMtY2F0Y2gtb24tb3Zlci1pbnZlc3Rvci13b3JyaWVzLXF1aWNrdGFrZS1rbHdidHJ5Zw==]. Thus, even if the relevant market in which the cartel facilitated by the coalition operates is the market for dual-class IPOs rather than the general IPO market, its members collectively possess significant market power there as well.

189. U.S. Sec. & Exch. Comm'n, *Initial Public Offerings*, *Why Individuals Have Difficulty Getting Shares*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/initial-public-offerings-why-individuals-have [perma.cc/6EQC-8SAE].

190. *Id.*

191. *Id. See also* Beatrice Boehmer, Ekkehart Boehmer, & Raymond P.H. Fishe, *Do Institutions Receive Favorable Allocations in IPOs with Better Long-Run Returns?* 41 J. FIN. & QUANTITATIVE ANALYSIS

The recent changes in ownership patterns in capital markets, particularly the retail investors' gravitation toward the asset management industry, have potentially amplified the buying power of several institutional investors. As recent data shows, the largest 25 institutional investors hold more than a third of all American corporate shares.[192] When considered in combination, the Big Four control over 20 percent of the stock of companies populating the S&P 500.[193] Given such high concentration levels, one can reasonably expect that IPO share allocations would mirror that concentration, providing large equity stakes to major institutional investors.[194] In this scenario, the IPO macrostructure resembles an oligopsony, where a small group of large buyers dominates the demand side of the market.[195]

In light of the current macrostructure of the capital market, it is fair to say that the coalition effectively aggregates the opinions of buyers that, together, possess significant market power. This enables the coalition members to leverage their shared opposition to dual-class as a bargaining chip against issuers of this type of stock, thereby imposing a cost on such issuers. Sellers are forced to set the price of the issue at a level below that which would have emerged in a competitive market or to adjust the rights attached to the stock in favor of the buyers. Both potential effects lead to inefficiencies in the market for dual-class stock.

2. Bargaining in the Shadow of the Coalition

In the context of negotiating a capital structure, bargaining power is crucial. As Goshen and Hamdani explain, investors and issuers can choose different structures that balance the founders' interest in maintaining control and pursuing their idiosyncratic vision with the investors' need for protection against agency costs.[196] The final structure to which the parties ultimately agree, these authors argue, reflects the outcome of that negotiation, which largely depends on each party's relative bargaining power and the competition in the market.[197] As I now

809 (2006); Tim Loughran & Jay R. Ritter, *Why Don't Issuers Get Upset About Leaving Money on the Table in IPOs?* 15 REV. FIN. STUD. 413 (2002) (arguing that there is a quid pro quo that underwriters receive from buy-side clients in return for allocating underpriced IPOs to these investors).

192. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *supra* note 42.

193. *See* COATES, *supra* note 46.

194. Note that, among S&P 500 firms, the shareholdings of index funds are exceptionally high, given the large sums invested in funds that track the S&P 500 stock indices. The proportions of IPO allocation to institutional investors that track these indices are expected to be somewhat lower than their holding proportion in the S&P 500 firms because companies that go public do not usually enter major market indices during the first few years immediately following their IPOs. Nonetheless, it should be noted that many of the asset management institutions that oversee index funds manage actively managed funds as well and are also profoundly invested in IPO firms.

195. The coalition may be seen as either a monopsony or an oligopsony. Historically, a monopsony was defined as an oligopsony limited to one buyer. However, in the antitrust literature and case law, the term "monopsony" is often used to describe a group of buyers as well (similar to oligopsony). *See, e.g.*, Blair & Harrison, *supra* note 181; NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

196. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560, 585–86 (2016) (the authors mainly refer to entrepreneurs in their capacity as managers of the issuer). *See also* Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1272 (1999) (arguing that the contractual provisions that will be shaped "depend on the outcome of the bargaining process that takes place between the contracting parties").

197. *See* Goshen & Hamdani, *supra* note 196, at 585–86.

show, by acting through a coalition, institutional investors can extract significant bargaining power over issuers to control competition in IPOs.[198] This power can be attributed to several factors.

First, as explained, institutional investors—and, particularly, a sub-group of these investors—dominate the demand side of the primary market (for both dual-class and single-class stock). However, they not only receive a substantial portion of the shares allocated in IPOs but also play an essential role in the IPO price discovery process. In practice, the IPO pricing process is "an intricate exercise" in which different players, with different information and incentives, interact with each other in an attempt to arrive at a price at which the security can be put on the market with reasonable assurance of success.[199] Institutional investors, as informed participants, provide valuable pricing feedback throughout the process, particularly during marketing activities and "book-building," where prospective investors submit flexible bids within a predetermined price range.[200]

If these investors *collectively* send negative signals on a governance term attached to a security sold in an IPO, I argue that they can more easily pressure issuers.[201] The unspoken but very real threat is that a failure on the part of the issuers to align with the institutions' preferred governance standards will cause these investors to drive the IPO stock price down. In fact, some prominent institutional investors have explicitly tied the decision to go public with a dual-class structure to lower offering prices. For example, in a recent white paper, BlackRock emphasized that "deviations from the proportionality principle can negatively impact the value of shares" and that investors tend to apply a discount of up to 30 percent on dual-class stock.[202] In a similar spirit, a CalPERS director publicly stated that the IPO valuation of Snap was lower than initially hoped-for *because of* its proposed dual-class share structure. [203]

Second, because institutional investors are informed agents that acquire data about the issue and report price signals to the underwriters, the ability of sellers in

198. Regardless of capital structure choice, issuers are generally at a disadvantage considering how the IPO process has evolved in recent decades. This is mainly because, unlike institutional investors as a class, "many pre-IPO shareholders . . . are not repeat players in the IPO market. They depend on experts (law firms and investment banks) to advise them about the conventions and effects of governance term choices," whose interests may diverge from those of issuers. John C. Coats, *Explaining Variation in Takeover Defenses: Failure in the Corporate Law Market* 16 (Harv. L. & Econ. Discussion Paper No. 297, 2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=237020 [web.archive.org/web/20250426041049/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=237020]. Consistent with that view, the literature concludes that the IPO allocation process tends to be biased toward institutional investors. *See, e.g.*, Supriya Katti & B.V. Phani, *Underpricing of Initial Public Offerings: A Literature Review*, 4 UNIVERSAL J. ACCT. & FIN. 35 (2016).

199. United States v. Morgan, 118 F. Supp. 621, 654 (S.D.N.Y. 1953).

200. *See, e.g.*, Katti & Phani, *supra* note 198.

201. *See, e.g.*, *Dual-Class Stock*, *supra* note 97 ("CII has pressed dual-class IPO companies to include reasonable time-based 'sunset' provisions in their charters.").

202. BLACKROCK, Key Considerations in the Debate on Differentiated Voting Rights, https://www.blackrock.com/corporate/literature/whitepaper/blackrock-the-debate-on-differentiated-voting-rights.pdf [web.archive.org/web/20241212104629/https://www.blackrock.com/corporate/literature/whitepaper/blackrock-the-debate-on-differentiated-voting-rights.pdf].

203. *See* Orol, *supra* note 170 ("We and others noticed the slide in the potential valuation for Snap's IPO, some of that is your price tag for not allowing [outside] votes.").

IPOs to switch to (less informed) retail investors is limited.[204] Replacing too many informed investors with less-informed investors will impair the underwriters' ability to receive sufficient information about the offering. Therefore, institutional investors are likely to receive substantial share allocations even if they provide less favorable (and perhaps intentionally misleading) signals during marketing activities.[205]

Finally, members of the coalition against the dual-class structure have a very weak incentive to shirk, rendering it easier for the members to secure a competitive advantage over issuers. I attribute this weak motivation primarily to (i) the unique characteristics of the IPO pricing and allocation process, (ii) the stabilizing and monitoring role of institutional investor consortia, and (iii) the cross-ownership links between institutional investors. Starting with (i), flexible bids received by institutional investors affect the ultimate offer price, which is the *same* for all buyers in the IPO. This means that, to the extent that an institutional bidder shirks by failing to "properly" discount dual-class stock, such an action would intrinsically impact all buyers. The expected payoff for all institutions participating in the IPO thus becomes bigger with collusion.[206] From an ex-ante perspective, each institution has an incentive to make this work.[207]

Moreover, unlike most cartel settings in which the defecting party is expected to gain a higher market share, in the case of an IPO, a defecting bidder that bids higher will not necessarily enjoy a greater share allocation. This is because underwriters take into account many factors when allocating shares, and the bidding price is only one of them.[208] Thus, a defecting bidder is not guaranteed to acquire more shares in an IPO. It is also important to signal that, due to considerations related to diversification, liquidity, and disclosure requirements,[209] there are often restrictions on the number of shares and the percentage equity stake that institutional investors can own. Thus, receiving more shares in an IPO may not necessarily serve the interests of institutional bidders.

