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1985]

## THE LONG AWAITED DEATH KNELL OF THE INTRA- ENTERPRISE DOCTRINE

### I. INTRODUCTION

In the wake of proliferating trusts and an increasing tendency towards concentration of resources through the growth of large industrial concerns, Congress enacted the Sherman Act in 1890.<sup>1</sup> The Act's major purpose was to preserve and promote competition in the market place,<sup>2</sup>

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1. THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 9-13 (1978) [hereinafter cited as LEGISLATIVE HISTORY]. See Sherman Act, ch. 647, §§ 1-8, 26 Stat. 209-10 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

The Supreme Court has stated that the main cause which led to the [Sherman Act] was the thought that it was required by the economic conditions of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

The economic conditions of the 1890's were a result of the rapid industrial and economic expansion of the post-Civil War era. LEGISLATIVE HISTORY, *supra*, at 9. That expansion was stimulated by scientific and technological innovations and by a government policy of laissez-faire which encouraged an individual entrepreneurial spirit. *Id.* As the scope of commercial activity increased and as the number of corporations thereby multiplied, competing corporations combined under the trust mechanism with increasing frequency in order to lessen the competition faced by each. *Id.* at 10. In this way, the corporations were able to take advantage of centralized management and aggregation of capital to jointly control the supply and price of goods, such that they were able to divide markets, share increased profits, discriminate against other entities, and otherwise wield their combined economic power. *Id.* Because of an inherent distrust of big business and because of various other social and political factors, the public blamed these trusts for all of their ills. *Id.* at 11. Thus, the public's agitation for antimonopoly laws spurred the politically expedient Sherman Act. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 222, 226, 247-49 (1956). Speaking to Congress concerning the new law, Senator Sherman cautioned, however, that "[i]t [was only] the unlawful combination, tested by the rules of common law and human experience, that [was] aimed at by this bill, and not the lawful and useful combination." 21 CONG. REC. 2457 (1890). See generally A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 14-21 (3d ed. 1980) (political and economic atmosphere inducing the enactment of the Sherman Act).

2. United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is . . . in a word to preserve the right of freedom to trade."); A. AUSTIN: LAW, ECONOMICS, AND POLICY § 3.2 (1976); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 64, at 167 (1977). The Supreme Court recently reaffirmed this concept when it stated that the Sherman Act aims to foster that form of competition which, in turn, will advance consumer interests in the mar-

thereby preventing vast agglomerations of economic power and the formation of trusts, which were considered anticompetitive and injurious to the public.<sup>3</sup> To effectuate this goal, Congress drafted section 1 of the

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ket-place. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 (1984). The Court qualified this statement, however, by noting that the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Id.* at n.14 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))) (emphasis supplied by *Brown Court*).

The underlying premise of the Sherman Act's procompetitive notion is that unrestrained competition leads to the most efficient allocation of resources, ultimately benefiting the public, while concurrently providing an environment conducive to the preservation of our democratic political and social ideals. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). For a thorough discussion of the economic and social objectives of the antitrust laws, see 1 P. AREDA & D. TURNER, *ANTITRUST LAW*, ¶¶ 103-113 (1978) (economic objectives include promotion of competition and efficiency; social objectives include "fairness" and distribution of opportunities).

3. 21 CONG. REC. 2457 (1890) (statement of Senator Sherman). During the Senate debate of the Sherman Act, Senator Sherman discussed trusts, stating that

[t]he sole object of [a trust] is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. . . . Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now.

*Id.*

The Supreme Court has recognized, however, that large size may in some instances be desirable where it is necessary for efficient operation in research, manufacture, and distribution. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 386 (1956). And as Senator Sherman even noted:

The combination of labor and capital in the form of a corporation to carry on any lawful business is a proper and useful expedient, especially for great enterprises of a quasi public character, and ought to be encouraged and protected as tending to cheapen the cost of production, but these corporate rights should be open to all upon the same terms and conditions.

21 CONG. REC. 2457 (1890).

Thus, the Sherman Act presents an attempt to balance the two major economic forces of competition and combination. LEGISLATIVE HISTORY, *supra* note 1, at 28-29. Congressman Stewart commented that "both [competition and combination] ought to exist. Both ought to be under restraint. Either of them, if allowed to be unrestrained, is destructive of the material interests of this country." 21 CONG. REC. 5956 (1890).

Act<sup>4</sup> to outlaw concerted conduct that restrains trade,<sup>5</sup> and section 2<sup>6</sup> to prevent unilateral conduct that threatens actual monopolization.<sup>7</sup> Con-

4. 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act provides as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Id.*

5. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 (1984). The intent of § 1 is to prevent "a sudden joining of two independent sources of economic power previously pursuing separate interests . . ." *Id.* at 2742. Thus, § 1 does not reach conduct that is "wholly unilateral." *Montsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1469 (1984); *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968). Rather, § 1 seeks "to prohibit collaboration by independent business entities that inhibits competition." Note, "*Conspiring Entities*" Under Section 1 of the Sherman Act, 95 HARV. L. REV. 661, 663 (1982) [hereinafter cited as Note, "*Conspiring Entities*"]. The major reason behind preserving "independent sources of economic power" is the prevention of socially undesirable cartel behavior and its equally undesirable effects on the marketplace, especially the price distortion that often results from collusive behavior. Comment, *Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach*, 71 CALIF. L. REV. 1732, 1732 (1983); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 737 (1977) [hereinafter cited as Note, *Intra-Enterprise Conspiracy*]. For a discussion of the perceived injurious effects of trusts, see *supra* notes 1-3 and accompanying text.

In addressing the Senate, Senator Sherman stressed that the object of the Act (which at the time contained the provisions of § 1 but not those of § 2) was not to create new law, but rather to codify for federal purposes old and well recognized principles of common law that prohibited combinations in restraint of trade and production as against public policy. 21 CONG. REC. 2456 (1890). Thus, § 1 is not aimed at all combinations, but only those that threaten the industrial liberty of individuals to engage in free and fair competition, i.e., those combinations formed with a view of preventing competition or restraining trade. *Id.* at 2457. For a discussion of the elements of a § 1 violation, see *infra* notes 10-15 and accompanying text.

6. 15 U.S.C. § 2 (1982). Section 2 of the Sherman Act provides as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Id.*

7. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2740 (1984). Section 2 proscribes monopolies, attempts to monopolize, and combinations or conspiracies to monopolize. 15 U.S.C. § 2 (1982). Therefore, that section applies to both unilateral and concerted action. LEGISLATIVE HISTORY, *supra* note 1, at 32. Section 2 is principally concerned, however, with unilateral behavior that seeks unwarranted control over a particular market. *Id.*

gress deliberately chose to scrutinize concerted behavior more strictly than single firm behavior for fear of inhibiting the type of conduct the Sherman Act was designed to encourage.<sup>8</sup>

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The Supreme Court has defined monopoly power for purposes of § 2 as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Thus, the goal of § 2 is to control undesirable single-firm size and power that allows the firm to force its will upon the market. See Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 737. Monopoly power is considered detrimental to the public welfare because its acquisition allows a single dominant entity to dictate the price, quantity, or quality of goods available to the public. *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911).

Recovery under § 2 for monopolization is generally granted where the plaintiff proves the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Monopoly power which is obtained as a consequence of a superior product, business acumen, or historical accident is not proscribed by the Act. *Id.* at 571. Recovery under § 2 for attempt or conspiracy to monopolize is granted only when the plaintiff proves a specific or relevant market that is the object of the attempt, a specific intent to monopolize that market, conduct designed to implement that intent, and a dangerous probability of success. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945). For a comprehensive review of cases concerning attempted monopolization, see Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373 (1974).

Although the potential scope of § 2 is broad, "[a]s currently construed, § 2 can reach only a narrow range of cases where single firm anticompetitive conduct is present." Comment, *supra* note 5, at 1732 n.6 (citing NATIONAL COMMISSION FOR THE REVIEW OF THE ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 145 (1979)). The reason for § 2's narrow construction is to permit corporations to take advantage of the benefits of efficiencies of scale. See McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 185 (1955).

8. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2741 (1984). Although Congress failed to articulate in debates concerning the Sherman Act the reasons for treating unilateral conduct differently than concerted conduct, it is clear from those debates and the evolution of the Act that the distinction was intentional. See LEGISLATIVE HISTORY, *supra* note 1, at 23-25; 21 CONG. REC. 3152 (1890) (statements of Senators Edmunds, Gray, and Hoar). This is evidenced by the fact that a proposed amendment by Senator Gray to change § 2 so that it would apply only to conspiracies to monopolize was rejected. *Id.* Furthermore, in opposing the proposed amendment, Senator Edmunds, the chairman of the Senate Judiciary Committee that drafted § 2 to accompany Senator Sherman's § 1, stated;

So I assure my friends that although we may be mistaken . . . we were not blind to the very suggestions which have been made [by Senator Gray], and we thought we had done the right thing in providing, in the very phrase we did, that if one person instead of two, by a combination, if one person alone . . . did it, it was just as offensive and injurious to the public interest as if two had combined to do it.

21 CONG. REC. 3152 (1890) (statement of Senator Edmunds). The Supreme Court has also acknowledged Congress' deliberate distinction between the scope of § 1 and § 2. See *Copperweld Corp. v. Independence Tube Co.*, 104 S. Ct. 2731, 2740-41 (1984).

The major reason underlying Congress' more intense scrutiny of concerted behavior may be its awareness that some businesses must be of considerable size

Section 1 prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade . . . .”<sup>9</sup> This section is violated when two or more persons<sup>10</sup> conspire<sup>11</sup> to restrain<sup>12</sup> unreasonably<sup>13</sup> interstate

to operate at peak efficiency. *See supra* notes 2-3. Because robust competition by a single firm aimed at procuring peak operating efficiency may sometimes be difficult to distinguish from conduct with long-run anticompetitive effects, the Supreme Court surmised that Congress tried to shelter unilateral competitive conduct from unwarranted liability by subjecting it to condemnation under the antitrust laws only when it posed a danger of monopolization. *Copperweld*, 104 S. Ct. at 2740. Otherwise, if § 1’s lesser standard of “retraining trade” were to be applied to a single firm’s conduct, the effect might be to inhibit single firms from engaging in fiercely competitive activity, contrary to the purpose of the antitrust laws. *Id.*

On the other hand, if two or more firms were to combine or to conspire to act for their common benefit, the risk that the combination would produce anticompetitive effects would be very great. *Id.* The combination would necessarily reduce the diverse directions in which economic power was aimed. *Id.* at 2741. Although such merging of resources could lead to economies of scale that benefit consumers, such activity would also deprive the marketplace of independent centers of decisionmaking. *Id.* Because concerted activity was more likely to result in a restraint of trade than to generate an economic benefit, Congress determined that concerted activity warranted scrutiny even in the absence of threatened monopolization. *Id.* *See also* McQuade, *supra* note 7, at 185 (greater number of independent competitors is preferred because they increase the likelihood of mechanical—as opposed to manipulated—market determinations); Note, *May Unincorporated Divisions of a Single Corporation Conspire Among Themselves in Violation of Section One of the Sherman Act?*, 48 B.U.L. REV. 303, 308 (1968) (unitary business entity’s conduct, requiring power to make decisions, should be accorded different treatment than coordinated multicorporate behavior).

9. 15 U.S.C. § 1 (1982). “Contract, combination . . . or conspiracy” represents a single concept roughly translated as meaning “‘concerted’ action.” *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977) (quoting L. SULLIVAN, *supra* note 2, § 312), *cert. denied*, 434 U.S. 1086 (1978). Although the three terms are sometimes used interchangeably, the term “conspiracy” is most prevalent and thus will be used in this note to refer to the general concept. For the full text of § 1, see *supra* note 4.

10. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); L. SULLIVAN, *supra* note 2, § 108, at 311. For purposes of the Sherman Act, the word “person” or “persons” includes “corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911); 15 U.S.C. § 7 (1982).

11. *See* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 490 (1940); 15 U.S.C. § 1 (1982). “A classic conspiracy has occurred only when common action has been taken in furtherance of some common design, only if the actors have become a group and have reached an accord about how they will act.” L. SULLIVAN, *supra* note 2, § 110, at 315; *see* *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (“conscious commitment to a common scheme designed to achieve an unlawful objective”) (citations omitted), *cert. denied*, 451 U.S. 911 (1981). Thus, a conspiracy presupposes an “agreement” among the conspirators. *See* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 387 (1951). The agreement need not be express, but may be implied from the conduct of the parties. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948) (“[i]t is enough that a concert of action is contemplated and that the

defendants conformed to the arrangement") (citations omitted). Because an agreement to restrain trade is often not expressed, its existence may be inferred from circumstantial evidence. *Id.* (horizontal conspiracy between various movie distributors in violation of § 1 inferred from pattern of price fixing disclosed in trial record); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939) (inference of conspiracy in violation of Sherman Act drawn from nature and manner of proposals by movie exhibitors to movie distributors, as well as from unanimity of action by distributors). Only an agreement need be proved. The course agreed upon need not be carried out successfully nor need there be an actual injury to competition. L. SULLIVAN, *supra* note 2, § 109, at 312. The evidence, however, should exclude the possibility that the alleged violators were acting independently. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1471 (1984).

12. See 15 U.S.C. § 1 (1982). Generally, antitrust injury need not be shown in order to prove a conspiracy in violation of § 1. L. SULLIVAN, *supra* note 2, § 109, at 312. Only an agreement to restrain trade need be proved. *Id.* In an alleged § 1 violation under the rule of reason, however, actual harm to competition must be demonstrated for a cause of action to lie. *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310, 322 (7th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 2731 (1984).

13. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911). The language of § 1 prohibits all conspiracies "in restraint of trade." 15 U.S.C. § 1 (1982). Read literally, this statute would prohibit all agreements pertaining to trade because every commercial agreement involves some restriction of the rights of the parties to the agreement. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Consequently, the Supreme Court has determined that the only agreements which violate § 1 are those that unreasonably, or unduly, restrain trade. *Standard Oil*, 221 U.S. at 59-60, 64. The term "undue restraint of trade" includes both those agreements whose major purpose is to reduce competition, as well as those which, regardless of motive, have a significant tendency to reduce competition. A. NEALE & D. GOYDER, *supra* note 1, at 21-24; L. SULLIVAN, *supra* note 2, § 63, at 166.

Courts apply two methods in determining whether an agreement constitutes an unreasonable restraint of trade, the rule of reason and the per se approach. L. SULLIVAN, *supra* note 2, § 63, at 166. Under the rule of reason, the court examines the facts surrounding the agreement in order to ascertain if competition is unreasonably restricted. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 31, at 685-86 (1971) (citing *White Motor Co. v. United States*, 372 U.S. 253 (1963)). In what has become a classic statement of the rule, Justice Brandeis explained:

The true test of legality [of an agreement] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

On the other hand, per se violations are "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse

trade.<sup>14</sup> Thus, one requisite element of a section 1 violation is a plurality of actors.<sup>15</sup>

In determining what constitutes a plurality of actors under section 1, the lower federal courts generally have held that the officers or employees of a corporation are legally incapable of conspiring among themselves or with their corporation because there is in effect only one actor.<sup>16</sup> The courts have reached this conclusion by reasoning that be-

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for their use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (tying arrangement held illegal per se where seller possesses sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product). *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (horizontal market division arrangement held illegal per se); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 228 (1940) (price-fixing agreement is illegal per se).

14. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). Section 1 is also violated by a conspiracy to restrain trade with foreign nations. *Id.* *See* 15 U.S.C. § 1 (1982).

15. *See United States v. Colgate & Co.*, 250 U.S. 300, 302, 304 (1919); *Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine*, 3 *CARDOZO L. REV.* 23, 24 (1981). Because the word conspiracy suggests the joining together of distinct entities, *a fortiori*, a conspiracy theory is not supported by unilateral action. Note, *supra* note 8, at 303. *See generally* *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 606 (1951) (Jackson, J., dissenting); *Barndt, Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 *MONT. L. REV.* 158, 159 (1962). For a historical explanation of the joint action requirement, see *Rahl, Conspiracy and the Antitrust Laws*, 44 *ILL. L. REV.* 743, 744-48 (1950).

