

Antitrust's Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule

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Antitrust law makes a fundamental distinction between “concerted” conduct among multiple entities and “unilateral” conduct of single entities. Under the “single-entity doctrine,” § 1 of the Sherman Antitrust Act is inapplicable to the latter. The statutory hook for this distinction is that § 1 only outlaws agreements, and a single entity cannot “agree” with itself. However, it is exceedingly difficult to find a principled basis for deciding which complex business organizations, all of which comprise a number of persons, should qualify as a “single entity” for § 1 purposes. The problem stems from the inescapable fact that the “agreement” requirement of § 1 is itself a formal rule, not an economically meaningful standard. Perhaps because of the tension between such a formalistic requirement and an increasingly economics-based antitrust jurisprudence, the Supreme Court has not articulated a clear and predictable standard for application of the single-entity doctrine over the last century. This Note proposes a solution that embraces the formality of § 1’s “agreement” requirement with a formalistic rule for determining business organizations’ single-entity status. Under this approach, whether a business constituted a single entity for § 1 purposes would depend entirely on the “form” into which that business was organized. The courts would simply choose the “forms” into which persons must formally organize themselves in order to obtain § 1 immunity and then use antitrust’s regulation of mergers to police self-sorting into those forms. This would reduce the indeterminacy of current doctrine, which should appreciably reduce the administrative costs of antitrust litigation without a comparable risk of an increase in error costs.

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I. INTRODUCTION

What is the National Football League (NFL)? Is it a single company that sells its product (NFL football)? Or is it a cartel of thirty-two different companies engaging in elaborate collusion, fixing the prices of their respective intellectual properties? This ostensibly quaint question has enormous consequences for this multi-billion dollar industry.¹ If the NFL is just a “single entity,” its teams are immune from liability under § 1 of the Sherman Antitrust Act, which regulates combinations, contracts, and conspiracies in restraint of trade.² If not, its teams potentially face millions of dollars’ worth of antitrust litigation over the reasonableness of their cooperative activities. This is because of a fundamental distinction in antitrust law between “concerted” and “unilateral” conduct.³ This distinction is the foundation for the “single-entity doctrine,” which aims to sensibly divide defendant businesses – all of which comprise multiple persons – into “single entities” immune from § 1 liability and cooperative arrangements among multiple entities subject to § 1 scrutiny.

The Supreme Court recently answered the NFL question in *American Needle, Inc. v. National Football League*⁴ — but its opaque reasoning ensures that future disputes over whether defendants qualify as a single entity will continue to complicate litigation and add to the administrative costs of antitrust regulation. The “test” applied by the Court is hardly a test at all. Rather, it is an oft-repeated set of two empty bottles (“control” and “unity of interest”) which have so little self-evident meaning or economic relevance. The result is that it is difficult to determine whether (much less why) the next complex business organization will or will not be deemed a single entity. This Note proposes a change in current doctrine aimed at reducing this uncertainty, which should appreciably reduce the administrative costs of antitrust

1. See 15 U.S.C. § 15 (2006) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”).

2. 15 U.S.C. § 1 (2006).

3. See generally Herbert Hovenkamp & Christopher R. Leslie, *The Firm as a Cartel Manager*, 64 VAND. L. REV. 813, 819–20 (2011) (describing the inapplicability of § 1 of the Sherman Act to unilateral conduct).

4. 130 S. Ct. 2201 (2010).

litigation for complex commercial entities, which should have a positive effect on social welfare.

This Note proposes a new formalistic approach to single-entity determinations as a way to clarify current doctrine, simplify complex § 1 litigation, and reduce the administrative costs of antitrust regulation. For seasoned antitrust readers, the provocativeness of this proposal will be readily apparent even before it is explained. “Formalism” — used here to refer to an antitrust policy explicitly concerned with “form” rather than “substance” — is a dirty word in antitrust scholarship. Some of the most reviled antitrust decisions are criticized for their allegedly “formalistic” approaches.⁵ Often, competing sides of the same debate will defend their positions on anti-formalism grounds.⁶ Indeed, there is likely no antitrust literature that speaks of a “formalistic” rule in a positive manner. Such antagonism toward formalism is generally well-deserved: formalistic reasoning in antitrust often produces perverse results.⁷ Nevertheless, this Note argues that resort to formalism would be a positive change in one narrow respect: making sense of the single-entity doctrine, which remains unforgivably muddled even after *American Needle*.

5. See, e.g., Wesley J. Liebeler, *Resale Price Maintenance and Consumer Welfare: Business Electronics Corp. v. Sharp Electronics Corp.*, 36 UCLA L. REV. 889, 892 (1989) (criticizing *Business Electronics Co. v. Sharp Electronics Co.*, 485 U.S. 717 (1988), for its formalism); Robert Zwirb, *Dual Distribution and Antitrust Law*, 21 LOY. L.A. L. REV. 1273, 1291–92 (1988) (formalism in analyzing distribution restraints); Troy Everett Peyton, *The Per Se Rule and the Rule of Reason After In Re Michigan Medical Society*, 9 J. CORP. L. 595, 596–97 (1984) (formalism in defining the categories of per se liability); Wesley J. Liebeler, *Intrabrand “Cartels” Under GTE Sylvania*, 30 UCLA L. REV. 1, 1–2 (1982) [hereinafter Liebeler, *Cartels*] (criticizing the formalism of *United States v. Arnold Schwinn*, 388 U.S. 365 (1967), before it was overruled); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1847–49 (1984); Thomas A. Piraino, Jr., *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 NOTRE DAME L. REV. 1, 10 (1988) (criticizing various proposed formalistic tests for deciding antitrust liability in patent licensing).

6. Compare *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772–73 (1984) (“[*Yellow Cab*] looks to the form of an enterprise’s structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary.”), with *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947), overruled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (“The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.”).

7. See, e.g., *infra* Part IV.C.4.c (discussing *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), and *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), both perversely formalistic decisions).

Part II of this Note introduces the “agreement” requirement in § 1 of the Sherman Act: the requirement that the plaintiff prove the existence of multiple actors engaging in collective conduct, as opposed to a single actor engaging in unilateral conduct. This requirement is the statutory hook for the single-entity doctrine; a single entity cannot “agree” or “conspire” with itself, so a single entity acting unilaterally will never violate § 1. This Part concludes that the agreement requirement is inescapably formalistic.

In Part III, this Note illustrates the main problem with current single-entity doctrine: its indeterminacy. It argues that the two factors courts have applied since *Copperweld Corporation v. Independence Tube Corporation*⁸ — (1) unity of interests and (2) control — are vacuous and, insofar as their principled application suggests that price-fixing cartels should be immune from § 1 liability, nonsensical.

Finally, Part IV proposes, commensurate with the formalism of § 1’s “agreement” requirement, a formalistic solution to current doctrine’s indeterminacy. Under this approach, the Supreme Court would develop an exclusive list of corporate forms that constitute “single entities.” Lower courts would then be faced with the relatively manageable task of determining whether, as a matter of fact, the defendants have formally organized themselves into one of the protected forms. Furthermore, by carefully ensuring that only those corporate forms whose formation is governed by § 7 of the Clayton Act are protected by the single-entity doctrine, the Supreme Court would preserve a mechanism for preventing collusive businesses from doing an end-run around § 1 by reorganizing into an organizational form immunized from § 1 liability.

II. THE ANTITRUST LAWS AND THE “AGREEMENT REQUIREMENT” OF THE SHERMAN ACT § 1

The fundamental goal of antitrust law is to protect the economy against harms associated with cartels and monopolies.⁹ Mo-

8. 467 U.S. 752 (1984).

9. On the evolution of the philosophy of U.S. antitrust law toward this modern economic approach, see RICHARD A. POSNER, *ANTITRUST LAW*, Preface (2d ed. 2001) [hereinafter POSNER, *ANTITRUST*] (“The first edition of this book, published a quarter of a century ago, bore the subtitle ‘An Economic Perspective,’ implying there were other perspectives.

nopolies and cartels lead to supracompetitive prices (i.e., higher prices than that which would prevail in a competitive market), suboptimal levels of output, reduced innovation, a transfer of consumer surplus to producers in the form of rents (i.e., profits that exceed opportunity cost),¹⁰ or some combination thereof.¹¹ The law does this by criminalizing naked cartel behavior¹² — such as price-fixing — and providing treble damages in civil suits¹³ for a much broader set of behavior thought to restrain trade.¹⁴

The primary antitrust statutes are § 1 of the Sherman Act,¹⁵ § 2 of the Sherman Act,¹⁶ and § 7 of the Clayton Act.¹⁷ For the purposes of this Note, the reader should conceptualize the framework of antitrust statutes in this way: § 1 regulates *concerted* anticompetitive conduct among two or more entities (such as price-fixing), § 2 addresses *unilateral* anticompetitive behavior by a single entity (such as predatory pricing), and § 7 addresses the transformation of multiple entities into a single entity (such as the merger of two companies).

Part II.A describes the “agreement” requirement for § 1 liability: the requirement that the plaintiff prove that the defendant

The implication was spelled out in the preface, where I announced that the purpose of the book was to expound and defend the economic approach to antitrust law. In the intervening years, the other perspectives have largely fallen away, a change that I have marked by dropping the subtitle from this new edition.”); David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J.L. & PUB POL’Y 61, 62 (1999) (noting shift during Reagan Administration toward a focus on regulating “economically anticompetitive” conduct); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 236–40 (1995).

10. Not all economists would classify this last phenomenon as an economic “harm,” as distinct from a mere transfer of wealth. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 358–59 (8th ed. 2011) [hereinafter POSNER, *ECONOMIC ANALYSIS*] (discussing how one might or might not conceptualize this transfer as a social welfare loss).

11. See generally *id.* at ch. 9 (discussing the economics of cartels and monopolies).

12. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS* § 2.1 (1995), available at <http://www.justice.gov/atr/public/guidelines/internat.htm>. (“Conduct that the Department prosecutes criminally is limited to traditional per se offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities.”). On this history of the criminal aspect of the antitrust laws, see Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001).

13. 15 U.S.C. § 15 (2006).

14. 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1912d, at 358–61 (3d ed. 2008) (discussing “restraint of trade”).

15. 15 U.S.C. § 1 (2006).

16. 15 U.S.C. § 2 (2006).

17. 15 U.S.C. § 18 (2006).

engaged in “concerted” rather than “unilateral” conduct as a predicate for liability under § 1. Part II.B then describes the formalistic — rather than substantive economic — nature of this agreement requirement. Part II.C then canvasses the case law on single-entity doctrine.

A. THE REQUIREMENT OF AN “AGREEMENT” BETWEEN SEPARATE ENTITIES UNDER § 1 OF THE SHERMAN ACT

A firm acting unilaterally can never violate § 1 of the Sherman Act, which only regulates concerted conduct.¹⁸ Section 1 only applies to “contract[s],” “combination[s],” and “conspirac[ies], in restraint of trade.”¹⁹ As a shorthand, courts describe this language as limiting the reach of § 1 to “agreements” between two or more entities.²⁰ If the defendant is a single entity, then the plaintiff will be unable to meet this requirement: one cannot “agree” or “conspire” with oneself. So, by way of example, a plaintiff alleging a price-fixing agreement between two unrelated sellers of vitamins should have little difficulty establishing liability.²¹ However, if the two sellers are, in fact, two salespersons in a single GNC store, the plaintiff’s claim would be dismissed quickly.²²

Absent proving an agreement, the plaintiff can still proceed under § 2 of the Sherman Act, which regulates unilateral conduct. However, § 2 is very unfriendly to plaintiffs.²³ Under § 1, a plaintiff need only prove, *inter alia*, that the defendant has power over price, commonly referred to as “market power.”²⁴ Under § 2, how-

18. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760 (1984) (noting that unilateral by a single firm acting independently is “not proscribed” by § 1).

19. 15 U.S.C. § 1.

20. See generally WILLIAM HOLMES & MELISSA MANGIARACINA, *ANTITRUST LAW HANDBOOK* § 2.4 (2011–12 ed. 2011).

21. For the real-life vitamin cartel case, see *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337 (D.C. Cir. 2004) and related opinions.

22. Cf. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984) (“Although this Court has not previously addressed the question, there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor.”).

23. Hovenkamp & Leslie, *supra* note 3, at 820.

24. Economics explains the policy rationale for requiring plaintiffs to prove market power. In the extreme example, if cartel members collectively face a perfectly elastic demand curve (i.e., if they have no market power, meaning that they would lose every one of their customers if they raise prices at all), their attempts to fix supracompetitive prices will lead to their demise: consumers will simply buy the good (or perfect alternatives)

ever, she must prove either “monopoly power” or some risk of “monopolization.”²⁵ Furthermore, there are certain kinds of conduct that a monopolist can legally perform but a cartel cannot, because the former is by definition a single entity.

For instance, while a price-fixing cartel is illegal per se,²⁶ charging a monopoly price is legal per se.²⁷ This is so despite the fact that monopoly pricing inflicts greater static harm on the economy than cartel pricing, since cartels are always at risk of breaking down.²⁸

A specific example of the differences between § 1 and § 2 is their disparate permissiveness of an organization's refusal to deal with another party.²⁹ Under § 1, *concerted* refusals to deal are

elsewhere. See POSNER, *ECONOMIC ANALYSIS*, *supra* note 10, §§ 10.5–10.7. In the absence of market power, then, restraints on trade must serve some goal unrelated to charging supracompetitive prices, such as capitalizing on economies of scale or scope or preventing free-riding. *Id.* The usual requirement that plaintiffs define a market and prove the defendant's required “share” of that market can be dispensed with in the rare situation where plaintiffs can prove *actual* power over price (or “anticompetitive effect”). See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (quoting 7 PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1511 (1986)) (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’”). *But see* *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n.*, 388 F.3d 955, 961 (6th Cir. 2004) (refusing to dispense with proof of market power).

25. 15 U.S.C. § 2 (2006). The black-letter standard under the *Grinnell* framework for § 2 violations requires a plaintiff to prove both (1) monopoly power (*viz.*, market power consistent with that of a monopolist) and (2) “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). For “attempted” monopolization, this framework has been modified slightly to require (1) anticompetitive conduct, (2) “intent to monopolize,” and a (3) “dangerous probability” of monopolization by the defendant. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

26. See 15 U.S.C. § 1 (2006). Engaging in price-fixing is also a felony punishable with up to ten years of prison time. *Id.*

27. See 3A AREEDA & HOVENKAMP, *supra* note 14, ¶ 720, at 3–11 (explaining why monopolies are allowed to charge monopoly prices). Note that the alternative would be to turn courts into utility regulators, overseeing the prices charged by monopolies. *Id.*

28. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 23–24 (2005) (discussing reasons why antitrust law is more skeptical of cartels than monopolists); POSNER, *ECONOMIC ANALYSIS*, *supra* note 10, § 10.1, at 287–95 (discussing the instability of cartels).