Turning to (ii), the stabilizing and monitoring function of institutional investor consortia, such as the CII and the ISG, is critical in facilitating and sustaining the cartel of buyers in the primary market. Notably, these consortia provide an opportunity for communication and interaction among institutional investors, thereby enabling them to share opinions and coordinate their actions.[210] In addition, by centralizing decision-making on best practices at the organizational level, institutional investors that belong to a consortium can overcome the hurdle of

204. *See, e.g.*, Ann E. Sherman & Sheridan Titman, *Building the IPO Order Book: Underpricing and Participation Limits with Costly Information*, 65 J. FIN. ECON. 65, 16–17 (2006). In addition, because underwriters want to encourage the participation of informed institutional investors in public offerings, they must compensate these investors in the form of favorable IPO allocation. *See, e.g.*, Benveniste & Spindt, *supra* note 26, 343–62.

205. *Id.*

206. Edward J. Green, Robert C. Marshall & Leslie M. Marx, *Tacit Collusion in Oligopoly*, *in* 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 464, 464–65 (Roger D. Blair & D. Daniel Sokol eds., 2014).

207. *Id.*

208. *See* Benveniste & Spindt, *supra* note 26; *see also supra* note 188.

209. *See, e.g.*, 15 U.S.C. § 78p (1964) (regarding limitations on stock ownership by institutional investors. Section 16 of the Exchange Act also establishes mechanisms for a company to recover "short-swing" profits).

210. *See supra* notes 65–67 and accompanying text.

agreement that ordinarily inhibits cartel formation.[211] More importantly, investor consortia often require their members to endorse the governance views that these organizations promote,[212] a behavior that helps signal the institutional investors' allegiance and fortify the cartel.

The foregoing analysis suggests that, in the absence of solid *collective* opposition, issuers could enjoy a stronger bargaining position. For example, one might expect that at least some institutional investors would have a more favorable opinion of the dual-class structure. Such tolerance would align with the empirical evidence on the superior financial performance of dual-class companies,[213] as well as with recent studies showing that these companies often outperform their single-class counterparts (ironically, some of which were sponsored by prominent asset managers themselves).[214] Such a scenario would have also aligned with the fact that many institutional investors that have spoken out against the dual-class structure are the largest investors in many dual-class companies.[215] I contend, however, that by guaranteeing that all its members are "on the same page," the coalition forecloses that possibility, undermining the notion of a fair auction embodied in antitrust law. The coalition enables its members, in their capacity as bidders in IPOs, to buy dual-class stock for a lower price than if they had bid independently and without regard for each other's respective independent views about dual-class stock.[216]

From an antitrust perspective, such praxis, which can be seen as a form of joint bargaining over a governance term, stands in opposition to what courts describe as Congress's preference for "unorganized individualism in bargaining" over "the danger, real or fancied, which may attend any efforts to control [bargaining] by concerted efforts."[217] The suspicious view of joint bargaining agreements reflects the prevalent notion that such agreements are "the most effective means of coordinating pricing, preventing cheating, and preventing nonprice competition by cartel members."[218] The main concern I wish to signal here in the context of the coalition against dual-class is that the joint bargaining would cause issuers to lose the benefit of competition, such that they would no longer be able to play bidders against one another.[219]

Finally, (iii) the cross-ownership of the coalition members, that is—the fact that many of the members have ownership stakes in one another—makes it all the more likely that they will have no incentive to defect from this corporate governance

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211. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. PA. L. REV. 1093, 1133 (2014).

212. *See supra* note 69 and accompanying text.

213. *See supra* note 88 and accompanying text.

214. *See supra* note 144 and accompanying text (referring to a study that was performed and cited by State Street Global Advisors).

215. Robertson & Tan, *supra* note 188.

216. *See* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1940 (2002) (explaining how standard-setting can enable competing buyers to coordinate and depress input prices below competitive levels). The institutional coalition functions similarly: by committing members to a uniform stance on dual-class shares, it aligns bids and reduces demand at the margin, yielding a lower IPO clearing price than independent bidding would produce.

217. *See, e.g.*, Live Poultry Dealers' Protective Ass'n v. U.S., 4 F.2d 840, 843 (2d Cir. 1924).

218. *See* Rock, *supra* note 15, at 526 n.123.

219. *See* Edward Rock, *Antitrust and the Market for Corporate Control*, 77 CALIF. L. REV. 1365, 1373 (1989) (explaining that an agreement among bidders competing for control results in the seller losing the chance to play one bidder against others).

cartel. Take, for example, BlackRock, Vanguard, and State Street. Vanguard is the largest owner of BlackRock and State Street, in each case followed by BlackRock.[220] Taken together, these three giants directly own about 19 percent of BlackRock and 25 percent of State Street.[221] And, many other institutional investors, such as pension funds and union funds, many of which play active roles in the coalition, have ownership stakes in these institutions.[222]

B. The Market Effects of the Coalition

Here, I demonstrate how the competitive distortions caused by the coalition against the dual-class structure translate into *market* outcomes, directly affecting the ultimate allocation of gains between institutional investors and issuers. In particular, I wish to analyze two of the primary distorting market effects of the coalition—the price effect and the governance-terms effect—and argue that these may constitute an unreasonable restraint of trade within the meaning of the Sherman Act.[223]

1. The Price Effect

During the IPO process, underwriters acting as intermediaries advise the issuer on pricing. Their advice is rendered both at the time of the issuance of a preliminary prospectus, which includes a *file price range* (P1), and at the pricing meeting with the issuer, when the *final offer price* (P2) is determined.[224] Notably, P1 is determined before marketing activity takes place, while P2 is determined after the marketing efforts involved in the book-building process are concluded. It is generally accepted that both P1 and P2 are affected by the market's perceptions, especially the perceptions of informed institutional investors.[225]

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220. Dan Morenoff, *Break Up the ESG Investing Giants*, WALL. ST. J. (Aug. 31, 2022), https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693 [web.archive.org/web/20250210071608/https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693].

221. *Id.* According to Morenoff, the Big Three also own shares in many other institutional investors with holdings in the Big Three's shares, such that, after including those holdings, the Big Three aggregately hold, directly or indirectly, approximately 32 percent of BlackRock's equity and 42 percent of State Street's.

222. *See, e.g.*, BLACKROCK, 2021 ANNUAL REPORT (2021), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001364742/3173f90f-150e-43a3-941a-fba9a7e35773.pdf [perma.cc/K79S-97PR] ("BlackRock is among the world's largest managers of pension plan assets with $3.2 trillion, or 65%, of long-term institutional AUM managed for defined benefit, defined contribution and other pension plans for corporations, governments and unions at December 31, 2021.").

223. 15 U.S.C. § 1 (1988).

224. SEC Securities Act Release No. 6383, 47 Fed. Reg. 11422 (1982). Regulation S-K requires companies pursuing an IPO to file a "bona fide estimate of the range of the maximum offering price" before circulating a preliminary prospectus to investors. This filing kicks off the roadshow period, in which the issuer's managers typically launch a blitz campaign of one-on-one meetings with large institutional investors and other important potential purchasers of the issuer's stock. At the end of the marketing phase, the underwriters, together with the issuer, set the final offer price. This final price is based on the "indications of interest" received from institutional investors, coupled with "receiving the bids from the investors belonging to various classes, recording the price and quantity demanded, [and] tracking the payment and changes in case the bids are revised."

225. *See* Katti & Phani, *supra* note 198; *see also* Fabio Braggion & Mariassunta Giannetti, *Changing Corporate Governance Norms: Evidence from Dual Class Shares in the U.K.* (Eur. Corp. Governance Inst. Fin. Working Paper No. 375/2013, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=

P1: The initial price range

The widespread aversion of institutional investors to the dual-class structure sends a strong message to issuers, underwriters, and investors: that shares with limited voting rights deviate from what is considered best practice and are therefore inferior. Thus, under the pretense that this structure imposes principal-agent risks, institutional investors foster a generally negative image of it, camouflaging the anticompetitive aspects of the coalition's efforts.[226]

This bias against dual-class drives the price of such shares down. As noted, certain institutional investors have explicitly stated that a decision to issue dual-class stock should come at a price.[227] Thus, it is fair to assume that the general concerns expressed by institutional investors about dual-class offerings and the institutions' attempts to discourage the use of this structure are likely to impact the underwriters' perception as to the price at which the offering of dual-class stock is likely to succeed.