16. *See, e.g., Tose v. First Pa. Bank*, 648 F.2d 879, 893-94 (3d Cir.) (corporation and officers), *cert. denied*, 454 U.S. 893 (1981); *Card v. National Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979) (corporation and sales agents); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978) (corporation and manager of company-owned store); *Spectrofuge Corp. v. Beckman Indus.*, 575 F.2d 256, 287 (5th Cir. 1978) (corporation and employees), *cert. denied*, 440 U.S. 939 (1979); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 654 n.7 (5th Cir. 1977) (corporation, officers, and employees); *Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc.*, 531 F.2d 910, 916-17 (8th Cir. 1976) (corporation and officers); *Walker v. Providence Journal Co.*, 493 F.2d 82, 87 (1st Cir. 1974) (corporation and employees); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 & n.9 (9th Cir. 1969) (corporation, officer, sales director, and sales agent); *Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 617 (3d Cir. 1960) (corporation and president/sole shareholder); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (corporation, president, sales manager, officers, employees, and agents), *cert. denied*, 345 U.S. 925 (1953). *But see* *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) (accepting general rule but finding exception if officer has personal stake in alleged conspiracy); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F.2d 600, 605 (8th Cir. 1942) (concerted acts of corporation and officers within ambit of Sherman Act where alleged violation concerns matters of sufficient general public interest); *Patterson v. United States*, 222 F. 599, 618-19 (6th Cir.) (officers or agents of corporation capable of conspiring on behalf of their corporation in violation of § 1), *cert. denied*, 238 U.S. 635 (1915).

The Supreme Court has never considered whether intracorporate agreements between officers or employees of a single firm come within the purview of § 1. *See* *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2741 (1984); Note, "*Conspiring Entities*," *supra* note 5, at 662-63.



cause a corporation is able to act only through its officers or employees, their actions on behalf of the corporation in making agreements or setting policies constitute actions of the individual corporation, not those of separate economic entities.<sup>17</sup> Similarly, the courts have held that an unincorporated division of a corporation is legally incapable of conspiring with the corporation's other divisions<sup>18</sup> or with the corporation itself<sup>19</sup> because a division, as simply an organizational subunit of a

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17. Handler & Smart, *supra* note 15, at 46. See, e.g., H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978) (plurality requirement of Sherman Act loses all meaning if agreement between corporation and employees could be a conspiracy because corporation able to act only through employees); Spectrofuge Corp. v. Beckman Indus., 575 F.2d 256, 286-87 (5th Cir. 1978) (§ 1 offense requires concerted action between separate business entities), *cert. denied*, 440 U.S. 939 (1979); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 916-17 (8th Cir. 1976) (corporation and officers incapable of conspiring, except where agent or officer acting beyond scope of authority or for own benefit); Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960) (corporation acting through proper agent is not plurality of actors); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) (Sherman Act does not purport to cover conspiracy consisting of officers of corporation performing day-to-day jobs in implementing managerial policy; because employees are only medium through which corporation can act, acts of agent are acts of corporation), *cert. denied*, 345 U.S. 925 (1953).

The Supreme Court recently supported the notion that officers and employees of the same firm do not represent the plurality of actors required by § 1 in an opinion that is the subject of this note. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2741 (1984). Although nothing in the literal language of § 1 precludes its application to coordinated conduct among officers and employees of the same corporation, the Supreme Court reasoned that such conduct does not pose the antitrust dangers contemplated by § 1 because separate economic actors pursuing separate economic interests are not suddenly joining. *Id.* Rather, as the Court noted, the officers and employees act on behalf of their corporation in implementing its single, unitary policy. *Id.* Such internal coordination is usually necessary for the corporation to compete effectively. *Id.*

18. See, e.g., *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80-84 (9th Cir. 1969) (rejects notion that divisions of single corporation are capable of conspiring because no practical way to avoid labeling all intracorporate agreements as conspiracies to restrain trade), *cert. denied*, 396 U.S. 1062 (1970).

19. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 606 (1951) (Jackson, J., dissenting) (corporation and its British and French subsidiaries incapable of conspiring if subsidiaries are unincorporated divisions); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 206 (5th Cir. 1969) (unincorporated division is not separate legal entity, but rather part of the corporation); *Poller v. Columbia Broadcasting Sys.*, 284 F.2d 599, 603 (D.C. Cir. 1960) (charge that corporation and unincorporated division conspired is in reality charge that corporation conspired with itself), *rev'd on other grounds*, 368 U.S. 464 (1962); *J.W.T., Inc. v. Joseph E. Seagram & Sons, Inc.*, 347 F. Supp. 965, 966 (N.D. Ill. 1972) (corporation incapable of conspiring with unincorporated division in absence of false representations of independence of and competition among sister corporations); *Ark Dental Supply Co. v. Cavitron Corp.*, 323 F. Supp. 1145, 1148 (E.D. Pa. 1971) (corporation and unincorporated division do not have separate legal existence and are therefore single actor), *aff'd*, 461 F.2d 1093 (3d Cir. 1972) (*per curiam*); *Kemwel Automotive Corp. v. Ford Motor Co.*, 1966 Trade Cas. (CCH) ¶ 71,882 (S.D.N.Y. 1966) (division is not a separate

corporation, acts solely in accordance with the corporation's wishes.<sup>20</sup>

Until recently, the Supreme Court had suggested in a number of cases that companies affiliated under common ownership satisfied the plurality of actors requirement, and therefore were capable of conspir-

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entity capable of conspiring with its corporation); *Deterjet Corp. v. United Aircraft Corp.*, 211 F. Supp. 348, 353-54 (D. Del. 1962) (corporation cannot conspire with unincorporated division because corporation cannot conspire with self).

The Supreme Court has expressly declined to consider whether a corporation and its unincorporated divisions are capable of violating § 1. See *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 469 n.4 (1962).

20. See, e.g., *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80-83 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). In *Hawaiian Oke*, the plaintiff liquor distributor charged the defendant liquor distiller and its three divisions with conspiring to restrain the plaintiff's trade in violation of § 1 of the Sherman Act. *Id.* at 73. The Ninth Circuit disapproved of the district court's jury instructions that "as a matter of law . . . these . . . three . . . divisions of the House of Seagram, Inc., . . . are entities or units which, under the antitrust laws, are legally capable of conspiring among themselves . . ." *Id.* at 80-81, 82 (quoting jury instructions). The primary reason the court of appeals gave for reaching this result was that such a rule would be unworkable. *Id.* at 83. The court explained that to achieve sound management, corporations of any size must delegate authority to internal divisions of labor. *Id.* Because it is unlikely that subunits of a single corporation, no matter how autonomous, can or will operate independently, however, the court found it inevitable that they would communicate with each other and the corporation. *Id.* at 84. Such communication could then be used as evidence of a common understanding, or conspiracy, and there would then be no practical way to distinguish internal corporate conduct violating the Sherman Act from that not violating the Act. *Id.* Thus, the court concluded, an intracorporate conspiracy doctrine applied to divisions of a corporation "hands to plaintiffs, on a silver platter, an automatically self-proving conspiracy." *Id.* One commentator has noted that the underlying basis of the *Hawaiian Oke* decision appears to be the Ninth Circuit's fear that applying such a rule to divisions would hamper the efficient administration of business. Comment, *supra* note 5, at 1744 n.61.

The Supreme Court has commented that a corporation and its division always have a "unity of purpose" and thus never warrant § 1 scrutiny. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2742 (1984). The Court noted that a corporation creates divisions as a method of organizing its labor efficiently, and as such, those divisions are established for the purpose of pursuing the common interests of the whole rather than their own independent interests. *Id.* Thus, the Court reasoned that coordination between a corporation and its divisions does not represent the sudden joining of independent economic entities previously pursuing separate interests that would warrant § 1 scrutiny. *Id.*

There are at least two other reasons for refusing to apply conspiracy provisions of § 1 to unincorporated divisions: 1) such a threat would deter decentralized corporate management, and 2) its application would completely annul the technical requirement of a plurality of actors for a § 1 violation. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 26 (1968). Additionally, application of the conspiracy doctrine to divisions would be impracticable due to the difficulty inherent in developing standards sufficiently precise to distinguish those divisions which are sufficiently autonomous to warrant § 1 scrutiny. Note, *supra* note 8, at 309-10. Even in the event that such standards are formulated, a corporation will be able to circumvent § 1's enforcement by disguising the autonomy of its divisions. *Id.* at 310.

ing in violation of section 1.<sup>21</sup> This concept became known as the intra-enterprise conspiracy doctrine.<sup>22</sup> In *Copperweld Corp. v. Independence Tube Corp.*,<sup>23</sup> however, the Supreme Court squarely considered the doctrine's merits in the context of a parent and its wholly owned subsidiary and laid the concept to rest.

## II. EVOLUTION OF THE INTRA-ENTERPRISE DOCTRINE

In 1941, the Seventh Circuit sowed the first seeds of the intra-enterprise conspiracy doctrine in *United States v. General Motors Corp.*<sup>24</sup> In *General Motors*, General Motors Corporation (GMC) and two of its wholly owned subsidiaries, General Motors Sales Corporation (GMSC) and General Motors Acceptance Corporation (GMAC),<sup>25</sup> were convicted<sup>26</sup> of conspiring with one another to force General Motors' dealers to finance purchases and sales of cars through GMAC in violation of section

21. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947). For a discussion of *Yellow Cab*, see *infra* notes 33-40 and accompanying text. For a discussion of *Keifer-Stewart*, see *infra* notes 41-46 and accompanying text. For a discussion of *Timken*, see *infra* notes 47-53 and accompanying text. For a discussion of *Perma Life*, see *infra* notes 54-59 and accompanying text.

22. See, e.g., *Willis & Pitofsky*, *supra* note 20, at 20 ("This concept is often referred to as the 'intra-enterprise' . . . conspiracy doctrine . . ."); Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 717 ("A theory of intra-enterprise conspiracy has arisen from a series of Supreme Court decisions . . ."). The courts and commentators sometimes use different terminology to describe the "intra-enterprise" doctrine, but this note will rely exclusively on the use of that term. See, e.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974) ("thin conspiracy"), *cert. denied*, 421 U.S. 1004 (1975); *Handler & Smart*, *supra* note 15, at 23 n.2 ("intracorporate"); *Kempf, Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*, 24 *BUS. LAW.* 173 (1968) ("bathtub conspiracy").

23. 104 S. Ct. 2731 (1984).

24. 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

25. *Id.* at 382. Because of the huge demand for automotive products and services in the first two decades of this century, GMC mushroomed, and soon its centralized administrative structure became overburdened by the new decision-making demands which increased concomitant with such rapid growth. Comment, *supra* note 5, at 1737. Failing to maintain adequate control over its operations and facing a financial crisis, GMC adopted an innovative decentralized corporate structure whereby it retained control of the long term direction of the company and vested day to day control over operations in autonomous units. *Id.* Thus, GMC conducted its operations through five motorcar divisions: Chevrolet, Pontiac, Oldsmobile, Buick, and Cadillac. *General Motors*, 121 F.2d at 385. Because it catered to a large national market and because it marketed cars through dealers on a cash up front basis, GMC created GMSC to coordinate distribution of the cars to the various dealerships and GMAC to provide financing in order to aid dealers and customers in completing the purchases. *Id.* at 386.

26. 121 F.2d at 382. General Motors Acceptance Corp. of Indiana, a wholly-owned subsidiary of GMAC, was also convicted. *Id.*

1 of the Sherman Act.<sup>27</sup> In upholding the conviction, the Seventh Circuit rejected the defendants' claim that as affiliated and noncompeting units of a single enterprise, they in effect constituted a single corporate entity incapable of conspiring under section 1.<sup>28</sup> Without explaining its underlying rationale,<sup>29</sup> the court stated that the defendants could not "enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade . . . ." <sup>30</sup> Rather, the court declared, "[t]he test of illegality . . . is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce."<sup>31</sup> The court cited no

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27. *Id.* at 382, 398-99. Through various measures, GMC effectively tied dealerships to the exclusive use of GMAC, thereby forcing dealers to finance their wholesale purchases of cars from GMSC and their resale to consumers through GMAC. *Id.* at 398-99. As the Seventh Circuit noted, because the sale of GM cars was inextricably intertwined with the availability of GMAC financing, GMC's coercive conduct produced two distinct restraints on trade: (1) to the extent that consumers were prevented from purchasing a GM car because they were denied GMAC credit or to the extent they failed to purchase a GM car because they preferred another financing company, there was an unreasonable restraint on the commerce in GM cars; and (2) to the extent that dealers and consumers desired GM cars but preferred to finance their purchase through a company other than GMAC, there was an unreasonable restraint of trade on the commerce in instruments of credit. *Id.* at 399.

28. *Id.* at 404. The defendants also argued that because they constituted a single entity, they were entitled to condition the sale of their product and to restrain their own trade by selling the product to whom they pleased. *Id.* The court stated that the defendants' argument incorrectly assumed that the dealers were the defendants' agents and, as such, part of the single enterprise. *Id.* Rather, the court found that the dealers were independent of the defendants. *Id.* Thus, the court concluded that the defendants had restrained the dealers' trade. *Id.* at 402.

29. *See* 121 F.2d at 404. The court failed to respond directly to the defendants' proffered defense that they lacked the requisite element of a plurality of actors for a § 1 violation. *See id.* Rather, in addressing the defendants' claim that as a single enterprise they possessed the right to restrain the trade of their own product, the court seemed simply to assume that the defendants were separate entities. *See id.* at 410 ("as a matter of law . . . [defendants] are separate entities"). The court's statements concerning the Sherman Act thus should not be viewed as pertaining to the intra-enterprise doctrine.

30. *Id.* at 404. The court apparently considered the limited liability and tax advantages accorded both GMSC and GMAC to be the benefits of separate incorporation. *Id.*; *see also* Kempf, *supra* note 22, at 174-75. One commentator suggests that the court failed to perceive the legitimate reasons for adopting decentralized corporate structures and thus "set the stage for the evolution of an antitrust [intra-enterprise conspiracy] doctrine based upon the false premise that such structures should be treated differently from the traditional centralized administrative forms that preceded them." Comment, *supra* note 5, at 1738. Another commentator suggests that the court sought to provide prosecutors with greater latitude in selecting theories of antitrust illegality. *See* Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 375 (1954).

31. 121 F.2d at 404. This statement of the law is incorrect insofar as it implies that a purely unilateral restraint of trade can satisfy the requirements of § 1. *See* Handler & Smart, *supra* note 15, at 27. For a discussion of § 1 requirements, *see supra* notes 10-15 and accompanying text.

authority for these propositions, however, and muted their precedential value by stating that it was not relying on them.<sup>32</sup>

The Supreme Court first alluded to the intra-enterprise conspiracy doctrine in *United States v. Yellow Cab Co.*<sup>33</sup> In that case, Morris Markin, the president, general manager, and controlling stockholder of Checker Cab Manufacturing Corporation (CCM), set about to acquire control of the more important cab operating companies in Chicago, New York, and other cities.<sup>34</sup> Once this was accomplished,<sup>35</sup> Markin caused these various cab companies to purchase their cabs exclusively from CCM.<sup>36</sup> The government charged Markin, CCM, and the cab subsidiaries with engaging in a combination and conspiracy to restrain and to monopolize interstate trade in the sale of taxicabs in violation of sections 1 and 2 of the Sherman Act.<sup>37</sup> The district court dismissed the complaint for failure to

32. See 121 F.2d at 404. The court concluded that the questioned practices constituted an illegal vertical contractual restraint and thus the defendants had violated the Sherman Act even if they were a single entity. *Id.* One commentator suggests that the defendants probably could not have avoided antitrust liability by reorganizing into a single corporation because their tie-in sales were forbidden by § 3 of the Clayton Act. Comment, *supra* note 30, at 375. Another commentator has characterized the court's position as follows: "Form matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow." McQuade, *supra* note 7, at 191 (emphasis in original).

33. 332 U.S. 218 (1947). In a case decided prior to *Yellow Cab*, the Supreme Court held affiliated companies liable under the Sherman Act without discussing the intra-enterprise conspiracy issue. *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944). For a discussion of *Crescent*, see *infra* note 40.

34. 332 U.S. at 220-21. The case was appealed directly to the Supreme Court from the district court's dismissal of the plaintiff's complaint. *Id.* at 220. For this reason, the Court accepted as true the facts as alleged in the complaint for purposes of the appeal. *Id.*

35. *Id.* at 220-24. CCM organized and owned 62% of Parmalee Transportation Co. (Parmalee), a cab operating company located in Chicago. *Id.* at 221. Parmalee promptly formed or acquired subsidiaries in Chicago (owning more than 50% of the subsidiary), New York (owning 100% of the subsidiary), Pittsburgh (owning 100% of the subsidiary), and Minneapolis (owning 100% of the subsidiary). *Id.* at 221 & n.1. Each of these subsidiaries controlled 53%, 15%, 100%, and 58%, respectively, of the licensed cabs in their markets. *Id.* at 221. In addition, Markin gained sole ownership of another Chicago cab operating company that controlled 33% of the Chicago cab market, which gave him power over 86% of the Chicago taxicab market. *Id.* at 221-24.

36. *Id.* at 222 n.2, 224.