29. Herbert J. Hovenkamp, *American Needle* and the Boundaries of the Firm in *Antitrust Law* 2–3 (August 15, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616625. For an example of a “unilateral refusal to deal” case (*i.e.*, where a defendant by itself refused to deal with the plaintiff), see *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S.

often (though not always) prohibited under a per se rule.³⁰ By contrast, unilateral refusals to deal are virtually per se legal under § 2.³¹ Thus, with the very same facts, the outcome of a “refusal to deal” case could depend on whether the defendant qualifies for single-entity status.

B. THE ECONOMIC (IR)RELEVANCE OF A FORMAL “AGREEMENT” REQUIREMENT

American antitrust law today is decidedly rooted in economics.³² Nevertheless, the limits of language and the realities of statute-based law are such that antitrust law may always contain residual, economically unjustified legal formalities.³³ The re-

398 (2004). For an example of a “concerted refusal to deal” case (i.e., where a group of defendants all agreed not to deal with the plaintiff), see *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

30. *Nw. Wholesale Stationers*, 472 U.S. at 296–97 (citing LAWRENCE ANTHONY SULLIVAN, *LAW OF ANTITRUST* 292–93 (1977)); 11 AREEDA & HOVENKAMP, *supra* note 14, ¶¶ 1800–05, at 1822–23; 13 AREEDA & HOVENKAMP, *supra* note 14, ¶¶ 2203, 2210–2224, at 288–301, 311–429 (explaining that per se prohibition on concerted refusals to deal is the norm while identifying possible exceptions to it; exploring unilateral refusals to deal in context of joint ventures); Joseph Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1982).

31. See *Verizon Commc'ns*, 540 U.S. at 879–80; 3B AREEDA & HOVENKAMP, *supra* note 14, ¶ 772d3, at 223 (noting “severe[] limits [on] the scope of unlawful unilateral refusals to deal under § 2 of the Sherman Act”). This is especially true where the plaintiff and defendant are not even competitors, as was the case for the NFL and Reebok in *American Needle*. See 130 S. Ct. 2201, 2207 (2010); see also 3B AREEDA & HOVENKAMP, *supra* note 14, ¶ 774d, at 267–75 (discussing courts that have denied standing to non-competitors in unilateral-refusal-to-deal cases).

32. See POSNER, *ANTITRUST*, *supra* note 9, at viii.

33. Perhaps worse, there are a number of relatively minor antitrust statutes that are patently uneconomic. The most heavily-criticized example is likely the Robinson-Patnam Act, 15 U.S.C. §§ 15–15a (2006), which limits a manufacturer’s power to charge competing dealers different prices (thus reducing large retailers’ ability to capitalize on economies of scale). See, e.g., HOVENKAMP, *supra* note 28, at 21, 192 (calling Robinson-Patnam “a competitively harmful provision that often operates to limit a supplier’s use of wholesale pricing to make the distribution of its product more efficient,” and also the “bastard child of the antitrust laws” that “often operates to harm consumers for the benefit of weaker or less efficient dealers.”). Largely as a result of doubts over Robinson-Patnam’s effectiveness, it has been virtually unenforced at the federal level: the Department of Justice (DOJ) has never enforced the statute, and the Federal Trade Commission (FTC) has only enforced the statute twice since the 1980s. ROBERT PITOFSKY ET AL., *TRADE REGULATION: CASES AND MATERIALS* 1272–73 (6th ed. 2010).

quirement of a formal agreement among multiple entities in § 1 is one such example.³⁴

Requiring a plaintiff to prove a formal agreement has no immediately apparent economic relevance.³⁵ This is not to say that concerted behavior is less suspect than unilateral behavior; quite the contrary.³⁶ But is it not an agreement *qua* agreement that makes concerted behavior economically harmful; it is the restraint on competitive output. And a cartel can restrain competitive output without meeting or communicating in a way that amounts to a formal agreement.³⁷

The facts of *Interstate Circuit v. United States*,³⁸ a 1939 Supreme Court case, show how a cartel could effectively engage in concerted conduct that restrains trade without entering into a formal agreement. There, the manager of a movie theatre company sent a letter to eight branch managers of film distribution

34. Judge Richard Posner, for his part, has argued forcefully for doing away with a formal “agreement” requirement in order to restrict “tacit collusion.” See POSNER, *ANTITRUST*, *supra* note 9, at 33–48; Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) (suggesting that antitrust law follow the approach of George Stigler to pursue “tacit collusion,” as elucidated in GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* 39–66 (1968)). *But see* Donald F. Turner, *The Definition of “Agreement” Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962) (articulating “definitive” theory of current law — providing that oligopolistic pricing is outside the purview of § 1 — to which Posner was responding). For the argument that an “agreement” is economically irrelevant to single-entity doctrine, see Benjamin Klein & Andres V. Lerner, *The Firm in Economics and Antitrust Law*, in 1 ISSUES IN COMPETITION LAW AND POLICY 249, 252 (Wayne D. Collins ed., 2008) (“Whether one places the label of a firm on these various contractual arrangements is less important to an economist than an understanding of the economic motivation and effects of the particular contractual arrangements.”).

35. See Victor P. Goldberg, *Featuring the Three Tenors in La Triviata*, 1 REV. L. & ECON. 54 (2005) (noting that, as an analytical matter, there is no difference between activities within a firm and across firms, which is a function of transaction costs).

36. See, e.g., *Verizon Commc’ns*, 540 U.S. at 410 n.3 (“[C]oncerted action . . . presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces . . .”); *cf.* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 879–89 (2007) (discussing the relative innocuousness of vertical, as opposed to horizontal, restraints). The DOJ had issued a report in 2008 that would have virtually ended federal regulation of unilateral conduct under § 2, but withdrew this report in 2009 under the Obama Administration. See U.S. DEP’T OF JUSTICE, *COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* (2008), available at <http://www.justice.gov/atr/public/reports/236681.htm> [hereinafter *COMPETITION AND MONOPOLY*].

37. For a helpful survey of literature on the economics of oligopoly and collusion, see Andrew Dick, *Cartels and Tacit Collusion*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS & THE LAW* 206 (Peter Newman ed., 1998).

38. 306 U.S. 208 (1939).

companies in which he asked them to agree to what amounted to a resale price maintenance regime.³⁹ Curiously, the letters included the name and address of all eight of the addressees, but there was no direct evidence of any agreement among the film distribution companies that received the letter.⁴⁰

The plaintiff's claim survived the "agreement" threshold of § 1, but only because the Court held that the plaintiff could prove, by the indirect evidence of the letter, that the film distributors had in fact agreed to fix retail prices.⁴¹ But, as a matter of economics, why should it matter if the eight distributors had any communication amounting to an agreement? Imagine that each of the defendants never spoke to one another; they still all knew that each had received the same letter with the same offer. They did not need to "agree" to achieve a restraint on output.⁴²

None of this is to say that an agreement requirement could never serve an economic function. First, given the imperfections of litigation, it could be that courts would find collusion too frequently absent a requirement of proof of a formal agreement.⁴³ In

39. *Id.* at 216–17. "Resale price maintenance" here refers to an agreement between a supplier and a retailer wherein the retailer promises not to charge a price below some floor. See JEFFREY L. KESSLER & SPENCER WEBER WALLER, *INTERNATIONAL TRADE AND U.S. ANTITRUST LAW* § 1:10 (2d ed. Supp. 2012).

40. *Interstate Circuit*, 306 U.S. at 216.

41. *Id.* at 221–27.

42. See Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 68 n.239 (2004) (discussing *Interstate Circuit* as a "tacit collusion" case, rather than a case about actual agreements); Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 738–39 (2004). But see David A. Butz & Andrew N. Kleit, *Are Vertical Restraints Pro- or Anticompetitive? Lessons from Interstate Circuit*, 44 J.L. & ECON. 131 (2001) (arguing that the facts of *Interstate Circuit* are more consistent with a theory of vertical restraints than horizontal collusion).

43. Always lurking in economic analyses of antitrust law are concerns about the institutional capabilities of courts to adopt them. See *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (questioning the competence of courts to provide a remedy in above-cost predatory pricing schemes)); *United States v. Microsoft Corp.*, 147 F.3d 935, 949 (D.C. Cir. 1998) ("In antitrust law, from which this whole proceeding springs, the courts have recognized the limits of their institutional competence . . ."); HOVENKAMP, *supra* note 28, at 52–56 (cautioning against complex rules that increase administrative costs); Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1504 (2008) ("Antitrust courts should recognize their limited competence in evaluating innovation and tread cautiously when confronted with an antitrust challenge to a dominant firm's product changes."); Herbert Hovenkamp, *Sensible Antitrust Rules for Pharmaceutical Competition*, 39 U.S.F.

this respect, a formal agreement requirement could reduce error costs by preventing a large number of false positives.⁴⁴ Second, cartels are inherently unstable.⁴⁵ It may be that cartels that operate by formal agreement, rather than by tacit collusion, are relatively more stable⁴⁶ such that penalizing only formal agreements provides an economical way of destabilizing relatively stable cartels.

Therefore, if the common law of antitrust were allowed to develop without a statutorily imposed agreement requirement, many cases where the existence of an “agreement” is at issue may look the same or similar. But maybe not — this will depend on an evaluation of the relative costs and benefits of the requirement for different types of cases. Some scholars, including Judge Richard Posner, have argued for the elimination (or near-elimination) of a formal agreement requirement for § 1 claims.⁴⁷

Regardless of the economic desirability of a formal agreement requirement, the current language of § 1 clearly requires some kind of an agreement among multiple entities, and no cases hold otherwise. This means that if a § 1 defendant can show that it is part of a single entity, and thus lacks the capacity to conspire, the plaintiff's § 1 claim will be dismissed. But this is a formalistic rule with at most colorable economic relevance under some circumstances. Perhaps because of the tension between an increa-

L. REV. 11, 11–12 (2004) (“[G]eneralist Article III federal judges and particularly juries are not good at dealing with technological complexity.”).

44. For a more detailed discussion of “error costs” and “administrative costs,” see *infra* Part IV. For the present discussion, “error cost” here refers to the possibility that, without requiring the plaintiff to prove an explicit agreement, courts will find collusion where there is none (“false positives”) at an unacceptable rate. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984) (noting that false positives are the most problematic form of error cost).

45. See, e.g., POSNER, ANTITRUST, *supra* note 9, at 67–69 (explaining difficulty of “maintaining a collusive pricing scheme”); Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241, 244–45, 257 (1996) (describing the factors for successful cartelization and specifically finding that cartels that simply fixed prices tended to be particularly unstable). Note that Dick’s article probably understates the instability of cartels in the United States, as his study focused on legal cartels, so it did not address the stress of potential criminal liability that cartel members face.

46. This may or may not in fact be true; Cournot oligopoly theory is beyond the scope of this Note. Nevertheless, this is at least the understanding of the Supreme Court in *Brooke Group*. 509 U.S. 209 at 227–28.

47. See POSNER, ANTITRUST, *supra* note 9, at ch. 3. But see Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 919–26 (2003) (arguing against Judge Posner’s proposal).

singly economics-based antitrust jurisprudence and a statutorily imposed formalistic rule, the Supreme Court has — as this Note discusses in the next section — been unable to craft a predictable regime for adjudicating single-entity questions.

C. IMMUNITY UNDER § 1 FOR “SINGLE ENTITIES”

The question of whether a group of defendants constitute a “single entity” or “multiple entities” has proven difficult for courts to consistently and predictably answer for complex or cooperative business organizations. Over time, Supreme Court jurisprudence has shifted from a simple but rightly criticized formalistic rule during the *Yellow Cab* era⁴⁸ to *Copperweld*’s often unwieldy anti-formalistic approach today.⁴⁹

The answer to single-entity questions will often be fairly clear. If the executives of two completely separate, competing companies met in a clubhouse and agreed not to compete with each other in their respective territories, courts would have no difficulty finding conspiratorial capacity.⁵⁰ Conversely, courts should meet no difficulty in finding single-entity status when a company sets its own wage policy, even if a CEO forms a committee of executives to “agree” on what that policy should be.⁵¹ But there is

48. See *infra* Part II.C.1.

49. See *infra* Part II.C.2.

50. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“Restraints that are per se unlawful include horizontal agreements among competitors to fix prices”); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (“[A] horizontal agreement to divide territories is per se illegal”); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (“Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused.”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (“One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.”).

51. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 288 (4th Cir. 2009) (holding that manufacturer did not engage in vertical price fixing when it fixed the prices of its bona fide agents, due to the absence of the requisite concerted action for a § 1 claim); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1298 (10th Cir. 2008) (applying *Copperweld* “single entity” principles to affirm dismissal of § 1 claims against officers and employees of a tobacco company for allegedly conspiring with the company to restrain trade); *Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 841 (5th Cir. 2002) (finding that a hospital could not legally have conspired with a management company to monopolize a purported market for outpatient surgical services, where the management company operated as an

much more uncertainty when it comes to complex or cooperative business organizations. What if ten lawyers form a partnership, even though they could, in theory, compete against each other? What about joint ventures? Or two separate corporations, one of which is a majority owned subsidiary of the other?

These are not idle questions, and the answers are often far from clear-cut. Multiple actors organized into a single entity can collude with impunity. This is true, for instance, of lawyers in a law firm — partners are permitted to collude on the price of billable hours because the probable absence of market power means that their “collusion” must be for reasons other than restraining output, such as capitalizing on economies of scale or scope.⁵² If, however, this same power is granted to any member of a joint venture or a franchise relationship, the door is opened to expansive § 1 immunity.

Despite these heavy policy implications, the Supreme Court has struggled to elucidate a consistent and predictable standard to guide the adjudication of single-entity status for complex business organizations. Instead, it has shifted over time from a simple but perverse formal rule focusing on corporate personhood to a more pragmatic but unpredictable framework.

agent for the hospital); *Okusami v. Psychiatric Inst. of Washington, Inc.*, 959 F.2d 1062 (D.C. Cir. 1992) (holding that a hospital and its medical director were not separate actors capable of conspiring, where it was not shown that the director had acted other than in his capacity as an employee of the hospital); *Mann v. Princeton Cmty. Hosp. Ass'n., Inc.*, 956 F.2d 1162 (4th Cir. 1992) (applying *Copperweld* to hold that a hospital did not conspire with members of its staff peer-review committee in terminating the plaintiff's staff privileges, where the committee members were acting as agents of the hospital when making their recommendations).