Moreover, it is not just the institutional investors' generalized views about dual-class stock that affect P1 but their issuer-specific comments as well. Although empirical research on the interaction between underwriters and investors during pre-marketing activities is scarce,[228] it is clear that buy-side (the institutional investors) and sell-side (the issuers and underwriters) interact and exchange information even prior to marketing activities. [229] This interaction is even more probable following the enactment of the 2012 Jumpstart Our Business Startups (JOBS) Act.[230] The JOBS Act permitted certain emerging growth companies (EGCs), which today account for nearly 90 percent of all IPOs,[231] to engage in "testing-the-water" communications with sophisticated institutional investors. Thus, issuers can now determine P1 following discussions and consultations with large institutional investors regarding their valuation assessments and demands for information.[232] Since such investors are likely to convey their opposition to dual-class stock at this juncture, their input is expected to affect P1.

2138949 [web.archive.org/web/20250426110021/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138949].

226. The fact that the negative view of the coalition is backed by the scholarly consensus strengthens the coalition's position and inadvertently makes it appear more innocent.

227. *See supra* notes 202–203.

228. For a theoretical discussion on pre-marketing interaction, see Tim Jenkinson, Alan D. Morrison, & William J. Wilhelm Jr., *Why Are European IPOs So Rarely Priced Outside the Indicative Price Range?* 80 J. FIN. ECON. 185 (2006).

229. *See, e.g.*, Patrick M. Corrigan, *Does an Initial Public Offering (IPO) Issuer's SEC Registration Fee Calculation Method Predict Pricing Revisions and IPO Underpricing?*, 19 J. EMPIRICAL L. STUD. 1114 (2022), https://onlinelibrary.wiley.com/doi/epdf/10.1111/jels.12332 [perma.cc/B9HD-ABJY].

230. The JOBS Act amended section 5 of the Securities Act (15 U.S.C. § 77e) to provide that an EGC or any person (such as an underwriter) whom it authorizes to act on its behalf may engage in oral or written communications with qualified institutional buyers and institutional accredited investors to gauge their interest in a proposed offering, whether before or after the first public filing of any registration statement, subject to the requirement that no binding orders can be solicited or accepted at that time.

231. Carlos E. Juarez, *EGC IPOs and IPO Registration Statement Trends in 2019*, MAYER BROWN (Nov. 18, 2019), https://www.freewritings.law/2019/11/egc-ipos-and-ipo-registration-statement-trends-in-2019/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration [perma.cc/B8WP-M6YR]] (showing that, depending on the year, from 2014–2019, between 86 percent and 97 percent of IPOs in the United States were of EGC companies).

232. Corrigan, *supra* note 229.

Similarly, the joint efforts of the coalition to exclude dual-class stock from market indices may also have a negative effect on P1. Since many investors in the secondary market, particularly passive funds that track market indices, will not purchase excluded dual-class stock, the very real effect of the aforementioned index-exclusion sanction is likely to decrease the pool of potential buyers. This, in turn, increases the cost of capital for excluded companies.[233] In other words, the low expected future demand in the secondary market will depress the price that investors will be willing to pay for dual-class stock in the IPO.[234] Moreover, because index exclusion is generally associated with limited liquidity, the restriction on inclusion may increase investors' required rate of return, resulting in lower prices even at the IPO stage.[235]

P2: The final offer price

The coalition's efforts are also likely to exert downward pressure on the final offer price of dual-class stock—by depressing P1, prompting P2 to almost certainly decline. This is because the two prices are correlated: if P1 is set within a low range in light of the institutions' views, it would be difficult to push toward a higher offer price.[236] In other words, a low P1 affects the behavior of underwriters and investors in a way that makes it sticky, inevitably bringing P2 down.[237]

Moreover, as soon as marketing activities begin, underwriters collect information and solicit indications of interest from institutional investors (non-binding statements of intent to buy the securities from prospective shareholders). This book-building process enables the underwriters to factor in the collective information available—that is, the intrinsic value as perceived by investors—before arriving at a final sales price.[238] In this process, underwriters are mainly swayed by feedback received from institutional investors.[239] Indeed, such investors, particularly a small group of key institutions, constitute the primary source of information gleaned in the course of these marketing efforts.[240]

Considering their unfavorable public statements about the dual-class structure, the reasonable expectation is that institutional investors will express their negative views in roadshows and during the book-building process as they place their bids. As Smart and his co-authors note, "[i]t is hard to imagine that firms going through the IPO process fail to hear, either from their investment bankers or from institutional investors on the roadshow, that issuers pay a price for insulating

233. *See* Hirst & Kastiel, *supra* note 64, at 1252–53 (finding that index inclusion increases the demand for a stock, which subsequently leads to significant positive abnormal returns).

234. *Cf.* Andrei Shleifer, *Do Demand Curves for Stocks Slope Down*? 41 J. FIN. 579 (1986). Note that, although firms are not automatically added to indices as they become public, their price at the IPO stage is likely to integrate potential future expectations regarding demand from index funds.

235. Hirst & Kastiel, *supra* note 64, at 1253.

236. Corrigan, *supra* note 229.

237. *Id.*

238. *See* Katti & Phani, *supra* note 199.

239. *See, e.g.*, Benveniste & Spindt, *supra* note 26.

240. *See, e.g.*, Alexander P. Ljungqvist & William J. Wilhelm, Jr., *IPO Allocations: Discriminatory or Discretionary?* 65 J. FIN. ECON. 167, 178 (2002); David C. Brown & Sergei Kovbasyuk, *Key Investors in IPOs* 13–14 (Paris Dec. 2015 Fin. Meeting), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657394 [web.archive.org/web/20160321172054/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657394] (explaining that key investors' industry expertise and information are particularly important in IPO pricing).

managers through a dual-class equity offering."[241] Indeed, the evidence on prices of dual-class stock indicates that institutional investors' progressive domination of the landscape over time, coupled with their aversion to dual-class, may have affected how dual-class companies are valued. [242]

Consider this: Because institutional investors, as competing buyers of stock in IPOs, share a mutual interest in depressing the price paid for the issue, they have an *incentive* to collaborate to underprice dual-class stock. If they all cooperate, perhaps under-representing their true estimation of the issue by overvaluing voting rights, they increase their chances of being able to force a low offering price for this type of stock. In that type of collusive equilibrium, the optimal strategy from the institutional investors' perspective would be to shade their bids rather than place bids that more accurately reflect their valuation of the shares. Due to the underwriters' constraints associated with switching from institutional to retail investors,[243] deliberately over-representing a negative view is the optimal strategy from the perspective of the colluding institutional investors.[244] The tacit collusion between bidders can therefore lead to the systematic over-discounting of dual-class offerings.

Indeed, the data suggest that institutional investors often succeed in forcing deep underpricing in IPOs of dual-class stock. [245] According to one study, the "first-day bump"—the price increase over the first day of trading, an important indicator of severe underpricing—is almost twice as large for dual-class companies compared to single-class companies.[246] This bump implies that, as soon as dual-class shares enter the broader market for securities, where institutional investors do not have as

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241. *See, e.g.*, Scott B. Smart, Ramabhadran S. Thirumalai, & Chad J. Zutter, *What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values*, 45 J. ACCT. & ECON. 64, 105 (2008). *See also* Albert H. Choi, *Pricing Corporate Governance* (Eur. Corp. Governance Inst., Law Working Paper No. 719/2023, 2023), https://www.ecgi.global/sites/default/files/working_papers/documents/pricingcorporategovernance.pdf [perma.cc/5JS6-S8WB] (discussing different corporate governance arrangements that tend to be priced in the IPO).

242. *See* Reddy, *supra* note 84, at 956.

243. *See supra* note 204 and accompanying text.

244. Ljungqvist & Wilhelm, *supra* note 240, at 182–83 (explaining that, if there are constraints on the underwriter's ability to switch to retail investors, then misrepresenting positive views is an optimal strategy from the perspective of institutional investors).

245. Although IPO underpricing is a common phenomenon in IPOs, many of the traditional explanations offered in the literature for IPO underpricing are less relevant in the case of dual-class shares, particularly in the U.S. capital markets, making the severe underpricing of such shares particularly puzzling. For example, according to one hypothesis, heavy underpricing generates excess demand for the offer, allowing issuers to ration shares to create a more diffused ownership structure. This, in turn, would reduce the incentives of outside shareholders to monitor managers. Thomas J. Boulton, Scott B. Smart & Chad J. Zutter, *Acquisitions, Strategic IPO Underpricing, and Firm Survival*, 39 FIN. MGMT. 1521 (2006). Such an explanation for underpricing is not applicable to dual-class shares as control will continue to reside with insiders, regardless. For a comprehensive review of the literature on IPO underpricing and its causes (including the motives of underwriters in this regard), see Katti & Phani, *supra* note 198.