37. *Id.* at 220. The nature of the Sherman Act violation was that CCM and its affiliated companies excluded all other cab manufacturers from that segment of the market represented by the defendant cab operating companies and prevented the cab operating companies themselves from purchasing cabs in a free and open market. *Id.* at 226-27.

The complaint also alleged that the defendants combined and conspired to restrain and to monopolize interstate trade in the furnishing of cab service in Chicago in violation of § 1 and § 2 of the Sherman Act. *Id.* at 220. Specifically, it was alleged that Parmalee's affiliated Chicago cab companies agreed not to compete with Parmalee in bidding for the exclusive right to provide cab services for railroad passengers travelling between the two major rail stations in Chicago. *Id.* at 228.

state a claim upon which relief might be granted.<sup>38</sup>

In reversing the district court, the Supreme Court rejected the notion that vertically integrated companies can never be governed by the Sherman Act:

The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint 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. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. 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.<sup>39</sup>

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38. *Id.* at 220 (citing *United States v. Yellow Cab Co.*, 69 F. Supp. 170 (N.D. Ill. 1946), *rev'd*, 332 U.S. 218 (1947)). The district court dismissed the complaint for failing to state a claim under the Sherman Act, reasoning that intrastate taxicab transportation of interstate railroad passengers is an intrastate matter and concluding that the facts alleged in the complaint failed to show the defendants conspired to or restrained trade. 69 F. Supp. at 173.

39. 332 U.S. at 227 (citing *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61, 376-77 (1933)). In *Appalachian Coals*, 137 bituminous coal producers located in the Appalachian Territory (eight districts lying in Virginia, West Virginia, Kentucky, and Tennessee), who produced 74.4% of the bituminous coal output of the Territory and 11.96% of the bituminous coal produced east of the Mississippi river, created a corporation, Appalachian Coals, Inc. (the Company), for the purpose of acting as the exclusive selling agent for their coal. 288 U.S. at 356-57. The coal producers owned and controlled the Company jointly, and each made a contract with the Company designating the Company as its exclusive selling agent and giving the Company the power to determine the selling price. *Id.* at 358. The government charged the coal producers and the Company, which had not yet begun to operate as a selling agent, with violating § 1 and § 2 of the Sherman Act. *Id.* at 356, 358. In considering whether the defendants could be guilty of unreasonably restraining trade, the Court noted that the restrictions imposed by the Act are neither mechanical nor artificial. *Id.* at 360. Rather, the Court stated that “[r]ealities must dominate the judgment” and thus turned to focus on the intent and effect of the potentially violative combination. *Id.* at 360-61. The Court examined the nature of the defendants’ plan and the economic conditions peculiar to the coal industry in order to ascertain the probable effect of the execution of the plan on market prices and on the general public interest. *Id.* at 361. As a result of this examination, the Supreme Court determined that the effect of the plan would not be detrimental to fair competition, but rather would enhance the defendants’ ability to compete in the economically depressed bituminous coal industry. *Id.* at 373-75. Thus, the Court held that the Sherman Act had not been violated because the defendants’ combination would not work an undue restraint on interstate trade. *Id.*

In rejecting the government’s argument that the defendants’ combination should be condemned because it eliminated competition among the defendants themselves, and in responding to the defendants’ counterargument that there would be no transgression of the Sherman Act were the defendants to eliminate competition among themselves by a complete integration of their mining

In applying the foregoing principles to the facts of the case, the Court stated that where the primary object of the combination was to restrain trade and where that object was effectuated, the Sherman Act would be plainly violated and "common ownership and control . . . [would be] impotent to liberate the alleged combination and conspiracy from the impact of the Act."<sup>40</sup>

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properties under single ownership, the Supreme Court recognized that the Act aims at substance:

The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. . . . Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the [Act] gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint.

*Id.* at 377 (citations omitted).

40. 332 U.S. at 227. The Court framed the issue in this way: "The theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior management, but by deliberate, calculated purchase for control.' If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred." *Id.* at 227-28 (citing *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944)). Thus, the Court appeared to rely on *Crescent* as one of the bases for finding a Sherman Act violation. *Id.* at 228.

In *Crescent*, several independent corporate movie exhibitors that were partially owned by related individuals combined their buying power in towns lacking competing theaters to obtain preferential treatment from movie distributors in those towns where they were faced with competition. *Crescent*, 323 U.S. at 179. As a result of these and other tactics, competing theaters were frequently induced to sell out to the combination or forced out of business. *Id.* at 181. The district court found that these affiliated motion picture exhibitors, and certain of their officers, had conspired to unreasonably restrain the trade in motion picture films and to monopolize the exhibition of films in certain geographical areas in violation of § 1 and § 2 of the Sherman Act. *Id.* at 178-79, 181. In affirming the conviction and in rejecting the defendants' argument that normal processes eliminated the competing theaters, the Supreme Court stated that "if a single exhibitor [had] launched such a plan of economic warfare he would not run afoul of the Sherman Act. But the vice of this undertaking was the combination of several exhibitors in a plan of concerted action." *Id.* at 183 (footnote omitted). In addition, the Court noted that ordering dissolution of the combination was proper where "the creation of the combination [was] itself the violation." *Id.* at 189. One commentator has suggested that because distinct corporations joined forces in effectuating a program of restraint and thereby furnished the plurality of actors required by § 1, and because nowhere in the Court's opinion

In a subsequent Supreme Court case, *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,<sup>41</sup> the Court again acknowledged the existence of

or in the briefs on appeal did a "single enterprise" defense arise, it was inappropriate to regard *Crescent* as embracing the intra-enterprise theory. See McQuade, *supra* note 7, at 196-97. Other commentators have pointed out that because the defendants in *Crescent* were clearly liable for a § 2 violation, the § 1 holding was not essential to a finding of liability. See Handler & Smart, *supra* note 15, at 27 n.22.

Consequently, after an examination of *Crescent*, it appears that the Court's holding in *Yellow Cab* may be limited to an unlawful merger situation, i.e., where an initial business combination, not a subsequent intracorporate agreement, is considered an illegal restraint of trade under § 1. Areeda, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 458 (1983). Further support for this proposition is contained in the Court's own statement in *Yellow Cab* that "the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S. at 229. As one commentator has explained:

If indeed this was a combination that effectuated a prior conspiracy among independent entities, then common ownership and affiliation in the resulting arrangement would clearly be no defense to an antitrust attack: The initial conspiracy itself would be a violation of section 1 of the Sherman Act and the subsequent combination could be attacked as the "fruit" of that conspiracy.

Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 719.

41. 340 U.S. 211 (1951). The Supreme Court decided two other conspiracy cases after *Yellow Cab* but prior to *Keifer-Stewart*; each involved a combination between affiliated movie exhibitor companies in violation of the Sherman Act. See *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948). Together with *Crescent*, this triumvirate forms what is often referred to as the "movie cases." See McQuade, *supra* note 7 at 195-202; Comment, *supra* note 30, at 376. For a discussion of *Crescent*, see *supra* note 40.

In *Griffith*, four corporate defendants, affiliated through common ownership by related individuals also named as defendants, were charged with violating § 1 and § 2 of the Sherman Act by pooling their buying power to obtain certain exclusive privileges in their contracts with various movie distributors. 334 U.S. at 101-03. The district court dismissed the complaint on the merits after finding no evidence of a monopoly, of an unreasonable restraint of trade, or of an intent by the defendants to achieve either of the two. *Id.* at 104. The district court distinguished *Crescent* by noting that the defendants in that case used their combined buying power for the avowed purpose of eliminating competition and of acquiring monopoly power, whereas the defendants in *Griffith* possessed no such purpose. *Id.* at 105.

The Supreme Court determined that the Sherman Act may be violated where the defendants' conduct results in a restraint of trade or in a monopoly, notwithstanding a lack of specific intent to achieve the unlawful objective. *Id.* In reversing and remanding, the Court found that exclusive privileges had been acquired by the use of monopoly power and stated that "[t]he [defendants], having combined with each other and with the distributors to obtain those monopoly rights, formed a conspiracy in violation of §§ 1 and 2 of the Act." *Id.* at 109.

Thus, the *Griffith* Court found § 1 conspiracy despite the fact that the corporate defendants were affiliated, supporting a potential intra-enterprise conspiracy theory. *Id.* at 101, 109. Several points deserve attention, however. First, the opinion neither recognized nor discussed the intra-enterprise issue. See *id.*; McQuade, *supra* note 7, at 199. Thus, the *Griffith* Court simply assumed that the affiliated defendants were capable of conspiring. See *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2738 n.8 (1984). Second, the bulk of the



the intra-enterprise doctrine. In *Keifer-Stewart*, the plaintiff charged the defendants, two subsidiaries owned by a common parent,<sup>42</sup> with conspiring to fix the resale prices of liquor in violation of section 1.<sup>43</sup> In reversing the court of appeals,<sup>44</sup> the Supreme Court rejected the defendant's argument that their status as "mere instrumentalities of a single manufacturing-merchandising unit" necessarily precluded the court from finding a plurality of actors, and consequently a conspiracy prohibited under section 1 of the Sherman Act.<sup>45</sup> Without supplying any analysis or reasoning, the Court simply stated that such a "suggestion runs

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Court's discussion focused on a monopoly violation, and, but for the language in the quoted passage, the decision could have been based purely on a § 2 violation. See 334 U.S. at 104-109; McQuade, *supra* note 7, at 198. Third, one commentator suggests that the corporate defendants formed two independent groups because their connections were minimal and because there was no common ownership. See McQuade, *supra* note 7, at 199. The plurality of actors required by § 1 thus existed, thereby precluding the implication that an intra-enterprise doctrine is viable as a result of *Griffith*. *Id.* at 199-200.

In *Schine*, a case decided concurrently with *Griffith*, a parent movie exhibitor company and its wholly owned subsidiaries and directors were found guilty of combining their purchasing power to compel favors from movie distributors and to force out competition in violation of §§ 1 and 2 of the Sherman Act. *Schine*, 334 U.S. at 113-15. In affirming the district court, the Supreme Court stated that the defendants' "concerted action . . . was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent." *Id.* at 116. This sentence was followed by citations to *Yellow Cab* and *Crescent*, without any discussion of the Court's reasoning which led to such a conclusion. See *id.* Because the Court found a monopoly violation by the exhibitors and a conspiracy between the exhibitors and the distributors, the intra-enterprise conspiracy issue was only collaterally related to the Court's holding. See *id.* at 116-17. Thus, the *Schine* opinion did not properly stand for the intra-enterprise doctrine. As one commentator explained, the quoted "statement is too cryptic to be helpful." McQuade, *supra* note 7, at 201.

42. 340 U.S. at 212. This was the first major case in which the subsidiaries were wholly owned and internally created. Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 723.

43. 340 U.S. at 212. The two subsidiaries, Seagram and Calvert, in selling liquor to wholesalers, including the plaintiff, fixed maximum prices above which the wholesalers could not resell. *Id.* To effectuate this policy, the subsidiaries refused to deal with wholesalers who would not comply. *Id.* at 213.

44. *Id.* at 215. The Court of Appeals for the Seventh Circuit had reversed a jury verdict for the plaintiff stating that the evidence was insufficient to demonstrate concerted activity and that fixing maximum resale prices was not violative of the Sherman Act for the reason that such prices promote competition. *Id.* at 212. The Supreme Court disagreed, finding that the evidence clearly showed that the defendants had a "unity of purpose or a common design and understanding" sufficient to establish a conspiracy, and that all price fixing, maximum as well as minimum, is illegal per se. *Id.* at 213.

45. *Id.* at 215. The defendants attempted to distinguish earlier cases which rejected the notion that affiliated companies form a single entity for purposes of the Sherman Act by arguing that those cases condemned single entities only when they engaged in coercive practices. *The Supreme Court, 1950 Term*, 65 HARV. L. REV. 107, 122-23 (1951) (citing Brief for Respondents at 22, *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951)). The defendants contended that the resale price limits set by the two subsidiaries were agreed

counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws . . . especially . . . where . . . [they] . . . hold themselves out as competitors."<sup>46</sup>

Following on the coattails of *Keifer-Stewart*, the Supreme Court once again implied an intra-enterprise conspiracy doctrine in *Timken Roller Bearing Co. v. United States*.<sup>47</sup> There, Timken Roller Bearing Company (American Timken) cooperated with a British businessman named Dewar in buying all of the stock of British Timken, Ltd. (British Timken) and in organizing Société Anonyme Français Timken (French Timken).<sup>48</sup> The three companies proceeded to operate under "business agreements" whereby they allocated world geographic markets among themselves, fixed the prices of their products, and cooperated in attempting to eliminate outside competition.<sup>49</sup>

In appealing the district court's finding of a section 1 Sherman Act

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upon voluntarily as a matter of internal business policy. 340 U.S. at 214. The Court apparently ignored the defendants' proffered distinction. *Id.* at 383.

46. 340 U.S. at 215. The Court relied on *Yellow Cab*, but failed to explain why. *See id.* This is a source of confusion, as it would appear that the defendants in *Keifer-Stewart*, owing their existence to internal expansion, should not have been subject to the rule announced in *Yellow Cab*, which may be limited to a proscription against independent companies that combine. For a discussion of this narrow interpretation of *Yellow Cab*, see *supra* notes 39-40 and accompanying text. Some commentators have suggested that *Keifer-Stewart* is the only Supreme Court case in which the existence of the intra-enterprise conspiracy doctrine was necessary for the outcome of case. *See Areeda, supra* note 40, at 459 n.22 ("the only Supreme Court decision whose result could not at the time be fully explained on grounds other than an intraenterprise conspiracy"); Handler & Smart, *supra* note 15, at 31 ("neither the facts of the case nor the state of the law at the time of the decision supports [the] view" that the intra-enterprise doctrine was unnecessary to the result reached).

*Keifer-Stewart* has been described as a landmark decision announcing the rule that horizontal affiliates may conspire only when they hold themselves out as independent competitors. Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 DUQ. L. REV. 63, 70-71 (1975). This interpretation has been criticized due to the Court's vagueness in explaining the relevance of the pretense of competition to an intra-enterprise conspiracy theory. *See, e.g., Areeda, supra* note 40, at 459 n.23, 468 (there is no rationale for a "holding out" rule, which implicates an estoppel concern, absent some identifiable reliance interest because estoppel depends on reasonable and foreseeable reliance); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 CALIF. L. REV. 182, 185 n.22 (1969) (emphasis on "holding out" inappropriate because it appeared from evidence that defendants did not hide their relationship and that plaintiffs were fully aware that the two subsidiaries were in fact commonly owned). For a further discussion of the holding out theory, see *infra* note 75.

47. 341 U.S. 593 (1951).

48. *Id.* at 595. American Timken owned 30% and Dewar owned 24% of British Timken, and between the two of them, they owned 100% of French Timken. *Id.* American Timken labeled their involvement with Dewar as a joint venture. *Id.* at 597.

49. *Id.* at 595-96.

violation,<sup>50</sup> American Timken claimed that the restraints resulting from its agreements were reasonable because they were merely incidental to an otherwise legitimate joint venture with Dewar.<sup>51</sup> The Supreme Court rejected this contention, stating:

Our prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal under the Act. . . . The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws.<sup>52</sup>

In a vigorous dissent, Justice Jackson criticized the majority for exalting form over substance.<sup>53</sup>

In *Perma Life Mufflers, Inc. v. International Parts Corp.*,<sup>54</sup> the most recent Supreme Court case to imply the existence of an intra-enterprise conspiracy doctrine,<sup>55</sup> Midas Muffler franchisees brought suit against In-

50. *Id.* at 594. The district court had entered an injunction against American Timken ordering divestiture, and American Timken appealed directly to the Supreme Court. *Id.* at 594, 600.

51. *Id.* at 597.

52. *Id.* at 598 (citations omitted). Thus devoid of analysis, the Court simply reiterated its blanket statement from *Keifer-Stewart*, in which the Court merely had reiterated its statement in *Yellow Cab*. See Areeda, *supra* note 40, at 459. For a comparison of the *Timken* majority's holding with the Court's language in *Keifer-Stewart* and *Yellow Cab*, see *supra* text accompanying notes 39 & 46.

Justice Reed, in a concurring opinion, may have supplied the only justification for the majority's holding:

It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in the foreign fields.

341 U.S. at 601-02 (Reed, J., concurring).

53. 341 U.S. at 606-07 (Jackson, J., dissenting). Justice Jackson interpreted the majority opinion as saying that the mere fact of separate incorporation provided the separate "persons" necessary for a § 1 conspiracy:

It is admitted that if Timken had . . . set up separate departments to operate plants in France and Great Britain . . . "that would not be a conspiracy" . . . because a corporation cannot conspire with itself. . . . Thus, the Court applies the well-established conspiracy doctrine that what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are "separate persons". . . . I think that result places too much weight on labels.

