BLACKROCK AS AN ACTIVIST

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ABSTRACT

In 2024, a coalition of state attorneys general filed suit against BlackRock, Vanguard, and State Street, alleging that, in an attempt to impose certain climate biases on coal companies, the three asset managers violated antitrust law. With a change of administration, the Federal Trade Commission and the U.S. Department of Justice joined the fray with a joint statement of interest in which the agencies used cross ownership precedent to advance common ownership theory while reaffirming the importance of index investing and corporate governance.

In light of these developments, this Essay makes three observations. First, there is an underlying tension between proponents of systemic stewardship and the predominant form of antitrust analysis, which does not and cannot accommodate the argument that systemic risk mitigation is a procompetitive justification for reducing output and raising prices. Second, the joint statement takes a narrow interpretation of the exception for passive investors under the Clayton Act without condemning index funds. Finally, the states must meet a demanding evidentiary standard, and if they are successful, this could set a precedent that delivers a blow not to BlackRock, but to their own constituents.

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INTRODUCTION

The history of corporate governance revolves around a simple question: *Who controls?* For a time, the answer was that control belonged to the corporation's owner, similar to a proprietary relationship.[1] Then, control passed to professional managers who ran the corporation on the owner's behalf.[2] Under that principal-agent relationship, managerial conduct monopolized the attention of corporate governance theorists.[3] Gradually, the corporation's owner changed too; it evolved to thousands of small owners.[4] Dispersed ownership precipitated the rise of institutional investors.[5] Some of them are activists, viewed as a force that instills market discipline based on management's performance.[6] Others are passive investors who focus on a company's long-term value prospects.[7] Of those, large asset managers have recently come to prominence.[8]

Post Lehman, safe and low-cost index funds offered by large asset managers became the preferred vehicles of investment in public companies.[9]

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[1] *See* Brian R. Cheffins, *Introduction* to 1 THE HISTORY OF MODERN U.S. CORPORATE GOVERNANCE, at xi–xii (2011); Peer Zumbansen, *The Corporation in an Age of Divisiveness*, 26 U. PA. J. BUS. L. 234, 251 (2024).

[2] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119 (1932). Once control passed to professional managers, the question corporate governance theorists asked was "for whom is the corporation managed?" ensuing the debate between stakeholder governance and shareholder primacy. *Id.*

[3] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309–10 (1976).

[4] *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 7 (2001).

[5] *See* Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 628, 630–32, 642 (2022) (showing that different priorities between diversified and undiversified investors led corporate governance theorists to attempt to reconcile the principles of portfolio value maximization and firm-specific governance).

[6] *See* Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1136 (2015); for a view which casts doubt on activists as a force for corporate value and holds them as a force of occasionally reckless opportunism see Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L.J. 411, 485–86 (2022).

[7] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2034 (2019).

[8] *See* JOHN COATES, THE PROBLEM OF TWELVE: WHEN A FEW FINANCIAL INSTITUTIONS CONTROL EVERYTHING (2023); Lucian Bebchuk & Scott Hirst, *Big Three Power, And Why It Matters*, 102 B.U. L. REV. 1547, 1550 (2022).

[9] Adriana Z. Robertson, *Passive in Name Only: Delegated Management and "Index" Investing*, 36 YALE J. ON REGUL. 795, 802–03 (2019); Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 19–20 (2019); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1774–75 (2020).

Whether due to a tainted reputation of investment banks or capitalizing on investor sentiment for diversification, these product offerings have been so popular that index funds have amassed substantial equity stakes in most—if not all—publicly traded companies.[10] This is referred to as common ownership, and like its preceding model, corporate governance theorists have sought to scrutinize its effects on the managerial class.[11] The concern is that public companies with the same shareholders may be inclined to compete less vigorously with each other.[12] In 2023, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) revised their merger guidelines to include the theory of common ownership.[13] Additionally, the agencies discerned certain signs which could enable anticompetitive behavior under this theory.

They began with shareholder privileges like the ability to exert board influence through "a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select

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[10] Miguel Antón, Florian Ederer, Mireia Giné & Guillermo Ramirez-Chiang, *Common Ownership Around the World* 3 (NBER Working Paper No. 33965, 2025) (finding that the three largest asset managers have become the largest shareholders in nearly 40% of all public companies), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5330817 [https://perma.cc/B2KS-C6TX].