246. Tallarita, *supra* note 27, at 37–38. The author finds that the average first-day "price bump" is 41 percent for dual-class firms and 24 percent for single-class firms. However, when looking at the variation between the offer price and the market price one week and four weeks (rather than a day) after the IPO, the difference between dual-class and single-class companies becomes less significant. According to a study from the early 2000s, the underpricing for dual-class shares was actually smaller. Scott B. Smart & Chad J. Zutter, *Control as a Motivation for Underpricing: A Comparison of Dual and Single-Class IPOs*, 69 J. FIN. ECON. 85 (2003).

much market power as they have at the IPO stage, the price of such shares immediately surges toward what is likely to be their actual market value.

The IPOs of many dual-class companies over the last decade provide a useful illustration of the adverse pricing effect of the coalition. While most of these offerings were subjected to criticism from the investor community, many of them were also significantly oversubscribed and severely underpriced, as indicated by the first-day bump. For example, Snap's decision to issue nonvoting rights encountered robust resistance; and yet, the company made one of the biggest one-day pops for a U.S.-listed IPO, raising at least $1 billion,[247] with the order-book more than ten times oversubscribed.[248] As Lund notes, "investors, including some of the large institutional investors that vocally opposed the dual-class structure, did not seem to be deterred from purchasing nonvoting shares." [249]

Another example is Airbnb, whose stock soared by 112 percent on its opening day, suggesting it could have raised over double the anticipated amount in its IPO.[250] Ultimately, Airbnb left approximately $4 billion on the table in its IPO—the second-largest first-day profit received by investors that were allocated shares at the offer price.[251] Airbnb's decision to issue dual-class stock potentially contributed to this huge underpricing, given that its share structure had also drawn criticism from the institutional investor community.[252]

The phenomenon of deep underpricing of dual-class stock can also be discerned from the fact that most institutional investors that ultimately invest in IPOs of dual-class stock are not passive investors whose options are typically limited to the indices they track. Rather, these are stock-pickers and information investors (often described as value investors) that are heavily invested in dual-class companies.[253] The fact that these value investors decide to invest in dual-class IPOs implies that these shares are significantly undervalued, which may well be the result of the coalition's efforts.

Because institutional investors receive most of the shares in IPOs, particularly in underpriced offerings,[254] and are being favorably treated by underwriters,[255] they are the primary beneficiaries of the systematic underpricing of dual-class stock. By

247. *See* Maureen Farrel, Corrie Driebusch & Sarah Krouse, *Snapchat Shares Surge 44% in Market Debut*, WALL ST. J. (Mar. 2, 2017), https://www.wsj.com/articles/snapchat-parent-snap-opens-higher-in-market-debut-1488471695 [web.archive.org/web/20250608004816/https://www.wsj.com/articles/snapchat-parent-snap-opens-higher-in-market-debut-1488471695].

248. *See* Lauren Hirsch, *Snap's Shares Pop After Year's Biggest IPO*, REUTERS (Mar. 2, 2017), https://www.reuters.com/article/us-snap-ipo/snaps-shares-pop-after-years-biggest-ipo-idUSKBN1690I7 [web.archive.org/web/20230406182443/https://www.reuters.com/article/us-snap-ipo/snaps-shares-pop-after-years-biggest-ipo-idUSKBN1690I7].

249. Lund, *supra* note 84, at 707.

250. *See* Kevin Stankiewicz, *Cramer Calls IPO Pricing 'Broken' and 'Embarrassing' after Airbnb, Doordash Debuts Skyrocket*, CNBC (Dec. 11, 2020), https://www.cnbc.com/2020/12/11/jim-cramer-calls-ipo-pricing-broken-after-airbnb-doordash-debuts.html [perma.cc/8D22-KKRW].

251. *See* Ritter, *supra* note 28.

252. *See, e.g.*, Letter from Kenneth Bertch, Exec. Dir., Council of Institutional Invs., to Angela Ahrendts, Dir. at Airbnb, Ken Chenault, Dir. at Airbnb & Ann Mather, Dir. at Airbnb (Sep. 20, 2020), https://www.cii.org/files/Airbnb.pdf [web.archive.org/web/20220520120047/https://www.cii.org/files/Airbnb.pdf].

253. *See* Sharfman, *supra* note 85, at 19–20.

254. *See, e.g.*, Ljungqvist & Wilhelm, *supra* note 240.

255. *See* Loughran & Ritter, *supra* note 191 and accompanying text.

flipping dual-class stock in the secondary market soon after the IPO for a quick profit or enjoying the abnormal stock returns often associated with dual-class companies,[256] investors in dual-class IPOs can make big profits. This price effect of the coalition also emphasizes how the coalition enables powerful institutional investors to gain a competitive advantage over retail investors, to whom these IPO profits are unavailable. If IPO allocation were less biased in favor of institutions, retail investors would be able to buy dual-class stock in IPOs, perhaps mitigating the bargaining distortions facilitated by the coalition. In addition, greater participation of retail investors might force institutional investors to purchase the shares on the secondary market, where they have no bargaining power, probably for higher prices than in the primary market. Instead, the coalition amplifies the advantages institutional investors have over retail shareholders in today's capital markets.

2. The Governance-Terms Effect

The idea that a group of buyers may take advantage of their collective market power to depress the price of critical inputs lies at the heart of competition laws. However, it has been recognized that a group of companies sharing monopsony power may also conspire to influence a non-price term.[257] This would be the case, for example, if the attempts of a monopsonic group to affect non-price terms were to indirectly affect prices, reduce quantity, or exclude market participants.[258] Under such circumstances, coordinated attempts to affect non-price terms may also be seen as an antitrust violation.[259]

The process facilitated by the coalition, pursuant to which institutional investors with substantial buying power collectively oppose a governance arrangement, indeed causes a non-price term effect—a governance-terms effect. I argue that, by bringing together a large number of market participants in IPOs and enabling them to coordinate their efforts against a particular governance arrangement, the coalition provides institutional investors with the opportunity to negotiate in lockstep on a substantial governance term. This, in turn, deprives issuers of the chance to negotiate on this term fairly.[260]

These efforts of the coalition's members are analogous to the *standard-setting* process by which different market actors develop standards for products or services through industry collaboration.[261] This process is often scrutinized under antitrust law, as it has traditionally raised anticompetitive issues—for a variety of reasons that also apply to the coalition against the dual-class structure. First, because the

256. According to Smart and his co-authors, relative to fundamentals, dual-class stock trades at lower prices than single-class, both in the IPO and for the subsequent five years at least. *See* Smart et al., *supra* note 241.

257. *See, e.g.*, Roger D. Blair & Jeffrey H. Larrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 308 (1991). The most prominent example is the collaboration of buyers in a standard-setting process. For a general review, see Teece & Sherry, *supra* note 30.

258. *Id.*; *see also* OECD, *supra* note 31.

259. *Id.*

260. *See* Primetime 24 Joint Venture v. NBC, Inc., 219 F.3d 92 (2d Cir. 2000) (holding that a conspiracy between copyright owners not to settle with infringement defendants might violate section 1 of the Sherman Act, while noting that "copyright holders may not agree to limit their individual freedom of action in licensing future rights to such an infringer").

261. *See* Teece & Sherry, *supra* note 30.

standard-setting process involves communication and deliberation among competitors, the concern is that competitors will use this process to achieve anticompetitive ends in restraint of trade.[262] Indeed, SSOs—industry groups that create standards to ensure that products are interoperable, compatible, or safe to use—have traditionally been seen as "continuing conspiracies of their members when agreements have related to areas in which they compete."[263] Accordingly, antitrust law seeks to "condemn facially neutral product standards where the very purpose of the standards is to facilitate anticompetitive conduct."[264]

When the largest buyers in the industry are involved in the standard-setting process, their buying power enables them to favor the demand side of the market over the supply side.[265] In such circumstances, the competitive disadvantage is imposed on actors in the downstream chain, and the SSO can be viewed, from an antitrust perspective, as a buyers' cartel.[266] In that context, it is crucial to emphasize that competition law may view the standard-setting process as a collusive practice that restrains trade regardless of the reasonableness of the standard being promoted.[267] For example, in *Fashion Originators' Guild of America, Inc. v. FTC*, the Supreme Court denounced the "well-intentioned" activities of a trade association to eradicate the counterfeit clothing market, viewing it as an attempt to become an extra-governmental agency.[268] Using that rationale, the attempts by investor consortia, whose members are competitors in capital markets, to set market-wide governance standards should ring alarm bells, even to those who view equal voting rights as an appropriate governance standard. In other words, I contend that, even if we accept the premise that the dual-class structure is somehow inferior (a view that, as explained, is controversial and not necessarily backed by empirical evidence), the mere attempt by institutional investors to use their market power against dual-class issuers and set a market-wide governance standard is legally problematic.