52. “Market power” here means the ability to raise one's prices above marginal cost (the competitive price). In a perfectly competitive market, a firm cannot raise its prices at all without losing all of its customers. If law firms are presumed (probably rightly) not to have market power (or not enough for policymakers to care about), when their lawyers “collude” on prices, it must not be to raise prices above competitive levels: by postulation, the firm *cannot* so raise prices. So, their “collusion” must be for reasons other than cartelization. For a brief discussion of economic reasons that entities may wish to merge aside from the creation of market power, see POSNER, *ECONOMIC ANALYSIS*, *supra* note 10, §§ 10.4, 14.9, at 301–02, 432–33 (discussing scale benefits and allocating valuable management resources). For lengthier analyses of the economic benefits of mergers, see, for example, Sayan Chatterjee, *Types of Synergy and Economic Value: The Impact of Acquisitions on Merging and Rival Firms*, 7 STRATEGIC MGMT. J. 119 (1986); Joseph Farrell & Carl Shapiro, *Scale Economies and Synergies in Horizontal Merger Analysis*, 68 ANTITRUST L.J. 685 (2001).

1. 1947–1984: The “Formalistic” Intraenterprise Conspiracy Doctrine

The Court’s first attempt to solve the single-entity puzzle was its heavily criticized 1947 decision in *United States v. Yellow Cab*,⁵³ which created a formalistic framework based on firm incorporation (referred to in the literature as the “intraenterprise conspiracy” doctrine).⁵⁴ The case involved a series of vertical agreements⁵⁵ between the Checker Cab Manufacturing Corporation and several Yellow Cab companies operating in various cities. An individual named Markin acquired control of the Yellow Cab companies and ran them as a single business.⁵⁶ The Yellow Cab companies, in turn, purchased their vehicles solely from Checker.⁵⁷ The alleged conspirators were Markin, Checker, and the operating companies that Markin controlled. The Court held that an unlawful restraint could be found via an agreement within this vertically integrated enterprise, stating:

[A restraint of trade] may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. . . .

And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the

53. 332 U.S. 218 (1947), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

54. *See, e.g.*, Phillip Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451 (1983); Ann I. Jones, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 Cal. L. Rev. 1732, 1733–34 (1983) (noting that *Yellow Cab* and its progeny stand for the “formalistic doctrine” that “when corporate subdivisions have been separately incorporated, they are to be treated as separate entities for the purpose of applying section 1”).

55. “Vertical” in this context refers to a relationship between two businesses that operate at different parts of the production process for a good or service. For example, an agreement between a steel manufacturer and a car manufacturer would be vertical, as would an agreement between the car manufacturer and a car dealer.

56. *Yellow Cab*, 332 U.S. at 220–24.

57. *Id.* at 224–25.

alleged combination and conspiracy from the impact of the Act.⁵⁸

So, despite the fact that each of the Yellow Cab companies were part of the same business organization, the Court held that they were capable of conspiring with each other in fulfillment of § 1's requirement of an agreement. However, one might actually understand the agreement in *Yellow Cab* to be the *merger* of the Yellow Cab companies, rather than the putative agreement among the Yellow Cab companies to purchase only from Checker.⁵⁹

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,⁶⁰ decided just two years later, cannot be so explained. That case involved an agreement between two "sister" corporations — separate subsidiaries of a single parent.⁶¹ The sister corporations had agreed to impose price limits on their wholesalers. Citing *Yellow Cab*, the Court unequivocally stated that "mere instrumentalities of a single manufacturing merchandizing unit" have the ability to conspire under § 1.⁶² Similarly — and dissipating any theory that *Yellow Cab* rested on an "agreement" to merge — the Court in

58. *Id.* at 227.

59. This is not the most common understanding of *Yellow Cab*. See, e.g., Peter J. Alessandria, *Intra-Entity Conspiracies & Section 1 of the Sherman Act: Filling the "Gap" After Copperweld*, 34 BUFF. L. REV. 551, 562 (1985); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 449 (1965); Owen T. Prell, *Copperweld Corp. v. Independence Tube Corp.: An End to the Intraenterprise Conspiracy Doctrine?*, 71 CORNELL L. REV. 1151, 1152–53 (1986) (all describing *Yellow Cab* as resting on the vertical agreement between the Yellow Cab companies and the car manufacturer, not the merger of the cab companies). Professor Hovenkamp, however, suggests that the "agreement" in this case was the *merger* of the Yellow Cab companies by Markin. See 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1463b, at 205–07.. On this reading, the case would be rather unobjectionable but irrelevant today, since § 7 of the Clayton Act — passed shortly after *Yellow Cab* — now regulates mergers both by asset acquisition and stock acquisition. 15 U.S.C. § 18 (2006).

60. 340 U.S. 211 (1951), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

61. *Id.* at 215.

62. *Id.*; see also *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134 (1968), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (finding conspiratorial capacity among parent corporations and its three subsidiaries); *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (citing, in dicta, *Kiefer-Stewart* for the proposition that common ownership or control does not remove conspiratorial capacity). Even Professor Hovenkamp agrees that this case cannot be "explained on grounds other than an intraenterprise conspiracy" doctrine. 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1463c, at 207.

Perma Life Mufflers v. International Parts Corp. found conspiratorial capacity among a parent corporation and its three subsidiaries.⁶³

Yellow Cab, *Kiefer-Stewart*, and *Perma Life* are considered part of the formalist era of single-entity doctrine.⁶⁴ That is, despite *Yellow Cab*'s ostensible disavowal of looking to "form,"⁶⁵ the Court looked no further than the corporate form into which the defendants organized themselves.⁶⁶ In *Yellow Cab*, each of the *Yellow Cab* companies were formally separate business entities, despite the fact that they were owned by a single person who operated them as a single business. *Kiefer-Stewart* also involved two formally separate corporations, though they were run by the same parent corporation. *Perma Life* found the same conspiratorial capacity between a parent and a separately incorporated subsidiary, despite the awkwardness of requiring a parent corporation to run its subsidiary as if the subsidiary were a completely separate competitor.

The *Yellow Cab* line of cases developed and applied the "intra-enterprise conspiracy" doctrine well into the 1980s.⁶⁷ Whether looking to parents and subsidiaries, sister corporations, or the like, the Court focused its attention on form, treating separate incorporation as the talisman for conspiratorial capacity.⁶⁸

63. 392 U.S. 134, 135, 142 (1968), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

64. See e.g., Judd E. Stone & Joshua Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism! Some Implications of American Needle v. NFL*, 2010 CATO SUP. CT. REV. 369, 373 (2010).

65. *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947) ("[The Sherman Act is] aimed at substance rather than form.").

66. See Jones, *supra* note 54, at 1733–34. Stone and Wright go further and suggest that "[u]nder this antiquated formalistic conception of Section 1, a single firm could as easily constitute a cartel as multiple firms." Stone & Wright, *supra* note 64, at 373 (citing *Yellow Cab*, 332 U.S. at 227, and *Kiefer-Stewart*, 340 U.S. at 215). This proves too much, though. Even during the *Yellow Cab* era, courts would have respected a single corporate form. In fact, their fault was in respecting the corporate form too much insofar as separate incorporation (for example, separately incorporated sister corporations) was the talisman for conspiratorial capacity.

67. For more on the intraenterprise cases from the *Yellow Cab* era, see 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1463, at 205–13.

68. *Id.*

2. 1984–Present: The “Anti-Formalist” Copperweld Doctrine

The formalistic “intraenterprise conspiracy” doctrine was heavily criticized in the contemporaneous academic literature.⁶⁹ Perhaps the most famous of these critiques came from Professor Phillip Areeda in 1983.⁷⁰ Professor Areeda criticized the “mischievous” doctrine as merely serving to “confuse litigants and courts and to lengthen and complicate antitrust litigation,” all the while distracting judicial attention away from an antitrust analysis of suspect conduct.⁷¹ He questioned the antitrust significance of the formality of separate incorporation, while noting the various benefits (for example, tax benefits and firm goodwill) that might come from it.⁷² He also noted that lower courts had effectively ignored the intraenterprise conspiracy doctrine by various machinations,⁷³ and those that did not used the doctrine “perniciously, both to circumvent [the Sherman Act’s] conspiracy ‘technicality’ and to avoid serious inquiry into whether prohibiting a particular form of unilateral activity serves antitrust policy.”⁷⁴ As a result, he argued, courts should abrogate the doctrine.⁷⁵

One year later, the Court accepted Professor Areeda’s advice and did away with the intraenterprise conspiracy doctrine in its 1984 decision, *Copperweld Corp. v. Independence Tube Corp.*⁷⁶ The dispute in *Copperweld* arose from the sale of a steel tubing

69. See, e.g., Milton Handler & Thomas A. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 CARDOZO L. REV. 23 (1981); Donald G. Kempf, *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*, 24 BUS. LAW. 173 (1968); Lawrence 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); James A. Sprunk, *Intra-Enterprise Conspiracy*, 9 A.B.A. ANTITRUST SEC. 20 (1956); George W. Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963); Everett I. Willis & Robert Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968); Note, “Conspiring Entities” Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661 (1982); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) (all criticizing the intraenterprise conspiracy doctrine). For a brief historical overview of the academic criticism of intra-enterprise conspiracy doctrine, see Stone & Wright, *supra* note 64, at 372–74.

70. Areeda, *supra* note 54.

71. *Id.* at 462, 473.

72. *Id.* at 452–56.

73. *Id.* 462–63.

74. *Id.* at 451–62.

75. *Id.* at 473.

76. 467 U.S. 752 (1984).

manufacturing company, Regal Tube.⁷⁷ Regal Tube was acquired first by Lear Siegler, which operated it as an unincorporated division.⁷⁸ The defendant Copperweld then bought Regal Tube from Lear Siegler and operated it as a wholly owned subsidiary.⁷⁹ In the course of that purchase, Lear Siegler promised not to compete with the defendant for five years.⁸⁰ This promise apparently did not bind Regal Tube's employees, one of whom had managed Regal before it was sold to Copperweld.⁸¹ That employee then organized the plaintiff corporation, Independence Tube, to compete with Copperweld.⁸² Officials from Regal and Copperweld sent letters to the plaintiff's suppliers and customers expressing their intent to take steps to protect their trade secrets.⁸³

The alleged conspiracy, then, was between Copperweld and its wholly owned subsidiary Regal — the same fact pattern supporting the Court's finding of conspiratorial capacity in *Perma Life*, and similar to the facts of *Yellow Cab* and *Kiefer-Stewart*. So clear was the conspiratorial capacity of parents and subsidiaries at the time that there was no circuit split on the issue when the Supreme Court granted certiorari, despite overwhelming academic criticism.⁸⁴

Nevertheless, the Supreme Court granted certiorari and, citing Professor Areeda's 1982 article,⁸⁵ did away with the formalistic approach of the intraenterprise conspiracy doctrine, expressly overruling *Yellow Cab* and its progeny in holding that a parent corporation and its wholly owned but separately incorporated subsidiary constituted a "single entity" to which § 1 did not apply.⁸⁶

The core reasoning of *Copperweld* can be separated into two parts.⁸⁷ First, from a consequentialist standpoint, the Court

77. *Id.* at 756.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 756–57.

84. *See Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 316–17 (7th Cir. 1982).

85. *Copperweld*, 467 U.S. at 767 n.12.

86. *Id.* at 771–74.

87. *Cf.* 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1463h, at 211–13 (breaking down the court's analysis into four "steps").

noted that taking the “agreement” language of § 1 literally would include “coordinated conduct among officers or employees of the same company,” a result the Court apparently thought absurd.⁸⁸ This point was not groundbreaking.⁸⁹ The intraenterprise conspiracy doctrine would not have reached agreements within a single, formally incorporated entity,⁹⁰ even where the agreement was between the corporation at large and an unincorporated division of the corporation.⁹¹ That was the very essence of the formalism of *Yellow Cab* and its progeny: conspiratorial capacity was a function of formal incorporation.

Second, and more controversially, the Court held that Copperweld and its wholly owned subsidiary were a “single entity” because (1) there was a “unity of interest” between Copperweld and its subsidiary and (2) the parent did or could at any time exercise “control” of the subsidiary.⁹² The Court emphasized that the notion of an “agreement” had no meaning here because:

[A] parent and a wholly owned subsidiary always have a “unity of purpose or a common design.” They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at

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

89. *Cf.* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208 (2010) (“Taken literally, the applicability of § 1 to ‘every contract, combination . . . or conspiracy’ could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm’s chief executive telling her subordinate how to price their company’s product.”).

90. *See, e.g.,* *Schwimmer v. Sony Corp.*, 677 F.2d 946, 953 (2d Cir. 1982); *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 893–94 (3d Cir. 1981), *abrogated on other grounds by* *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 916–17 (8th Cir. 1976); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969); *Poller v. Columbia Broad. Sys., Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952); ATTY. GEN.’S NAT’L COMM. TO STUDY THE ANTITRUST LAWS, ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 30–31 (1955); Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. 1, 9–10 (2005) (arguing that courts should not hear disputes between one internal division and another).

91. *See, e.g.,* *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 205–06 (5th Cir. 1969); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83–84 (9th Cir. 1969); *Poller*, 284 F.2d at 603.

92. *Copperweld*, 567 U.S. at 771–72.

any moment if the subsidiary fails to act in the parent's best interests.⁹³

The Court also emphasized that, as a practical matter, there was no real difference between an unincorporated division of a corporation (for example, a sales department) and a wholly owned, separately incorporated subsidiary (for example, the same sales department but separately incorporated, perhaps with its own trademark).⁹⁴ The Court pointed out that "Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld,"⁹⁵ and nothing in the record suggested "that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler."⁹⁶

Post-*Copperweld* courts have applied the *Copperweld* factors to extend § 1 immunity to parents and subsidiaries accused of conspiracies under other antitrust statutes,⁹⁷ to parents "conspiring" with a subsidiary it was readying for sale,⁹⁸ to American subsidiaries of foreign corporations,⁹⁹ and to non-wholly-owned subsidiaries.¹⁰⁰ They also extended immunity to sister corporations¹⁰¹

93. *Id.*

94. *Id.* at 773-74.

95. *Id.* at 774.

96. *Id.*; cf. Stone & Wright, *supra* note 64, at 375 (stating that this holding "mapped onto straight-forward economic intuition: a parent and wholly-owned subsidiary neither could nor should be expected to behave as potential competitors might.").

97. See, e.g., Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214, 221 (6th Cir. 1985) (applying the Robinson-Patnam Price Discrimination Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13(a) (2006))).