[11] *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268–69 (2016). In sum, there are two versions of the common ownership theory of harm based on a two-pronged test of acquisition and subsequent use of stocks in firms: the mild version, or "mere common ownership," pertains to the acquisition of stock and puts heavier focus on distorting managerial incentives, whereas the more aggressive version, or "collaborative common ownership," pertains to the use of acquired stock and scrutinizes collusive and coercive practices by common owners; such practices are not typically part of the index fund playbook but in Texas v. BlackRock, Inc., No. 24-cv-437, 2025 WL 2201071, at *1 (E.D. Tex. Aug. 1, 2025) the states allege that the funds engaged in this type of behavior. For another view see Thomas A. Lambert, *Mere Common Ownership and the Antitrust Laws*, 61 B.C. L. REV. 2913 (2020). Professor Lambert defends his skepticism of common ownership by reframing the standard of harm from "cause" to "intent to cause" despite the Clayton Act prohibiting anticompetitive effects regardless of intent.

[12] Elhauge, *supra* note 11; OECD, COMMON OWNERSHIP BY INSTITUTIONAL INVESTORS AND ITS IMPACT ON COMPETITION 40 (2017) ("[I]nstitutional investors have an incentive to encourage unilateral effects that increase the value of their portfolio, and to facilitate collusive outcomes."). The OECD report benefited from the expertise of a talented team at the DOJ's Antitrust Division led by Roger Alford and Makan Delrahim, which continued the tradition of engagement with peer competition authorities in foreign jurisdictions. For more on the benefits of such cooperation see Roger P. Alford, *Promoting International Procedural Norms in Competition Law Enforcement*, 68 KAN. L. REV. 1165 (2020).

[13] Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 J. ECON. PERSPS. 3, 14–15 (2025); Merritt B. Fox & Menesh S. Patel, *Common Ownership and the Merger Guidelines*, *in* U.S. MERGER GUIDELINES: A REVIEW (S. Sullivan ed., 2024). Common ownership should not be conflated with cross-ownership which is also included in the Merger Guidelines.

particular managers."[14] But beyond board composition, large financial institutions in particular can leverage their size to induce corporate managers through public statements, such as annual letters to investors, or in private discussions. Institutional investors are aware that engaging the incumbent board members is usually more effective in shaping corporate norms than seeking to antagonize them by appointing new ones. In turn, responsive corporate managers may stand to gain from the fund's tacit acquiescence in matters of executive compensation or in a proxy contest. And even if the messaging is more focused on addressing systemic risk, long-term strategies may still influence short-term considerations.

They continued with the distortion of managerial incentives which may occur without a prior intent to bring about such change.[15] Drawing from legal literature, they referenced the claim that even if a horizontal shareholder is passive and neutral, the acquisition and mere holding of ownership interests in rival companies is enough to dissuade management from competing too aggressively.[16] Stockholding in rival firms can deter a corporate manager from taking market share from those firms and hurting the interests of their mutual shareholder.[17] In light of dispersed ownership and the increasingly important role of larger stockholders, management may be tempted to appease the shareholder by toning down competition.[18]

They concluded with the more aggressive version: collusive behavior. Just as the managers are aware of their shareholder's stakes in their rivals which may induce them to soften competition, institutional investors with access to sensitive information could also try to collectively coerce a company toward a certain direction.[19] The possibility of collaborative common ownership begs the question: if fund managers possess the ability, incentive, and information required for exploiting vulnerabilities to extract portfolio value without the offset of some form of forceful deterrence, what exactly prevents them from doing so?

Answering the call—and likely exploiting a moment of political expediency—a coalition of state attorneys general filed suit against

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[14] U.S. DEP'T OF JUST. & F.T.C., MERGER GUIDELINES 28 (2023).

[15] *Id.*

[16] *See* Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026, 2030–31 (2018).

[17] *Id.*

[18] *Id.*

[19] U.S. DEP'T OF JUST. & F.T.C., *supra* note 14, at 28–29.