*Id.* One commentator has suggested that Timken stands for a narrower proposition than set forth by Justice Jackson because, despite some common ownership, the corporations were in fact independent and thus provided the plurality of actors necessary for a conspiracy. See Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 722.

54. 392 U.S. 134 (1968).

55. *Copperweld*, the case abrogating the doctrine, is the latest Supreme Court decision to consider the doctrine. See *Copperweld Corp. v. Independence*

ternational Parts Corp. and its wholly owned subsidiary, Midas, Inc. (Midas), charging the franchisor and its parent with conspiring to restrain trade in violation of section 1 of the Sherman Act.<sup>56</sup> The franchise agreements required the franchisees to abide by the resale prices and specified sales territories fixed by Midas, to purchase all of their mufflers and exhaust systems from International Parts' marketing subsidiary, and to refrain from dealing with any of Midas' competitors.<sup>57</sup> In rejecting the court of appeals' determination that the defendants comprised a single business entity incapable of conspiring in violation of section 1,<sup>58</sup> the Court stated that "since . . . 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."<sup>59</sup>

The Supreme Court has thus only intimated the existence of an intra-enterprise conspiracy doctrine in four cases whose language is succinct, but devoid of cogency.<sup>60</sup> Because the last three decisions, *Keifer-*

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Tube Corp., 104 S. Ct. 2731 (1984). For a discussion of *Copperweld*, see *infra* notes 79-137 and accompanying text.

56. 392 U.S. at 135. The other defendants included two additional International Parts' subsidiaries and six individuals who were officers or agents of the corporations. *Id.* The plaintiffs also charged that the defendants had violated § 2(a) and § 3 of the Clayton Act. *Id.*

57. *Id.* at 136-37. The franchise agreements also obligated the franchisees to honor the Midas guarantee on Midas mufflers sold by any dealer. *Id.* at 137.

58. *Id.* at 136. The Court of Appeals for the Seventh Circuit made this determination in affirming the district court's entry of summary judgment for the defendants with respect to the Sherman Act claim. *Id.* at 135-36. It is interesting to note that in stating that the defendants were legally incapable of conspiring, the Seventh Circuit seemed to ignore its own prior holding in *General Motors*. See Comment, *supra* note 5, at 1743 n.55. For a discussion of *General Motors*, see *supra* notes 24-32 and accompanying text.

59. 392 U.S. at 141-42. The Court followed this statement with citations to *Timken* and *Yellow Cab*, but supplied no further explanation. See *id.* at 142. The Court, however, did not wholly rely on this theory, for it immediately supplied two alternative bases for sustaining a Sherman Act violation—a conspiracy between Midas and the plaintiff or between Midas and the other franchise dealers. *Id.* at 142.

In addition, the plaintiffs had alleged in their briefs in the district court, court of appeals, and the Supreme Court that the defendants had held themselves out as competitors. Handler, *supra* note 46, at 184-85. This assertion conflicted with the defendants' affidavit submitted in the district court in support of their motion for summary judgment. *Id.* at 184. Because the Court never resolved this apparent conflict, it is possible that *Perma Life* is nothing more than a reiteration of *Keifer-Stewart's* "holding out" rule. *Id.* at 185. For a discussion of *Keifer-Stewart*, see *supra* notes 41-46 and accompanying text.

60. Handler & Smart, *supra* note 15, at 26 (citing *Perma Life*, *Timken*, *Keifer-Stewart*, and *Yellow Cab*); Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 718 (citing *Perma Life*, *Timken*, *Keifer-Stewart*, and *Yellow Cab*). One commentator emphasized the paucity of analysis as follows:

The remarkable thing about each of the . . . cases which might be construed as supporting a theory of conspiracy within a multicorporate enterprise is the scant attention they devote to the point. Each opinion

Stewart, Timken, and Perma Life, rely primarily on *Yellow Cab* as their source of authority,<sup>61</sup> and because the holding of *Yellow Cab* is unclear,<sup>62</sup> it is dubious whether the Court ever intended to create the intra-enterprise conspiracy doctrine.<sup>63</sup> Whatever the Supreme Court's actual intent, lower courts<sup>64</sup> and commentators<sup>65</sup> acknowledged the doctrine's

tends to ignore the requirement of duality and to concentrate on a consideration of predatory practices. In some cases the single enterprise defense was only faintly argued, or not even raised.

McQuade, *supra* note 7, at 188.

61. See *Perma Life*, 392 U.S. at 141-42; *Timken*, 341 U.S. at 598; *Keifer-Stewart*, 340 U.S. at 215. See also *Areeda*, *supra* note 40, at 459 & n.28 (*Perma Life*'s "holding was supported only by citations to *Timken* and *Yellow Cab*," and *Timken* offers "no reasoning apart from a citation to *Keifer-Stewart*, which in turn relied merely on a citation to *Yellow Cab*").

62. See, e.g., *Areeda*, *supra* note 40, at 458 ("[t]hat unlawful merger was the theory of the case is clear from the case's ultimate resolution"); *McQuade*, *supra* note 7, at 194 (because action was brought under both § 1 and § 2, and because Court treated separate allegations in blurred, hazy manner, it is impossible to distinguish what portion of Court's language refers to § 1 and which to § 2); Note, *Intra-Enterprise Conspiracy*, *supra* note 5, at 719-21 (although Court's language implies existence of intra-enterprise doctrine, close reading of case suggests such an implication is unnecessary). For a discussion of *Yellow Cab*'s holding, see *supra* notes 39-40 and accompanying text.

63. See *Handler & Smart*, *supra* note 15, at 28-29. *Handler & Smart* suggest that even though the Court's language in *Yellow Cab* asserts that the fact of corporate affiliation will not preclude § 1 liability where a restraint of trade has occurred, other language in the opinion implies that the Court never intended such a reading. *Id.* For example, pointing to that other language, *Handler & Smart* note that the *Yellow Cab* Court emphasized that

restraint of trade "was the primary object of the combination," . . . . [and that t]he theory of the complaint was that defendants' " 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.' "

*Id.* at 29 (quoting *Yellow Cab*, 332 U.S. at 227-28) (footnotes omitted). Thus, these commentators contend that *Yellow Cab* merely stands for the proposition that a series of acquisitions may violate § 1 if they result in an unreasonable restraint of trade and may violate § 2 if they achieve a monopoly. *Id.* at 29. For a further discussion of this proposition, see *supra* note 40. Another commentator argues that the *Yellow Cab* Court failed to make a final and serious determination of the status of the intra-enterprise conspiracy doctrine because the Court did not distinguish between the alleged § 1 and § 2 violations. See *McQuade*, *supra* note 7, at 212. For a further discussion of the court's potential holding in *Yellow Cab*, see *supra* note 40 and accompanying text.

64. See, e.g., *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33-35 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Syracuse Broadcasting Corp. v. Newhouse*, 319 F.2d 683, 687 (2d Cir. 1963); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 88 (7th Cir. 1949).

existence, although they greeted its arrival with a tepid embrace.<sup>66</sup> The doctrine was especially criticized for its amorphous character,<sup>67</sup> which had the effect of generating uncertainty<sup>68</sup> and encouraging meritless lawsuits.<sup>69</sup> It was also excoriated for its stifling effect on competition, which ran contrary to the purpose of the antitrust laws,<sup>70</sup> for its effect

65. See, e.g., Areeda, *supra* note 40; Barndt, *supra* note 15; Handler, *supra* note 46; Handler & Smart, *supra* note 15; Kempf, *supra* note 22; McQuade, *supra* note 7; Rahl, *supra* note 15; Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5 (1963); Willis & Pitofsky, *supra* note 20; Comment, *supra* note 5; Comment, *supra* note 46; Comment, *Conspiracy Under the Sherman Act*, *supra* note 30; Note, *supra* note 8; Note, "Conspiring Entities," *supra* note 5; Note, *Intra-Enterprise Conspiracy*, *supra* note 5.

66. See, e.g., *William Inglis, Etc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir.) ("just as the fact of common ownership alone should not insulate corporations from the antitrust laws, . . . 'the mere formality of separate incorporation is not, without more, sufficient to provide the capability for conspiracy'") (citations omitted), *cert. denied*, 459 U.S. 825 (1982); Handler & Smart, *supra* note 15, at 23 (the doctrine has numerous critics and few friends). See generally *supra* notes 64-65.

67. Comment, *supra* note 5, at 1743-44. This commentator identified the uncertainty which characterized attempts to resolve the issue:

The wide range of factual settings in which the court has applied the doctrine and the vague language of the opinions make it difficult for lower courts to ascertain the law or to discern its possible limits. . . .

Only one rule can be identified with any certainty: corporate subdivisions that are incorporated separately are considered independent enough to conspire with their parent or with each other.

*Id.* (citations omitted).

68. Note, "Conspiring Entities," *supra* note 5, at 665. Antitrust counsel, enforcement agencies, and the courts have been unable to discern the boundary between legal and illegal business conduct under § 1. Willis & Pitofsky, *supra* note 20, at 21. As a result of this uncertainty, it is impossible to put businessman on notice as to permissible actions. *Id.* at 48-49.

69. Handler & Smart, *supra* note 15, at 62. Rather than pervading governmental antitrust efforts, the intra-enterprise conspiracy doctrine principally served plaintiffs in private treble damage actions in reaching conduct legal under § 2, but illegal under § 1. *Id.* at 67. Almost half of the intra-enterprise conspiracy cases involved disputes between a supplier, organized in multicorporate form, and its customers or competitors arising out of the supplier's unilateral decision to terminate existing relations, to refuse to deal, or to favor its own wholly owned subsidiary. *Id.* A narrowly defined set of refusals to deal are lawful when engaged in by a single enterprise under the Supreme Court's decision in *United States v. Colgate & Co.* *Id.* at 68. See *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (the Sherman "[A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" or with whom he will stop dealing). Plaintiffs, typically former dealers, distributors, or franchisees, attempted to circumvent the *Colgate* doctrine by using the intra-enterprise conspiracy doctrine in charging § 1 violations against vertically integrated manufacturers who operated their distribution arms as incorporated subsidiaries rather than as unincorporated divisions. Handler & Smart, *supra* note 15, at 68-69. Thus, the intra-enterprise doctrine provided a technical basis for these plaintiffs to convert essentially lawful conduct of manufacturers into unlawful behavior prohibited by § 1 of the Sherman Act. *Id.* at 69.

70. Kempf, *supra* note 22, at 178. The existence of the intra-enterprise doc-

upon organizational decisionmaking,<sup>71</sup> and for its elevation of form over substance.<sup>72</sup>

In an attempt to narrow the scope of the intra-enterprise doctrine, the lower federal courts devised various tests designed to determine when affiliated corporations should be treated as single entities incapable of violating section 1 of the Sherman Act.<sup>73</sup> The "actual competi-

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trine created the specter of treble damage antitrust suits which caused firms to dampen their competitive ardor. Note, "*Conspiring Entities*," *supra* note 5, at 665. Also, to the extent that the doctrine encouraged firms to select more centralized forms of organization to avoid § 1 liability, and to the extent that such forms are less efficient than decentralized structures, the doctrine fostered anticompetitive behavior. *Id.* at 681. These results were obviously contrary to the basic purpose of the antitrust laws, i.e., the promotion of competition in the market place. L. SULLIVAN, *supra* note 2, § 64, at 167; Note, "*Conspiring Entities*," *supra* note 5, at 681. For a more thorough discussion of the purpose of the Sherman Act, see *supra* notes 2-8 and accompanying text.

71. Note, "*Conspiring Entities*," *supra* note 5, at 681. A perfect example is illustrated by Joseph E. Seagram & Sons, Inc. See Note, *supra* note 8, at 305. Following *Keifer-Stewart*, which held illegal a horizontal conspiracy between Seagram's corporate subsidiaries, Seagram reorganized, converting its subsidiary distillers into unincorporated divisions. *Id.* For a discussion of *Keifer-Stewart*, see *supra* notes 41-46 and accompanying text. The Ninth Circuit recognized the effect of this change in subsequently holding that the divisions were legally incapable of constituting the plurality of actors necessary to a § 1 violation. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

72. Comment, *supra* note 5, at 1745. The intra-enterprise conspiracy doctrine provided no rationale for holding that conduct between a parent and its subsidiary violates § 1 of the Sherman Act when similar behavior by a corporation and its unincorporated division would be immune. Comment, *supra* note 46, at 68. In stressing form over substance, the intra-enterprise doctrine failed to recognize that many subsidiaries are formed for legitimate business reasons wholly unrelated to the concerns of antitrust law, reasons that, in fact, further the purpose of § 1, the promotion of competition. *Handler & Smart*, *supra* note 15, at 62-63. Some of the reasons that single enterprises adopted multicorporate forms include the following: increasing managerial flexibility through territorial, departmental, or functional divisions; increasing financial flexibility through tax savings, risk spreading, and capital acquisition; easing the burden or prohibition upon a parent attempting to operate in a state or foreign country with unfavorable local laws; limiting tort or contract liability; tailoring accounting and financial systems to meet a subsidiary's specialized operating needs; maintaining separate employee benefit and wage plans in each operating unit; and maintaining corporate goodwill. *McQuade*, *supra* note 7, at 186; Comment, *supra* note 5, at 1745; Comment, *supra* note 30, at 381. For a more elaborate discussion of some of the related tax advantages of separate incorporation, see *Willis & Pitofsky*, *supra* note 20, at 27. Many of these advantages of operating through subsidiaries, rather than divisions, resulted in economic efficiencies, including the cutting of costs and the effective distribution of products, that actually intensified competition. *Handler & Smart*, *supra* note 15, at 62-63.

73. The courts have also constructed tests that focus on the character of the particular conduct under examination rather than the relationship of the alleged coconspirators to limit the intra-enterprise's application. These tests, which may be referred to as the rule of reason, the purpose and effect, and the internal decision tests, generally find that the particular conduct in question does not violate § 1 if the conduct is not an unreasonable restraint of trade. See Note,

tor" test treated affiliated corporations as lacking the capacity to conspire unless the corporations actually competed with one another. The basic premise underlying this test was that any combination between the affiliated corporations resulted in a decrease in competition which was injurious to the public.<sup>74</sup> The "holding out" test considered it appropriate to find affiliated corporations liable under section 1 only if they represented to the public that they were competitors.<sup>75</sup> The "single entity" test precluded section 1 liability where the affiliated corporations were determined, after a weighing of several factors indicative of

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*"Conspiring Entities," supra* note 5, at 673-76. See, e.g., *Auburn News Co. v. Providence Journal Co.*, 504 F. Supp. 292, 300 (D.R.I. 1980) (agreements of related corporations subject to the rule of reason), *rev'd on other grounds*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Chastain v. AT&T*, 40 F. Supp. 151, 160 (D.D.C. 1975) (affiliated companies treated as conspirators under § 1 only where joint action amounts to, in purpose and effect, a conspiracy in restraint of trade); *In re Penn Cent. Sec. Litig.*, 367 F. Supp. 1158, 1166-67 (E.D. Pa. 1973) (parent's decision to forbid its three subsidiaries from competing in the same market is an internal decision not violating § 1).