98. Eichorn v. AT & T Corp., 248 F.3d 131, 139 (3d Cir. 2001)

99. Rosen v. Hyundai Group (Korea), 829 F. Supp. 41, 45 n.6 (E.D.N.Y. 1993).

100. Leaco Enters. v. Gen. Elec. Co., 737 F. Supp. 605, 608-09 (D. Or. 1990), *order clarified* by Civ. No. 87-1026-FR, 1990 WL 200085 (D. Or. Nov. 27, 1990) (more than 90% ownership); Novatel Commc'ns Inc. v. Cellular Tel. Supply, Inc., No. Civ.A.C85-2674A, 1986 WL 798475, at *9 (N.D. Ga. Dec. 23, 1986) (51% ownership); Stone & Wright, *supra* note 64, at 377.

101. Davidson Schaaf, Inc. v. Liberty Nat'l Fire Ins., 69 F.3d 868, 871 (8th Cir. 1995). See also Century Oil Tool, Inc. v. Prod. Specialties, Inc., 737 F.2d 1316, 1317 (5th Cir. 1993) (extending immunity to a group of individuals with joint ownership over a parent company and its two subsidiaries); Orson, Inc. v. Miramax Film Corp., 862 F. Supp. 1378, 1385 (E.D. Pa. 1994), *aff'd in part, vacated in part*, 79 F.3d 1358 (3d Cir. 1996). *But see* Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987) (holding that only corporations which are owned 100% in common, or a de minimis amount less than 100%, are covered by the *Copperweld* rule).

and to corporations who had agreed to merge but had not yet consummated the merger.¹⁰²

More controversially, and quite indicative of the unpredictability of the *Copperweld* regime, some lower courts found single-entity status — meaning that collusion between the relevant actors was condoned — in franchisor/franchisee relationships,¹⁰³ patent licensee arrangements,¹⁰⁴ trade associations and their members,¹⁰⁵ a hospital's medical staff and the hospital itself when making employment decisions regarding individuals in competition with the members of the medical staff,¹⁰⁶ and — prior to *American Needle* — to sports leagues with independently owned teams.¹⁰⁷

Part III will show how unpredictable the *Copperweld* approach has proven in practice, particularly in dealing with complex business organizations, and how it has needlessly resulted in an increase in litigation costs for such § 1 disputes.

102. *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1398 (8th Cir. 1993).

103. *Orson*, 862 F. Supp. at 1386; *Williams v. Nevada*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd* 999 F.2d 445 (9th Cir. 1993) (per curiam). *But see* *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 58 n.8 (1st Cir. 2002) (suggesting disagreement with *Orson* in dicta). This position would mean that all tying claims based on § 1 would be dismissed.

104. *Levi Case Co. v. ATS Prods., Inc.*, 788 F. Supp. 428, 432 (N.D. Cal. 1992). If this position were taken to its logical maximum, various collusive agreements in patent licenses would be permitted.

105. *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 622 (6th Cir. 1999). Note that trade associations are sometimes cartel facilitators. *See generally* *FTC v. Cement Institute*, 333 U.S. 683, 709–10 (1948) (noting that “numerous concerted activities” were “carried on by . . . the industry's unincorporated trade association”); Jon Leibowitz, Comm'r, Fed. Trade Comm'n, *The Good, the Bad and the Ugly: Trade Associations and Antitrust*, Remarks at the Am. Bar Assoc. Antitrust Spring Meeting, (Mar. 30, 2005) (transcript available at <http://www.ftc.gov/speeches/leibowitz/050510goodbadugly.pdf>) (discussing various pro- and anti-competitive practices by trade associations).

106. *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605, 614 (6th Cir. 1990).

107. *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (1996). For conflicting cases, see *Hovenkamp & Leslie*, *supra* note 3, at 820–21 nn. 35–36; 7 AREEDA & HOVENKAMP, *supra* note 14, ¶¶ 1467–69, at 237–58. *See also* Gabriel A. Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 844–54 (2009); Michael McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 756–62 (2010) (both criticizing the lower court decision in *American Needle* holding the NFL to be a single entity).

III. THE COST AND DIFFICULTY OF APPLYING THE SINGLE-ENTITY DOCTRINE BEFORE AND AFTER *AMERICAN NEEDLE*

Copperweld doctrine is difficult to understand and apply. Its malleable two-factor test can be stretched to accommodate as much as any price-fixing cartel or compressed to exclude all but the most singular of business forms. Worse, as will be discussed, more recent attempts by the Court to clarify single-entity doctrine have resulted in either great confusion or no improvement in clarity. Part II.A will discuss the difficulty of understanding and applying the Supreme Court's test in *Copperweld*, stemming from the its amorphous two-factor test. Part II.B will go on to show how the Supreme Court's most recent forays into single-entity doctrine have not helped to clarify doctrine and may have simply made it more opaque.

A. THE DIFFICULTY OF UNDERSTANDING AND APPLYING COPPERWELD

The most narrow holding of *Copperweld* is easy to state and apply: a parent and its wholly owned subsidiary are legally incapable of "agreeing" as required by § 1 of the Sherman Act and are thus shielded from § 1 liability. But its reasoning is very difficult to understand; worse, where comprehensible, it is antithetical to the basic goals of antitrust law.¹⁰⁸ As such, predicting extensions and applications beyond the wholly owned subsidiary context is an exercise in speculation.

First, the "unity of interest" prong of *Copperweld's* analysis¹⁰⁹ cannot sensibly be the guiding principle for a non-formalistic approach to single-entity decisions by lower courts. Whether or not a group of actors have the same "unity of interest" will always depend on the scope of the inquiry, such that the factor simply reduces to question-begging.¹¹⁰ For instance, members of a cartel

108. See *supra* note 9.

109. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 ("A parent and its wholly owned subsidiary have complete unity of interest. Their objectives are common, not disparate . . .").

110. As Judge Easterbrook put it less diplomatically, "Although the [unity of interest] phrase appears in *Copperweld* . . . [a]s a proposition of law, it would be silly." *Chi. Prof'l Sports*, 95 F.3d at 598.

certainly enjoy a “unity of interest,” at least in the short term.¹¹¹ Indeed, the only reason cartels exist at all is because its members share an interest in reducing output and increasing prices.¹¹² By contrast, various directors of divisions within a single corporation can surely hold divergent interests, including different long-term goals for the company.¹¹³ Imagine a proposed long-term strategy that will leave one division of a company obsolete and a second expanded: how aligned are the interests of the heads of the respective divisions? Think, too, of a short-term incentivizing system wherein the officers of the best-performing division of a corporation get a bonus.

Furthermore, the “unity of interest” prong of *Copperweld* will often be in tension with its “control” prong. This is true of the latter example above, where the two divisions with divergent interests are under the ultimate control of a single CEO. This is also true of franchisees or members of a league who are subject to some degree of control by a central organization but who have divergent economic interests — for example, a franchisee typically wants a greater territorial allocation than a co-franchisee.¹¹⁴

It seems, then, that “unity of interest” will not help to develop a predictable guidepost for single-entity questions. But what of the “control” factor? Admittedly, this second prong might be marginally more helpful; it is at least consistent with some modern economic literature on the theory of the firm, which describes a “firm” as a collection of “control” transactions taking the place of “market” transactions.¹¹⁵ This consistency suggests at least the

111. Stone & Wright, *supra* note 64, at 375–76.

112. Hovenkamp & Leslie, *supra* note 3, at 852.

113. See *Chi. Prof'l Sports*, 95 F.3d at 598 (“Even a single firm contains many competing interests.”). Note that according to the economic literature, one purpose of a firm’s organizational structure is to optimally allocate residual profits as incentives for performance. Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Oliver E. Williamson, *Transaction Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979). An optimal system could conceivably include the artificial creation of competition among divisions of a single firm.

114. See Stone & Wright, *supra* note 64, at 375–76.

115. See Klein & Lerner, *supra* note 34, at 252. (“[T]he economic definition of the firm that corresponds most closely with the legal definition and common usage focuses on control rights”). Stone and Wright seem to suggest that *any* contractual relationship wherein the parties “organize[] themselves with centralized control in order to reduce transaction costs,” should have § 1 immunity. Stone & Wright, *supra* note 64, at 379–80.

potential for a more meaningful guidepost for single-entity doctrine.

But here is the problem: the most stable and well-formed cartels may look like a single entity under the lens of “control.” As Professors Hovenkamp and Leslie have recently explained, the most stable cartels may give all decision-making power to a central entity who can manage a cartel in such a way as to prevent breakdown.¹¹⁶ An example is a scenario where resale price maintenance is forced upon a manufacturer by a retailer cartel.¹¹⁷ Since the manufacturer is a single corporation with total “control” over its own pricing policy, would not *Copperweld’s* control prong suggest immunity from § 1?¹¹⁸ This would create a very perverse system that protects the most stable cartels.¹¹⁹

It thus appears that the formality of the corporate form is not dispositive, and it is clear that a wholly owned subsidiary and its

But Professors Hovenkamp and Leslie demonstrate that this argument proves too much. See *infra* note 119.

116. Hovenkamp & Leslie, *supra* note 3, at 825–48.

117. *Id.* at 842. This is not to say that resale price maintenance (RPM) is usually suspect. See, e.g., Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736 (1984) (providing a number of justifications for vertical restrictions between manufacturer and retailer).

118. A savvy antitrust reader might respond that the RPM agreement itself is enough to trigger § 1 scrutiny. Very well: Professors Hovenkamp and Leslie’s example can be restructured to a *Colgate*-type “suggested retail price” scenario with largely the same effect. See *United States v. Colgate & Co.*, 250 U.S. 300, 306–07 (1919) (finding § 1 inapplicable to manufacturers who do not enter into vertical price agreements with retailers, but nevertheless announce that they will, in the future, refuse to sell to retailers who fail to comply with a suggested retail price).

119. Hovenkamp & Leslie, *supra* note 3, at 851 (citing *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)). Professors Hovenkamp and Leslie suggest that this might be remedied by changing *Copperweld’s* control prong to a “who is controlled” prong. See *id.* at 817.

This Note does not agree with such a suggestion. First, the distinction called for by Professors Hovenkamp and Leslie is a very fine one that is difficult to apply with any more predictability or consistency than the current “control” test. Worse, the test as elucidated in the work is question-begging: NFL Properties (NFLP), as discussed in *American Needle* would fail because “who is controlled” is a group of independent trademark owners. But that is not a test; that is simply assuming the answer. At bottom, the test looks like this: “entities are separate if what is controlled by a single organization is a group of separate entities.” This point is shown most clearly in Professors Hovenkamp and Leslie’s application of the test to *Copperweld*. “The reason the Supreme Court found a single firm, however, is that there was no separately owned entity whose market behavior was being controlled.” *Id.* at 824–25. Again, that just assumes the answer: that a parent’s complete control over a subsidiary means that no independent actor was “controlled.” With all due respect to the legendary Professor Hovenkamp, this is not an attractive solution to the currently messy single-entity doctrine.

parent corporations lack the ability to “conspire[]” with each other per § 1 of the Sherman Act. But what is less clear is *why* they lack conspiratorial capacity — at least, it will be difficult to predict with much certainty how the rule of *Copperweld* will apply to other kinds of organizational structures.¹²⁰ Therefore, and expectedly, lower courts have split on the single-entity status of various kinds of organizations, including sports leagues,¹²¹ partially owned subsidiaries,¹²² and franchise arrangements.¹²³ Unfortunately, as will be shown, subsequent case law has only added to the confusion.

B. MUDDYING THE WATERS: *DAGHER* AND *AMERICAN NEEDLE*

The two most recent cases from the Supreme Court that discuss the single-entity doctrine are *Texaco, Inc. v. Dagher*¹²⁴ and, more importantly, *American Needle, Inc. v. National Football League*.¹²⁵ Both presented opportunities to clarify the doctrine and make lower court application more predictable vis-à-vis complex business organizations.¹²⁶ Both decisions failed to bring clarity to single-entity doctrine.

120. See Stone & Wright, *supra* note 64, at 400 (“As increasingly complicated businesses attempted to avail themselves of *Copperweld*, however, no uniform rule arose that proved capable of consistent judicial application in addressing even partial equity states, much less patent licenses, franchisees, and so on.”).

121. Compare *Chi. Prof'l Sports Ltd. v. NBA*, 95 F.3d 593, 599–600 (7th Cir. 1996) (finding the NBA to be a “single entity”), with *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994) (holding that the NFL is not a single entity); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1388–90 (9th Cir. 1984) (same); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1256–58 (2d Cir. 1982) (same).

122. Compare *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1128 (3d Cir. 1995) (finding immunity for 99% controlled subsidiary); *Novatel Commc'ns Inc. v. Cellular Tel. Supply, Inc.*, No. Civ.A.C85-2674A, 1986 WL 798475, at *9 (N.D. Ga. Dec. 23, 1986) (holding that immunity requires only majority ownership), with *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1486 (D. Or. 1977) (holding that extension of *Copperweld* is limited to de minimis exceptions).

123. See *Fraser v. MLS, LLC*, 284 F.3d 47, 58 (1st Cir. 2002) (“Traditionally, vertically imposed arrangements restricting competition among franchisees have been tested (and often upheld) under the rule of reason. Yet since *Copperweld*, several district court decisions have avoided the section 1 inquiry by deeming franchiser and franchisee part of a single entity.”) (citations omitted).

124. 547 U.S. 1 (2006).

125. 130 S. Ct. 2201 (2010).

126. Stone & Wright, *supra* note 64, at 403–04 (“By the time *American Needle* came before the Court . . . judicial application of *Copperweld* had largely devolved into a psychological and metaphysical inquiry.”).

Dagher involved a joint venture between Texaco and Shell Oil, both vertically integrated oil companies that refine crude oil and market gasoline to downstream purchasers.¹²⁷ The joint venture, called Equilon, refined and sold gasoline in the western United States under the Texaco and Shell Oil brand names from 1998 until 2002.¹²⁸ The Federal Trade Commission (FTC) had approved the formation of Equilon pursuant to § 7 of the Clayton Act (the antitrust statute regulating mergers) after the parties agreed to certain conditions.¹²⁹ After the joint venture began operation, a class of service stations brought suit, alleging a per se violation of § 1 on the theory that Equilon, by charging a single price for the two brands of gasoline, engaged in a per se price-fixing conspiracy.¹³⁰

The Court held that the per se prohibition against price fixing did not apply to the pricing decisions of Equilon.¹³¹ Unfortunately, in the course of reaching that rather routine and uneventful holding, the Court muddied the waters of single-entity doctrine with some haphazard dicta. In at least three different instances, the Court curiously described the joint venture as a “single entity,” suggesting that its operations were categorically beyond the reach of § 1.¹³² For example, the Court stated that “the pricing policy challenged here amounts to little more than price setting

127. *Dagher*, 547 U.S. at 3.