BlackRock, Vanguard, and State Street, relying on all three grounds.[20] In their complaint, the states allege that in an attempt to impose certain climate biases the three asset managers violated antitrust law.[21] According to the states, the asset managers (1) obtained significant non-controlling ownership interests in several coal companies and used it to produce anticompetitive effects in violation of Section 7 of the Clayton Act, and (2) colluded with each other to coerce the coal producers to reduce output in violation of Section 1 of the Sherman Act.[22] As to the assertion that they acted like activists, the asset managers contend that as passive investors, they are not preoccupied with obtaining control or influencing business decisions.[23] As to common ownership, the managers invoke the Section 7 exception for passive investors.[24] And as to collusion, they claim that participating in a climate coalition does not—by itself—meet the evidentiary standard of proof of an agreement.[25]

With a change of administration, the FTC and the DOJ joined the fray. In a joint statement of interest, the agencies took a narrow interpretation of the exception for horizontal shareholdings by passive investors.[26] This change of posture indicates that the presumption of innocuous horizontal shareholding may no longer be the starting point. As this new reality begins to take shape, the purpose of this Essay is to make three short observations. The first is that there is underlying tension between certain corporate governance theorists and the predominant form of antitrust analysis, which does not (and cannot) accommodate the argument of systemic risk

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[20] The complaint was filed by the state attorneys general of Texas, Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, Louisiana, Oklahoma, West Virginia, and Wyoming. Complaint at 5, Texas v. Blackrock, Inc., 24-cv-00437 (E.D. Tex. Nov. 27, 2024); Karen Zraick, *BlackRock Is Accused of a Plot Against Coal. The Firm Says That's 'Absurd.'*, N.Y. Times (June 9, 2025), https://www.nytimes.com/2025/06/09/climate/blackrock-coal-texas-lawsuit.html [https://perma.cc/VAH5-W487]. On February 26, 2026, Vanguard reached a settlement agreement with the states. Madlin Mekelburg & Julie Fine, *Texas Says Vanguard Settles Collusion Suit for $29.5 Million*, Bloomberg (Feb. 26, 2026, at 11:04 ET), https://www.bloomberg.com/news/articles/2026-02-26/texas-says-vanguard-settles-collusion-suit-for-29-5-million [https://perma.cc/3JFU-MSUR].

[21] Complaint at 2, Texas v. Blackrock, Inc., 24-cv-00437 (E.D. Tex. Nov. 27, 2024).

[22] *Id.* at 3.

[23] Defendants' Joint Motion to Dismiss at 25–28, Texas v. Blackrock, Inc., 24-cv-00437 (E.D. Tex. Mar. 17, 2025).

[24] *Id.* at 28–30.

[25] *Id.* at 9–13 (explaining that the standard of proof is difficult to satisfy without evidence of substantial secret communications).

[26] Statement of Interest of the Federal Trade Commission and the United States of America at 10, Texas v. Blackrock, Inc., 24-cv-00437 (E.D. Tex. May 22, 2025).

mitigation, including climate stewardship, as a pro-competitive justification to reduce output and raise prices. The second observation is that the interpretation of the "solely for investment" exception by the antitrust agencies is a balanced approach that allows for enforcement action on occasion *without* condemning passive investment. The last observation is that the states have a difficult burden to prove and if they are successful, it could set a precedent which will deliver a blow not to BlackRock, but to their own constituents.

I. SYSTEMIC STEWARDSHIP AND COMMON OWNERSHIP

The rise of institutional investors came with divergent priorities between diversified and undiversified interests. Recognizing the patterns of investor heterogeneity, some corporate governance theorists argued that diversified investors should forgo the burden of firm-specific engagement.[27] Instead, for large asset managers, portfolio value maximization was deemed to be the optimal model because it prioritized addressing systemic risk, i.e., disruptions to the entire economy, leaving activist investors to deal with idiosyncratic risk.[28] Systemic stewardship offered institutional investors a coveted compromise between the portfolio-based strategy of diversification and the firm-specific premise of shareholder primacy.

Like the shareholder primacy doctrine, the consumer welfare standard was developed by the free market theorists of the 1970s.[29] Ever since it was enshrined as the prevailing form of antitrust analysis, courts have been reluctant to depart from a firm-specific, fact-intensive form of inquiry with a focus on price and output.[30] In turn, adherence to this standard has been

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[27] Gordon, *supra* note 5.

[28] *Id.* at 628–29.

[29] ROBERT H. BORK, THE ANTITRUST PARADOX 107–15 (1978).