74. See, e.g., *Aaron E. Levine & Co. v. Calkdraft Paper Co.*, 429 F. Supp. 1039, 1043-44, 1046 (E.D. Mich. 1976); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 572-73 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 & n.6 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). This test has been criticized for its anomalous result in that it makes potential § 1 liability the penalty for competing, and for its apparent inconsistency with Supreme Court precedent that implied an intra-enterprise conspiracy between related corporations that do not compete. Note, *"Conspiring Entities," supra* note 5, at 669 (citing *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). This test has been rejected by a number of circuits. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 652 F.2d 917, 958-59 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Battle v. National Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

75. See, e.g., *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554 (7th Cir. 1980); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268, 273 (5th Cir. 1954). See also *supra* note 74 (cases cited in support of actual competitor test may also be understood as standing for the holding out test). The holding out test is thought to derive from the Supreme Court's emphasis in *Keifer-Stewart* on the fact that the two companies held themselves out as competitors. *Handler & Smart, supra* note 15, at 51. *Handler and Smart*, after noting that the test is only of limited usefulness because the majority of the reported cases have lacked scenarios involving affiliated companies which held themselves out as competitors, suggest that the test poses practical problems because of the difficulty of constructing indicia sufficient to delineate those related corporations holding themselves out as competitors. *Id.* at 55. *Willis and Pitofsky* support the holding out test because they are in favor of the fact that it encourages disclosure to the public of the affiliated corporations' relationship. *Willis & Pitofsky, supra* note 20, at 36-38. This test, too, apparently has received little support from the courts. Note, *"Conspiring Entities," supra* note 5, at 670. For a discussion of the *Keifer-Stewart* holding, see *supra* note 46 and accompanying text.



their relationship, to constitute one company.<sup>76</sup> Finally, the “sole decisionmaker” test, which was confined to a narrow set of circumstances, held that section 1 liability could not be imposed where the affiliated corporations were owned and controlled by one person.<sup>77</sup>

These numerous court-fashioned solutions to a broad intra-enterprise conspiracy doctrine created multifarious interpretations resulting in a lack of uniformity. It was in this climate that the Supreme Court seized upon the opportunity to fully contemplate the merits of the doctrine in *Copperweld Corp. v. Independence Tube Corp.*<sup>78</sup>

### III. COPPERWELD: ABOLITION OF THE INTRA-ENTERPRISE DOCTRINE

In 1972, the Copperweld Corp. purchased Lear Siegler, Inc.'s Regal Tube division, a manufacturer of steel tubing,<sup>79</sup> and transferred Regal's assets to a newly formed, wholly owned subsidiary, the Regal Tube Co.<sup>80</sup> The agreement of sale bound Lear Siegler and its subsidiaries not

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76. See, e.g., *Murray v. Toyota Motor Distribs., Inc.*, 664 F.2d 1377, 1378-79 (9th Cir.) (per curiam), cert. denied, 457 U.S. 1106 (1982); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980). The single entity test recognizes that § 1's multiplicity of actors requirement, when it is based solely on separate incorporation of related corporations, elevates form over substance in a manner inconsistent with the intent of the antitrust laws. Note, “*Conspiring Entities*,” *supra* note 5, at 670-71. Thus, the single entity test examines particular factors in an attempt to determine when affiliated corporations' operations are so integrated that the nominally separate corporations should be viewed as divisions or departments of a single corporation, thereby precluding § 1 liability. Areeda, *supra* note 40, at 464. For an enumeration of the various factors considered by the courts in applying the test, see *infra* notes 91-92. The single entity test has been criticized for its difficulty of use in litigation involving complex corporate structures and for its underlying paradox that evidence of a conspiracy between affiliates simultaneously demonstrates a degree of common control that should preclude a finding of conspiratorial capacity. Areeda, *supra* note 40, at 464. Also, the test has been criticized for lacking predictability because of its reliance on a case-by-case fact determination which has prevented a clear standard from emerging. Note, “*Conspiring Entities*,” *supra* note 5, at 671.

77. See, e.g., *Las Vegas Drive-In Theatre, Inc. v. National Gen. Theatres, Inc.*, 1979-2 Trade Cas (CCH) ¶ 62,895 (D. Nev.); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1358-59 (N.D. Cal. 1974), *aff'd in relevant part*, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977); *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951). The sole decisionmaker test rests on the notion that there can be no conspiracy where one individual functions through multiple corporations because there can be no meeting of two or more minds; one individual is obviously incapable of conspiring with himself. See *Handler & Smart*, *supra* note 15, at 48-49.

78. 104 S. Ct. 2731 (1984).

79. *Id.* at 2734. The Regal Tube Co. was established in Chicago in 1955 as a wholly owned subsidiary of C.E. Robinson Co. *Id.* In 1968, Lear Siegler, Inc. bought Regal and operated it as an unincorporated division. *Id.*

80. *Id.* at 2734. The Regal Tube Co. shared Copperweld's corporate head-

to compete with Regal anywhere in the United States for five years.<sup>81</sup> Shortly after the acquisition, David Grohne, former President of the Regal Tube division,<sup>82</sup> organized his own steel tubing business, Independence Tube Corp., to compete in the same market as Regal.<sup>83</sup> Independence soon secured an offer from the Yoder Co. to supply a tubing mill and gave Yoder a purchase order calling for delivery of the mill by the end of December 1973.<sup>84</sup> After having learned of Grohne's plans, executives at Regal and Copperweld drafted a letter to be sent to businesses considering dealing with Grohne, announcing that Copperweld would take any and all legal steps necessary to protect its non-competition clause with Lear Siegler.<sup>85</sup> Copperweld sent Yoder one of these letters on the same day that Yoder accepted Independence's purchase order for the tubing mill; two days later, Yoder voided its acceptance.<sup>86</sup>

Independence filed an antitrust suit in the United States District Court for the Northern District of Illinois in 1976 against Copperweld, Regal, and Yoder.<sup>87</sup> The jury found that Copperweld and Regal, but

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quarters in Pittsburgh, but continued to conduct its manufacturing operations in Chicago. *Id.*

81. *Id.*

82. *Id.* Grohne, who had come to Regal in 1959 when it was owned by C.E. Robinson Co., had risen to become Regal's vice-president and general manager by 1968. *Id.* Grohne then became president of the division after its acquisition by Lear Siegler. *Id.* When the sale of Regal to Copperweld was being negotiated, Grohne accepted a job as Lear Siegler's corporate secretary, a position he held from February to July 1972. 691 F.2d 310, 314 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984). Grohne continued his employment with Lear Siegler, working on various other projects from July until September of that year. *Id.*

83. 104 S. Ct. at 2734. Independence was formed in May 1972. *Id.* At that time, Grohne was still employed by Lear Siegler. *Id.*

84. *Id.*

85. *Id.* Copperweld's attorney had advised them that although Grohne was not bound by the noncompetition agreement, it might be possible to obtain an injunction against Grohne to prevent him from using "any of the 'know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal,' all of which Copperweld had purchased from Lear Siegler." 691 F.2d at 314. Copperweld asserted that the rationale for the letter was to prevent third parties from forming reliance interests in their relations with Grohne that might make a court reluctant to later enjoin Grohne's activities. 104 S. Ct. at 2734.

86. 104 S. Ct. at 2734-35. Independence attempted to resurrect the deal with Yoder, but these efforts failed and Yoder finalized its cancellation of the purchase order in March 1973. 691 F.2d at 314. Thereafter, Independence contracted with Abbey Etna Machine Co. to supply the tubing mill. *Id.* Abbey performed its agreement despite its also having received a warning letter from Copperweld, and Independence's operations began on September 13, 1974—nine months later than they could have if Yoder had not cancelled the original agreement. *Id.*

Although the letter to Yoder was Copperweld's most successful effort in discouraging those contemplating doing business with Grohne, Copperweld and Regal also had contacted others, including banks, real estate firms, and prospective suppliers and customers. 104 S. Ct. at 2735.

87. 691 F.2d 310, 314 (7th Cir. 1982). *See also* 543 F. Supp. 706 (N.D. Ill.

not Yoder, had conspired to restrain trade in the market for structural steel tubing in violation of section 1 of the Sherman Act.<sup>88</sup> On appeal, the Court of Appeals for the Seventh Circuit affirmed.<sup>89</sup> The Seventh Circuit, in questioning the wisdom of subjecting a corporation and its wholly owned subsidiary to section 1,<sup>90</sup> applied the single entity test and determined that section 1 liability was appropriate only "when there is enough separation between the two entities to make treating them as two independent actors sensible."<sup>91</sup> The court of appeals found that

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1982). Phillip H. Smith, the chairman of the board and chief executive officer of both Copperweld and Regal, was also named as a defendant. 691 F.2d at 314. Independence charged the defendants with violating § 1 and § 2 of the Sherman Act. *Id.* at 315. Before the trial, Independence dismissed Smith from the suit and dropped the § 2 monopolization count. *Id.* For a discussion of the other claims made by Independence, see *id.*

88. 691 F.2d at 315. The jury awarded damages of \$2,499,009, which was trebled to \$7,497,027. *Id.*

89. 691 F.2d 310, 331 (7th Cir. 1982), *rev'd*, 104 S. Ct. 2731 (1984).

90. *Id.* at 316-18. After noting that a conspiracy under § 1 requires an agreement by two or more parties, and that a corporation and its subsidiary technically supply the requisite plurality of actors while a corporation and its fully integrated divisions do not, the appellate court suggested that where a wholly owned subsidiary is in substance the same as a fully integrated corporate division, § 1 liability should be foreclosed. *Id.* at 316. Furthermore, the court recognized that commentators have been highly critical of the intra-enterprise conspiracy doctrine because of its use as a gap filler between § 1 and § 2, i.e., in reaching restraints of trade by a single entity whose conduct or power falls short of a § 2 monopoly violation. *Id.* at 317 (citing Handler & Smart, *supra* note 15, especially the bibliography at 23 n.3; Note, "Conspiring Entities," *supra* note 5). The court noted further that the federal courts have adhered to Supreme Court precedent in recognizing that affiliated corporations possess the capacity to conspire, but have nevertheless attempted to limit the doctrine. *Id.* at 317-18 (citing the survey in Handler & Smart, *supra* note 15, at 40-61). For a discussion of court-created limiting approaches, see *supra* notes 73-77 and accompanying text.

91. 691 F.2d at 318 (interpreting Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)). The court noted that an approach which focuses on the practical relationship between the parent and its subsidiary by examining readily available empirical evidence represents a reasonable and pragmatic solution to the intra-enterprise conspiracy problem. *Id.* Thus, the Seventh Circuit reaffirmed its acceptance of the single entity test as articulated in Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). See *Copperweld*, 691 F.2d at 318.

In *Photovest*, the Photovest Corp., an operator of several Fotomat franchises, accused Fotomat Corp. (Fotomat) and its wholly-owned subsidiary, Fotomat Labs, Inc. (Labs), of conspiring in violation of § 1 to force independent dealers such as Photovest out of business pursuant to a plan of vertical integration. 606 F.2d at 707, 726. In dealing with the intra-enterprise doctrine, the court stated that "[s]eparate incorporation, . . . albeit an important factor, is not conclusive proof of the requisite two actors for a § 1 conspiracy." *Id.* at 726 (citing Knutson v. Daily Review, Inc., 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977)). The court found that each case must be decided on its particular facts and set forth some of the relevant factors:

the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two

the jury instructions and the evidence in the instant case were sufficient to support the jury verdict that Regal was more like an independent corporation than a mere arm of its parent.<sup>92</sup> The Seventh Circuit, therefore, concluded that the two entities were capable of violating section 1.<sup>93</sup> The Supreme Court granted certiorari in order to reexamine the intra-enterprise conspiracy doctrine.<sup>94</sup>

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firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.

*Id.* (quoting L. SULLIVAN, *supra* note 2, § 114, at 328). Noting the evidence of consolidated financial statements, overlapping executive management, common corporate offices, and Lab's separate incorporation for the purpose of providing less employee benefits to processing personnel with minimal friction in labor relations, the Seventh Circuit determined that Labs was a mere service arm of its parent and that the two corporations therefore comprised a single entity for antitrust purposes, incapable of conspiracy under § 1. *Id.* at 727.

92. 691 F.2d at 318-20. The district court instructed the jury to consider the following factors in determining whether the two companies, in fact, operated as separate entities:

1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated;

2. Whether the two companies are run by separate management staffs;

3. Whether the two companies maintained separate corporate offices;

4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary;

5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions;

6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;

7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;

8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence;

9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

*Id.* at 331-32 (quoting the district court's instructions to the jury). Copperweld and Regal argued that the district court's instructions were improper insofar as they failed to correspond exactly to the language in *Photovest*. *Id.* at 318. For a discussion of *Photovest*, see *supra* note 91. The appellate court disagreed with the defendants' argument, noting that the *Photovest* factors were not canonical and that the jury charge properly emphasized real, rather than merely formal, distinctness. 691 F.2d at 318-19.

93. 691 F.2d at 320.

94. 104 S. Ct. 2731, 2736 (1984).

Chief Justice Burger, writing for the majority<sup>95</sup> in *Copperweld*, in reviewing prior Supreme Court cases from which the intra-enterprise conspiracy doctrine evolved, doubted the precedential weight of those decisions and noted that none of them had considered the doctrine's merits in depth.<sup>96</sup> The majority suggested that *Yellow Cab*, rather than breathing life into the doctrine, actually stood for the narrower proposition that a conspiracy to create a combination through a pattern of acquisitions is illegal under section 1 of the Sherman Act.<sup>97</sup> Chief Justice Burger next discussed *Keifer-Stewart*, conceding that this case supported an intra-enterprise theory.<sup>98</sup> He down-played the case's importance, however, by pointing out that the *Keifer-Stewart* Court treated the conspiracy doctrine in an "off-handed" manner and failed to confront the doctrine's anomalies.<sup>99</sup> In considering *Timken* and *Perma Life*, the *Cop-*

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95. Justices Blackmun, Powell, Rehnquist, and O'Connor joined in Chief Justice Burger's opinion. Justice White did not participate in the decision. *Id.* at 2731.

96. *See id.* at 2736-39 (citing *Perma Life*, 392 U.S. 134 (1968); *Timken*, 341 U.S. 593 (1951); *Keifer-Stewart*, 340 U.S. 211 (1951); *Yellow Cab*, 332 U.S. 218 (1947)). The Court questioned whether these cases necessarily stood for the intra-enterprise doctrine and stated that "a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result." *Id.* at 2736. For a discussion of *Keifer-Stewart*, the "one instance" to which the Court referred, see *infra* notes 98-99 and accompanying text. Thus, the Court suggested that its prior decisions concerning the doctrine deserved little weight because the doctrine was summarily considered in those opinions and because it played only a minor role in their holdings. *See id.* at 2739.

97. *Id.* at 2737. The majority noted that the narrower holding was a well-settled rule at the time of *Yellow Cab* and commented that the intra-enterprise conspiracy discussion in *Yellow Cab* properly should be read in light of the settled rule. *Id.* The majority stated that under such an interpretation, the defendants' affiliation would have been irrelevant because the original acquisitions of the cab companies, being themselves illegal, would have provided a predicate for holding any postacquisition conduct illegal under § 1. *Id.* at 2737 & n.5. Furthermore, the Supreme Court pointed out that *United States v. Crescent Amusement Co.* and *Appalachian Coals, Inc. v. United States*, the two cases relied upon by the *Yellow Cab* Court in its putative intra-enterprise conspiracy discussion, also may have supported a narrow holding based on the original illegality of the affiliation. *Id.* at 2737-38 & n.6-7. For a discussion of *Crescent's* and *Appalachian Coals'* potentially narrow holdings, see *supra* notes 39-40. For a discussion of *Yellow Cab*, see *supra* notes 33-40 and accompanying text.

98. 104 S. Ct. at 2738. Chief Justice Burger recognized that *Keifer-Stewart* was the only one of the Supreme Court intra-enterprise cases in which the doctrine's existence was necessary for a finding of liability under § 1. *Id.* The reason for this was that the defendants, two wholly owned subsidiaries of a liquor distiller, could not provide the plurality of actors required by § 1 absent the intra-enterprise conspiracy theory. For a discussion of *Keifer-Stewart*, see *supra* notes 41-46 and accompanying text.

99. 104 S. Ct. at 2738. The majority noted that, although the *Keifer-Stewart* language discussing the intra-enterprise doctrine could not pertain to a combination whose initial affiliation was illegal, that passage was delinquent in relying upon *Yellow Cab* through a bare citation without further considering the ramifications which would result by straying beyond *Yellow Cab's* narrow holding. *Id.* Furthermore, Chief Justice Burger recognized that the intra-enterprise doctrine

*perweld* Court noted that both cases invoked the doctrine through little more than a bare citation to *Yellow Cab* and *Keifer-Stewart*, and commented that both could have reached the same result without relying on the doctrine.<sup>100</sup>

The majority then reexamined *de novo* the question of whether a parent and its wholly owned subsidiary were capable of conspiring in violation of section 1 of the Sherman Act.<sup>101</sup> Initially, Chief Justice Burger addressed the language of the Act and focused on the distinction Congress drew between concerted and unilateral conduct under sections 1 and 2.<sup>102</sup> The majority found that Congress intended to scrutinize unilateral activity only when it posed a danger of monopolization, in order to encourage single firms to compete vigorously.<sup>103</sup> In contrast, the majority determined that Congress deliberately decided to treat concerted conduct strictly under section 1 because it necessarily “deprive[d] the marketplace of the independent centers of decisionmaking that competition assumes and demands” and thus “inherently [was]

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would no longer be necessary in order to find the defendants in *Keifer-Stewart* liable for violating § 1 as subsequent Supreme Court interpretations of antitrust law had produced alternative theories of liability. *Id.* at 2738 & n.9. The dissent considered this suggestion useless as it ignored the salient fact that the majority’s holding was inconsistent with the ground on which *Keifer-Stewart* was actually decided. *Id.* at 2748 (Stevens, J., dissenting).

100. *Id.* at 2739. Section 1 liability in *Timken*, as the majority suggested, could have been grounded in evidence that the stock acquisition in the foreign corporations was designed to effectuate restrictive practices. *Id.* at 2739 & n.11. Also, the *Copperweld* Court noted that the relevance of the *Timken* Court’s statement pertaining to the intra-enterprise doctrine—“[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws”—was unclear as the American defendant neither owned a majority interest in nor controlled the foreign corporate conspirators. *Id.* at 2739 (quoting *Timken*, 341 U.S. at 598). For a discussion of *Timken*, see *supra* notes 47-53 and accompanying text.