Second, the standard-setting process can be the means by which companies with buying power in some markets reduce the buying price of products or services they purchase. A prominent antitrust case from the 1960s illustrates this scenario.[269] In this case, the Seventh Circuit analyzed the attempt by the National Macaroni Manufacturers Association (NMMA) of the United States, which produced almost

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262. *See* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33–35 (2007).

263. *See* Rock, *supra* note 15, at 508.

264. *See* Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMORY L.J. 583, 619 (1998).

265. *See* Teece & Sherry, *supra* note 30.

266. *See* Lemley, *supra* note 216.

267. *See* Gates, *supra* note 264, at 621.

268. Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941). The Fashion Originators' Guild of America consisted primarily of textile manufacturers, garment designers, manufacturers, sellers, and distributors. Other manufacturers routinely copied and sold versions of the Guild members' products at a lower price. Because the original designs were not protectable under copyright, the Guild members set up a private Intellectual Property system, in which designers registered their creations with the Guild. The Guild was able to detect violations, and retailers that copied the originals were boycotted by Guild members. Despite the "good intentions" of the Guild in the fight against counterfeiting, the Supreme Court ultimately found that its actions violated section 1 of the Sherman Act and constituted an illegal restraint of trade.

269. Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965). For an excellent review of this case, see Gates, *supra* note 264, at 619–20.

three-quarters of the country's macaroni, to set an industry standard. Due to a shortage of the durum wheat used to produce the pasta, the NMMA had decided that durum millers, who were all members of the NMMA, would no longer offer the raw material in its pure form. Instead, they would sell blends of durum and another, inferior quality, wheat. The goal was to prevent a sharp increase in the price of durum wheat. The FTC ruled that the new standard violated section 5 of the Federal Trade Commission Act. As the FTC stated, "where all of the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements."[270] On appeal, the Seventh Circuit affirmed that decision, also finding that the macaroni industry had used the product standard to suppress prices in the industry.[271] By the same token, governance terms that are imposed via sanctions by a coalition of institutional investors can depress stock prices. As mentioned, some of the coalition members have explicitly flagged the price discount associated with the decision to use a dual-class structure.[272]

The third and perhaps most frequently cited problem related to the joint setting of standards is that the standard may be used to unlawfully *exclude* participants from the market. As the Supreme Court has noted, an "agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products."[273] Applying that logic to the coalition's "equal voting rights" standard, one can see how that guideline enables institutional investors to eject issuers that do not meet the standard from the public market. Private companies that want to avoid the heavy sanctions imposed on dual-class issuers are effectively precluded from going public or forced to raise equity in other ways. Thus, by setting a standard that pertains to corporate governance, institutional investors can arguably limit the supply of shares (or, at least, a specific type of share such as dual-class stock) in the public market.

Moreover, note that the coalition's standard has the explicit capacity to push public dual-class companies out of a specific subset of the public market—the index market. By excluding dual-class stock from prominent indices, institutional investors establish a voting-rights hurdle that limits access to equity markets and eligibility for benchmark indices. In fact, considering that investor consortia have pushed for the exclusion of firms from indices solely based on their voting rights, such an act may constitute the kind of de facto exclusion, against which the courts and the antitrust authorities tend to guard vigorously.[274] When this market exclusion is performed by market players with monopsonic characteristics, such an act may

270. *Id.* at 426 (quoting 65 F.T.C. 583, 612 (1964)).

271. *Id.* at 427.

272. *See* BLACKROCK, *supra* note 202; Orol, *supra* note 170.

273. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988). Such an agreement may also be viewed as a boycott, which generally involves an agreement among competitors to refuse to conduct business with another firm, including another competitor, a supplier, or a purchaser.

274. *See* David M. Schneck, *Setting the Standard: Problems Presented to Patent Holders Participating in the Creation of Industry Uniformity Standards*, 20 HASTINGS COMMC'NS & ENT. L.J. 641, 647 (1998).

well provide an early warning of collusion risk and can be seen as an indicator of cartelization that requires antitrust enforcement.[275]

C. The Welfare Implications

As in the case of a classic cartel, the coalition's market effects have significant distributional and allocational ramifications. These welfare-reducing consequences are primarily attributed to the coalition's disruption of the private ordering between issuers and investors, which is a process that provides for the implementation of market-driven corporate governance arrangements.[276] The underlying notion is that market forces are considered efficient in allocating control and cash-flow rights through different ownership structures.[277] Thus, the bargaining process between issuers and investors would naturally identify the optimal corporate governance arrangement for a particular company.[278] We can thus observe that any interruption to this process, for example through the collective action of investors targeted at issuers in IPOs, may result in inefficiencies. In particular, the bargaining leverage that institutional investors secure through their coordinated attack on the dual-class structure reduces the contractual freedom available to issuers. And, in those circumstances, companies are likely to adopt suboptimal financing and make value-reducing investment and governance decisions.

It is important to note that, under certain circumstances, the bargaining power of founders tends to be relatively robust. Usually, that is the case when there is greater availability of private funding or when "more money is chasing deals."[279] Thus, at least theoretically, the coalition might function as a countervailing power that can help mitigate the bargaining power of founders.[280] Indeed, legal scholars who oppose the dual-class structure have suggested that, when a large group of shareholders comes together to develop common strategies against this structure, this collaboration can serve as an effective mechanism to deter IPO companies from

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275. *See* Nolan E. Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1152 (1985).

276. *See, e.g.*, Sharfman, *supra* note 85.

277. Goshen & Hamdani, *supra* note 196, at 587 n.85.

278. *Id.* at 587*; see also* Sharfman, *supra* note 85, at 21–22.

279. *See, e.g.*, Dhruv Aggarwal, Ofer Eldar, Yael V. Hochberg & Lubomir P. Litov, *The Rise of Dual-Class Stock IPOs* 6 (Eur. Corp. Governance Inst., Finance Working Paper No. 806, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690670 [web.archive.org/web/20250516142246/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690670] ("VC firms do not appear, on average, to be averse to founders' voting rights exceeding their economic rights."). The same might also be true in the case of hot IPOs, as observed by Josh Korff, a legal practitioner, following Snap's IPO. Korff noted that the very nature of hot IPOs "allows issuing companies to effectively do what they please, despite rising levels of shareholder objection." He attributed this outcome to the "fear of missing out," explaining that "[e]veryone is going to invest in Snap's IPO, whether you like their no voting rights policy or not." The logic here is that, if certain institutional investors abstain from investing in dual-class shares, while some "defect" and invest, the defecting investors might outperform the others if the dual-class company does well. John Crabb, *Blue Apron's No-Vote Shares IPO Concerns Investors*, INT'L FIN. L. REV. (June 28, 2017), http://www.iflr.com/Article/3728513/Blue-Aprons-no-vote-shares-IPO-concernsinvestors.html [perma.cc/SY48-FL7F].

280. For an interesting discussion on countervailing power under competition law, see Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241, 244–45 (2008).

adopting them.[281] However, given the anticompetitive risks associated with the practice of joint bargaining described above,[282] this argument collides with antitrust policy.

As I set out in the remainder of this Section, certain private companies that, were it not for the coalition's efforts, would prefer to go public with a dual-class structure, are left with three possible courses of action. Each may result in distributional distortions, allocational inefficiencies, or both.

1. Staying Private

Because the dual-class structure is often viewed as a tool to help maintain a founder's control and preserve their idiosyncratic vision, it can be a prerequisite to persuading founders to list their companies.[283] For that reason, the coalition's opposition to the structure may render it more likely that private companies will decide to forego or delay their entry into the public market.[284] From the founder's perspective, listing with a single-class structure means that they would either risk losing control or retain control but lose their ability to diversify their personal wealth, as they would have to own the majority of the company stock.