128. *Id.*

129. *Id.* at 4.

130. *Id.*

131. *Id.* at 3. The joint venture was legally formed and approved by consent decree with federal and state antitrust regulators. *Id.* at 4. Furthermore, if the plaintiffs wanted to challenge the *formation* of Equilon (which they were not foreclosed from doing), their challenge would, by statute, not be adjudicated as a per se antitrust violation. 15 U.S.C. § 4302 (2006) (formation of joint venture “shall not be deemed illegal per se,” but rather, is governed by the rule of reason). Notably, the plaintiffs had conceded at oral argument that if Equilon sold the gasoline under a single brand, there would be no per se liability. *Dagher*, 547 U.S. at 6. It is hard to see how Equilon’s decision to capitalize on the goodwill of the extant trademarks should invoke per se liability.

132. *Id.* at 6–7 (quotation marks omitted) (“In other words, the pricing policy challenged here amounts to little more than price setting by a single entity — albeit in the context of a joint venture — and not a pricing agreement between competing entities with respect to their competing products.”; “When persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit such joint ventures [are] regarded as a single firm competing with other sellers in the market.”; “As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”).

by a *single entity* . . . not a pricing agreement between competing entities with respect to their competing products.”¹³³ But, paradoxically, the Court then held that the venture’s pricing unification policy could be challenged under the rule of reason,¹³⁴ which would not be true if joint ventures were single entities: they would simply be immune from § 1 liability entirely.

But the opinion rewards careful reading. Despite some inartful drafting, the Court did not hold that joint ventures were immune from § 1 liability.¹³⁵ It simply restated the familiar rule that restraints related to joint ventures are subject to the rule of reason.¹³⁶ For this reason, scholars have suggested that the single-entity language of *Dagher* should not be taken too seriously.¹³⁷ Here, then, is little guidance (and at least some confusion) as to how to predictably apply the single-entity doctrine post *Copperweld*.

The more recent and momentous decision of the Supreme Court, *American Needle*, does not suffer from *Dagher*’s waywardness, and thus courts should take both its narrow holding and its reasoning at face value. *American Needle* concerned the trademarks of the thirty-two separately owned professional football teams of the NFL.¹³⁸ The NFL is organized as a joint venture, and each team owns its own intellectual property.¹³⁹ Prior to 1963, each team licensed its intellectual property (for example, to jersey manufacturers) individually.¹⁴⁰ In 1963, however, the teams formed a joint venture, NFL Properties (NFLP), to develop,

133. *Id.* at 6 (emphasis added).

134. *Id.* at 7.

135. The most expansive reading is that the Court did not decide the question of the conspiratorial capacity of joint ventures under § 1. *See Id.* at 7 n.2 (citations omitted) (“Respondents have not put forth a rule of reason claim. Accordingly, we need not address petitioners’ alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures.”).

136. *Dagher*, 547 U.S. at 7. *See also* HOLMES & MANGIARACINA, *supra* note 20, § 2.2.

137. *See, e.g.*, Hovenkamp & Leslie, *supra* note 3, at 866–67. *But see* Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 EMORY L.J. 735, 737–38 (2008) (arguing that *Dagher* was a complete game-changer for joint ventures). Nevertheless, if there were any doubt over the applicability of § 1 to joint ventures, *American Needle* removed it when it held that the NFL and NFLP joint ventures were subject to § 1 scrutiny under the rule of reason. 130 S. Ct. 2201, 2216 (2010).

138. *Id.* at 2206.

139. *Id.* at 2207.

140. *Id.*

license, and market their intellectual property.¹⁴¹ From 1963 to 2000, NFLP granted nonexclusive licenses to NFL marks,¹⁴² but in December 2000, the teams voted to authorize NFLP to grant exclusive licenses.¹⁴³ One such exclusive license was given to Reebok, after which the nonexclusive license held by apparel maker American Needle, Inc. was allowed to lapse without renewal.¹⁴⁴ American Needle then sued, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated § 1.¹⁴⁵

Both the district court and the Seventh Circuit held that the NFL was a single entity for antitrust purposes.¹⁴⁶ The Supreme Court reversed, holding that neither of the NFL and NFLP joint ventures were single entities for antitrust purposes.¹⁴⁷ But *American Needle* did very little to clear up a doctrine that *Copperweld* and dicta from *Dagher* left indeterminate.¹⁴⁸ The Court again emphasized both the “unity of interests” and “control” language of *Copperweld*,¹⁴⁹ despite the noted unhelpfulness of those factors. And its reasoning largely mirrors the *Copperweld* decision: yet again, the Court admonished lower courts to avoid formalism and to be pragmatic,¹⁵⁰ and yet again, the Court tried in vain to explain what that analysis looks like.¹⁵¹ It is now apparent that joint ventures are not categorically single entities and that the NFL in particular is not a single entity, though it is difficult to

141. *Id.*

142. *Cf.* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (another example of a non-exclusive intellectual-property pooling regime).

143. *Am. Needle*, 130 S. Ct. at 2207.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 2212–16.

148. *See, e.g.*, Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMPETITION L. & ECON. 543, 556–63 (2011) (criticizing the reasoning of *American Needle* while accepting the outcome).

149. *American Needle*, 130 S. Ct. at 2209–15. *But see* Stone & Wright, *supra* note 64, at 371 (apparently reading *American Needle* as “unraveling” *Copperweld* immunity from “the unmanageable vagaries” of the “unity of interests” language — an arguably unnatural interpretation).

150. *Compare* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772–74 (1984), *with* *Am. Needle*, 130 S. Ct. at 2209–11.

151. *See* *Am. Needle*, 130 S. Ct. at 2212–16 (applying the “control” and “unity of interest” prongs of *Copperweld*; though, for reasons already highlighted, those concepts should not guide single entity questions).

say with certainty whether the next sports franchise or next complex joint venture is.¹⁵²

Modern doctrine, in short, is very uncertain. Uncertainty in litigation is very expensive. The story of *American Needle* is indicative: suit was filed in district court;¹⁵³ after full discovery and motions practice, summary judgment was granted for defendants¹⁵⁴ and, after further briefing, was affirmed by the Seventh Circuit;¹⁵⁵ the Supreme Court then granted certiorari and, after eighteen briefs were filed in the case, remanded back to the Seventh Circuit¹⁵⁶ which, in turn, remanded back to the district court — six years after the complaint was filed.¹⁵⁷ And all that is settled is that § 1 applies to the NFL's trademark licensure regime.¹⁵⁸

IV. THE CASE FOR A NEW FORMALISTIC APPROACH TO THE SINGLE-ENTITY DOCTRINE

The confusion around single-entity doctrine begs for a comprehensive, predictable fix. This Note aims to provide just that. This Note's case against the current single-entity regime and in favor of a new formalistic approach stems from an appreciation of two sets of costs, consciousness of which should guide any antitrust policy analysis: error costs and administrative costs.

This Note's case-in-chief will proceed in three steps. Part IV.A will introduce the reader to a framework of analyzing antitrust policy around the twin goals of reducing "error costs" and "administrative costs." Part IV.B will then evaluate current doctrine's

152. Sometimes, though, the answer will not matter, as when esoteric statutes create antitrust immunity for collective action. *See, e.g.*, 15 U.S.C. § 1291 (2006) (creating antitrust immunity for sports leagues pooling television licensing rights).

153. *See* Complaint at 1, *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941 (N.D. Ill. 2007) (No. 04C-7806) (complaint dated Dec. 4, 2004).

154. *Am. Needle*, 496 F. Supp. 2d at 944, *rev'd sub nom.* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (granting partial summary judgment for defendants); *Am. Needle, Inc. v. New Orleans La. Saints*, 533 F. Supp. 2d 7901, 7901 (N.D. Ill. 2007), *rev'd sub nom.* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (granting summary judgment for defendant on remaining counts).

155. *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 744 (7th Cir. 2008), *affg* 496 F. Supp. 2d 941 (N.D. Ill. 2007), *and affg* 533 F. Supp. 2d 7901 (N.D. Ill. 2007).

156. *Am. Needle*, 130 S. Ct. at 2217, *rev'g* 538 F.3d 736 (7th Cir. 2008).

157. *Am. Needle, Inc. v. Nat'l Football League*, 391 Fed. Appx. 564, at *1 (7th Cir. 2010).

158. *See Am. Needle*, 130 S. Ct. at 2215.

ability to contain both sets of costs, concluding that the *Copperweld* regime is expensive to administer without a concomitant reduction in error costs. Part IV.C will then propose a new formalistic approach aimed at reducing the administrative costs of single-entity adjudication without an appreciable risk of an increase in error costs.

A. DEVELOPING AN “ERROR COST” AND “ADMINISTRATIVE COST” FRAMEWORK

The concept of “error costs,” elucidated and applied to anti-trust law in Judge Frank Easterbrook’s seminal 1984 article “The Limits of Antitrust”¹⁵⁹ provides a useful framework antitrust policy. Litigation will always produce both false negatives and false positives, because it is imperfect¹⁶⁰ and because it is exceedingly difficult to distinguish between pro- and anti-competitive conduct (even trained economists will disagree about the vices or virtues of a given restraint).¹⁶¹

Both false positives and false negatives are harmful. False positives exact ex post harm by forcing a business or an individual to cease engaging in what is, at worst, competitively neutral conduct. Worse, false positives discourage companies from engaging in what might be welfare-enhancing activity in the first place. False negatives are harmful in that they allow anti-competitive conduct to continue and they encourage future anti-competitive conduct by other actors. The harms associated with false positives and false negatives are called “error costs.”

But all error costs are not equal. False positives are generally more harmful than false negatives because markets can correct the latter with greater efficacy, as the rents obtained by a cartel or monopolist will encourage entry by other competitors.¹⁶² For example, if a widget cartel successfully evades detection, a manufacturer of gadgets would eventually notice how much money the widget makers are making and enter the market. The cartel could try to bring in this new player, but this would increase the

159. 63 TEX. L. REV. 1 (1984).

160. *Id.* at 14–15.

161. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1712 (1986).

162. Easterbrook, *supra* note 44, at 15.

risk of detection and cartel breakup. The necessary implication is that antitrust policy should generally tip the scale in favor of defendants.

But this line of reasoning can go too far. Sometimes, a rule might be so defendant-friendly that the welfare losses associated with false negatives overwhelm the welfare benefits of preventing false positives. Some scholars argue that antitrust law's very deferential treatment toward predatory pricing is an example of taking the worry over false positives too far, since under U.S. antitrust law, such claims are nigh impossible to prove.¹⁶³

The error-cost framework is more or less orthodoxy today,¹⁶⁴ and current antitrust law contains a number of mechanisms that can be thought of as "error-cost filters." One example is the per se rule against naked price-fixing. Antitrust law never allows

163. See, e.g., Frederic M. Sherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 868, 890 (1976). For a survey of criticisms of the lenience of current predatory pricing law, see PITOFSKY ET AL., *supra* note 33, at 84–85.

164. See, e.g., POSNER, ANTITRUST, *supra* note 9, at viii–ix; C. Frederick Beckner & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 41 (1999) (developing a process for antitrust decision-making "when information is costly and therefore imperfect"); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 74–5 (2005) ("This Essay offers an approach to designing rules for assessing unilateral practices based in part on the error-cost framework pioneered by Judge Frank Easterbrook."); Luke Froeb et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 659 (2005) (using error-cost framework in analysis); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 470 (2001) (offering a "decision-theoretic framework" that "takes into account the likelihood of judicial error in the application of rules and the costs of such error"); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV J.L. & PUB. POL'Y 171, 178–89 (2011) (considering error costs in antitrust); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153, 156 (2010) (promising to "bring to battle" the "error-cost framework"); Fred S. McChesney, *Easterbrook on Errors*, 6 J. COMP. L. & ECON. 11, 13 (2010) (focusing on how errors should be factored into judicial thinking about antitrust); Stone & Wright, *supra* note 64, at 381–90 (analyzing antitrust doctrine within the error-cost framework).

Note that Judge Easterbrook's 1984 article has been cited favorably in no less than three Supreme Court opinions. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986). However, the framework had at least one famous dissenter within the DOJ. See Christine Varney, U.S. Asst. Att'y Gen. for Antitrust, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference: Public or Private: Are the Boundaries in Transition? 4–5 (June 24, 2010), (transcript available at <http://justice.gov/atr/speeches/262745.pdf>).

naked price-fixing,¹⁶⁵ even though it is possible to conjure a scenario wherein a naked price-fixing agreement actually enhances consumer welfare.¹⁶⁶ Nevertheless, antitrust law would condemn such an agreement precisely because it would have to be so stylized. It is so likely that naked price-fixing agreements will exact a harm on consumer welfare that allowing a defense in a price-fixing case will lead to much more harm (false negatives) than good (false positives).¹⁶⁷ This can be true for price-fixing claims even if we accept, as a general matter, that antitrust law should load the dice in favor of defendants.¹⁶⁸ Trying to balance the welfare harms of false positives against the welfare harms of false negatives should be the goal of any antitrust policy guided by an appreciation of error costs.

But error costs tell only half the story. Even if a proposed rule is theoretically optimal (viz., it correctly balances false positives and false negatives), it may be that the new rule is so difficult to administer that the cost of adjudicating the rule overwhelms whatever welfare gains are obtained by changing to it.¹⁶⁹ That is

165. See HOLMES & MANGIARACINA, *supra* note 20, § 2:11.

166. Imagine that there were a monopoly in the computer tablet industry, with the monopolist (“M”) charging a monopoly price, such that output was reduced and price was supracompetitive. A second company (“E” for entrant) wants to enter the industry, but believes that if it does so, it and M will compete so strongly as to bring output up and price down to the competitive level. Assume now that E will not enter this industry if its entry would drive prices down to the competitive level. Realizing this, executives from E credibly threaten to enter the computer tablet industry. They tell M that they want to enter into an agreement whereby both companies agree to charge a price below the monopoly price but above the competitive price. Under this hyper-stylized set of facts, allowing a price-fixing agreement between M and E would lead to enhanced consumer welfare: lower prices and higher output, even if not competitive output. This hypothetical is adapted from MICHAEL D. WHINSTON, LECTURES ON ANTITRUST 17 (2008).

167. *Cf.* *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 351 (“The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.”).

