

WHY *COPPERWELD* WAS ACTUALLY KIND OF DUMB: SOUND,
FURY AND THE ONCE AND STILL MISSING
ANTITRUST THEORY OF THE FIRM

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Simple ideas hardly ever are very productive if the
underlying reality is complex.¹

It was an uncommon pleasure to speak at the symposium of which this paper was a part, and not only because of Villanova's exceptional new law school facility, the warm welcome provided by the journal's staffers, or the caliber of the panelists.² It was an opportunity to seriously re-think something that had seemed obvious. In the years since *Copperweld Corp. v. Independence Tube Corp.*,³ it had come to seem that antitrust really *needs* a "theory of the firm." *Copperweld* seemed pretty plainly to direct the lower courts to develop some theory of the firm, and their efforts had been disappointing.⁴ So I thought someone should figure out some such theory that

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1. Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 150 (1989).

2. The panel included some truly major talent, among whom I felt pretty out of place. It included a major league team owner, one of the country's most prominent defenders of the "single entity" treatment of pro sports, not just one but two counsel who took part in litigation of *American Needle* before the Supreme Court, and a prominent federal enforcement official. The discussion was, as one might guess, good. Also, myself an advisor to a student law journal, I can't overstate the good it did me that this *Journal's* members were so engaged in the event and, by all appearances, they all attended the entire thing.

3. 467 U.S. 752 (1984).

4. *Copperweld* addressed the question whether a corporation and its wholly owned subsidiary could constitute a "contract, combination, . . . or conspiracy" that could be subject to section 1 of the Sherman Antitrust Act. The Court said no, explaining that where two entities share the same economic interest they are not "separate" enough to satisfy section 1's multiplicity requirement. In the course of explaining that, the Court seemed to indicate that there could be other relationships that rendered defendants only one "single entity" under the Sherman Act, even though there might not be a 100% ownership at stake. The problem since then has been that lower courts' "single entity" determinations have been ad hoc and theoretically hollow. Outcomes are unpredictable and it is often unclear just which policies are thought to be served. See *infra* Part II.B.

would coherently serve the purposes of antitrust and produce predictable outcomes. I had said so⁵ and others had said it as well.⁶

That now seems incorrect, and *Copperweld* seems more regrettable than ever. In fact, the proceedings of this conference, and the fact that the contours of a “single entity” remains a matter of such controversy, came to seem emblematic of the deep misdirection of contemporary antitrust. They suggested just how far antitrust has forgotten that it is a *law*, a practical system for real-world application of public policy choices made through our system of government. Much too much of the time it seems to fancy itself an abstract policy seminar to be dabbled in for its own sake, by the federal judiciary and its academic support staff. In fact, so far as I am aware, one simple question appears to have gone basically unasked throughout several decades of single-entity debate: Does antitrust *need* some elaborate sociological inquiry, of the kind apparently envisioned by *Copperweld*, at the very *beginning* of a lawsuit?

I think not. If there is one thing antitrust does not need, it is yet another rule for summary dismissal at the early stages of litigation. There are at least a few dozen such rules already.⁷ The chief

5. See Chris Sagers, *American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?*, ANTITRUST SOURCE, Aug. 2009, available at <http://www.abanet.org/antitrust/at-source/09/08/Aug09-Sagers8-12f.pdf>.

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

7. By most accounts, Sherman Act section 1 claims have gotten much easier to dismiss, under *Bell Atl. Corp. v. Twombly*, 550 U.S. 554 (2007). Likewise, in all antitrust cases private plaintiffs must make what have come to be difficult demonstrations of antitrust “injury” and antitrust “standing.” See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 441-51 (2001). Additionally indirect-purchase plaintiffs can never sue in federal antitrust, under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Furthermore, wherever a plaintiff challenges a defendant that is regulated under some law other than antitrust, there is the chance that defendant has an “implied repeal” defense, and that defense appears to have become substantially more powerful since the *Credit Suisse* ruling of 2007. It now appears that antitrust can be “repealed” where compliance with both antitrust and the other regulatory scheme would be merely costly or even only speculative—that is, it could be repealed even when the conduct is illegal under both laws, so long as the regulatory treatment of that conduct could conceivably change in the future. See *Credit Suisse Secs. (USA), LLC v. Billing*, 551 U.S. 264, 275-84 (2007). Even where implied repeal is unavailable, private plaintiffs might also be unable to recover damages for rates that are “filed” with a regulatory agency, perhaps even where the agency in question provides no substantive review of the rates. See *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (citing *Square D Co. v. Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 417 n.19 (1986)). And indeed, perhaps where the rates are not even filed. See *In re Hawaiian & Guamanian Cabotage Antitr. Litig.*, 2010 WL 4996730, at *9-11 (W.D. Wash. 2010). No one can challenge the trade-restraining conduct of state governments, see *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984), even where it may constitute private action that is merely authorized and supervised by a state government, see *Cal. Ret. Liq. Dealers*

justification for most of these rules is the protection of legitimate enterprises from frivolous litigation. But at least in the case of the single entity rule, that fear is surely overstated, in light of the ease with which truly single entities could get early dismissal on the merits and the unlikelihood that many plaintiffs would bother with such obviously hopeless lawsuits.⁸ That point was made to the Court but ignored in *Copperweld*, and it has largely failed in other courts as well.⁹ Most of these rules for quick disposal, including the single-entity inquiry, as *American Needle* itself demonstrated, can be applied with little or no discovery. In that sense, they are just one more symptom of what antitrust has become. Ever more, the com-

Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Nor can anyone challenge private conduct that can be characterized as part of a "petition" to government for redress of grievances, see *E. R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), or as part of labor negotiations, see *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-42 (1996) (generally describing the so-called "labor exemption"). And, for no plausible reason on earth, no one can sue baseball. See *Flood v. Kuhn*, 407 U.S. 258 (1972). Finally, there also remain upwards of thirty statutory exemptions from antitrust for various industries and activities. See SECTION OF ANTI-TRUST L., AM. BAR ASS'N, FEDERAL STATUTORY EXEMPTIONS FROM ANTI-TRUST LAW (2007) (listing all statutory exemptions still in force).

8. For example, during the panel discussion, one participant proposed a hypothetical in which a professional sports league changed its scheduling rules to reduce the number of games in its regular season. He then suggested that such action was an example of naked, horizontal output restriction. And, the point was that exposure to antitrust laws under such circumstances would produce absurd results, subjecting mundane matters such as the scheduling of games to judicial scrutiny.

This alleged result, however, is almost certainly incorrect. Scheduling changes are no more naked than a product design standard produced by a private standard setting organization. The standard is a horizontal agreement not to produce competing designs if the organization includes competing manufacturers of the product. If the standard came to have influence because the product displays a strong need for interoperability, this horizontal output restriction might have significant trade restraining consequences. It is unlikely, however, to be held *per se* illegal because this activity is ancillary to the pro-competitive purpose of quality improvement and technological innovation. See generally Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMORY L.J. 583 (1998) (discussing case law treatment of private standard setting).

Most plaintiffs do not bother to challenge arrangements so plainly subject to the full rule of reason—like garden variety standard setting and sports league scheduling rules—because rule of reason analysis presents them with almost certain loss.

9. The point was made in Justice Stevens's excellent dissent, which was joined by Justices Brennan and Marshall, but it was ignored by the majority. See *Copperweld*, 467 U.S. at 778-96 (Stevens, J., dissenting). They argued that intra-corporate conspiracy cases should be handled by the rule of reason, under which most cases would be quickly dismissed for the same reasons of pro-competitive efficiency that drove the *Copperweld* majority opinion. See *id.* at 778-79. The majority nowhere directly addressed this argument, stressing only its view of the congressional intent. Cf. *id.* at 775-76.

petition policy that governs all of our nation's markets is a scholastic, metaphysical game of strictly a priori theoretical reasoning, often performed on the basis of little evidence by trial judges as they sit alone in their chambers.

While that ultimately is the point to be made, this brief essay will make only one small part of it. As proof that resolving matters like the metaphysical boundaries of real-world institutions with glib, a priori rules was maybe not such a good idea, this essay will explore the lower court caselaw concerning single entity treatment, both as it existed before and after *Copperweld*.¹⁰ *Copperweld* was widely seen as a watershed, and its wisdom is now essentially unquestioned. So one might have thought there would be quite a change in the lower courts' handling of these issues. With *Copperweld's* more elaborate, economically enlightened guidance, their decisions should have become more predictable and more coherently linked to clear policy goals. If nothing else, they should at least seem *different*. And yet, they do not. They seem quite the same. Both before and after *Copperweld* they seem ad hoc, subjective, and largely unexplained. In other words, as has been said before, courts have been "bemused by the label 'joint venture'" for decades,¹¹ even though they have been told not to be.¹² They have struggled for many years to find explanations in their collaboration cases that are coherent and relevant to the goals of antitrust, but mostly they boil down to just their hunches about how well defendant collaborators seem "integrated" or "economically unified." As Adolph Berle said in a similar context, the courts in these cases have been using words rather than rules.¹³ And so, while measuring the effects of economic integration may very well be the "central issue confronting antitrust policy," it is also one as to which "[t]here is . . . no easy way to distinguish desirable from undesirable transactions."¹⁴ For that rea-

10. Before *Copperweld*, the lower courts were obliged to try to decide when a parent and subsidiary—even a wholly owned one—were "separate" enough to conspire. After *Copperweld*, they must still decide when corporate affiliates that are not parent and wholly owned subsidiary are nevertheless so unified that they cannot conspire.

11. Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1045-46 (1969).

12. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("agreements . . . to suppress competition . . . can[not] be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled.").