[30] *See, e.g.*, firm specific: Broadcast Music Inc. v. Columbia Broadcasting System Inc., 441 U.S. 1, 16 (1979) ("But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to per se invalidation."); fact intensive: Continental Television v. GTE Sylvania, 433 U.S. 36, 58–59 (1977) ("But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing."); welfare-focused: Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'"); price-focused: Cargill v. Monfort, 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'" (quoting Arthur S. Langenderfer Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir. 1984))).

conducive to a wave of increasing consolidation.[31] Yet, courts have resisted the temptation of weighing in on broader policy considerations attempting to challenge or justify such consolidation,[32] or treating social justifications as standalone efficiencies that can normalize a restraint of trade.[33] And so as systemic stewardship nudged asset managers to face economy-wide threats, welfarism anchored judges to a case-specific, fact-intensive orientation.[34] As a result, two approaches that drifted apart to opposite ends have now collided on common ownership. One side worries about the potential effects on consumers from companies competing less vigorously with each other.[35] The other holds that the benefits to the economy outweigh the risk of marginally anticompetitive practices within an industry.[36]

Once common ownership became contentious territory, some proponents of systemic stewardship proposed justifying collusive practices as a minor evil that serves the greater good.[37] One that ultimately seeks to

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[31] *See* Spencer Y. Kwon, Yueran Ma & Kaspar Zimmermann, *100 Years of Rising Corporate Concentration* (Univ. of Chi. Becker Friedman Inst. for Econ. Working Paper No. 2023-20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 4362319 [https://perma.cc/BAU3-NGVS].

[32] United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) ("It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not. The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.").

[33] FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 424 (1990) ("[S]ocial justifications proffered for [a] restraint of trade . . . do not make it any less unlawful."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.").

[34] Whether welfarism remains flexible enough to accommodate the complexities of modern markets is a separate discussion beyond the purpose of this Essay. For a brief overview on the evolution of welfarism see Daniel Francis, *After Neo-Brandeis*, PROMARKET (Nov. 25, 2024), https://www.promarket.org/2024/11/25/after-neo-brandeis/ [https://perma.cc/V8S2-C6TW]; for a more comprehensive reform proposal see Daniel Francis, *Post-Profit Antitrust*, 135 YALE L.J. 194 (2025).

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

[36] Gordon, *supra* note 5, at 638.

[37] The idea is that if institutional investors have an incentive to encourage unilateral effects that increase the value of their portfolio, and if they facilitate collusive outcomes through agreements which are not *per se* illegal restraints of trade, such restraints have a net positive effect to society. Amelia Miazad, *Investor Climate Alliances*, 102 WASH U. L. REV. 797, 836–37 (2024); Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1689–96 (2022).

address the systemic risk of climate change and rectify the market failure of the mispricing of greenhouse gas emissions. Fundamentally, the problem with these proposals is that they prescribe solving a systemic problem within a firm-specific context, which is like trying to fit a square peg in a round hole. For one, designating climate change as a systemic problem means it cannot be rectified by any single company or industry by definition; there will always be a less burdensome remedy than a complete fix to apply in any given case. Then, even if such a fix was possible, it would take more than a lax causal inference between an ambiguous claim like systemic risk mitigation and a specific outcome like product pricing to prove it. And last, in cases where the product's mispricing is more easily ascertainable due to the proximity of a market (e.g., coal) to the market failure (e.g., environmental pollution), these proposals substitute the market's choice with predetermined outcomes.

Other scholars have pointed out that "[r]educing the risk of an economy-wide negative event will improve consumer welfare across the board."[38] The difficulty lies in both accurately quantifying the cost of an unpredictable eventuality and overcoming the doctrinal rigidity of policy-neutral competition.[39] The proposition of offsetting consumer harm with some distant sense of economic euphoria would likely not fare very well in court. In a competitive market, a judge may question why they should force the hand of informed decision makers who can choose to internalize externalities for their own self-interest and in their individual capacity.[40] Furthermore, the problem is not inherently welfarist. The expectation that large asset managers will assume climate stewardship beyond—or as part of—their existing duty to investors, entails a higher degree of corporate engagement and management monitoring costs. Engagement imperils neutrality. No rational fund manager would assume such responsibility by inserting themselves into politicization in the process.[41] And monitoring costs are

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[38] Gordon, *supra* note 5, at 671.

[39] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 696 (1978) ("[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.").

[40] STEVEN C. SALOP, A MODERN ECONOMIC APPROACH TO ANTITRUST LAW: INDUSTRIAL ORGANIZATION DECISION THEORY AND ANTITRUST (forthcoming), (draft of Dec 31, 2025, ch. 3 at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5379164# [https://perma.cc/PJ5N-8EAT] ("If a competitive market can solve a problem, decision theory would counsel that collective action to solve should not be permitted in light of its risk of cartelization.").