Not only does the coalition's opposition limit the equity options available to companies but it also adversely affects other investors in capital markets. By deterring companies from listing, the coalition may deny investors in capital markets the ability to invest in dual-class stock and, accordingly, the opportunity to earn the high premiums associated with many dual-class companies.[285] Notably, other investors that are not limited to the public markets, such as private equity funds and actively managed funds—financial intermediaries that typically manage the wealth of the wealthiest citizens—will be able to continue investing in such companies even if they remain private. This consequence clearly has troubling distributional implications.

The decision to stay private may also entail inefficiency implications, creating a deadweight loss and reducing firm value. Because private funding is more expensive,[286] private companies might be more likely to forego funding for growth and innovation. The coalition may also push companies to incur debt (rather than equity), even if debt is a suboptimal choice that reduces the company's ability to

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281. *See* Hirst & Kastiel, *supra* note 64, at 1276–77; *see also* Crabb, *supra* note 279 ("[I]f . . . a few of the big investors get out in front of [the dual-class structure] and say, we don't want to do it, . . . then that would provide cover for others.").

282. *See* Live Poultry Dealers' Protective Ass'n v. U.S., 4 F.2d 840, 843 (2d Cir. 1924); *see also supra* notes 219–220 and accompanying text.

283. *See* Winden & Baker, *supra* note 78.

284. *See* Ofer Eldar, *Dual-Class IPOs: A Solution to Unicorn Governance Failure* (Eur. Corp. Governance Inst., Law Working Paper No. 741, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4647143 [web.archive.org/web/20231220143129/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4647143] (arguing that the discourse on dual-class structures often disregards their vital role in enabling founders to maintain control, a factor that could influence unicorns to stay private or delay their IPOs).

285. Adena Friedman, *The Promise of Market Reform: Reigniting America's Economic Engine*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 18, 2017), https://corpgov.law.harvard.edu/2017/05/18/the-promise-of-market-reform-reigniting-americas-economic-engine/ [perma.cc/55WC-LDNG].

286. *See*, *e.g.*, Thomas J. Chemmanur & Paolo Fulghieri, *A Theory of the Going-Public Decision*, 12 REV. FIN. STUD. 249 (1999).

take a necessary risk for innovation.[287] Thus, by impeding a company's path to public markets, the coalition potentially reduces growth, innovation, and profitability.

2. Listing with a Single-Class Structure

In the face of the coalition's opposition, the second option available to founders is to take their companies public without a dual-class structure. Concerned about price reduction and dilution, as well as the possibility of an IPO failure, issuers may reasonably conclude that the negative consequences associated with the dual-class structure (i.e., the increased cost of equity) outweigh the positive benefits (i.e., preserving control after the IPO).[288]

Crucially, this view might be shared by other insiders and stakeholders involved in the IPO process, such as the board of directors and other pre-IPO investors. For example, it is not difficult to imagine that a board might conclude that a single-class structure presents the greatest likelihood of a successful IPO or that such a structure will maximize proceeds from the offering.[289] Similarly, because of the penalty imposed by the coalition members on dual-class issuers, pre-IPO investors such as Venture Capital (VC) funds are also likely to push for a single-class structure. Because an IPO presents an exit opportunity for these funds, they have an incentive to maximize the value of the offer price at the IPO. Accordingly, VC funds are likely to oppose dual-class offerings. Thus, in a domino effect of the coalition's efforts, the ownership of these funds—which often have a say at the IPO as they typically control several board seats pre-IPO and participate in the selection of management—reduces the likelihood of a dual-class offering.[290]

The role of underwriters in choosing a governance structure must also be considered. Underwriters are expected to "engage in a continuing conversation with the company concerning the feasibility of a dual-class IPO [with or without sunset provisions], the preliminary 'indications of interests' received from investors, and the trade-off of the dual-class structure against the discounted price that investors would be ready to pay."[291] Underwriters' lawyers are also likely to alert their clients on terms that entail price effects.[292] The coalition's very public opposition to the

287. *See* Lund, *supra* note 84, at 693 n.27.

288. *See* Winden & Baker, *supra* note 78, at 119.

289. Moreover, since directors are also concerned about their reputation, the recent "dual-class enablers" initiative can further diminish their incentive to support a dual-class IPO.

290. *See, e.g.*, Smart, Thirumalai & Zutter, *supra* note 241; Tallarita, *supra* note 27. Interestingly, founders are more likely to support a dual-class structure after all, because they typically believe in their personal vision and the possibility that their firm will prosper under their guidance. Their vision can also explain why they rarely sell their shares during the IPO. However, depending on the VC funds' bargaining position vis-à-vis founders, the objection of such funds may lead to the adoption of a single-class structure, even if the latter opposes it. *See* Asma Fattoum-Guedri, Frédéric Delmar & Mike Wright, *The Best of Both Worlds: Can Founder-CEOs Overcome the Rich Versus King Dilemma After IPO?* 39 STRATEGIC MGMT. J. 3381, 3385 (2018) (explaining that founders' implementation of a dual-class structure is an outcome of a bargaining process involving other stakeholders such as VC funds and the board of directors). Interestingly, VC funds are generally accepting of the dual-class structure when investing in private companies. However, at the IPO juncture, perhaps due to the inflated penalty imposed by investors in IPOs, VC funds tend to push for a single-class structure or a dual-class structure with a sunset provision. *See, e.g.*, Aggarwal et al., *supra* note 279, at 4–7.

291. *See* Tallarita, *supra* note 27, at 22.

292. *See* COATES, *supra* note 46, at 21.

dual-class structure and the collective view among institutional investors that a dual-class structure does not represent best practice render it inevitable that law firms flag the issue.[293]

If a company ends up listing with a single-class structure, founders face two alternatives. One option is to maintain control through a single-class structure by owning most of the outstanding shares. The drawback of this decision is that it will limit the founders' ability to diversify their wealth, potentially resulting in suboptimal levels of risk-taking.[294] Moreover, under this scenario, founders might forgo efficient investment opportunities as new outside financing would likely further dilute their voting power. Under such circumstances, companies will not issue sufficient equity for further growth, resulting in inefficiencies. The second option is for founders to give up control in a single-class structure to enjoy diversification. However, in this scenario, they will likely be concerned about disciplinary forces and the possibility of being fired. Consequently, they would be much less inclined to execute innovative projects or projects with a long-term payoff.[295] Overall, then, restricting governance options to a single-class structure may also constrain companies in their pursuit of opportunities to maximize their value.

Note that, under the view that the dual-class structure presents a governance problem,[296] these inefficiencies should be weighed against managerial agency costs and the private benefits of control that may be extracted by founders of dual-class companies. Thus, scholars who oppose the dual-class structure may argue that, despite its anticompetitive effect, the coalition's actions may result in a net social benefit after all.

3. Listing with a Dual-Class Structure

If a private company decides to go public with a dual-class structure in the face of opposition from the coalition, such a decision is also likely to have adverse distributional consequences. First, because the coalition artificially inflates the cost of capital for dual-class companies, significant sums of money are left on the table in IPOs.[297] In effect, this constitutes a wealth-transfer from one side of the market (the issuers and possibly pre-IPO shareholders) to the other (investors in the IPO).[298] The issuers realize less capital from their IPO, and pre-IPO shareholders that sell their shares at the IPO do so for a lower amount.[299]

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293. *Id.; see also* Eckstein, *supra* note 4, at 966–68 (explaining how law firms often use proxy guidelines as a reference point and urge corporations to review and heed those guidelines).

294. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

295. Andrei Shleifer & Robert W. Vishny, *Equilibrium Short Horizons of Investors and Firms*, 80 AM. ECON. REV. 148, 151 (1990) (arguing that, due to the complexity of long-term projects, corporate managers who want to please their shareholders might be inclined to pursue short-term projects, which are easier for outsiders to evaluate).

296. *See supra* note 82 and accompanying text.

297. *See supra* note 246 and accompanying text.

298. *See* Boulton et al., *supra* note 245.

299. Moreover, the underpricing that characterizes dual-class IPOs might cause an increase in the demand for the stock at the IPO. When the demand is that high, average investors lose out because they are unable to acquire shares in an oversubscribed offering—an outcome that entails distributional consequences as well. *See, e.g.*, Gerard Hoberg, *Strategic Underwriting in Initial Public Offers* (Yale ICF Working Paper No. 04-07, 2004); *see also* U.S. SEC. & EXCH. COMM'N, *supra* note 189.