With respect to *Perma Life*, the majority noted that the significance of the reference to the intra-enterprise doctrine was muted by the *Perma Life* Court itself, which stated it was not relying on the concept, and further noted that the doctrine was not required as alternative theories of liability under § 1 existed. 104 S. Ct. at 2739. For a discussion of *Perma Life*, see *supra* notes 54-59 and accompanying text.

101. 104 S. Ct. at 2739-44. The majority expressly stated that it was limiting its consideration to the parent wholly owned subsidiary situation and was expounding nothing with respect to the conspiratorial ability of a parent and an affiliated corporation it did not completely own. *Id.* at 2740.

102. *Id.* at 2740-41. The Court stated that this distinction was critical for a proper understanding of the terms “contract, combination . . . or conspiracy” in § 1, because otherwise that broad language, if applied literally, could prevent unilateral conduct which § 1 was not designed to police. *Id.* at 2741.

103. *Id.* at 2740. The majority noted that single firms were not held to § 1’s stricter standard of unreasonable restraints of trade for fear of dampening their competitive zeal. *Id.* Such a result might occur because robust competitive efforts could be too easily confused with conduct possessing anticompetitive effects. *Id.* For a further discussion, see *supra* note 8 and accompanying text.

fraught with anticompetitive risk.”<sup>104</sup> The *Copperweld* Court then applied this reasoning to the coordinated conduct of officers and employees of the same company, and of an unincorporated division and its parent, and found that their conduct did not violate section 1 for the simple reason that there was no sudden joining of economic units “previously pursuing separate interests.”<sup>105</sup>

The majority next examined whether the logic underlying Congress’ exemption of unilateral conduct from section 1 scrutiny similarly excluded the coordinated conduct of a parent and its wholly owned subsidiary.<sup>106</sup> The Court determined that a parent and its wholly owned subsidiary always possessed a common objective, or one corporate consciousness.<sup>107</sup> This was so, Chief Justice Burger reasoned, because the parent, by owning all of the shares of the subsidiary, was able to exert full control over the subsidiary “whenever [it] fail[ed] to act in the parent’s best interest.”<sup>108</sup> Thus, the majority found that where a parent

104. 104 S. Ct. at 2741. Chief Justice Burger explained that conspiracies were potentially anticompetitive for two reasons: because conspiracies involved the combination for common benefit of two or more entities previously pursuing their separate interests, such combinations (1) reduced “the diverse directions in which economic power is aimed,” and (2) suddenly increased “the economic power moving in one particular direction.” *Id.* The Court noted that Congress had determined that the underlying purpose of the Sherman Act, the promotion of competition in the marketplace, would be best served if concerted activity were to be judged under a more rigorous standard than unilateral behavior, and consequently subjected only concerted behavior to proscription as unlawful restraints of trade. *Id.* For a further discussion of this rationale, see *supra* note 8 and accompanying text.

105. 104 S. Ct. at 2741-42. The majority noted that the officers of a single company were obviously not separate economic actors pursuing separate economic interests, and that the existence of divisions simply represented an internal organization of labor. *Id.* Therefore, the Court reasoned that any coordination that occurred would be only for the purpose of furthering the common interests of the corporate whole; hence, § 1 scrutiny would not be warranted. *Id.* Furthermore, the majority stated that because such coordination was usually undertaken only in an effort to make the corporation more competitive in the marketplace, such coordination comported with the Sherman Act’s procompetitive emphasis and should be encouraged accordingly. *Id.* For a further discussion of why conduct among the officers or employees of the same company or between an unincorporated division and its corporation is immune from § 1, see *supra* notes 16-20 and accompanying text.

106. 104 S. Ct. at 2742-45.

107. *Id.* at 2742. The Court compared the two corporations to “a multiple team of horses drawing a vehicle under the control of a single driver.” *Id.* Thus, because the parent was the subsidiary’s sole shareholder, the majority stated that with or without a formal “agreement,” both corporations’ general actions were guided by one consciousness, that of the parent. *Id.*

108. *Id.* The *Copperweld* Court noted that whether or not the parent kept a tight rein over the subsidiary, the corporations nevertheless shared a common ultimate interest because of the parent’s latent power to control its subsidiary absolutely. *Id.* The majority emphasized that the parent possessed the ability to convert the wholly owned subsidiary to a division at any time. *Id.* at 2743. Thus, the Court criticized the Seventh Circuit’s “single entity” test, as applied to wholly owned subsidiaries, for failing to adequately preserve the Sherman Act’s

and its wholly owned subsidiary "agreed" to a course of action,<sup>109</sup> there was no sudden joining of disparate economic interests that would warrant section 1 scrutiny.<sup>110</sup> Consequently, the *Copperweld* Court held that a parent and its wholly owned subsidiary were incapable of violating section 1 of the Sherman Act as a matter of law.<sup>111</sup> To hold otherwise, the Court concluded, would be to favor the form of the corporate structure over its reality.<sup>112</sup> Although recognizing that its decision left a "gap" in

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distinction between unilateral and concerted conduct. *Id.* at 2742-43 n.18. Because the "single entity" test's criteria, by focusing on empirical evidence of the affiliated corporations' operations, only described "the manner in which [a] parent [chose] to structure a sub-unit of itself," the Court concluded that the test failed to measure when the corporations should be viewed as a single economic entity due to their possession of identical interests. *Id.* For a further discussion of the "single entity" test, see *supra* notes 76 & 91-92 and accompanying text.

109. 104 S. Ct. at 2742. The Supreme Court noted that an "agreement" in terms of § 1 lacked meaning in the context of a parent and its subsidiary because such an "agreement" could be "found [only] when 'the conspirators had a unity of purpose or a common design or understanding, or a meeting of the minds in an unlawful arrangement,'" and a parent and its subsidiary always had such a unity or common design. *Id.* (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

110. 104 S. Ct. at 2742. After comparing the parent/unincorporated division and parent/wholly owned subsidiary relationships, the majority held that the same reasons which prevented § 1 from applying to the conduct of the former also precluded § 1 from applying to the behavior of the latter. *Id.* The Court determined that each combination represented in fact a single enterprise. *Id.*

111. *Id.* at 2745.

112. *Id.* at 2742-43. The Court recalled its own adage that "[r]ealities must dominate the judgment" and noted that the only difference between an unincorporated division and a wholly owned subsidiary was the form of ownership. *Id.* at 2744 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933)). Chief Justice Burger opined that if § 1 liability were to depend on whether a corporate subunit were dressed as a division or subsidiary, "corporations would be encouraged to convert subsidiaries into unincorporated divisions" in order to avoid antitrust liability. *Id.* at 2743. Because the economic, legal, or other considerations which caused management to choose one organizational structure over another bore no relationship to whether the firm's conduct seriously threatened competition, the Court declared that the intra-enterprise doctrine served no valid antitrust goals. *Id.* Rather, the doctrine deprived consumers and producers of the benefits that the subsidiary form could yield by "impos[ing] grave legal consequences upon organizational distinctions that [were] of *de minimus* meaning and effect." *Id.* (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962)).

The majority pointed to the facts of *Copperweld* as evidence of the fallacy of treating wholly owned subsidiaries differently than divisions. *Id.* at 2743-44. It noted that nothing distinguished Regal's operations or economic threat to competition when it was managed as a division from when it was separately incorporated. *Id.* at 2744. In either arrangement, the Court found, Regal might have acted to interfere with the entrance of new competitors in the market—the only difference being that the source of help in one case would emanate from its own corporate higher-ups at Lear Siegler, while in the other case, from its parent, Copperweld. *Id.* Thus, Chief Justice Burger concluded that "[f]rom the standpoint of the antitrust laws, there [was] no reason to treat one more harshly than



the Sherman Act's proscription against unreasonable restraints of trade by excluding affiliated corporations' conduct from the purview of section 1,<sup>113</sup> the majority adhered to its conclusion that corporations and their wholly owned subsidiaries do not form the requisite plurality of actors under section 1 on the ground that the language and underlying purpose of the Sherman Act compelled the result.<sup>114</sup>

The *Copperweld* dissent,<sup>115</sup> authored by Justice Stevens, criticized the majority's new per se rule of section 1 immunity, and instead advocated the retention of the intra-enterprise conspiracy doctrine.<sup>116</sup> Chastising the majority for failing to adequately heed the doctrine of *stare decisis*,<sup>117</sup> the dissent undertook a review of the Supreme Court precedent which dealt with the intra-enterprise theory. Examining this precedent, Justice Stevens claimed that the Court in *Yellow Cab* explicitly stated that a parent and its subsidiary were capable of conspiring.<sup>118</sup>

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the other." *Id.* For a discussion of the history of Regal's existence, see *supra* note 79.

113. 104 S. Ct. at 2744. Because § 1 only applies to concerted conduct, a single firm possessing as much market power as two firms, and therefore capable of inflicting the same economic effect, may engage in anticompetitive conduct that unreasonably restrains trade without violating § 1, whereas similar conduct by two firms would be prohibited. *Id.* If the single firm's conduct were to fall short of monopolization or of an attempt to monopolize, the Sherman Act would not prevent such conduct. *Id.* The Court suggested, however, that the size of this "gap" was minimal because the anticompetitive conduct of a corporation and its wholly owned subsidiary was adequately policed under the Clayton Act and Federal Trade Commission Act, without resort to the intra-enterprise conspiracy doctrine. *Id.* at 2745.

114. *Id.* at 2744. The Court determined that this conclusion was necessary in order to give effect to Congress' intent to distinguish between unilateral and concerted conduct and to subject only the latter to the prohibitions contained in § 1. *Id.* For a discussion of Congress' purpose in drawing a distinction between these two types of conduct, see *supra* note 8 and accompanying text. The Supreme Court noted that the Act's plain language required the distinction. 104 S. Ct. at 2744. Otherwise, the Court found, § 1's requirement of a contract, combination, or conspiracy, as well as the entirety of § 2, would have been superfluous. *Id.*

115. Justice Stevens was joined by Justices Brennan and Marshall. 104 S. Ct. at 2731, 2745.

116. *Id.* at 2746 (Stevens, J., dissenting). Justice Stevens argued that because conduct between a parent and its subsidiary was not always for the purpose of achieving the competitive efficiencies associated with vertical integration, but rather was sometimes aimed at eliminating competition, § 1's rule of reason test, which proscribes only the latter type of conduct, served as an adequate tool for the courts to distinguish between the two. *Id.* The dissent thus contended that there was no need to resort to a per se rule which would permit both types of conduct. *Id.* For a more elaborate discussion of this reasoning by the dissent, see *infra* notes 130-37 and accompanying text.

117. 104 S. Ct. at 2746-49 (Stevens, J., dissenting). As Justice Stevens noted, "[a]ny departure from the doctrine of *stare decisis* demands special justification" and should not be taken lightly. *Id.* at 2746 (Stevens, J., dissenting) (quoting *Arizona v. Rumsey*, 104 S. Ct. 2305, 2311 (1984)).

118. *Id.* at 2746 (citing *Yellow Cab*, 332 U.S. 218 (1947)). The dissent stressed that the *Yellow Cab* Court "explicitly held that restraints imposed by the

The *Copperweld* dissent argued that the majority's attempt to limit *Yellow Cab*'s holding to a theory of unlawful acquisition was unjustifiable because the *Yellow Cab* Court discussed acquisitions only as a collateral matter.<sup>119</sup> The dissent next contended that three other cases, *United States v. Crescent Amusement Co.*, *United States v. Griffith*, and *Schine Chain Theatres, Inc. v. United States*,<sup>120</sup> also recognized that affiliated corporations were capable of conspiring in violation of section 1 of the Sherman Act.<sup>121</sup> Finally, the dissent referred to the language of *Keifer-Stewart*, *Timken*, and *Perma Life* which suggested an intra-enterprise conspiracy doctrine, and argued that the majority was unable to refute the fact that the language and rationales of these three earlier decisions were clearly inconsistent with its holding.<sup>122</sup> For these reasons, Justice Stevens concluded that Supreme Court precedent unequivocally established the existence of the intra-enterprise doctrine.<sup>123</sup>

To demonstrate further support for the intra-enterprise doctrine, the *Copperweld* dissent turned to the language and underlying purpose of

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corporate parent on the affiliates that it *already* owned in themselves violated § 1" when it determined that the defendants prevented the cab operating companies under their control from purchasing cabs in a free competitive market. *Id.* at 2746-47 & n.2 (Stevens, J., dissenting) (emphasis in original) (footnote omitted).

119. *Id.* at 2746 (Stevens, J., dissenting). The dissent suggested that the majority overlooked language in *Yellow Cab* which indicated the Court's unqualified adoption of the intra-enterprise concept. *Id.* at 2746 n.1 (Stevens, J., dissenting) (citing *Yellow Cab*, 332 U.S. at 227). Furthermore, Justice Stevens maintained that the Court in *Keifer-Stewart* had considered and had rejected the same narrow reading of *Yellow Cab*, as advocated by the defendants in *Keifer-Stewart*. *Id.* at 2748 n.4 (Stevens, J., dissenting) (citing Brief for Respondents at 21, *Keifer-Stewart*).

120. For a discussion of *Crescent*, *Griffith*, and *Schine*, see *supra* notes 40-41.

121. 104 S. Ct. at 2747 (Stevens, J., dissenting). In support of its claim, the dissent simply quoted a segment of *Crescent* dealing with divestiture of affiliated companies and quoted a passage from *Schine* which stated that "[t]he concerted action of the parent company [and] its subsidiaries . . . was not immunized by reason of the fact that the members were closely affiliated rather than independent." *Id.* at 2747 & n.3 (Stevens, J., dissenting) (quoting *Schine*, 334 U.S. 110, 116 (1948)). The *Copperweld* dissent also criticized the majority's suggestion that alternative grounds could have sustained these decisions, reasoning that the Court failed to acknowledge the fact that the holdings rested on conspiracies between affiliated corporations and that the majority's holding was inconsistent with those holdings. *Id.* at 2747 (Stevens, J., dissenting).

122. *Id.* at 2747-48 (Stevens, J., dissenting). The dissent based this finding upon the fact that each of those cases involved conspiracies between corporate parents and subsidiaries. *Id.* Justice Stevens considered it especially salient that the majority, although "not wanting for inventiveness in its reading of the prior cases," was unable to provide an alternative holding for *Keifer-Stewart*. *Id.* at 2748 (Stevens, J., dissenting).

123. *Id.* at 2749 (Stevens, J., dissenting). The dissent urged, at a minimum, that a strong presumption of the doctrine's validity should have attached for the reason that *stare decisis* carried special weight in the area of statutory construction, especially where, as here, Congress had chosen not to amend the Sherman Act in the four decades since the Court's creation of the doctrine. *Id.*

the Sherman Act.<sup>124</sup> Initially, the dissent emphasized that the Sherman Act was intended to have a broad sweep.<sup>125</sup> Justice Stevens then examined the section 1 requirement of a "contract, combination in the form of trust or otherwise, or conspiracy."<sup>126</sup> The dissent noted that it was a well-settled rule under the common law existing at the time the Act was drafted that a corporation was a separate legal entity apart from its affiliates.<sup>127</sup> In addition, it pointed out that "trusts," a form of combination between affiliated corporations, were specifically prohibited under section 1.<sup>128</sup> For these reasons, the *Copperweld* dissent concluded

124. *Id.* at 2749-51 (Stevens, J., dissenting).

125. *Id.* at 2749-50 (Stevens, J., dissenting). The dissent claimed that the Court had long recognized that Congress intended § 1's language to have a broad sweep capable of reaching any form of combination that unduly restrained trade. *Id.* at 2749 (citing *Standard Oil Co. v. United States*, 211 U.S. 1, 59-60 (1911)).