[41] There is also an element of accountability and democratic principle. While the idea of systemic risk mitigation deemed pro-competitive is desirable, the idea that nameless, faceless asset managers, rather than elected officials accountable to their constituents, get to decide where social value lies in the US economy, is not. Climate stewardship may become

incompatible with product structuring precisely because index funds function as a low-cost investment product. In this sense, heightened regulatory scrutiny under common ownership, through a factor, is not the main disincentive; costs are.

Unlike the reconceptualization of systemic stewardship with shareholder primacy norms, the distance between systemic stewardship and common ownership is harder to bridge. Nevertheless, devising an approach that protects consumers while respecting investor rights is a worthwhile effort to address the part of the literature which is altogether in denial of common ownership "alarmism."[42] According to Professor Bebchuk, the danger to shareholder rights from regulatory intervention entails increased discretion for corporate managers in light of institutional investors' retreat into passivity.[43] To be sure, the concern with weaker managerial scrutiny resulting in higher agency costs and poorer corporate governance is valid. But touting the danger of agency costs for shareholders in light of empirical evidence of consumer harm in highly concentrated markets[44] is underestimating both the detrimental effects of such consolidation and the increased alignment of managerial interests with distant institutional priorities.

II. THE PASSIVE INVESTOR EXCEPTION

Balancing consumer harms with investor rights is a theoretical exercise with practical limitations. This is why, until now, common ownership has existed as "the darling of the professoriate."[45] With the state attorneys general asserting that large asset managers have succeeded in coercing corporate managers to anticompetitive ends, this novel theory of harm has

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more acceptable when the vast majority of the population in the United States overwhelmingly agrees on the need to address climate change as is the case in Europe.

[42] Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 108–09 (2017).

[43] Bebchuk & Hirst, *supra* note 7, at 2131–33.

[44] *See* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 2514 (2018); José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 227, 266 (2022). While there is empirical evidence (albeit disputed) of higher prices in the banking and airline industries, the legal literature has not been able to delineate a mechanism between cause and effect conclusively. For an in-depth analysis attempting to resolve the ambiguity on causal mechanisms see C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392 (2020); Menesh S. Patel, *Common Ownership, Institutional Investors, and Antitrust*, 82 ANTITRUST L.J. 279 (2018).

[45] Transcript of Oral Argument at 9, McDonald v. City of Chicago, 561 U.S. 742 (2010) (Scalia, J., using the phrase to describe a separate legal theory that, while engaging academically, has not been adopted into the case law).

found its way out of the enclave of intellectuals into the courts.[46] In their suit, the states allege that the asset managers (1) colluded through participation in international climate organizations, whose members pledge to pursue certain climate goals under Section 1, and (2) acquired and used stock to force companies to reduce output and raise prices under Section 7.[47] With respect to collusion, the states need to show that there were secret communications or exchange of information between the index fund managers beyond mere participation in these organizations,[48] a fairly challenging evidentiary standard. Regarding the acquisition and use of stock for anticompetitive ends, the states need to overcome the defendants' statutory interpretation of the exception for passive investors under Section 7.[49] Congress passed the Clayton Act in 1914.[50] Section 7 of the Clayton Act states:

> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where . . . the effect of such acquisition . . . or of the use of such stock . . . may be substantially to lessen competition, or to tend to create a monopoly.[51]

The Section 7 exception for passive investors provides that:

> This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.[52]

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[46] Complaint, *supra* note 20, at 3.

[47] *Id.* at 1–5, 40–41.

[48] The evidence must be enough to suggest that it is more likely than not that there is a conspiracy and not a kind of independent behavior which is rational and economically sound regardless of what other asset managers choose to do. Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954) (citations omitted) ("The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.").

[49] Complaint, *supra* note 20, at 4.

[50] Whereas the Sherman Act focuses more on agreements (restraints of trade) between competitors and attempts to monopolize, the Clayton Act puts emphasis on acquisitions, including partial acquisitions. *See* Sherman Act, ch. 647, §§ 1–2, 26 Stat. 209, 209–10 (1890); Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914) (current version at 15 U.S.C. § 18).

[51] 15 U.S.C. § 18.