Second, excluding dual-class companies from major market indices reduces the size of the potential investment pool in capital markets. In this scenario, certain institutional investors, including actively managed mutual funds and pension funds, will be able to invest separately in non-indexed companies, as many of them have traditionally done and continue to do. At the same time, investors in passive funds will be deprived of the opportunity to invest in dual-class companies.[300] To access dual-class stock, they would have to switch to actively managed funds, which charge much higher management fees. This outcome is particularly unfortunate given that the size and number of investors in passive funds have steadily grown in recent years and are expected to grow even more over the coming decades.[301]

According to several recent empirical studies, excluding dual-class companies from leading market indices would have significantly diminished the indices' returns over the last decade.[302] Furthermore, over the 2017–2022 period, 55 dual-class stocks that were not eligible for index inclusion solely due to their share capital structure outperformed the S&P 500 index by 15 percent.[303] In light of these findings, the detrimental implications of the dual-class index-exclusion initiative appear to be profound.

In addition to the distributional consequences that the coalition is likely to trigger with respect to dual-class issues, it is also expected to result in allocational inefficiencies, which are primarily attributed to the high cost of capital that dual-class companies face. The institutions' approach to the dual-class structure and the associated underpricing of dual-class offerings will likely harm the ability of IPO companies to grow as fast as they need, resulting in deadweight loss.[304] In particular, the funding for innovative projects in dual-class companies may become too expensive. Moreover, if a public dual-class company requires equity funding for growth, the continued high capital costs could compel it to convert to a single-class structure at an inopportune time—when maintaining the dual-class structure would have been more advantageous.[305]

What is more, as several European and Asian exchanges have recently amended their listing requirements to permit the listing of dual-class stocks,[306] the index-exclusion sanction may lead to a net loss of human, technological, and intellectual capital to foreign countries.[307]

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300. *See* Deluard, *supra* note 89, at 1 ("Because the S&P 500 index is the benchmark for the most popular target-date funds, index funds, and ETFs, most Americans will have fewer assets in retirement than if they had invested in a total market fund. Most index fund investors will also miss the growth of innovative technology IPOs, which increasingly favor dual share class structures.").

301. *See, e.g.*, Bebchuk & Hirst, *supra* note 1, at 1560 ("[T]he Big Three can be expected to hold an estimated 27.6% of the shares of S&P 500 companies in 2028 and 33.4% in 2038. Similar increases hold for the Russell 3000—if current trends continue, the Big Three can be expected to hold an estimated 23.9% of the shares of Russell 3000 companies in 2028 and 30.1% in 2038.").

302. *See supra* note 145.

303. Deluard, *supra* note 89, at 5.

304. *See* Hoberg, *supra* note 300.

305. *See* Reddy, *supra* note 84; *see also* Jill E. Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1080–83 (2019) (arguing that a one-size-fits-all approach to sunsets—like the one adopted by the CII and the index providers—may lead to inefficiencies).

306. The Editorial Board, *Why Dual-Class Shares Deserve Consideration*, FIN. TIMES (Nov. 11, 2019), https://www.ft.com/content/6f576e60-0231-11ea-be59-e49b2a136b8d [perma.cc/LS3U-F6ES].

307. *See* Deluard, *supra* note 89.

The capacity of the coalition to artificially depress the prices of dual-class stock also presents another deficiency: informational inefficiency. The pricing of a new capital asset is a critical element in capital markets, and price informativeness is considered a crucial component of any welfare analysis.[308] Ideally, the book-building method should help achieve price informativeness by evaluating the intrinsic worth of a security based on its underlying fundamentals.[309] However, in the context of dual-class offerings, institutional investors, as informed and sophisticated market players, are likely to transmit deliberately misleading signals to the market. And, because their views and public announcements are built on a self-serving and anticompetitive agenda, rather than on legitimate governance concerns, the market is likely to be distorted.

We have seen, then, how the coalition can harm the capital markets and lead companies to choose suboptimal governance arrangements, distorting their investment and financing decisions. The harmful consequences of these effects are particularly alarming in light of a recent study which found that the net gain for the U.S. stock market between 1926 and 2016 can be attributed to just 4 percent of all listed companies, including dual-class companies such as Alphabet and Facebook.[310] As Sharfman observed, forcing companies to join the market under standardized governance arrangements "[may inhibit] one company from becoming the next Alphabet or Facebook."[311] The main concern is that institutional investors are damaging the stock market as a whole in order to maximize profits in the IPOs. From a public policy perspective, I believe this is something we cannot afford.

IV. THE FUTURE OF INVESTOR COALITIONS: IMPLICATIONS FOR REGULATORS

The preceding antitrust-law analysis of the coalition against dual-class demonstrates how investor alliances on governance matters can help facilitate coordination among investors in their capacity as competitors in capital markets. In this Part, I argued that the potential misuse of market power by institutional investors in their capacity as members of investor coalitions requires an immediate policy response. In Section A, I advocated in favor of regulating investor coalitions, particularly those that emerge at the firm/market borderline. In Section B, I proposed that investor consortia be classified as SSOs and argue that the same antitrust principles that are generally applied to such organizations should be adopted.

A. Regulating Investor Coalitions

As I illustrate in this Article, there is a significant legal difference between shareholders coordinating a vote in an attempt to increase firm value and

308. On the relation between price informativeness and welfare, see, e.g., Jennie Bai, Thomas Philippon & Alexi Savov, *Have Financial Markets Become More Informative?*, 122 J. FIN. ECON. 625, 627 (2016) (explaining that the independent, market-based component of price informativeness contributes to the efficiency of capital allocation, which generates an improvement in welfare).

309. *See, e.g.,* Alexander Ljungqvist, *IPO Underpricing*, in HANDBOOK OF CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 375, 381–384 (B. Espen Eckbo ed., 2007).

310. Hendrik Bessembinder, *Do Stocks Outperform Treasury Bills?*, 129 J. FIN. ECON. 440, 441 (2018).

311. Bernard S. Sharfman, *The Undesirability of Mandatory Time-Based Sunsets in Dual Class Share Structures: A Reply to Bebchuck and Kastiel*, 93 S. CAL. L. REV. POSTSCRIPT 1, 10 (2019).

competitors coordinating a governance stance for the purpose of gaining a competitive advantage over other market actors. While corporate law provides justifications for encouraging shareholder cooperation—solving the shareholder collective-action problem and mitigating managerial agency costs—there is no equivalent legal or policy justification for allowing competitors in capital markets to collaborate. On the contrary: these competitor coalitions operate in a way that directly opposes the collective good. Thus, the widespread assumption upon which corporate law favorably viewed all coalitions is no longer valid; and, without that justification, I would call for these more problematic coalitions to be re-examined through an antitrust lens.

Identifying investor coalitions that raise antitrust concerns is no easy task. The boundary between firms and markets is often blurred, as a variety of collective actions that affect companies may have spillover effects on markets, and vice versa. Due to this ambiguous borderline between firms and markets, determining the appropriate framework within which to analyze certain investor coalitions is challenging. The main concern is that hurrying to apply antitrust scrutiny to investor coalitions will have a chilling effect on the incentive of investors in capital markets to cooperate on issues that are benign, from an antitrust perspective, and are potentially welfare-enhancing. However, the failure to use an antitrust framework when such a perspective is called-for may allow substantial market distortions to go unchecked.

The test that I propose to deal with this dilemma is as follows. If an Investor coalition emerges at a stage in which the members are not yet shareholders, the preliminary assumption should be that it is a competitor coalition. Accordingly, an antitrust analysis should apply. If, on the other hand, an investor coalition involves investors that jointly own the company at issue, corporate law should come to the fore, but with one important exception. Under circumstances in which the coalition has the capacity to directly affect markets in which the coalition members compete,[312] a preliminary analysis is required. The relevant question that should be asked is whether the collaboration among these shareholders is likely to provide them with a competitive advantage over other market participants in markets in which these shareholders compete. If the answer is "yes," competition laws offer the appropriate framework within which to analyze such a coalition.

Consistent with these distinctions, I have analyzed the coalition against dual-class (which emerges in the primary market, where the coalition members are mere competitors) from an antitrust perspective. With respect to what are essentially competitor coalitions, there are several potential policy responses.

First, I propose restricting investor coalitions among competing bidders in public offerings by limiting the freedom of such bidders to engage in collective action. Under this proposal, in the context of stock issuance, institutional investors should only be allowed to express their views individually and privately—even if those views relate to a seemingly innocent governance term such as the voting structure of the issuer. To the extent that a potential investor is dissatisfied with a

312. *Id.* at 524–44 (offering an antitrust perspective on joint-bargaining agreements in the context of tender offers).

particular governance term, they may object privately or simply avoid participating in the offering.[313]

By the same token, the practice of "negotiating" governance terms through trade associations should also be prohibited. In particular, the routine sending of open letters to prospective issuers of dual-class stock on behalf of the institutional members must be subject to antitrust scrutiny. Because institutional investors can use these letters to coordinate positions, stabilize the buyers' cartel, and reduce the chances of shirking, this practice raises significant anticompetitive risks.