126. *Id.* at 2750 (Stevens, J., dissenting) (quoting 15 U.S.C. § 1 (1982)). In construing Congress' intent by use of this language, Justice Stevens found it enlightening to examine the common law background against which the Sherman Act was written. *Id.*

127. *Id.* at 2750 (Stevens, J., dissenting) (citing *Schenley Corp. v. United States*, 326 U.S. 432, 437 (1946) (per curiam); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440-42 (1934); *Burnett v. Clark*, 287 U.S. 410 (1932); *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809)). The dissent concluded that because Congress passed the Sherman Act against the background of this common law rule, Congress intended this rule to govern the construction of § 1. *Id.* (citing 21 CONG. REC. 2571 (1890)). The *Copperweld* dissent further contended that evidence of the notion of corporate separateness existed in the law of criminal conspiracy and in Supreme Court pronouncements which recognized that officers of a single corporation are capable of conspiring with the corporation. *Id.* Thus, Justice Stevens suggested that the majority's holding, insofar as it considered agreements between a parent and subsidiary to consist of unilateral conduct, was contrary to the concept of combination or conspiracy as generally understood by the Supreme Court and by the Congress that enacted the Sherman Act. *Id.*

The majority, in refuting the dissent, contended that it was unclear whether the common law existing when Congress passed the Sherman Act recognized intracorporate conspiracies. *Id.* at 2744-45 n.24. With respect to criminal corporate conspiracy, the majority noted that the courts began finding liability for such crimes well after the Act became law. *Id.* Furthermore, the majority maintained, the obvious incompatibility of an intracorporate conspiracy theory with § 1 demonstrates that Congress never intended to incorporate such a doctrine, even if it did exist in the common law. *Id.*

128. *Id.* at 2750-51 (Stevens, J., dissenting). The dissent, in reviewing the legislative history, explained why Congress was especially determined to attack trusts through the Sherman Act:

[A]ssociated enterprises and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.

that Congress clearly intended section 1 to proscribe conspiracies between corporate affiliates.<sup>129</sup>

Finally, the dissent discussed the “gap” left in section 1 by the majority’s decision.<sup>130</sup> Justice Stevens identified this “gap” as the inability of the Sherman Act, after *Copperweld*, to prevent a parent and its subsidiary from engaging in anticompetitive conduct that is wholly unrelated to the efficiencies associated with vertical integration.<sup>131</sup> Justice Stevens argued that the “gap” could have been avoided had the majority, in analyzing section 1, focused on the character of the alleged violators’ conduct and on their economic power, rather than on the number of actors involved.<sup>132</sup> The dissent stated that this approach would have been justified because the Sherman Act’s goal of promoting competition depended more on the presence of economic power than it did on the existence of a plurality of actors.<sup>133</sup> By considering the purpose and potential effect of the challenged conduct and by applying the rule of

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*Id.* at 2751 (Stevens, J., dissenting) (quoting 21 CONG. REC. 2457 (1890)). For the text of the legislative history immediately following the above quotation, which was also quoted by the dissent, see *supra* note 3.

129. *Id.* at 2751 (Stevens, J., dissenting). The dissent commented that Congress’ concern with the anticompetitive effects of existing trusts demonstrated the majority’s error in holding that only the acquisition of corporate affiliates was governed by § 1 because, had that interpretation been adopted at the inauguration of the Act, existing trusts would have remained untouchable. *Id.* at 2751 n.18 (Stevens, J., dissenting). Justice Stevens emphasized that the Sherman Act was aimed at exactly those types of trusts. *Id.* See *supra* note 127. Furthermore, the dissent suggested that the parent/wholly owned subsidiary was subject to § 1 because that economic arrangement was the modern business device most closely resembling the trust device of the 1890’s. 104 S. Ct. at 2751 (Stevens, J., dissenting).

130. 104 S. Ct. at 2751-55 (Stevens, J., dissenting).

131. *Id.* at 2752 (Stevens, J., dissenting). For a further explanation of the “gap,” see *supra* note 113.

132. 104 S. Ct. at 2752-54 (Stevens, J., dissenting). The dissent explained that because there were clearly two legal entities in the parent-subsidiary situation, nothing precluded acceptance of an intra-enterprise doctrine which permitted an examination of the affiliates’ concerted conduct and their relative market power in order to see if the end result was anticompetitive. *Id.* at 2752 (Stevens, J., dissenting). For a further explanation of why the dissent would focus on the character of the alleged violative conduct in applying § 1, see *infra* notes 135-36 and accompanying text.

133. 104 S. Ct. at 2751-55 (Stevens, J., dissenting). By focusing on the plurality of actors requirement, the majority, according to Justice Stevens, improperly stressed a facet of § 1 that was only of evidentiary significance—concerted conduct signals anticompetitive potential more than does unilateral activity—yet had no extrinsic economic significance. *Id.* at 2752 & n.20 (Stevens, J., dissenting). Because § 1’s plurality of actors requirement was merely a consequence of the plain statutory language, the *Copperweld* dissent suggested that the critical determinant from an economic standpoint was the presence of market power, defined as the “ability to raise prices above those that would be charged in a competitive market,” rather than a plurality of actors. *Id.* at n.19.

reason,<sup>134</sup> the *Copperweld* dissent explained that courts could condemn concerted action by affiliates when it constituted an unreasonable restraint of trade,<sup>135</sup> but could exonerate concerted action that was designed to enhance affiliates' ability to compete.<sup>136</sup> Because the intra-enterprise doctrine permitted an inquiry into the effects of the concerted action, Justice Stevens concluded that the doctrine was a justifiable method to close section 1's "gap" while simultaneously advancing the goals of the Sherman Act.<sup>137</sup>

In reviewing the opinions in *Copperweld*, it is submitted that the majority's discard of the intra-enterprise conspiracy doctrine as applied to corporations and their wholly owned subsidiaries comports with the

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134. For a discussion of the rule of reason and its relationship to § 1, see *supra* note 13.

135. 104 S. Ct. at 2753 (Stevens, J., dissenting). The dissent explained that because corporate affiliates were not expected to compete against one another, and because they generally did not so compete, any coordination of action, be it labeled a "contract," a "conspiracy," or merely a policy decision, would not restrain any competition so long as it was related to the firms' functional integration. *Id.* Justice Stevens noted that such restraints upon the parent or subsidiary would be the result of otherwise lawful integration and would thus not violate § 1. *Id.* The dissent further explained, however, that if the concerted conduct was unrelated to functional integration and imposed a restraint upon third parties of sufficient magnitude to restrain marketwide competition, it would be appropriate "as a matter of economic substance, as well as form, . . . to characterize the conduct as a 'combination or conspiracy in restraint of trade.'" *Id.* (footnote omitted).

136. *Id.* at 2746 (Stevens, J., dissenting). In discussing the operating efficiencies associated with functional integration between a parent and its subsidiary, the dissent criticized the majority's holding, which was premised on the notion that there was no substantive economic difference between an unincorporated division and a wholly owned, incorporated subsidiary. *Id.* at 2753-54 n.27 (Stevens, J., dissenting). The dissent argued that if there were in fact no distinction between the two forms, corporations would convert their wholly owned subsidiaries into unincorporated divisions in order to escape antitrust liability. *Id.* Rather, Justice Stevens asserted, corporate parents weigh contingent antitrust liability against savings they realize through use of the subsidiary and use divisions where the latter exceed the former. *Id.* The *Copperweld* dissent concluded that use of the subsidiary over the division was more than merely a matter of form, and thus the intra-enterprise conspiracy doctrine was a rational tool of antitrust enforcement. *Id.*

137. *Id.* at 2752 (Stevens, J., dissenting). In support of its conclusion, the dissent pointed to the facts of *Copperweld*, in which *Copperweld's* and *Regal's* concerted attempt to exclude independence from the market was unrelated to any effort to achieve procompetitive efficiencies. *Id.* at 2755 (Stevens, J., dissenting). The dissent criticized the majority for failing to test its economic rationale for abolishing the intra-enterprise doctrine against the facts in *Copperweld*. *Id.* Justice Stevens suggested the reason the majority only spoke in the abstract was exactly because the facts of *Copperweld* contradicted the majority's conclusion that affiliated companies were incapable of engaging in conduct that restrained trade. *Id.* The *Copperweld* dissent concluded its discussion by noting that "[u]se of economic theory without reference to the particular economic arrangement at issue is properly criticized when it produces overly broad per se rules of antitrust liability; criticism is no less warranted when a per se rule of antitrust immunity is adopted in the same way." *Id.* (footnote omitted).

goals and scope of the Sherman Act. Although the Supreme Court precedent may have implied the existence of such a doctrine,<sup>138</sup> the majority was nevertheless correct in according this precedent little weight, primarily because none of the decisions addressing the issue discussed the rationale for the doctrine.<sup>139</sup> Thus, the majority properly approached the problem as though it were "writing on a clean slate" and correctly sought to resolve the issue by examining the legislative intent and economic rationale underlying the Sherman Act.

In addressing Congress' intent, both Chief Justice Burger and Justice Stevens acknowledged that Congress endeavored to promote competition in the marketplace by designing section 2 of the Act to prohibit unilateral conduct that monopolized or attempted to monopolize trade and by drafting sections 1 and 2 to proscribe concerted conduct that restrained and/or monopolized trade.<sup>140</sup> Because the legislative record was scant as to Congress' reasons for distinguishing between unilateral and concerted conduct,<sup>141</sup> the majority examined the economic reasons underlying the distinction in light of the policies and goals of antitrust law.<sup>142</sup> The *Copperweld* Court determined that Congress chose to scrutinize concerted conduct very closely because it posed a great risk of engendering anticompetitive effects. The majority, therefore, concluded that it was imperative to discover whether the behavior of a parent and a wholly owned subsidiary fell into either the unilateral or concerted category before analyzing its effects on competition. In sum, Chief Justice Burger relied upon the Act's legislative history as a guide to structuring his analysis. On the other hand, Justice Stevens attempted to rely on the Act's legislative history to impute to Congress the intent to incorporate

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138. For a discussion of the cases from which the intra-enterprise doctrine is derived, *Yellow Cab*, *Keifer-Stewart*, *Timken* and *Perma Life*, see *supra* notes 33-59 and accompanying text.

139. See *supra* notes 60-63 and accompanying text. In addition, it is possible that the intra-enterprise conspiracy doctrine was only dictum as alternative holdings existed by which to sustain § 1 liability in all the cases except for *Keifer-Stewart*. See *supra* notes 40 (*Yellow Cab*), 53 (*Timken*) & 59 (*Perma Life*). While it may be true that § 1 liability in *Keifer-Stewart* was only possible through the intra-enterprise doctrine, that Court employed the doctrine without providing any explanation other than a bare citation to *Yellow Cab*. See *Keifer-Stewart*, 340 U.S. at 215. For a discussion of the *Copperweld* majority's critique of *Keifer-Stewart*, see *supra* note 99 and accompanying text. It is interesting to note that although the dissent stressed the existence of precedent, nowhere in its discussion of those cases did it present any rationale for their holdings. See 104 S. Ct. at 2746-49 (Stevens, J., dissenting); see also *supra* notes 117-22.

140. See *supra* note 102 and accompanying text (majority's discussion); 104 S. Ct. at 2753 (dissent's discussion). For a discussion of the legislative history indicating Congress' deliberate distinction between unilateral and concerted conduct in the Sherman Act, see *supra* notes 5 & 7-8.

141. See *supra* notes 5 & 7-8.

142. See 104 S. Ct. at 2740-44.

the intra-enterprise conspiracy doctrine into the Sherman Act.<sup>143</sup> Thus, the dissent accepted the fact that affiliates could violate section 1 and immediately proceeded to analyze the effects of the parent's and the wholly owned subsidiary's behavior. Upon review of these two approaches, it appears that the majority's interpretation of the Act's legislative history is the more persuasive. The majority's exegesis is compelling because it ties together Congress' overall intent in enacting the Sherman Act with the structure, or tools, Congress provided for enforcing the Act's policies and with the realities of the modern business environment. The dissent's approach is less convincing for two reasons. First, reliance on the pre-Act common law rule that treated each corporation as a separate legal entity is misplaced because the modern parent-subsubsidiary structure was only in its infancy when Congress passed the Sherman Act<sup>144</sup> and because sections 1 and 2 do not expressly incorporate such a rule.<sup>145</sup> Second, although it is undisputed that the Act was aimed at "trusts," those combinations were composed of independent horizontal competitors seeking to limit competition through use of cartel power and not of vertically integrated entities seeking to enhance their ability to compete like most modern parent-subsubsidiary corporations.<sup>146</sup> Therefore, it is suggested that the majority, in interpreting Congress' intent, correctly identified the starting point for its analysis of the intra-enterprise doctrine.

Although the majority and the dissent diverged in their interpretation of the Act's legislative history, it should be noted that, in considering the economic rationale underlying the Act's antitrust concerns and

143. For a discussion of the dissent's legislative history analysis, see *supra* notes 124-29 and accompanying text.

144. See Comment, *supra* note 5, at 1735. Defining single corporate entities in 1890 was uncomplicated because most companies were simple, single corporate organizations. *Id.* Also, those few companies that had grown large through vertical integration or horizontal combination retained centralized administrative structures. *Id.* Thus, it is contended that the Congress of 1890 did not contemplate an intra-enterprise theory for the reason that intricate corporate structures remained basically undeveloped at that time.

145. See 15 U.S.C. §§ 1-2 (1982). Just because the Congress of 1890 was well acquainted with the rule that separately incorporated entities were separate legal entities, nothing in the Sherman Act itself or the legislative history reflects the incorporation of that concept into the Act, contrary to the dissent's suggestion. See *supra* note 127 and accompanying text. It should be noted that the portion of the legislative record cited by the dissent in support of its contention involved congressional discussion concerning the overall constitutionality of the Sherman Act, not debate with regard to the specific application of § 1 or § 2. See 104 S. Ct. at 2750 (citing 21 CONG. REC. 2571 (1890) (remarks by Senator Teller)). Furthermore, as the dissent itself noted, § 1 did not prohibit *every* contract; the Sherman Act's language was not intended to be applied literally. See 104 S. Ct. at 2752 n.20. Therefore, even though § 1 of the Act applies to corporations, it is suggested that there is no support for the notion that § 1 covers concerted conduct between any separately incorporated entities.

146. See *supra* note 1 and accompanying text. The dissent apparently took notice of this fact. See *supra* note 128.

its relationship to the intra-enterprise doctrine, both opinions focused on substance rather than form. Chief Justice Burger concentrated on the relationship of a parent and its subsidiary in order to resolve whether the two, in substance, should be treated as a single entity.<sup>147</sup> Justice Stevens, on the other hand, focused on the economic substance, or character and effect, of the corporations' conduct.<sup>148</sup> Thus, the majority examined the substance of the affiliated corporations' relationship in order to determine their form, while the dissent accepted their separate forms in order to examine the substance of their conduct.<sup>149</sup> In effect, the majority's approach differed from the dissent's by treating the plurality of actors requirement as the threshold question and by placing an additional hurdle to overcome in determining whether a parent and a wholly owned subsidiary were subject to section 1 liability.<sup>150</sup> The majority's framework, of course, comported with its interpretation of the structure and the congressional intent underlying the Sherman Act, i.e., that two actors were required to satisfy the elements of section 1.

Because Congress deliberately left the Sherman Act vague in order for it to be a flexible and enduring tool that would aid the courts in dealing with anticompetitive conduct through changing times, both analyses appear to be logically supportable.<sup>151</sup> Thus, the allure of each

147. See *supra* notes 101-14.

148. See *supra* notes 132-37 and accompanying text. The dissent suggested that because the affiliates were in fact separate legal entities, the entities' market power and potential to restrain third parties' trade should be the criterion by which to judge whether they violated § 1. 104 S. Ct. at 2755 (Stevens, J., dissenting). See also Comment, *supra* note 30, at 385-88. It is suggested that a similar rationale subconsciously motivated the *Yellow Cab*, *Keifer-Stewart*, *Timken*, and *Perma Life* Courts. See, e.g., *Yellow Cab*, 332 U.S. at 227 ("the test of illegality under the Act is the presence or absence of an unreasonable restraint").

149. This difference is best demonstrated by the way in which the majority and the dissent framed what they determined to be the issue. The majority phrased the issue as being whether the logic underlying Congress' exemption of unilateral conduct from § 1 "similarly excludes the conduct of a parent and its wholly owned subsidiary." 104 S. Ct. at 2745. The dissent phrased the issue as "why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can easily be fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather." *Id.* at 2755 (Stevens, J., dissenting).

150. For a discussion of the elements of § 1 liability, see *supra* notes 10-15 and accompanying text.

151. See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) ("[a]s a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions"); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (Sherman Act was intended "to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint"); P. AREEDA & D. TURNER, *supra* note 2, ¶ 106, at 14-16 ("Neither the language nor the legislative history . . . is very illuminating about what specifically is allowed or prohibited. . . . Congress has never defined either the range of factors that bear on legality, the quantum of evil or beneficial effects dictating



approach might well depend on one's political philosophy with respect to governmental interference in the marketplace and laissez-faire politics, with those believing in the latter preferring the majority's probusiness stance.<sup>152</sup> It is submitted, however, that not only does the majority's analysis appropriately commence the inquiry at the natural starting point for a section 1 violation, but also that further reflection reveals that the dissent's approach contains several deficiencies. Justice Stevens, in rejecting the majority's economic reasoning for the Sherman Act's unilateral/concerted conduct distinction, failed to reconcile the fact that his emphasis on market power over the substantive relationship of the actors would make the entirety of section 2 superfluous.<sup>153</sup> Also, if the Sherman Act's unilateral/concerted conduct distinction were to be retained, the dissent's utilization of market power as the sole yardstick of anticompetitive ability would theoretically require all entities except sole proprietorships to be subject to section 1,<sup>154</sup> a result hardly contemplated by Congress.<sup>155</sup> Finally, because almost all "agreements" between a parent and its subsidiary possess an anticompetitive potential, any coordination between the two would be vulnerable to a section 1

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the legal result, or the manner of making the necessary calculus." Congress intended the courts to create and develop the basic body of antitrust law in a manner similar to the common law development of contracts and torts. *Id.*, at 15. Judges do not have complete liberty when interpreting the Act; however, the "[s]tatutory language sets some bounds. . . . For example, the concept of two-party conduct, as distinct from unilateral conduct, seems embedded in the Sherman Act § 1 requirement of a 'contract, combination, or conspiracy.'" *Id.* at 16.