13. See Adolph A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUMBIA L. REV. 343, 346 (1947).

14. Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1523 (1982).

son this essay urges that the courts just stop trying to squeeze it into a glib rule for summary disposal.

I. THE SINGLE ENTITY PROBLEM

The courts have held since early in antitrust history that “unilateral” conduct is exempt from section 1, as the words “contract,” “combination,” and “conspiracy” each seems to imply that there be more than one “person” involved.¹⁵ Strictly speaking, the language of section 1 does not require this result, as even the *Copperweld* majority recognized.¹⁶ Among other things, section 1 contemplates not just “contracts” and “conspiracies,” but also “combinations,” and it was designed to reach those tightly affiliated corporate families known as “trusts” for which antitrust law is named.¹⁷ In fact the Court itself in early opinions treated sections 1 and 2 as largely interchangeable, and no less than Oliver Wendell Holmes once said so explicitly.¹⁸ It also seems unlikely that the Congress of 1890 understood a sharp distinction between conspiracy within and without corporate affiliations.¹⁹ *Copperweld*’s sharp distinction between section 1 and section 2 conduct—and the gap left open between them—was therefore a departure from prior law, though one that had been developing for a long time. That rather puts the lie to

15. The first clear Supreme Court authority to this effect was *United States v. Colgate & Co.*, 250 U.S. 300 (1919), which held that a manufacturer’s unilateral refusal to sell its product to a buyer, no matter what the purpose or consequence, could not violate section 1. Lower courts had reached the same result somewhat earlier. See *Union Pac. Coal Co. v. United States*, 173 F. 737, 745 (8th Cir. 1909).

16. *Copperweld* found that some concept of the boundaries of “firms” is needed, but only for policy reasons. As the Court wrote: Nothing in the literal meaning of th[e] terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal “agreement” to implement a single, unitary firm’s policies does not raise the antitrust dangers that section 1 was designed to police. *Copperweld*, 467 U.S. at 769.

17. See *Copperweld*, 467 U.S. at 787 (Stevens, J., dissenting) (making these points).

18. See *Northern Secs. Co. v. United States*, 193 U.S. 197, 404 (1904) (Holmes, J., dissenting).

All that is added to the 1st section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man.

Id.

19. As Justice Stevens pointed out in his dissent in *Copperweld*, the law of criminal conspiracy as it existed in 1890 recognized that affiliated corporations could conspire and that corporate agents could conspire with one another or with their corporations. See *Copperweld*, 467 U.S. at 785-86 (Stevens, J., dissenting). (Justice Stevens’s citations are all to post-1890 cases, but there is plenty of authority to the same effect predating 1890.)

one of the most fundamental claims on which *Copperweld* was based: that Congress itself *intended* to draw a substantively important distinction between concerted action under section 1 and unilateral action under section 2. (The *Copperweld* majority claimed that the 1890 Congress perceived concerted action to be much more dangerous, and so made it more easily penalized, and therefore also required clear proof of true multilateral conduct.) It seems likely that Congress intended nothing of the sort.

But, though that may be, it is now deeply engrained that section 1 liability requires conspiracy among two or more persons who are legally “separate” from one another. Thus, it has been long settled that a firm’s officers and employees cannot conspire with one another, and the firm cannot conspire with them either,²⁰ unless those agents act on their own behalves.²¹ Likewise, apparently only one judicial opinion has ever found a conspiracy among a firm’s unincorporated divisions,²² a decision made under unusual circumstances²³ and later reversed.²⁴

One problem, though, posed the courts quite a bit more trouble, and it was this problem that finally came to a head in *Copperweld*. For some decades prior to the 1980s, the Supreme Court

20. Strictly speaking, one Sixth Circuit opinion from 1915 held that corporate officers could conspire. See *Patterson v. United States*, 222 F. 599, 618 (6th Cir. 1915). Critics have observed that there was a sufficient basis in that case for section 2 liability, which the court also affirmed, and in any event *Patterson*’s section 1 rule was never followed in subsequent caselaw. See Donald G. Kempf, Jr., *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*, 24 BUS. LAW. 173, 173-74 (1968).

21. See *Victorian House, Inc. v. Fisher Camuto Corp.*, 760 F.2d 466, 469-70 (8th Cir. 1985) (antitrust can apply to action between corporation and its agent where agent acts on its own behalf); *Greenville Publ’g Co., Inc. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) (same).

22. See *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons*, 272 F. Supp. 915 (D. Hawaii 1967). Critics observed at the time that only *Hawaiian Oke* had ever reached this result. See Kempf, *supra* note 20, at 173; Everett I. Willis & Robert Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 20 n.1 (1968). Further research has uncovered no other examples.