In addition to the restriction on collective action, I propose that all communications between institutional investors aimed at facilitating concerted efforts against other market actors be banned.[314] In that sense, this proposal would alter the existing rules, which currently permit institutional investors, as potential investors in IPOs, to communicate freely on firm-specific matters without triggering any disclosure or filing requirements. Given that the ease with which competitors can communicate with each other is a critical factor in cartel formation, the lack of any restrictions on investor communication in this setting is troublesome.

And, it is not solely a ban on direct communication between investors that I propose here but also communication through public statements. As antitrust regulators have already acknowledged, competitors might issue such statements to send signals to each other in an attempt to relax competition.[315] For example, in the context of dual-class offerings, investors' public statements can signal a meeting of minds and intent to sanction dual-class issuers per the coalition's agenda, both of which help facilitate the agenda of the buyers' cartel.

The potential anticompetitive risks associated with investor coalitions that emerge in IPOs provide compelling justifications for extending these filing requirements by applying them to prospective investors in the primary market. This view is also arguably consistent with the general tendency of courts to acknowledge that, for the purpose of securities regulations, a "group can be formed informally, without written documentation, and its existence can be proved by circumstantial evidence."[316]

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313. *See* Drew Hasselback & Barbara Shecter, *From Cara Operations Ltd to Shopify Inc: Why Dual Class Shares Are Suddenly Cool Again*, FIN. POST (May 5, 2015), https://financialpost.com/news/fp-street/from-cara-to-google-why-dual-class-shares-are-suddenly-cool-again [perma.cc/Q5SH-7ZJY] (citing a legal practitioner who called on institutional investors that opposed dual-class shares to simply not buy them).

314. The view that mere discussion among competitors may lead to anticompetitive results was debated in *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965). The Ninth Circuit posed a hypothetical in which competitors met to discuss their problems. Each said, in turn, that it would not fix prices with the others but that it would set its own price at X dollars on the following Monday. Each then did so. The Court concluded that:

> We do not say that the foregoing illustration compels an inference in this case that the competitors' conduct constituted a price-fixing conspiracy, including an agreement to so conspire, but neither can we say, as a matter of law, that an inference of no agreement is compelled. As in so many other instances, it remains a question for the trier of fact to consider and determine what inference appeals to it (the jury) as most logical and persuasive, after it has heard all the evidence as to what these competitors had done before such meeting, and what actions they took thereafter, or what actions they did not take.

315. *See supra* notes 176–177 and accompanying text.

316. *See* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 543 (1990) (also citing court cases that acknowledge the possibility of forming a group of an informal nature for the purpose of securities regulation).

B. Investor Consortia as Standard-Setting Organizations

Institutional investor consortia play an important role in facilitating institutional investor cartels. As I have demonstrated, these consortia enable their members to communicate freely on issues that affect competition in markets where institutional investors compete and seek to arrive at a coordinated stance. Moreover, by centralizing decision-making on governance practices at the consortium level, these organizations help their members avoid the hurdle of agreement that often inhibits cartel formation. And, perhaps even more importantly, since members are required to adhere to the governance standards and best practices developed by the consortia, this helps ensure compliance with mutual commitments. In fact, to ensure adherence to the standards they promote, investor consortia push their members to increase transparency regarding their governance policies.[317] All of these actions are vital for cartel formation and stabilization.

Despite the anticompetitive risks associated with investor consortia, antitrust authorities have, thus far, failed to scrutinize their actions. This regulatory oversight must be addressed. Specifically, given the growing role of these organizations in setting governance standards for American corporations, I hold that they should be viewed as SSOs for antitrust purposes.[318] As explained, SSOs have traditionally posed significant anticompetitive risks because they involve agreements among competitors and provide opportunities for collusion.[319] The primary concern is that these organizations would use the standard-setting process as a cover to fix prices or to exclude or disadvantage other market participants.[320] Acknowledging that the effects of product standards "may result in economic prosperity or economic failure" for market competitors,[321] courts have traditionally required regulators to be proactive about the standard-setting process,[322] particularly if members of the SSO represent a large majority of the ultimate buyers of the "standardized products."[323]

To ensure a competitive selection process, antitrust law requires standard-setting to involve certain policies and procedures. Notably, it must include adequate industry representation and take into account divergent economic interests.[324] In addition, both the supply and demand sides of the potential market for the standardized product should be represented, as both will be affected by the standard.[325] In the more extreme cases in which the standard has broad market

317. *See* INVESTOR STEWARDSHIP GROUP, *supra* note 11 and accompanying text.

318. Although these consortia engage in activities other than standard-setting, it is now well-established that trade associations, even ones with broader agendas, can undertake standard-setting as one of their activities. *See* OECD, *supra* note 31, at 23.

319. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 566, 570 (1982); OECD, *supra* note 31.

320. *See supra* note 273; *supra* note 275 and accompanying text.

321. Lemley, *supra* note 216.

322. *See* OECD, *supra* note 31, at 10.

323. *See* Robert A. Skitol, *Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 ANTITRUST L.J. 727, 739–40 (2005).

324. *See* OECD, *supra* note 31, at 11.

325. Teece & Sherry, *supra* note 30. The underlying assumption is that, if there is industry-wide participation in the selection process, a presumption that the marketplace selected an appropriate standard should apply. S*ee* BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, STANDARDS AND CERTIFICATION FINAL STAFF REPORT (1983). In the words of the Federal Trade Commission, standards should be selected "in a nonpartisan manner . . . and in the presence of 'meaningful

effects, an extra-market agent to "control the specification and administration of standards so that the standards themselves do not cause or perpetuate market failure" may be required.[326] And, in circumstances where anticompetitive harm occurs due to the organization's failure to implement procedures to prevent abuse of the standard-setting processes, I believe strict antitrust liability should apply.[327]

As we have seen, the standard-setting process undertaken by investor consortia lacks such safeguards. Investor consortia have unilaterally set market-wide governance standards without including all interested parties, such as the companies' representatives, and without conducting third-party consultation. This lack of procedural safeguards is particularly pertinent to the coalition against dual-class. Not only has the process failed to implement a market-agent check, but the potential "agents" that were solicited by these investor consortia to regulate the dual-class structure—notably, the SEC and the stock exchanges—declined to support the "equal voting rights" standard.[328] The refusal of these bodies to adopt a strict single-class standard indicates that they believed a market-wide prohibition on the dual-class structure was not justifiable.[329] Meanwhile, the fact that institutional investors continued to promote this governance standard, particularly by pursuing "governance by indexation," calls into question the investors' motives and the legitimacy of this one-sided market standard. Considering the above, the actions of investor consortia and their members must face antitrust liability, and the fruits of their efforts to dictate governance standards should be nulled.

CONCLUSION

Three decades ago, Coffee predicted that we would "soon see the day when twenty-five or so large institutional investors, each holding one to three percent, will hold de facto working control among them and will then be able easily to communicate and achieve a joint strategy."[330] That day has arrived. Highly concentrated institutional investors wielding immense market power now routinely form coalitions and dictate corporate governance standards for corporate America.

I contend that, as much as this new era of investor coalitions signifies a corporate governance success, it also reflects a critical antitrust failure. These alliances provide institutional investors with the infrastructure to foster the type of collaboration that can lead to anticompetitive effects in capital markets. Using an antitrust lens to analyze the coalition against the dual-class structure, I have shown how an investor coalition can influence the distribution of IPO gains through the price effect and the allocation of control rights through the governance-terms effect, resulting in adverse distributional outcomes and allocational inefficiencies.

This pattern of potential anticompetitive effects suggests that policymakers should apply antitrust principles in evaluating the collective actions of institutional

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safeguards' that 'prevent the standard-setting process from being biased by members with economic interests in stifling product competition.'"

326. *See* Gates, *supra* note 265, at 585.

327. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 566, 570 (1982); TruePosition, Inc. v. L.M. Ericsson Telephone Co., 899 F. Supp. 2d 356 (E.D. Pa. 2012).

328. *See supra* notes 109-123 and accompanying text.

329. *See* Bainbridge, *supra* note 93.

330. John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 GEO. L.J. 1495, 1546 (1990).

investors, particularly those facilitated by investor consortia. The proposed approach, if universally and rigorously applied, could lead to a more efficient allocation of control and cashflow rights through different ownership structures. At the very least, it could prove useful in thwarting institutional investors' collusive attempts to exploit their mutual governance demands as a means to undermine competition in capital markets.