168. Some statutes, nevertheless, create special carve-outs for what might otherwise be per se violations of antitrust law, such as the current hospital cartel that restrains trade by allocating hospital medical residents via a system similar to an NFL draft. See 15 U.S.C. § 37b (2006).

169. *Cf.* Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 682–83 (discussing inability to capitalize on welfare gains of antitrust enforcement in face of administrative costs in certain scenarios); Posner, *supra* note 34, at 1590 (“The class action, save for large institutional purchasers, is a delusion. There is no feasible method of locating and reimbursing the consumer who several years ago may have paid too much for a toothbrush . . .”).

what this Note means by “administrative costs”: the cost of enforcing, adjudicating, and applying a given rule.¹⁷⁰

It may be that a relatively simple rule that is cheap to administer will be preferable to an expensive rule that theoretically creates an optimal false negative/false positive balance. An example of concern for administrative costs can be seen in the requirement of below-cost pricing in predatory pricing claims: to prove a predatory pricing claim, the plaintiff must prove that the defendant, inter alia, priced its good or service below some acceptable measure of cost.¹⁷¹ This is not because only below-cost pricing can exclude equally or more efficient competitors; on the contrary, a monopolist can, in some circumstances, exclude such competitors while engaging in pricing that is at once predatory and also above some proxy measure of marginal cost.¹⁷² Nevertheless, whatever difficulty courts have in determining below-cost pricing, it is the accepted wisdom that courts would have a much more difficult time adjudicating claims of anticompetitive, above-cost pricing.¹⁷³ Hence, courts consciously accept an under-detering rule because of its relative administrability.¹⁷⁴

170. Cf. 6A FEDERAL PROCEDURE, LAWYERS EDITION § 12:257 (2004), available at Westlaw FEDPROC (describing the concern in civil procedure for administrative costs in the use of the class action device, which may dwarf any potential recovery).

171. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

172. See, e.g., HOVENKAMP, *supra* note 28, at 165–67 (discussing one case of predation where the conduct in question was not below some measures of “cost”); POSNER, ANTITRUST, *supra* note 9, at 215–23 (discussing the preferability of what Posner describes as a “long-run marginal cost” approach); Richard Schmalensee, *On the Use Of Economics Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994, 1021 (finding that above-cost pricing based on present costs may exclude dynamically more efficient rival whose costs would fall over time). For a more extreme view supporting this position, see Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941 (2002).

173. See, e.g., *Brooke Grp.*, 509 U.S. at 223 (“As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.”); *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.) (discussing the administrability concerns of predatory pricing law); Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory — and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 808–21 (2003) (discussing at great length the implementation difficulties of allowing above-cost predatory pricing claims). A theoretically deterrent rule would have to take account of opportunity cost, which would probably be well beyond the competence of a court to determine. See COMPETITION AND MONOPOLY, *supra* note 36 (“[C]onsideration of foregone revenues is neither appropriate nor likely to be administrable.”).

174. An under-detering predatory pricing law can also be thought of as an error-cost device, given the particularly egregious harm of false positives for price-cutting producers.

B. APPLYING AN ERROR-COST AND ADMINISTRATIVE-COST ANALYSIS TO CURRENT SINGLE-ENTITY DOCTRINE

When analyzing single-entity doctrine with error costs and administrative costs in mind, it becomes clear that current doctrine is decidedly suboptimal and that all interests would be better served by a formalistic approach. First, single-entity doctrine's utility as an error-cost filter¹⁷⁵ has plummeted since 1984.¹⁷⁶ Substantive defendant-friendly changes in antitrust law outside of single entity doctrine have reduced the welfare gains to be gotten by a capacious single-entity doctrine, and those that remain are often dealt with under the Supreme Court's fairly recent decision in *Bell Atlantic Corp. v. Twombly*.¹⁷⁷ Second, the doctrine is expensive to apply.¹⁷⁸ The uncertainty wrought by the *Copperweld/American Needle* regime adds an unnecessary element to antitrust litigation involving complex business organizations — namely, long fights over whether § 1 even applies. Therefore, to make policy sense, any new single-entity regime should be mindful of the few error-cost gains to be had and the potential to reduce administrative costs by way of simplicity and predictability.

A new formalistic approach, especially one that takes advantage of robust merger control under § 7 of the Clayton Act, could do just that. The final two subparts of this Note develop this argument.

1. *The Single-Entity Doctrine's Reduced Necessity as an Error-Cost Filter*

At the time of the *Copperweld* decision, it was possible that a doctrine that disavowed the formalism of the *Yellow Cab* era, re-

See, e.g., Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 1 (2005) ("The paradox of predatory pricing law is that even an analytically perfect specification of the line between predatory and innocent price cuts would result in deviations from optimal pricing because the very recognition of a predatory pricing offense will induce some firms to forgo innocent price cuts.").

175. That is, as a device designed to balance false positives against false negatives; here, by excluding marginal cases where competitive harm is unlikely.

176. See *infra* Part IV.B.1.

177. 550 U.S. 544 (2007).

178. See *infra* Part IV.B.2.

sulting in more cases being dismissed, was a positive change in terms of error costs. If so, such a disavowal of formalism today is less likely to bring about a reduction in error costs, for two reasons: First, many fewer activities are unduly punished by a per se rule now than when *Copperweld* was decided.¹⁷⁹ Second, the Supreme Court's decision in *Twombly*, by raising the pleading requirements in antitrust cases,¹⁸⁰ has significantly reduced the risk of false positives stemming from adjudications of *American Needle*-type cases under the rule of reason.¹⁸¹

Before *Copperweld* was decided, agreements between independent actors were often treated much more harshly than current law would treat them. By way of example, one court of appeals held that a parent and its wholly owned subsidiary could be guilty of a per se unlawful conspiracy directed at one of the defendant's franchisees.¹⁸² Against this backdrop, even *Copperweld's* opacity may have served an error-cost function during this era¹⁸³ by increasing the risk-to-payoff ratio for plaintiffs contemplating bringing marginal suits (viz., by giving complex business

179. See, e.g., *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling 100-year-old precedent that held resale price maintenance to be per se illegal); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (abrogating line of cases to expand antitrust immunity of Foreign Trade Antitrust Improvement Act); *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (refusing to find a "duty to deal" for unilateral actor, and casting doubt on "essential facilities" doctrine, contrary to decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), where the plaintiffs prevailed); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling 1968 decision holding maximum resale price maintenance to be per se illegal); *Proff'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993) (holding that subjective intent of defendants is irrelevant when determining whether litigation is subject antitrust immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); dicta from a 1972 case had suggested otherwise).

180. 550 U.S. 544, 570 (2007).

181. See *infra* note 192.

182. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 725–27 (7th Cir. 1979); see also *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968), *overruled by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that parent and wholly-owned subsidiaries could conspire to impose per se unlawful ties on dealers); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (holding that two wholly owned subsidiaries of a common parent could unlawfully conspire to impose resale price maintenance on their dealers).

183. This is especially true in the realm of antitrust, where the cost (including the risk premium) of discovery in a rule of reason case can be exorbitant. See, e.g., Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 600 (2009); Christopher Jon Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH L. 317, 333 (2009).

organizations at least a colorable argument for § 1 immunity).¹⁸⁴ Today, the law is more favorable to defendants: even horizontal restraints that would otherwise be per se illegal (and even criminal) are often evaluated under the rule of reason for interdependent organizations, such as those in a joint venture.¹⁸⁵ The same can be said perhaps of any type of organizational structure wherein cooperation is necessary, including copyright pools¹⁸⁶ and multiple listing services for real estate agencies.¹⁸⁷

The second and much more important change is the Supreme Court's decision in *Twombly*, which subjects plaintiffs' claims to a fairly high "plausibility" threshold before being able to proceed to discovery.¹⁸⁸ *Twombly* greatly limits the importance of robust, factor-driven single-entity immunity as an error-cost filter. Many dismissals that would have occurred via the *Copperweld* doctrine today occur via the pleading requirements of *Twombly*.¹⁸⁹ The raw numbers show most emphatically why forcing cases that might previously have been dismissed on *Copperweld* grounds

184. *But see* Stone & Wright, *supra* note 64, at 388 (noting the relative attractiveness of applying *Copperweld* doctrine as an error-cost filter declines as the complexity of the analysis increases).

185. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 86 (1984) (using the rule of reason to analyze a horizontal price fixing and output limitation where the industry at issue required horizontal restraints on competition in order to make their product available).

186. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–24 (1979).

187. *See* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2003) (acknowledging legality of multiple listing services in general, but holding that per se rule of price-fixing applied under the particular facts of the case).

188. 550 U.S. 544, 554–554 (2007).

189. *Id.* at 570; Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 56–60 (2010) (describing the *Twombly* standard, highlighting some academic criticism of the standard, and providing a number of examples of its application); Stone & Wright, *supra* note 64, at 370–71 (“[M]uch of the work of the *Copperweld* doctrine has been subsumed by the ‘plausibility’ pleading requirement . . .”). For examples of cases where a single-entity defense was rejected, but the plaintiff still lost on summary judgment, suggesting they might now lose at the complaint stage under *Twombly*, see *Eichorn v. AT & T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001) (non-wholly-owned subsidiary); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. Of Podiatric Surgery, Inc.*, 185 F.3d 606, 622 (6th Cir. 1999); *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1398 (8th Cir. 1993); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) (transfers between parent and subsidiary); *Orson, Inc. v. Miramax Film Corp.*, 862 F. Supp. 1378, 1385 (E.D. Pa. 1994), *aff'd in part, vacated in part*, 79 F.3d 1358 (3d Cir. 1996); *Levi Case Co. v. ATS Products, Inc.*, 788 F. Supp. 428, 432 (N.D. Cal. 1992); *Williams v. Nevada*, 794 F. Supp. 1026, 1032, 1034 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993) (per curiam).

into rule of reason territory¹⁹⁰ would not lead to a significant risk of false positives post-*Twombly*. According to a 2009 empirical study by Professor Michael Carrier, defendants won 221 of the 222 cases governed by the rule of reason litigated between 1999 and 2009.¹⁹¹ Professor Carrier's article actually understates the point: *Twombly* was not decided until 2007, which means that most of the period covered by the study did not include cases where *Twombly* was within the defendants' arsenal.¹⁹²

With the defendant-friendly changes in antitrust law since 1982 and especially the Supreme Court's decision in *Twombly*, the relative necessity of the *Copperweld* decision as an error-cost filter has surely dwindled. Having cases decided under a combination of the rule of reason and *Twombly* in lieu of dismissing the case per single-entity doctrine should not lead to any appreciable risk of false positives, because, post-*Twombly*, there is less risk associated with being eligible for § 1 rule of reason scrutiny. Put simply, post-*Twombly*, there are just fewer marginal cases left to exclude.

2. Administrative Costs and the Absence of a Workable, Predictable Standard

The historical reduction of single-entity doctrine's utility as an error-cost filter would not be enough to recommend a change away from the rule of *Copperweld* if the doctrine exacted no positive harm (as opposed to just providing less of a benefit). However, the rule's emphasis on a non-formalistic, pragmatic analysis of the putatively separate defendants' mutual "control" and "unity of interest" greatly increases administrative costs.¹⁹³ It does this

190. And, indeed, this is what the alternative would be. After *Dagher*, *Copperweld*, and *American Needle*, no court would apply a per se rule to restraints related to otherwise lawful cooperative business ventures.

191. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828–29 (2009).

192. See Heather Lamberg Kafaele & Mario M. Meeks, *Antitrust Digest: Developing Trends and Patterns in Federal Antitrust Cases after Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal* 8 (2010), <http://www.shearman.com/files/upload/AT-041910-Antitrust-Digest.pdf> (finding that 111 of 170 post-*Twombly* motions to dismiss successful in federal courts as of the date of the study).

193. Stone & Wright, *supra* note 64, at 389 (“[T]here is no advantage in a single-entity defense that is [as fact-intensive as a full-blown Rule of Reason analysis], though focused

by way of uncertainty: both prongs of *Copperweld* are very indeterminate, leaving open colorable arguments for both sides on what is, at essence, a threshold question. As one set of commentators put it, “*Copperweld* provide[s] the untailed and occasionally arbitrary results one expects from a bright-line rule while imposing nearly all of the costs of an exploratory standard.”¹⁹⁴ This problem, as noted,¹⁹⁵ survives *American Needle*.

Whatever criticism there may be of the formalistic *Yellow Cab* era, it was a simple and much cheaper rule to administer: if the allegedly separate entities were separately incorporated, they had conspiratorial capacity.¹⁹⁶ If they were not, they lacked conspiratorial capacity.¹⁹⁷ Nevertheless, it is still probably the case that the *particular* formal rule of *Yellow Cab* — that two companies wholly owned by the same parent corporation should be treated differently than two unincorporated divisions of a single corporation¹⁹⁸ — would be unacceptable given the purposelessness of requiring a parent to treat a subsidiary as if it were an unrelated competitor.¹⁹⁹

Therefore, this Note proposes that the Supreme Court adopt a new formalistic approach that accepts the particular outcomes of *American Needle* (for joint ventures) and *Copperweld* (for parents and subsidiaries) without giving license to lower courts to engage in unguided analysis into corporate structures, a process that simply adds to the cost of litigation.

C. A NEW FORMALISTIC APPROACH

This Note proposes a new formalistic approach with the aim of capitalizing on error-cost improvements in antitrust law while reducing the administrative costs of single-entity-status adjudication. Rather than pragmatic but vague tests guiding lower courts as they adjudicate the single-entity status of complex business

on functional criteria with a less certain relationship to whether the business activity at issue is likely to generate competitive harms.”).

194. Stone & Wright, *supra* note 64, at 389–90.

195. See *supra* Part III.C.

196. See *supra* Part II.C.1.

197. See *supra* Part II.C.1.

198. See *supra* Part II.C.1. Or, similarly, that a parent and a wholly-owned subsidiary must be treated differently from a corporation and its unincorporated subdivision.

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

organizations, under this new formalistic approach, courts should: (1) decide, as a formal matter, which organizational forms constitute single entities for § 1 purposes; (2) determine whether the defendant has formally organized as a recognized single entity; and (3) use § 7 of the Clayton Act to police the transformation of previously “multiple entities” into this kind of single entity.

1. *Developing a “New Formalism”*

The key to the success of this new approach is capitalizing on the reduction in administrative costs that come with a formalistic approach while avoiding the mistakes of the *Yellow Cab* era by putting the wrong²⁰⁰ kinds of business organizations on one side of the line or another. The objection to *Yellow Cab*'s disparate treatment of arrangements between parents and subsidiaries, on the one hand, and corporations and their unincorporated divisions, on the other, is not an objection to formalism *qua* formalism, but an objection to a formal rule based on separate incorporation.