23. Defendant Joseph E. Seagram & Sons, Inc. was accused of conspiring with several of its unincorporated divisions. It previously managed those divisions as wholly owned subsidiaries, and apparently merged them into itself only because the Supreme Court had previously found the company capable of conspiring with them in their separately incorporated form. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). While the *Hawaiian Oke* court stated the then-existing law of intra-enterprise conspiracy in quite broad terms, the court supported its decision by observing Seagram’s effort to evade the effect of *Kiefer-Stewart*, finding that “[a]lthough Seagram changed the form of its corporate structure following *Kiefer-Stewart*, there was no substantive change in the marketing technique employed.” 272 F. Supp. at 920-21.

24. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969).

flirted with the idea that the separately incorporated members of a corporate family could conspire with one another. While it had some earlier antecedents in the lower courts and arguably in some earlier Supreme Court opinions,²⁵ this flirtation was dominated by the thinking of Hugo Black. It was premised predominantly on three opinions he wrote over about twenty years,²⁶ and also on a much disputed citation by him to *United States v. Yellow Cab Co.*²⁷ In keeping with his fondness for bright-line doctrinal rigidity, Justice Black in these opinions simply said with no elaboration that the defendants' legal form is in itself irrelevant to section 1 liability. Thus was born a much-maligned doctrine that came to be known as the "intra-enterprise conspiracy" rule.

A familiar string-cite of pre-*Copperweld* articles were harshly critical of this rule²⁸ and the enforcement agencies cast doubt on it as well.²⁹ Critics were especially bothered by the risk that there could

25. The most important of these opinions was *United States v. Gen. Motors Corp.*, 121 F.2d 376 (1941), which was apparently the first decision to find conspiracy between a parent and wholly owned subsidiary. *See also* *United States v. New York Great A&P Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

26. *See* *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co.*, 340 U.S. at 211.

27. 332 U.S. 218 (1947). *See Kiefer-Stewart*, 340 U.S. at 215 (citing *Yellow Cab Co.*, 332 U.S. at 218). As the Court would later point out in *Copperweld*, there is some doubt whether any Supreme Court opinion before *Kiefer-Stewart*, including *Yellow Cab*, had squarely adopted the intra-enterprise conspiracy rule. But in *Kiefer-Stewart*, Justice Black merely wrote that to find corporate affiliates incapable of conspiracy would "run[] counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws," and for that he cited only *Yellow Cab* with no elaboration. *See* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 763-64 (1984).

28. *See, e.g.*, M.A. Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 50-53 (1949); Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451 (1983); Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981); Kempf, *supra* note 20; Lawrence C. McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); James A. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); George W. Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L. J. 5 (1963); Willis & Pitofsky, *supra* note 22; Ann I. Jones, Comment, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CAL. L. REV. 1732 (1983); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977).

29. Notably in a frequently cited 1955 report of a study commission appointed by President Eisenhower's Attorney General, Herbert Brownell. The report is remembered especially for the breadth of representation among its commissioners—they comprised sixty economists and lawyers of a broad range of political persuasions—and they broadly condemned the doctrine. *See* ATTY GEN'S NAT'L CMM'N TO STUDY THE ANTITRUST LAWS, REPORT (1955). Though both the Justice Department and the Federal Trade Commission had aggressively challenged some intra-firm conduct prior to that report, neither of them appears to have brought any such challenge after 1955. *See* Robert A. Solo, *Intra-Enterprise*

be different section 1 treatment of agreements among unincorporated divisions (which were categorically immune, even under the intra-enterprise conspiracy rule) and incorporated subsidiaries (which, because they could conspire under the rule, were open to the many then-prevailing *per se* rules). This was so even though there would frequently be no difference in substance between those two ways of organizing a corporate family. Hence, there were frequent complaints that the intra-enterprise conspiracy doctrine elevated form over substance. Critics also observed several reasons for incorporating divisions separately that were not anticompetitive, like managerial benefits, compliance with differing local regulations, and a special tax benefit that existed prior to 1969.

But for all that, a fair question is whether the doctrine ever had much of an effect as a practical matter. Most lower courts honored it only in the breach, most often finding reasons in specific cases why particular defendants had not violated section 1, even while stating that theoretically they could have.³⁰ The Supreme Court itself was fairly inconsistent during the thirty-year life of the doctrine, deciding a handful of cases seemingly at odds with it.³¹ Genuinely intraenterprise conspiracy was found in only a smattering of lower court decisions.³²

Anyway, this all came to an apparent end in 1984, when *Copperweld* held that a parent and its wholly owned subsidiary are incapable of conspiring.³³ Though *Copperweld* was nominally limited to

Conspiracy and the Theory of the Firm, 34 J. Bus. 153, 155 (1961). Another strong and frequently mentioned critique was in a 1965 address by Assistant Attorney General Donald Turner, in which he argued that government enforcers should only bring those cases they thought socially desirable, even if prevailing law might permit more aggressive enforcement. He said that government "should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest." Donald F. Turner, *Address Before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965).