[52] *Id.*

Scholars have proposed several interpretations of this provision but the plain meaning of the text suggests it is a test of timing.[53] The authors of the Clayton Act were concerned with potential effects not only at the time of the acquisition of stock, but also in its subsequent use.[54] Under this two-pronged test, proponents of common ownership have argued that passive investment does not equate to passive ownership unless an index fund manager becomes entirely voiceless and neutral.[55] And even then, asset managers may not escape liability if their acquisition of stock—regardless of subsequent use—distorts competition.[56] Some scholars rest their views on three cases:[57] *United States v. Tracinda Inv. Corp.*, *Anaconda Co. v. Crane Co.*, and *United States v. Dairy Farmers of Am., Inc*.[58] Others who also adopt a narrow interpretation of the exception,[59] rely on *Golden Grain Macaroni Co.*, and *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co*.[60]

As their critics have correctly pointed out however, these cases pertain to *cross*-ownership, in which the acquirer already has control of at least one firm—its own—before it takes a stake in one or more rival firms.[61] Precedent from the 1970s hardly reflects the reality of common ownership which resulted from the growth of large asset managers after 2008.[62] In this context, index funds are investment vehicles acting as conduits for dispersed ownership. Asset managers may exert a growing level of influence in corporate governance norms for many firms, but they do not control any single one of them. When the asset managers pointed out this fact, the

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[53] Scott Morton & Hovenkamp, *supra* note 16, at 2044 ("While the statute itself applies only to acquisitions, the 'solely for investment' provision considers both the original acquisition and the subsequent use of the acquired shares.").

[54] *Id.*

[55] Elhauge, *supra* note 11, at 1305–07.

[56] *Id.* at 1308 ("In short, no matter how passive investors may be, they are still liable if their stock acquisitions or usage actually lessen competition.").

[57] *Id.* at 1305 n.188, 1308 n.203.

[58] 477 F. Supp. 1093 (C.D. Cal. 1979); 411 F. Supp. 1210 (S.D.N.Y. 1975); 426 F.3d 850 (6th Cir. 2005).

[59] Scott Morton & Hovenkamp, *supra* note 16, at 2042 n.70–71.

[60] 78 F.T.C. 63 (1971); 476 F.2d 687 (2d Cir. 1973).

[61] Keith Klovers & Douglas H. Ginsburg, *Common Sense About Common Ownership*, 2-2018 CONCURRENCES Art. N° 86847, at 5 (2018).

[62] *See, e.g.*, Scott Aquanno & Stephen Maher, The Rise of Asset Management Firms, Verso Books, (Feb. 13, 2024), https://www.versobooks.com/en-gb/blogs/news/the-rise-of-asset-management-firms?srsltid=AfmBOooOm5oK97jH5Dl8tXXSprnoyA644W17SNGjig5AlT3KflbACXhl [https://perma.cc/SF3J-L7JS] (discussing the rise of asset management firms since the 2008 financial crisis).

agencies claimed "this line of argumentation [to be] a misdirection."[63] Control—or lack of it—is not dispositive.[64] Influence suffices.[65] The agencies proceeded to take a narrow interpretation of the exception, relying primarily on *United States v. E.I. du Pont de Nemours & Co.*,[66] as well as *Tracinda*, *Anaconda*, and *Dairy Farmers*.[67]

In essence, the joint statement by the FTC and DOJ treads a very thin line between using cross-ownership precedent to advance common ownership theory, while reaffirming the importance of index investing and corporate governance. To this end, the agencies "do not assert a position as to when an investor's acquisition of stock in competing firms alone—without evidence of subsequent anticompetitive use—would implicate Section 7" and instead the statement places greater emphasis on whether the stock is used to "in fact cause anticompetitive effects."[68] Rather than condemning index funds by finding common ownership to be inherently anticompetitive, the antitrust agencies take a more measured approach, one that scrutinizes the growing influence of asset managers and which contemplates enforcement action on occasion.

III. THE REPERCUSSIONS

In August 2025, Judge Kernodle issued an order largely denying the states' joint motion to dismiss.[69] In his order, he acknowledged that until now "no court has addressed whether horizontal shareholding can ever violate Section 7."[70] But he added, "the text of Section 7 does not foreclose such a theory."[71] And in response to worries of liability for passive investors, he

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[63] Statement of Interest of the Federal Trade Commission and the United States of America, *supra* note 26, at 15.

[64] *Id.*

[65] *Id.*

[66] 353 U.S. 586 (1957) (also a cross-ownership case).

[67] Statement of Interest of the Federal Trade Commission and the United States of America, *supra* note 26, at 9, 10, 11, 14 ("[A]s with all express exemptions from the antitrust laws, it must be 'narrowly construed.'" (quoting Group Life & Health Inc. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979))).