The specific rule of *Yellow Cab* need not necessarily represent the kind of formalities that guide a formalistic single-entity doctrine. The courts — and the Supreme Court especially — can simply decide which kinds of business organizations get single-entity status and allow businesses to self-sort where the benefits of that status are weighed against the costs of that particular organizational structure.²⁰¹ For the purposes of this Note, it does not necessarily matter (though it often will) to which kinds of organizations the Court decides to convey this status, so long as it chooses organizations whose formation is governed by § 7. The parenthetical qualifier is necessary because a return to the specif-

200. “Wrong” here invokes error-cost analysis: the ideal policy would allocate business organizations onto one side of the single-entity line or the other according to the likelihood that collusion among the persons within that organization would be pro- or anti-competitive.

201. Note that after the *Copperweld* decision, corporations routinely mapped their firm structures directly onto the facts of that case in order to be sure of obtaining “single entity” status. Stone & Wright, *supra* note 64, at 376 (citing *Eichorn v. AT & T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001); *Russ’ Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985); *Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 45 n.6 (E.D.N.Y. 1993)).

ic rule of *Yellow Cab* would be ill-advised for reasons explained below.

Ultimately, the formal rule that emerges may only cover a few types of organizations. A sensible rule might look like this: a single corporation is a single entity; so are parents and their various subsidiaries, including sister corporations — and that is it. Joint ventures,²⁰² franchisor contracts, standard-setting organizations, and the like would remain subject to § 1 under the rule of reason.²⁰³ While this admittedly limited rule might have been very harmful in the *Copperweld* era — during which the larger reach of the per se rule²⁰⁴ would surely have forced many inefficient mergers — this seems much less true in a world where not only does the rule of reason dominate, but *Twombly* leads to such a large number of dismissals.²⁰⁵

In one sense, this kind of formalism would not be new. In fact, one formal rule in “entity” doctrine that stands today is older than *Yellow Cab* itself: courts have always treated corporations and partnerships as single entities.²⁰⁶ But this is a formalistic

202. For an excellent discussion of what that rule of reason analysis might look like for various kinds of joint ventures, see Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701 (1998). Professor Hovenkamp suggests that there are certain scenarios wherein joint ventures should be considered “single entities.” See generally 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1478, at 364, 374–75. The distinction he makes there seems indeterminate enough that it would probably be little improvement from *Copperweld*. For a criticism of a similar view, see Devlin & Jacobs, *supra* note 148, at 545–46 (though their approach would put district courts in the seemingly impossible tasks of judging joint ventures against “optimal industry structure” vis-à-vis a hypothetical ex ante bargain among joint venturers).

203. Treating legal cooperative ventures under the rule of reason is key to this system working. Otherwise, the threat of false positives would overwhelm the administrative cost gains. Cf. Goldberg, *supra* note 35 (describing the FTC’s per se treatment of what should have been an unquestionably legal agreement related to a joint venture).

204. Compare *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (per se liability against resale price maintenance), with *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 887 (2007) (resale price maintenance governed by the rule of reason, overruling *Dr. Miles*). Compare *United States v. Schwinn & Co.*, 388 U.S. 365 (1967) (nonprice vertical restraints per se illegal), with *GTE Sylvania*, 433 U.S. 36 (1977) (non-price vertical restraints governed by the rule of reason, overruling *Schwinn*).

205. *Supra* Part IV.B.1.

206. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770, 770 n.16 (1984) (citing *Yellow Cab* era cases evincing the then-contemporaneous “general agreement that §1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions”); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 606 (1951), overruled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (“It is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as in the

rule. It holds incorporation or a formal partnership agreement to be dispositive.²⁰⁷ Courts do not engage in searching inquiries into whether the corporation has sufficient control over the shareholders or whether the various parts of the company have a “unity of interest” — the fact of incorporation ends the inquiry.²⁰⁸ This kind of formalism is even more telling in the partnership context where every equity partner in a law firm could, at any time, leave the partnership and become a direct competitor to the firm — but the partners are not viewed as participating in an illegal cartel until they engage another firm in such an agreement.²⁰⁹

The Court surely could re-adopt the *Yellow Cab* rule as to parents and subsidiaries, but such a rule would probably *increase* rather than decrease administrative costs by leading to more suits, especially against companies that organize themselves as separate sister corporations operating in different geographic regions, or against corporations that vertically integrate via subsidiaries. The point, though, is that accepting a new formalistic approach would not necessarily entail accepting the formal rule adopted in *Yellow Cab*.

Similarly, a new formalistic approach need not reject the central holding of *Copperweld* that parents and their wholly-owned subsidiaries need not pretend to be competitors.²¹⁰ A sensible formal rule may be even more expansive than that and provide that, any time two companies have formally organized themselves in a parent/subsidiary relationship, including passing

United State [sic], that would not be a conspiracy. You must have two entities to have a conspiracy.”) (citation omitted); 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1462a, at 199 (“Historically and today, concerted actions by persons within a firm, including a single corporation, is not a contract, combination . . . or conspiracy within the meaning of Sherman Act § 1.”) (citation omitted).

207. See *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 141–42 (1968), *overruled by* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (*Yellow Cab* era decision holding that “since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.”); *supra* note 206.

208. *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992) (holding that officers, employees, a corporate division, and a wholly owned subsidiary were all legally incapable of conspiring with a corporation for Sherman Act purposes).

209. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996).

210. See *supra* Part II.C.2.

through any necessary § 7 hoops,²¹¹ they will be treated as “single entities.” Again, all a new formalistic approach would need to do is simply pick the organizations that “count” as single entities and allow persons to self-sort, policed as necessary by § 7.²¹²

2. Benefits of a New Formalistic Approach

The difference in administrative costs between *Copperweld/American Needle* and a new formalistic approach should be apparent: it is much easier to determine as a matter of fact the answer to the question “is the defendant a wholly owned subsidiary” than to apply the amoebic *Copperweld* factors.

But this difference is not new: formalism is always “easier” for courts to administer than some manner of pragmatic searching inquiry (for the same reason that any bright-line “rule” is easier to apply than a “standard”). So, perhaps the savings in administrative costs is not enough to justify the switch. But two other changes in antitrust law outside of the single-entity context since the *Copperweld* decision have also increased the attractiveness of this already cheaper approach. The first is the Court’s decision in *Twombly*, whose error-cost benefits have been discussed in Part IV.B.1. The second is the Hart-Scott-Rodino Act (HSR).²¹³

HSR created a pre-merger clearance system that requires merging companies to file “Pre-Merger Notification” forms with both the FTC and the Department of Justice (DOJ).²¹⁴ The parties must then wait thirty days before closing the merger, unless either agency makes a “second request” for more information or

211. Note that *acquisitions* of subsidiaries, as occurred in *Copperweld*, would be governed by § 7 and the Hart-Scott-Rodino Act, 15 U.S.C. § 18 (2006). Section 7 polices mergers and acquisitions, and Hart-Scott-Rodino requires preclearance by DOJ and the FTC for certain acquisitions (basically, those that are valued above some threshold). See *infra* Part IV.C.2.

212. Recall that § 7 polices mergers and other forms of asset acquisitions that lead to the transformation of actors from “multiple entities” into “single entities.” See 15 U.S.C. §§ 18–18a (2006).

213. 15 U.S.C. § 18 (2006). The implementing regulations can be found at 16 C.F.R. §§ 801–03 (2011).

214. 15 U.S.C § 18a(b) (2006). Failing to file the pre-merger forms can result in the merger being barred. See *FTC v. McCormick & Co., Inc.*, CIV. A. No. 88–1128, 1988 WL 43791 (D.D.C. Apr. 26, 1988). 15 U.S.C § 18a(g) also provides for civil penalties against “any person, or any officer, director or partner thereof” responsible for failing to file and comply, at a rate of up to \$10,000 per day.

indicates that it will not challenge the merger.²¹⁵ HSR was passed prior to the *Copperweld* decision, in 1976, and pre-merger review has since become a robust and sophisticated area of anti-trust regulatory practice.²¹⁶ Prior to HSR, the government's only ability to regulate mergers came after the fact, and divestiture following a completed merger proved so difficult and ineffective as to be a thoroughly unattractive remedy.²¹⁷ By contrast, enjoining a merger that has not yet been consummated is relatively simple.²¹⁸

The point for this Note is that HSR renders § 7 a useful tool for policing the transformation of multiple entities into single-entity forms — as long as the organizational forms that receive single-entity treatment are limited to the kinds of organizations the formation of which would require HSR pre-merger review. This analysis was not true (or significantly less true, since merger clearance was in its infancy) when *Copperweld* was decided. It is true today, and it makes a formalistic approach much more attractive.

Lastly, a formalistic approach may lead to dynamic improvements in antitrust jurisprudence because it would allow academic criticism to focus on which forms should fall on either side of the single-entity line, according to comparative error and administrative costs. This focus would replace emphasis on which indeterminate factors the courts should consider when determining anew every time a similar business organization is before them whether that form is a single entity. It is worth noting that even outside of the HSR pre-clearance framework, a formalistic approach would still allow a challenge to the *formation* of the single

215. 15 U.S.C. § 18a(b) (waiting period); 15 U.S.C. § 18a(e) (2006) (second requests). The FTC maintains a website with more detailed information on the Act's various reporting requirements. See *Hart-Scott-Rodino Premerger Notification Program*, FED. TRADE COMM'N, <http://www.ftc.gov/bc/hsr/index.shtm> (last visited Sept. 19, 2012).

216. The first set of merger guidelines (now central to merger review) were published in 1968 by DOJ. See *1968 Merger Guidelines*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/hmerger/11247.htm> (last visited Sept. 19, 2012). These guidelines have been updated regularly since 1968, becoming increasingly sophisticated, most recently in 2010. See U.S. STATES DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

217. See POSNER, ANTITRUST, *supra* note 9, at 102–18.

218. *Id.*

entity (as opposed to putative “agreements” between divisions of that entity).²¹⁹

3. *Applications of the New Formalistic Approach*

Thus far, this Note has suggested that a new formalistic approach accept the outcomes of the Supreme Court’s single-entity cases: single entities would include single corporations (including merged entities) and corporations under common ownership (such as parents/subsidiaries and sister corporations), but would not include joint ventures, franchisor/franchisee contractual relationships, members of a professional organization, intellectual property right pools, etc.²²⁰

Tweaking the facts of *American Needle* slightly, imagine a sports league that was not a joint venture among independently owned teams but, rather, was a single corporation that owned all league assets and organized the players into several teams. By every formal measure, the league is a “single entity” in the purest form: a single corporation. This Note’s proposed formalistic approach would treat this league as a “single entity,” even though it

219. See, e.g., *United States v. First Nat’l Bank & Trust Co.*, 376 U.S. 665 (1964); *Nelson v. Monroe Reg’l Med. Ctr.*, 925 F.2d 1555 (7th Cir. 1991); *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278, 1281 (7th Cir. 1990) (all cases involving private challenges to mergers).

220. In *Williams v. Nevada*, 999 F.2d 445, 447 (9th Cir. 1993), the court found single-entity status between a fast-food franchisor and franchisee, but one suspects this will not be where the law settles. See Suzanne E. Wachsstock & Erika L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees under Section 1*, 23 *FRANCHISE L.J.* 7, 7 (2003) (noting “eyebrow-raising nature” of a finding of single-entity status between franchisor and franchisee). A franchisor essentially sells licenses to its intellectual property (IP). See *BLACK’S LAW DICTIONARY* 729 (9th ed. 2009). It is unclear why a franchisor’s contracts with IP licensees and any restraints therein should be any less an “agreement” than any other kind of exclusive dealing contract. Note that franchisors are already regularly subject to “tying” claims, which are based on § 1. See, e.g., *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436–43 (3d Cir. 1997) (considering tying claim by franchisees against franchisors); Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a “Kodak Moment”?*, 21 *FRANCHISE L.J.* 1, 1 (2001) (explaining circumstances under which franchisor/franchisee tying arrangement violates § 1); 7 *AREEDA & HOVENKAMP*, *supra* note 14, ¶1478, at 364 (“[T]he courts have nearly always dealt with [franchisee] claims . . . as if they involved concerted action. This is so even if the only purpose of incorporating a particular McDonald’s franchisee is to serve as part of the McDonald’s franchise.”). A tying arrangement is one in which “the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product.” *Allen-Myland, Inc. v. Int’l Bus. Machines Corp.*, 33 F.3d 194, 200 (3d Cir. 1994).

would not confer the same treatment on the NFL as it exists today.

But some scholars take issue with treating the NFL differently from a league that is owned and operated as a single entity (as opposed to a joint venture).²²¹ Professors Devlin and Jacobs, for example, posit that the NFL could have been formed in 1992 as a formal single entity, and that such “historical accident” would not justify “such asymmetric treatment.”²²² But this criticism ignores the fundamental distinction that antitrust law already makes between cartels and monopolies, and the reasons for that distinction. The law treats cartels relatively more harshly because of the ease and speed with which they can be formed.²²³ In contrast, a monopoly takes time (perhaps a very long time) to grow and expand; a cartel can be formed in one meeting.²²⁴ Furthermore, a monopolist can become a monopolist by means of innovation.²²⁵ So, the monopolist can charge a monopoly price, but a group of individuals who are horizontal competitors cannot form a cartel and charge a cartel price. This is unproblematic even though, ex post, a monopolist exacts more economic harm than a cartel.

By the same principle, there should be no discomfort in treating the NFL differently from a single-corporation sports league. The NFL was never organized as a single-entity structure — it grew to its present size as a joint venture of independently owned firms.²²⁶ By contrast, Major League Soccer (MLS), assuming it is a pure single corporation as in the hypothetical,²²⁷ was a single-entity structure from the beginning. It is impossible to know whether MLS could have existed as a joint venture instead of a single entity. If the NFL had initially formed as a single entity

221. Devlin & Jacobs, *supra* note 148, at 558–59.

222. *Id.* at 559.

223. See HOVENKAMP, *supra* note 28, at 23–24 (2005) (discussing reasons why antitrust law is more skeptical of cartels than monopolists).

224. *Id.* at 24.

225. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

226. See *Am. Needle v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

227. Note that as a factual matter this may or may not be true. Dicta from *Fraser v. Major League Soccer, L.L.C.* would suggest otherwise. See 284 F.3d 47, 56–58 (1st Cir. 2002) (concluding that the MLS is not a “single entity” but finding harmless a contrary ruling below). However, dictum within that dicta would seemingly accept the hypothetical league as a “single entity.” See *Fraser*, 284 F.3d at 56 (“If ordinary investors decided to set up a company that would own and manage all of the teams in a league, it is hard to see why this arrangement would fall outside *Copperweld's* safe harbor.”).

and grew organically like MLS, it too would be a “single entity.” Thus, there is nothing wrong with treating the NFL differently from MLS — at least nothing more wrong than there is in treating cartels differently from monopolies.