30. See Areeda, *supra* note 28, at 462-70.

31. See *id.* at 457-62.

32. Of course, corporate concern over the mere risk of liability might have chilled the creation of otherwise desirable corporate groupings, or may have caused undue caution in intra-firm communications or planning. But that seems fairly unlikely. What proof is there that between 1951 and 1984 corporations were shy about creating sprawling, complex corporate families, organized in any variety of different ways?

33. Defendants were a manufacturer of structural steel tubing and its parent corporation. The subsidiary was wholly owned by the parent and the two corporations shared the same headquarters and overlapping management. Plaintiff was a rival manufacturer of steel tubing that was formed by a man who had served as an officer of the defendant subsidiary before its acquisition. Plaintiff alleged that the parent and subsidiary engaged in a series of anticompetitive acts to thwart its entry and survival in the structural steel tubing market. See generally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 755-59 (1984).

its facts,³⁴ the Court pretty clearly signaled that relationships short of outright ownership could constitute single entities, and implied that the lower courts should formulate rules for when that could be. The Court also made clear that the boundaries should follow economic substance and not legal formalism. In the course of explaining its new rule, the Court set out essentially three separate economic ideas that would inevitably drive the contours of the single-entity test it meant for the lower courts to fashion. First and foremost, the Court stressed that separate firms have separate “interests.”³⁵ While the Court never precisely explained which “interests” mattered or why, it apparently meant that separate firms do not share in the same profits and losses. That seems reasonable, because only firms “separate” in this sense stand to gain from underselling one another. The Court implied that, other things equal, antitrust should favor a greater number of “separate” firms in a market, but should disregard the number of non-separate entities.³⁶ Second, the Court implied the arguably different idea that there is independent value in preserving some number of firms under separate management teams.³⁷ Finally, the Court offered

34. *See id.* at 767.

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

Id.

35. *Id.* at 771 (“A parent and its wholly owned subsidiary have a complete unity of interest.”) The parent’s and subsidiary’s:

objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal ‘agreement,’ the subsidiary acts for the benefit of the parent, its sole shareholder.

Id. at 771-72 (parent and subsidiary “share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests.”).

36. This is evidently the idea behind the Court’s concern that only agreement or combination of separate entities results in a “sudden joining” of competing resources. *See id.* at 769 (parent and subsidiary are not “separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”); *id.* at 771 (“If a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.”).

37. *See id.* at 769. Agreement among separate entities, unlike parent and subsidiary:

deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combin-

the more homely policy point that a legal rule that discourages productively efficient integrations would impose some costs.³⁸ What these ideas mean together is maybe a little vague, but fundamentally the Court seemed to imply that most important is whether the allegedly separate defendants internalize sufficiently adversarial profit incentives that the law can require them to compete.

Copperweld has had a powerful sway with most observers, and that seems to come at least in part from its simplicity. The particular decision before the Court in that case—whether a corporation and its wholly owned subsidiary could conspire—was admittedly a simple one. And the intra-enterprise conspiracy doctrine, whose viability was in question in the case, had been the focus of such voluminous, vehement, and largely unanimous criticism that only one outcome seemed possible. And the reasoning of a court in a case reaching such an obviously correct conclusion, it seems, must also have the weight of exceptional common sense.

But as a matter of fact, *Copperweld*'s very simplicity turns out to be its major weakness. As Justice Marshall once said, easy cases sometimes make bad law too.³⁹ In *Copperweld* the problem was the suggestion that courts should engage in a summary single-entity inquiry in every section 1 case, according only to the very abstract few paragraphs of economic reasoning in the *Copperweld* opinion, and that such an inquiry could be simple. *Copperweld* actually answered only the narrowest conceivable question in this inherently difficult area, and gave no consideration to the fact that in most cases except that very narrow one, the issues would get much more complex and uncertain.

ing to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Id.

38. The Court wrote that intra-enterprise conspiracy liability might “deprive consumers of the efficiencies that decentralized management may bring,” *Copperweld*, 467 U.S. at 771, and that “[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.” *Id.* at 769.

39. See *Heckler v. Chaney*, 470 U.S. 821, 840 (1985) (Marshall, J., concurring) (“Easy cases at times produce bad law, for the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew.”).

II. WHY THERE USED TO NOT BE A THEORY, AND WHY . . .
WELL, . . . THERE STILL KIND OF ISN'T

A. The Inherent Problem and the "Formalism" Irony

For practical purposes, non-trivial economic activity always involves cooperation of biological persons of a sort that renders their incentives different than under atomistic competition. Though it may seem like some obviously real one, there is no obvious substantive distinction between collaboration through consolidation or internal growth, on the one hand, and collaboration between juridically distinct entities, on the other. In fact, that some particular collection of persons and assets are legally affiliated in a "corporation" is at best a convenient heuristic. Some trade associations and standard setting bodies are incorporated, for example, and, *Appalachian Coals* notwithstanding,⁴⁰ the law is clear that an otherwise naked trade restraint cannot be made legal just by incorporating it.⁴¹ Were the rule otherwise, any garden-variety cartel—even a hard-core criminal conspiracy—could be immunized by a simple legal fiction. *Copperweld's* heavy criticism of the old intra-enterprise doctrine's "formalism" is therefore pretty obviously ironic. *Copperweld* itself took as a fundamental premise that a distinction of economic substance can be made to depend on a legal formalism.