[68] *Id.* at 19.

[69] Texas v. BlackRock, Inc., No. 24-cv-437, 2025 U.S. Dist. LEXIS 147891 (E.D. Tex. Aug. 1, 2025).

[70] *Id.* at *38.

[71] *Id.* This is a noteworthy development because the antitrust agencies are embracing novel theories which were first included in the 2023 Merger Guidelines, even after a change of administration. Previous attempts were less successful, *see, e.g.*, Federal Trade Commission v. U.S. Anesthesia Partners, Inc., No. 23-cv-03560, 2024 U.S. Dist. LEXIS 85714 (S.D. Tex. 2024) (testing the serial acquisitions theory).

further explained that "it is not Defendants' *mere common ownership* of competitors within a single industry that allegedly violates Section 7; rather, it is their alleged *acquisition and use* of the stock to bring about, or attempt to bring about, a substantial lessening of competition that is unlawful."[72]

Nevertheless, despite the early win for the states, the case is flawed in several aspects. For companies, going after asset managers and not board directors sets poor corporate governance norms.[73] For the states, creating precedent based on political expediency can always backfire.[74] For the coal companies, the prospect of a divestiture undermines support for the coal market.[75] For the asset managers, who incorporate environmental criteria in their portfolio to assess systemic duress, priority now lies in identifying industries where adherence to climate risk mitigation is inseparable from a firm's business operations, including its output.[76] And although BlackRock, State Street, and Vanguard have disassociated themselves from climate alliances, and will likely refrain from expressing vocal support for climate risk in the foreseeable future to weather the storm, the long-term repercussions of this case will compel industries to reexamine their shareholdings in highly concentrated markets altogether.[77]

Finally, the joint statement by the antitrust agencies accomplishes two things: it allows the agencies to expand their view of the common ownership theory without having to go through the arduous process of litigation, and it

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[72] *BlackRock, Inc.*, 2025 U.S. Dist. LEXIS 147891, at *39–40.

[73] Bebchuk & Hirst, *supra* note 7, at 2131–33. The corporate governance reservations about enforcement actions against index fund managers are justified but the proclivity toward regulatory inertia is more questionable.

[74] For example, suppose the antitrust agencies under a different administration sue BlackRock, Vanguard, and State Street for exercising their voting rights in Exxon, Chevron, and others in a way which incentivizes management to keep output low and prices high, thereby harming consumer welfare, and seek to force the funds' divestiture from the oil and gas industry. Assuming they are successful and given that Chevron and Exxon have most of their workforce in Texas, there is little doubt where the repercussions of a divestiture would be felt the most; John C. Coffee Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 COLUM. BUS. L. REV. 602, 646–647 (2021) (arguing a similar hypothetical).

[75] David Blackmon, *Texas Suit v. Blackrock Et Al Could Undermine Trump's Energy Agenda*, FORBES (Sep. 2, 2025, at 10:03 ET), https://www.forbes.com/sites/davidblackmon/2025/09/02/texas-suit-v-blackrock-et-al-could-undermine-trumps-energy-agenda/ [https://perma.cc/Q74H-738B].

[76] For example, the oil and gas industry.

[77] For example, the airline and banking industries.

takes a narrow interpretation of the exception for passive investors without condemning index funds.[78]

CONCLUSION

As systemic stewardship steered institutional investors to face economy-wide threats, welfarism oriented courts to protect consumers from high prices and low outputs. In the meantime, the rise of intermediaries in service of dispersed ownership intrigued regulators, thrusting large asset managers into the contested territory of common ownership. In response, some academics have tried to find an approach that ties climate stewardship to consumer welfare. Concurrently, enforcement agencies have capitalized on an opportunity to scrutinize shareholder conduct. It has not yet reached the point where horizontal shareholding is inherently anticompetitive. However, if the common ownership debate tilts toward holding shareholders more accountable in law, institutional investors will have to grapple with the prospect of long-term value creation facilitating cartelization in concentrated markets and undermining short-term prosperity.

[78] For more on the implications of Texas v. BlackRock see Cynthia Hanawalt & Denise Hearn, *Texas v. BlackRock Puts the Common Ownership Theory on Trial, with Implications across the Financial Sector and Collaborative Sustainability Efforts*, 2025 INT'L J. FOR FIN. SERVS. 107.