4. *Objections to a Formalistic Approach*

(a) *Providing Cover for Cartels?*

A standard objection to any formalistic approach when it comes to single-entity doctrine is the fairly common refrain that cartels should not have the ability to organize themselves in such a way as to avoid § 1 liability.²²⁸ However, this concern is inapposite if the courts limit single-entity status to corporate structures regulated by § 7 of the Clayton Act. If courts do so, a formal approach would change nothing in this regard — cartels without market power can already merge if they so choose, if their merger is approved under the HSR framework. Formality in application of § 1 has no obvious effect on the ability of § 7 to police mergers that could lead to collusion. Section 7 merger review would look exactly the same the day before the Court adopted a formalistic approach to single-entity doctrine as it would the day after.

Nor would this formalistic approach give cover to members of a cartel who create a corporation, place their individual CEOs on the board of directors, and give the corporation authority over the individual firm’s output and prices.²²⁹ Certainly, the “cartel manager” corporation would itself be treated as a single entity. But this would not necessarily immunize the cartel members or even the cartel manager corporation from § 1 liability. For instance, whatever transaction led to the cartel manager’s acquisition of control over the cartelists’ prices and output would itself be a vertical agreement subject to § 1 scrutiny.²³⁰ Furthermore, to the extent that the cartel manager structure itself evinced an agree-

228. See Amicus Curiae Brief of Economists in Support of Petitioner, *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661), 2009 WL 3090453, at *34; Hovenkamp & Leslie, *supra* note 3, at 824.

229. This example is from Hovenkamp & Leslie, *supra* note 3, at 824.

230. Cf. 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1478, at 358 (noting that, even if the NFL were a single entity, the conduct at issue included an exclusive contract between the NFL and Reebok such that, if the plaintiff’s litigation strategy were different, the challenged conduct included an “agreement” and would have been reachable by § 1).

ment among the cartelists to use this particular cartel manager, that agreement, too, would be reachable by § 1.²³¹

In this way, under a formalistic approach, the NFLP can still be treated differently from a record label, for example.²³² Superficially, as this author understands it, both the NFLP and RCA Records perform very similar tasks: they pool intellectual property and coordinate the production, manufacture, and distribution of goods related to that intellectual property. But the NFLP was created and is managed today by a horizontal agreement among the NFL teams as a joint venture.²³³ This formation is an agreement, and its exclusive contracts are a restraint of trade. This does not mean that the NFLP is anticompetitive.²³⁴ By contrast, there is no reason to suspect that RCA exists by virtue of a horizontal agreement among its myriad musical artists.²³⁵

(b) *Subsidizing Inefficient Mergers?*

A second objection to a formalistic rule is that it would encourage a suboptimal business organization by subsidizing inefficient mergers. Firms integrate for many reasons. Integration might be the result of a Coaseian cost/benefit analysis as to the comparative costs of internalizing a given transaction and engaging the market.²³⁶ Another reason might be that the economic

231. Cf. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939) (upholding finding by district court of a horizontal agreement based on such indirect evidence). The *Sealy* conspiracy, too, discussed in *infra* Part IV.C.4.c, would have been reachable on this theory.

232. Thanks to my advisor, Dr. Victor Goldberg, for suggesting this scenario.

233. *Am. Needle*, 130 S. Ct. at 2207.

234. Far from it, in fact. Even bracketing the dirty “secret” of antitrust that plaintiffs almost never win rule of reason cases, Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009), there is every reason to believe the NFLP structure will be upheld on remand. For arguments relevant to a full-blown rule of reason analysis of the NFLP trademark pool, see Brief of Economists as Amici Curiae in Support of Respondents, *Am. Needle*, 130 S. Ct. 2201 (No. 08-661), 2009 WL 4247983; Amicus Curiae Brief, *supra* note 228; 7 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1478d2, at 357–68; 3 J. THOMAS MCCARTHY, MCCARTY ON TRADEMARKS AND UNFAIR COMPETITION §§ 18.5–18.6 (4th 3d. 2009) (describing interest in quality control by trademark licensor over licensee’s output).

235. See *Artists*, RCA RECORDS, <http://www.rcarecords.com/artists> (last visited Sept. 20, 2012) for a list of RCA artists. Professors Hovenkamp and Leslie give a similar example of an artist hanging her painting in a consignment gallery, along with twenty different artists. See Hovenkamp & Leslie, *supra* note 3, at 851.

236. There is a rich and abundant literature on the “theory of the firm” stemming from Ronald Coase’s seminal work. Ronald Coase, *The Nature of the Firm*, 4 ECONOMIC 386

actors who are integrating have such cumulative market power that the rents they can obtain by integration outweigh whatever inefficiencies are associated with a non-Coaseian integration.²³⁷ Additionally, it is possible that actors will inefficiently integrate if the costs of possible § 1 scrutiny outweigh any efficiencies that exist by incomplete integration (say, by operation as a joint venture).²³⁸

A second objection (a rejoinder to the answer to the “cover” objection) would be that this Note’s formalistic approach would increase the risk of inefficient mergers whose function is merely to avoid § 1 scrutiny.²³⁹ This objection is not entirely incorrect, but there are reasons to believe that the specter it raises is not very troubling.

First, the change might not be great in this regard. As long as antitrust refuses to find § 1 agreements within a single formally organized corporation, there will always be an incentive to integrate beyond what Coaseian efficiencies would provide. More emphatically, this incentive will always exist as long as antitrust law looks askance at concerted activity, and as long as courts are imperfect, such that non-integrated transactions always bear

(1937). Under Coaseian theory, firms exist because they are able to substitute internal “rule” transactions for more costly external “market transactions” and will continue to integrate various functions (including via merger) “until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organizing in another firm.” *Id.* at 395. For more on the “theory of the firm,” see Daniel F. Spulber, MARKET MICROSTRUCTURE: INTERMEDIARIES AND THEORY OF THE FIRM xiii (1999) (arguing that the firm structure may provide advantages over market exchanges by reducing transaction costs, pooling and diversifying risk, lowering search costs, and reducing free-riding problems); Williamson, *supra* note 90, at 10 (arguing that integration allows parties to carry out activities that involve high relationship-specific investments within the firm rather than through the marketplace).

237. See generally Eric Devos et al., *How do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies*, 22 REV. FIN. STUD. 1179 (2009).

238. See 11 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1906 at 259–62 (discussing efficiency-enhancing ancillary restraints in joint ventures); Hovenkamp & Leslie, *supra* note 3, at 818 (arguing that joint ventures can reduce development, production, or distribution costs, and can be profitable whether or not the participants have market power).

239. See Brief of Economists, *supra* note 234, at *4 (arguing that legal standards can cause firms to adopt legal structures that the firm or league would not have selected for pure efficiency or competition reasons); Dennis W. Carlton et al., *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in National Hockey League*, 112 J. POLIT. ECON. S268, S271 n.9 (2004) (noting that the pre-American Needle circuit split had caused some professional sports leagues to organize with all teams owned by a single corporation); Stone & Wright, *supra* note 64, at 375–76, 397.

some risk of antitrust scrutiny (put another way, as long as antitrust law exists).²⁴⁰

Furthermore, it is not entirely clear that current law would provide single-entity status to more types of business organizations than this Note suggests. Again, the harm associated with current doctrine is not that it covers too many types of organizations but, rather, that its disavowal of formalism leads to so much uncertainty. Nevertheless, this second objection is not entirely incorrect. Setting aside the possibility that the uncertainty itself may lead to difficulties for business planning, it may be that the uncertainty associated with current doctrine gives at least some classes of defendants enough “cover” that they forego inefficient, § 1-immunizing integration.

But this would seemingly be a *de minimis* class: defendants (1) who would inefficiently integrate, (2) and whose integration would pass § 7 muster, (3) but do not integrate *only because* of the colorable arguments provided by the uncertainties of *Copperweld* and *American Needle* (which create a risk premium for plaintiffs bringing suit). If this class exists, their integration would concededly be a social cost.

(c) *A Return to Sealy and Topco?*

Another criticism of this new formalistic approach is that it would return to or reaffirm the much maligned decisions of *United States v. Sealy, Inc.*²⁴¹ and *United States v. Topco Assocs., Inc.*²⁴²

Both cases have similar fact patterns. *Sealy* involved a joint venture among thirty bedding manufacturers who owned substantially all of the stock of Sealy, Inc., which produced and owned a common trademark used by the manufacturers.²⁴³ Sealy then licensed the trademark back to the manufacturers with territorial limitations, though each manufacturer could sell outside of the territorial restrictions under its own brand name.²⁴⁴ *Topco*

240. See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 603 (2000) (“[The] inability of courts . . . to verify what is common knowledge between the parties to an exchange could induce a move from inter-firm to intrafirm organization.”).

241. 388 U.S. 350 (1967).

242. 405 U.S. 596 (1972).

243. *Sealy*, 388 U.S. at 351–53.

244. *Id.*

involved a purchasing co-operative of approximately twenty-five small- and medium-sized regional supermarket chains.²⁴⁵ The co-op served as a purchasing agent for the chains, purchasing goods that would then be sold by the chains under the Topco trademark.²⁴⁶ In both cases, the Supreme Court found territorial restrictions related to use of the joint ventures' trademarks to be per se violations of § 1.²⁴⁷

In one sense, both decisions would be reaffirmed to the extent that they both refused to treat joint ventures as single entities. But the decisions *would not* be reaffirmed in that aspect of the decisions that precipitated their rampant criticism: application of the per se rule. Both cases have been heavily (and rightly) criticized,²⁴⁸ but not because the Court found conspiratorial capacity. Rather, they have been criticized for applying a rule of per se illegality; on that latter point, the cases are probably no longer good law.²⁴⁹

245. *Topco*, 405 U.S. at 598.

246. *Topco*, 405 U.S. at 598.

247. *Id.* at 608–09; *Sealy*, 388 U.S. 355–57.

248. See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX* 270 (1978); 11 AREEDA & HOVENKAMP, *supra* note 14, ¶ 1910c2, at 313–19; 13 AREEDA & HOVENKAMP, *supra* note 15, ¶ 2134c, at 208–38; Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 428 (1965); Alan Devlin, *Antitrust in an Era of Market Failure* 33 HARV J.L. & PUB. POL'Y 557, 567 nn.36–37 (2010); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 155 n.37 (1984); Victor Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91, 109 n.77 (1979); Milton Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 420–21 (1973); William K. Jones, *An Example of a Regulatory Alternative to Antitrust: New York Utilities in the Early Seventies*, 73 COLUM. L. REV. 462, 466 n.8 (1973); Mark A. Lemley & Christopher R. Leslie *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1260 (2008); Liebel, *Cartels*, *supra* note 5, at 36–40; Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 79 n.91 (1984); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 295 n.50 (1975); Richard Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508 (1974); Edward C. Smith, *Trademarks & Antitrust: The Misuse Defense under Section 33(b)(7) of the Lanham Act*, 4 HARV. J.L. & PUB. POL'Y 161, 194 (1981); Adam Weg, Note, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535, 1549 (2009) (all criticizing one or both of the cases).

249. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–29 (D.C. Cir. 1986) (Bork, J.) (concluding that subsequent case law has overruled the “per se” aspect of *Topco* and, by implication, *Sealy*); *Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield United of Wis.*, 1993 WL 78756, at *13–14 (N.D. Ill. Feb. 26, 1993) (noting that subsequent cases have cast doubt on whether the per se aspect of *Topco* is still good law); *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 n.2 (1st Cir. 1999) (same). *But see* *Bascom Food Prods. Corp. v. Reese Finer*

And this Note does not suggest that they should be.²⁵⁰ To be sure, the reasoning in both *Sealy* and *Topco* can be described as very formalistic: territorial allocation (or price-fixing) plus characterization of conduct as “horizontal” equals per se illegality. But this Note is proposing a formalistic approach *only* as to the determination of single-entity status, not a formalistic approach in the application of the various per se rules that exist in antitrust law. If the two necessarily went hand-in-hand, the error costs would be so great that this Note’s thesis would be in tatters. This Note’s new formalistic approach would only answer the question of whether § 1 applies at all — formalism surely should not answer when restraints governed by § 1 are declared illegal. Once the merits of a restraint are reached, what is always required is an inquiry “meet for the case,”²⁵¹ such that a territorial allocation by otherwise unrelated horizontal competitors need not be treated the same as a territorial allocation ancillary to an otherwise lawful joint venture’s trademark. If antitrust law were again to treat those two scenarios the same way, then the game would be up, and no amount of tinkering with single-entity doctrine would help.

V. CONCLUSION

The expansive and indeterminate *Copperweld* doctrine was an appropriate response to its time — taking advantage of the agreement requirement of § 1 as a way of filtering out marginal cases during an era of relatively harsh antitrust treatment, especially of vertical restraints. But this error-cost filter came at a price to social welfare. The indeterminacy of the *Copperweld* factors, continued in *American Needle*, increases the administrative costs of antitrust litigation, especially for complex joint ventures, franchises, less-than-completely-owned subsidiaries and sister corporations, intellectual property pools, trade associations, stan-

Foods, Inc., 715 F. Supp. 616, 630–33 (D.N.J. 1989) (concluding that *Topco* was still good law, despite subsequent case law).

250. Dr. Goldberg has noted that one of the *Sealy* firms executed a roll-up of many *Sealy* dealers, and that this set of mergers did not raise a § 7 objection. This is fine: if merger law allows multiple parties to merge, there is nothing left for § 1 to do. Although beyond the scope of this Note, if § 7 is too lenient (and it is not apparent that it is), this is a problem for § 7 merger jurisprudence, not § 1 jurisprudence.

251. Cal. Dental Ass’n v. FTC, 526 U.S. 756, 781 (1999).

dard-setting organizations, and the like. Consumers likely feel the effects as these costs are passed through.

It may be that these costs were worth the doctrine's error-cost filtering function in 1984. But this is likely not true today. First, post-*Twombly*, rule of reason analysis is so defendant-friendly that there are many fewer error-cost gains to be had by a capacious and indeterminate single-entity doctrine. Second, the increased sophistication of modern pre-merger review reduces the likelihood that collusive firms will merge in order to take advantage of formalistic review. It seems clear that, today, the *Copperweld* game is not worth the administrative costs candle.

If *Copperweld* was a product of its time, it has become antiquated and should be retired.