There also remains surprisingly little guidance in economic theory. The price theory that is our predominant model is notorious for its failure to define the boundaries of firms at all,⁴² and the one prominent body of modern theory concerned with the ques-

40. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933). While nominally still good law, *Appalachian Coals* is a highly anomalous decision, in which the Court found a straightforward and quite naked price fixing cartel to be legal, largely because the relevant industry was economically distressed in consequence of the ongoing Great Depression. The conspiracy happened to have been incorporated as a jointly owned venture of several coal companies that were otherwise horizontal competitors, and they appointed it their exclusive sales agent within a specified territory. *Appalachian Coals* is now presumed a historical peculiarity with no current force. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 196-99 (2000); William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. REV. 1811, 1812 (1995) (*Appalachian Coals* was an "extraordinary . . . decision" that "only makes sense when placed in the context of the country's disillusionment with capitalism during the depths of the depression.").

41. See, e.g., *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). Likewise, the early trade association cases—many of which were held to involve *per se* illegal trade restraints—often involved associations that would have constituted state law general partnerships. It is interesting that in none of these cases do the courts appear to have considered whether entity status could be relevant to section 1 liability.

42. See, e.g., Joseph E. Stiglitz, *Incentives, Risk, and Information: Notes Towards a Theory of Hierarchy*, 6 BELL. J. ECON. 552, 552 (1975) ("Economic theory has had

tion—the so-called “neo-institutionalist” or “transaction cost” economics—generates at best complicated answers. In fact, its argument is mainly to the effect that there is no real distinction at all between “single” and “multiple” economic actors, or, that if there is some distinction it is neither susceptible to rigorous theoretical definition nor is it especially important. In fact, such a theory of the firm as there has come to be in either economics or law is, more powerfully than anything, an argument that the boundaries of the firm are a non-existent illusion.⁴³

We could on the one hand try to dig more deeply through *Copperweld*'s many delphic generalizations, which is what the courts and most commentators have done. On the other hand, we could return to first principles and try to find that basis of distinction that most justly serves the substantive purposes of antitrust law. But a problem which seems not especially palatable to acknowledge is simply this: however hard it may seem to believe, *there may be no principled distinction to be drawn on Copperweld's lines.*

B. The Multiplicity of Post-*Copperweld* Tests and Their Pre-*Copperweld* Antecedents

The analysis in the prior section is not just speculation. We have seen plenty of attempted doctrinal formulations, both before and after *Copperweld*, and they bear out the claim that single-entity tests will never be theoretically robust or easy to administer.⁴⁴ One

little to offer . . . by way of explaining why particular firms choose particular contractual arrangements.”).

43. See Steven N. S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1, 3 (1983) (“[W]e do not exactly know what the firm is—nor is it vital to know. The word ‘firm’ is simply a shorthand description of a way to organize activities under contractual arrangements that differ from those of ordinary product markets.”); cf. Naomi R. Lamoreaux, *Partnerships, Corporations, and the Theory of the Firm*, 88 AM. ECON. REV. PAP. & PROC. 66, 66, 70 (1998) (arguing that during the nineteenth century “no clear economic boundary distinguished ordinary contracts from those considered by law to be firms,” but nevertheless economic aspects of “firmness” explaining the much greater interest of entrepreneurs of that time to use the corporate form than the limited liability partnership form are evident).

44. One frequently made critique, which is probably applicable to all single-entity tests, is that they will be complex in litigation. They will invite the delay, complexity and expense of merits litigation which is their purpose to avoid. See *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 393 (7th Cir. 1996) (Cudahy, concurring); Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 766 (1989); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L. J. 25, 46 (1991). This supports the point made in this paper: the very idea of the pre-trial single-entity inquiry ought to just be disposed of because, however the test is formulated, it will subject defendants to at least some of the same merits litigation that *Copperweld* sought to spare them against.

careful post-*Copperweld* opinion, *Fraser v. Major League Soccer*,⁴⁵ written by a former Deputy Assistant Attorney General for Antitrust—predicted just this problem:

The law [on the single-entity question] could develop along either or both of two different lines. One would expand upon *Copperweld* to develop functional tests or criteria for shielding (or refusing to shield) such hybrids from section 1 scrutiny for intra-enterprise arrangements. This would be a complex task and add a new layer of analysis; but where the analysis shielded the arrangement it would serve to cut off similarly difficult, intrusive scrutiny of such intra-enterprise activities under extremely generalized rule of reason standards. It would also prevent claims, clearly inappropriate in our view, under *per se* rules or precedents dealing with arrangements between existing independent competitors.

The other course is to reshape section 1's rule of reason toward a body of more flexible rules for interdependent multi-party enterprises. Sports leagues are a primary example but so are common franchising arrangements and joint ventures that perform specific services for competitors Certainly the trend of section 1 law has been to soften *per se* rules and to recognize the need for accommodation among interdependent enterprises.

. . . .

Once one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases. To the extent the criteria reflect judgments that a particular practice in context is defensible, assessment under section 1 is more straightforward and draws on developed law. Indeed, the best arguments for upholding [the] restrictions [imposed by the defendant before the court, Major League Soccer]—that it is a new and risky venture, constrained in some (perhaps great) measure by foreign and domestic competition for players, that unquestionably creates a new enterprise with-

45. 284 F.3d 47 (1st Cir. 2002). Judge Kozinski also wrote a thoughtful critique of the post-*Copperweld* caselaw in *Freeman v. San Diego Bd. of Realtors*, 322 F.3d 1133 (9th Cir. 2003).

out combining existing competitors—have little to do with its structure.⁴⁶

The fundamental problem, Judge Boudin said, is that “[t]he criteria suggested in the[] [single entity] cases are so general and so various (unity of interest, lack of existing competition, extent of control), as to emphasize the lack of any developed body of law.”⁴⁷

Unfortunately, the *Fraser* case was the exception. Almost all other cases reaching the single-entity question have taken *Copperweld* as a direction that they devise some test for answering it ultimately informed by the economic reasoning laid out in the *Copperweld* opinion. It is only too telling that the tests they’ve come up with, such as they are, look almost exactly like the tests that had been applied before *Copperweld*.

Prior to 1984, only the Third Circuit held that separate incorporation would always constitute plurality of defendants.⁴⁸ Other courts to reach the issue largely settled on their so-called “single entity” test, under which they examined a non-exclusive series of qualitative factors that seemed likely indicators of economic unity. These cases ordinarily did not set out explicit lists of relevant factors. They rather sifted through the record evidence, looking for facts they consider to be either consistent or inconsistent with economic unity.⁴⁹ They were hardly unaware of the difficulty of their problem; they admitted willingly that it was a “thicket.”⁵⁰

The Fifth Circuit arguably took a bit of a different stance. The court observed that under Supreme Court caselaw a parent corporation, “[h]aving availed itself of separate incorporation for [its subsidiary,] [had] marked it off as a distinct entity, and the antitrust laws treat it as such.” But the court also observed that this rule

46. *Id.* at 58-59.

47. *Id.* at 58 n.8.

48. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33 n.49, 34 (3d Cir. 1978).

49. *See, e.g.*, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589-90 (8th Cir. 1981); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979). The Second Circuit never directly reached the issue, but indicated it would limit intra-enterprise conspiracy doctrine on the basis of some factual consideration. *See Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1358 n.1 (2d Cir. 1976) (stating in dicta that the doctrine would not be “necessarily applicable” in case involving parent and its “non-competing wholly owned subsidiary”); *Int’l Rys. of Cent. Am. v. United Brands Co.*, 532 F.2d 231, 240, 241 n.19 (2d Cir. 1976) (reserving the question whether parent and wholly owned subsidiary could conspire).

50. *See Int’l Rys. of Cent. Am.*, 532 F.2d at 240, 241 n.19 (describing the question as a “thicket,” and citing authority critical of the intra-enterprise conspiracy doctrine).

would apply “*especially* when [affiliated corporate defendants] compete,” and made a specific point of observing that the corporate defendants at issue had, by all appearances, actually competed with one another.⁵¹

In a nice irony, *Copperweld* itself criticized these various “single entity” approaches:

The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.⁵²

The Court did not foresee that as a consequence of its own reasoning they would continue largely unabated.

The post-*Copperweld* cases are basically ad hoc; though they attempt to explain their results with quotations from the economic reasoning section of *Copperweld*, they mostly collect a few facts from whatever record is before them and try to substantiate a gut-reaction as to whether the defendants satisfy some nebulous abstraction like “shared interest” or “integration.”

The thing that makes these post-*Copperweld* cases so hard is that they lack precisely the thing that made *Copperweld* so easy. For example, the courts consider it obvious that single entity status cannot require a “complete unity of interest,” even though that was the fact that decided *Copperweld*.⁵³ This cannot be the test, they say, because even internal unincorporated divisions can have conflicts among themselves and with their superiors.⁵⁴ But how much partial “unity of interest” is enough “unity of interest?” Since there is no gui-

51. *H&B Equip. Co., Inc. v. Int'l Harvester*, 577 F.2d 239, 244-45 (5th Cir. 1978) (emphasis added). The court's discussion was ambiguous, though, so it could either stand for a rule like that of the Third Circuit. See *supra* note 48 and accompanying text for a possibly attenuated version of the single entity test.

52. *Copperweld*, 467 U.S. at 772 n.18.

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

[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.

Id.

54. See, e.g., *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996) (finding that such a rule “would be silly. . . . Conflicts are endemic in any multi-stage firm, such as General Motors or IBM, . . . [but] these wrangles . . . do not demonstrate that [such] firms are cartels, or subject to scrutiny under the Rule of Reason [for] their decisions . . .”).

dance, from either law or economics, it was inevitable that some courts would find unity on the basis of roughly any common purpose. The *American Needle* trial and appellate opinions demonstrate this nicely. With virtually no analysis, and while insisting that as to some conceivable activities the member teams of the NFL would still be “separate,” their shared interest in promoting a product known as “NFL Football” rendered them incapable of conspiring even in cases where they have fairly obvious pecuniary conflicts—the licensing of their separately owned intellectual property.⁵⁵ Even aside from its lack of theoretical rigor, this was a very bad result. Substantial empirical evidence and a range of economic opinion of preeminent pedigree suggest that the member teams have virtually no shared pecuniary interest, as to *most* of their on-field and off-field activity.⁵⁶

Plenty of other examples can be found. The Eighth Circuit’s early and much noted decision in *City of Mt. Pleasant v. Assoc. Elec. Coop., Inc.*⁵⁷ found a state-wide group of separately organized, loosely affiliated electricity cooperatives to constitute one single entity. The court set out a fairly breathtaking test: “legally distinct entities cannot conspire among themselves if they ‘pursue[] the common interests of the whole rather than interests separate from those of the [group] itself.’”⁵⁸ Similarly, a series of cases involving “peer review” decisions by panels of doctors affiliated with a given hospital found the peer review panels and the hospitals they serve merely to be single units.⁵⁹ In one emblematic opinion, this was done only because doctors and hospitals at which they work share a “unity of interest” just like that in *Copperweld*, because “both of [them] seek to upgrade the quality of patient care.”⁶⁰

Approaches like this are plainly problematic. Aside from the fact that they seem contradictory to the many post-*Copperweld* Supreme Court decisions applying section 1 on the merits to closely integrated joint ventures with strong shared interests,⁶¹ and aside

55. See *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008); *American Needle, Inc. v. New Orleans, La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007).

56. See Amicus Curiae Brief of Economists in Support of Petitioner, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Sept. 24, 2009).

57. 838 F.2d 268 (8th Cir. 1988).

58. *Id.* at 271 (citation omitted).

59. See *Oksanen v. Page Mem. Hosp.*, 954 F.2d 696 (4th Cir. 1991); *Nurse Midwifery Ass’n v. Hibbett*, 918 F.2d 605 (6th Cir. 1990); *Nanavati v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96 (3d Cir. 1988).

60. *Oksanen*, 945 F.2d at 703.

61. See, e.g., *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

from the fact that they immunize coalitions that seems like they probably could get up to some pretty serious funny business,⁶² they offer nothing more than empirically unsupported and theoretically unbounded hunches to confront the problems laid out by Judge Boudin above. How much “integration” is enough?

And so this is all to say that, despite the sense that *Copperweld* wisely resolved a mess resulting from Hugo Black’s glib populism, the case actually settled very little of anything. The same messy and uncertain judicial inquiry is required now as was required before 1984, except that one narrow question of blackletter doctrine is off the table.

III. CONCLUSION

In a way, the most emblematic event in post-*Copperweld* developments was the filing of an amicus brief in *American Needle* by twenty economists, in support of plaintiff American Needle. In about sixty pages of argument, they laid out an elaborate case, supported with extensive citation to theoretical and empirical evidence, showing that not only are professional sports league members not just one unitary firm, their interests are actually wildly adverse and the amount of cooperation that is actually needed among them to make their product work is only a slender part of what they do.⁶³ That renders rather stark the fact that the lower court opinions in *American Needle* comprised merely the thoughts of four federal judges, with no especial economic expertise and making their judgment with essentially no record, who wrote their total of six or eight breezy, terse pages on the topic as if it were laughably absurd to doubt the NFL’s single-entity nature. Of course, there was also a brief filed in *American Needle* by another bunch of very fancy economists, citing another bunch of theory and evidence, and they argued in support of the NFL.⁶⁴

But that is precisely the point.

62. For example, in the hospital peer-review cases, the peer review panels are comprised of doctors who all have privileges at the hospital, but may have outside practices, treat their own patients within the hospital, and charge their own rates. While it may very well be that in the ordinary case they are only concerned with the quality of patient care, they also are a coalition of horizontal competitors with power to determine whether other horizontal competitors will have access to a useful competitive asset (the hospital).

63. See *supra* note 56.

64. See Brief of Economists as Amici Curiae in Support of Respondents, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Nov. 24, 2009).

If this is an issue that bitterly divides one group of a dozen or two prominent economists from another group of similar size and prominence, should it really be an issue for summary, largely a priori resolution?