152. Because the ultimate result of the majority's holding is a per se rule that precludes a parent and its wholly owned subsidiary from being capable of violating § 1, the majority approach would be the view chosen by those opposed to regulation of the private sector. On the other hand, "[p]roponents [of the intra-enterprise conspiracy doctrine] would . . . be satisfied to attack whatever conduct the statute could be made to reach." Areeda, *supra* note 40, at 454.

153. As the majority suggested, if Congress had intended market power to be the criterion by which to determine whether trade had been restrained, the entirety of § 2, as well as § 1's requirement of a contract, combination, or conspiracy, would have been superfluous. 104 S. Ct. at 2744. In order to prohibit such anticompetitive conduct, Congress would have needed only to outlaw all restraints of trade, permitting the courts to use the rule of reason to determine which restraints, whether by single or multiple entities, were unreasonable.

154. Comment, *supra* note 6, at 65. The dissent noted that a single firm possessing as much market power as two or more firms could act to restrain just as much trade as the combination and thus posed an equal threat to competition. 104 S. Ct. at 2752 (Stevens, J., dissenting). Similarly, it should be noted that a corporation with two divisions or a partnership composed of two partners may possess as much market power, and thus anticompetitive potential, as a single firm or affiliated firms. Thus, because any business concern composed of more than one individual possesses a plurality of actors, as that term was employed by the dissent, and may restrain trade, the sole proprietorship would be the only true business entity incapable of conspiring with itself under the dissent's reasoning. For a general discussion of the limits of an intra-enterprise concept, see Barndt, *supra* note 15.

155. See *supra* notes 1 & 3 and accompanying text.

suit.<sup>156</sup> Not only would this raise the spectre of clogging the courts, but it also would threaten to dampen affiliates' competitive zeal.<sup>157</sup>

It is submitted that the majority's holding, on the other hand, provides the advantage of furthering the Sherman Act's procompetitive goal while fitting contemporary modes of business organizations within its unilateral/concerted conduct distinction.<sup>158</sup> By dispensing with the intra-enterprise doctrine, Chief Justice Burger foreclosed scrutiny of the concerted conduct of a parent and a wholly owned subsidiary, which scrutiny in itself would have been anticompetitive.<sup>159</sup> Furthermore, because "conspiracy" in section 1 is defined as a "unity of purpose or common design,"<sup>160</sup> the majority's focus on "unity of interest" in the plurality of actors determination was extremely straightforward. Obviously, two entities may only acquire a unity of interest by an action if, prior to the action, they possess separate interests. Two separate corporations that initially share a unity of interest cannot possibly act, or combine, to create a unity of interest, and hence cannot conspire in violation of section 1. Therefore, *Copperweld's* holding is to be applauded for jettisoning a doctrine that never should have been born.

#### IV. RAMIFICATIONS OF *COPPERWELD*

Due to the Court's pronouncement in *Copperweld*, a parent corporation may act in concert with its wholly owned subsidiary without fear of violating section 1 of the Sherman Act.<sup>161</sup> The intra-enterprise conspiracy doctrine's demise, however, does not spell trouble for effective antitrust enforcement. On the contrary, as the Court itself pointed out,

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156. Note, "*Conspiring Entities*," *supra* note 5, at 663-64 ("practically all internal firm decisions would be susceptible to section 1 attack"); Note, "*Intra-Enterprise Conspiracy*," *supra* note 5, at 727 (expansive intra-enterprise doctrine would cause any discussions, agreements, or coordinated acts with respect to pricing or market allocation to be illegitimate).

157. *See, e.g., Areeda*, *supra* note 40, at 451, 453-54 (availability of doctrine has induced unsuccessful suits that would not otherwise occur and has created administrative difficulty for evaluating unilateral conduct not violating § 1); Note, "*Conspiring Entities*," *supra* note 5, at 665 (intra-enterprise doctrine would discourage competition because of the likelihood of spurious lawsuits motivated by the uncertainty as to what coordination would be illegal, coupled with courts' reluctance to grant summary judgments). Furthermore, an intra-enterprise doctrine would penalize corporations that use the multicorporate form, thereby hampering their pursuit of legitimate business goals, without substantially improving the ability of the antitrust system to prevent anticompetitive conduct. *Willis & Pitofsky*, *supra* note 20, at 24-30.

158. For a discussion of the majority's holding, see *supra* notes 101-14 and accompanying text.

159. Therefore, the problems attending the intra-enterprise doctrine, including its anticompetitive implications, would be avoided. *See supra* note 157.

160. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

161. 104 S. Ct. at 2742. The Court framed its ruling as follows: "We hold that [a parent] and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Id.* at 2745.

anticompetitive activities of a parent and its wholly owned subsidiary will continue to be policed by other provisions of the antitrust laws.<sup>162</sup> In addition, the government's antitrust enforcement efforts will not be stymied because the Justice Department has considered the doctrine to be ill-conceived and has not relied on it in recent years in prosecuting antitrust cases.<sup>163</sup> Therefore, abrogation of the doctrine with respect to a parent and its wholly owned subsidiaries does not provide these companies with a license to ravage the marketplace through anticompetitive activity, but it does eliminate the threat of treble damages from "private state tort suits masquerading as antitrust actions."<sup>164</sup>

Following *Copperweld*, the question remains under what circum-

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162. See *id.* at 2745. The initial acquisition of a subsidiary is subject to § 1 of the Sherman Act and § 7 of the Clayton Act. *Id.* See 15 U.S.C. § 1 (1982) (Sherman Act—prohibiting any contract, combination, or conspiracy unreasonably restraining interstate trade); *id.* § 18 (Clayton Act—prohibiting acquisition by corporation of all or any part of stock or assets of another corporation where competition would be substantially lessened). As has been suggested, *Yellow Cab*, at the least, stood for the proposition that corporations that become affiliated for the purpose of effectuating a restraint of trade violate § 1. See *supra* note 40 and accompanying text.

Subsequent conduct by the affiliates would be subject to the scrutiny of § 2 of the Sherman Act, § 5 of the Federal Trade Commission Act, and the anti-discrimination provisions of the Robinson-Patman Price Discrimination Act. Willis & Pitofsky, *supra* note 20, at 29. See 15 U.S.C. § 2 (1982) (Sherman Act—prohibiting monopolization, attempts to monopolize, or conspiracies to monopolize); *id.* §§ 13(a), (b), 21(a) (Robinson-Patman Act—prohibiting certain discrimination in pricing and practices with respect to the interstate sale of goods); *id.* § 45 (Federal Trade Commission Act—prohibiting "unfair methods of competition . . . and unfair or deceptive acts or practices").

163. See 104 S. Ct. at 2745 n.25. Donald Turner espoused the position of the Antitrust Division of the Department of Justice regarding the intra-enterprise doctrine: "We should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest." Handler & Smart, *supra* note 15, at 66 n.207 (quoting Turner, *Address Before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965)).

164. 104 S. Ct. at 2745. A private plaintiff might prefer to bring suit under § 1 rather than under some other antitrust provision because of treble damage relief, the avoidance of unfavorable precedent under the other antitrust provisions, and procedural advantages such as a reduction in his burden of proof and the extension of the statute of limitations. Willis & Pitofsky, *supra* note 20, at 41 n.68; Comment, *supra* note 46, at 78-79. In addition, because § 1 treats pacts between independent concerns as inherently anticompetitive, it scrutinizes such agreements more closely than do other antitrust statutory weapons. McQuade, *supra* note 7, at 185.

In *Perma Life*, the Supreme Court did note that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life*, 392 U.S. at 139. The Court's statement in *Copperweld*, rather than evidencing a retreat from its support of the role of private antitrust actions, clarified whether there exists a cause of action in the first place, thereby creating more certainty for all potential parties.

stances a parent and its less than wholly owned subsidiary<sup>165</sup> may constitute the plurality of actors required to violate section 1. Although *Copperweld* has established the principles to guide that inquiry, it has been left to the lower courts to determine what analysis should ultimately be employed.<sup>166</sup>

The *Copperweld* Court held that a parent and its wholly owned subsidiary were in substance a single entity for purposes of section 1 of the Sherman Act because the two corporations always possessed a "unity of interest."<sup>167</sup> The Court reached this conclusion based on its reasoning that a wholly owned subsidiary bore the same substantive relationship to its parent as an unincorporated division bore to its corporation, the only difference being in the form of ownership.<sup>168</sup> The cornerstone of the Court's conclusion was its perception that whether or not a parent actually exercised any control over the subsidiary, the parent always possessed the power to convert the subsidiary into a division.<sup>169</sup> Thus, the

165. A subsidiary corporation is defined as follows: "One in which another corporation (i.e. parent) owns at least a majority of the shares, and thus has control. Said of a company more than 50% of whose voting stock is owned by another." BLACK'S LAW DICTIONARY 1280 (5th ed. 1979). Where a "parent" has a minority interest in the "subsidiary" but control through majority shareholder acquiescence, such control may be termed an illegal agreement; the combination violates the Sherman Act without the need to resort to the intra-enterprise doctrine. McQuade, *supra* note 7, at 212-13. Of course, a "parent" may own a "minority" interest in the "subsidiary" and control it because there is no stock ownership by one entity greater in percentage than that owned by the "parent." Thus, although this portion of the discussion is primarily focused towards situations of majority control and ownership, the principles discussed may well apply to those situations where a "parent" owns less than 50% of the "subsidiary" but still controls it. For a discussion of stock percentages necessary to control a corporation, including situations in which a corporation is controlled by a single shareholder possessing as little as 10% of the outstanding stock, see W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 208-11 (5th ed. 1980).

166. It should be noted that of the lower court tests fashioned to determine a plurality of actors under the intra-enterprise doctrine, the test most closely resembling *Copperweld's* reasoning—the single entity test—was expressly rejected by the Court with respect to a parent and its wholly owned subsidiary because of the test's inability to gauge latent parental control that would signify the existence of a unity of interest. 104 S. Ct. at 2742 n.18. It is submitted that the lower courts, following *Copperweld*, must thus fashion a new approach to the plurality of actors problem which will comport with *Copperweld's* analysis. For a discussion of the single entity test and of the other existing lower court tests, which may have been rendered useless by *Copperweld*, see *supra* notes 73-77 and accompanying text.

167. For a discussion of the Court's holding, see *supra* notes 101-14 and accompanying text.

168. See *supra* notes 106-12 and accompanying text.

169. See *supra* note 108 and accompanying text. The Court determined that the antitrust goal of promoting competition would not be served by encouraging corporations to convert their wholly owned subsidiaries into divisions, which would occur if the intra-enterprise doctrine were maintained. *Id.* Furthermore, the Court noted that the doctrine might actually have the effect of decreasing the corporation's efficiency and thus its ability to compete. *Id.*

Court surmised, the subsidiary's ultimate purpose or goal was identical to that of its parent, and they were in effect one economic entity.<sup>170</sup>

In a similar vein, it is submitted that where a subsidiary is less than fully owned, *Copperweld* requires the lower courts to examine the various ownership interests in the subsidiary in order to determine as a matter of law whether the parent is able to exert full control over the subsidiary as though it were a division or a fully owned subsidiary, thereby necessitating a finding that the two enjoy a unity of interest and are incapable of violating section 1.<sup>171</sup> Such a determination will depend upon the circumstances of each case because the subsidiary's board of directors or even the parent itself may owe allegiances to the minority which precludes the board from managing the subsidiary in accordance with the parent's demands.

It is a fundamental notion of corporate law that the board of directors, which is charged with exercising its best judgment and independent discretion in determining and executing corporate policy, must act on behalf of the corporation as a whole, without favoring one group of shareholders over another.<sup>172</sup> Also, because of a parent's position of superiority over the minority shareholders of the subsidiary, the parent owes them the fiduciary duty of preventing oppression of their interests, as well as of avoiding "fraudulent, bad faith, or unfair results."<sup>173</sup> Moreover, where a parent uses its control over the subsidiary's board to

170. See *supra* notes 107-11 and accompanying text.

171. This section of the note is limited to a discussion of § 1 conspiracies between affiliated corporations where ownership is less than complete, for the reason that *Copperweld* is easily extended by analogy to those situations where common ownership is 100%. See, e.g., *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1496-97 (5th Cir. 1985) (wholly owned subsidiaries and their common parent); *Weiss v. York Hosp.*, 745 F.2d 786, 814-15 (3d Cir. 1984) (hospital and its medical staff), *cert. denied*, 53 U.S.L.W. 3669 (March 19, 1985); *Hood v. Tenneco Tex. Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (two wholly owned subsidiaries of common parent); *Lake Communications, Inc. v. Holiday Inns, Inc.*, 738 F.2d 1473, 1480 (9th Cir. 1984) (two wholly owned subsidiaries of common parent); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) (two corporations wholly owned by three individuals who together managed all affairs of the two corporations); *Zimmerman v. Board of Publications of Christian Reformed Church, Inc.*, 598 F. Supp. 1002, 1009-11 (D. Colo. 1984) (religious denomination and one of its separately incorporated boards).

172. Note, *Corporations—Under Delaware Law, Majority Shareholders Have No Duty to Ensure that a Minority Shareholder Benefit from a Contractual Corporate Dividend Distribution Policy Where the Latter's Changed Circumstances Preclude Enjoyment of the Benefit*, 29 VILL. L. REV. 932, 937-39 (1984).

173. H. HENN & J. ALEXANDER, LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 651-56 (3d ed. 1983); Note, *supra* note 172, at 937-39. The majority's fiduciary duty represents a limit to the concept that majority shareholders may ordinarily vote their shares in their own best interest and set corporate policy. Note, *supra* note 172, at 939. The majority's fiduciary duty to the minority is based on two theories: (1) the direct approach finds the duty because of the majority's position of superiority and influence over the minority's interests; (2) the indirect approach extrapolates the duty from the directors' duty because

engage in self-dealing,<sup>174</sup> the courts will scrutinize the resulting actions for intrinsic fairness,<sup>175</sup> thereby preventing the parent from exerting full control over the subsidiary.<sup>176</sup> Therefore, there may be some instances in which a less than wholly owned subsidiary may exercise independent judgment and may pursue its own parochial interests to the extent that it constitutes a separate economic entity from the parent.

It is submitted, however, that various situations exist where a parent could or does effectively exercise full control over its subsidiary, notwithstanding the presence of minority shareholders. Factors the courts ought to consider in determining the existence of that control include the following: (1) the factors enumerated by the single entity test, such as the firms' histories, whether the firms have common officers or directors, and the degree to which the subsidiary determines its own executive or long-term policy decisions; (2) the characteristics of the minority stockholders; and (3) the parent's power to change the corporate form of the subsidiary. Because the single entity test focuses on the external indicia of control, it is an appropriate mechanism by which to measure when a parent in fact controls its subsidiary such that the two possess one corporate consciousness.<sup>177</sup> As noted in *Copperweld*, though, the single entity test is deficient in its ability to ascertain the existence of a parent's latent power to control in those situations where the parent does not in fact appear to be in control of its subsidiary.<sup>178</sup> It is therefore suggested that the single entity test be supplemented by the two additional factors mentioned above.

The first additional factor involves examining the nature of the minority stockholders. In this manner, the courts can determine those instances where the minority interests are unlikely to interfere with parental power to control such that the affiliated corporations should be

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of the majority's domination of the corporation through their influence over the board of directors. H. HENN & J. ALEXANDER, *supra*, at 654.

174. Note, *supra* note 172, at 940. Self-dealing generally occurs where the majority uses its control to obtain some benefit for itself to the exclusion and detriment of the minority. *Id.* at 941 & n.38.

175. *Id.* at 940 ("The 'intrinsic fairness test' places the burden on the [majority] to demonstrate the total fairness of their actions to minority shareholders.").

176. Although the parent may substantially control its subsidiary and thus their interests may be similar, the two corporations may still lack a unity of purpose where minority shareholders exist. This is evidenced by the fact that the parent may be prevented from causing the subsidiary to do acts detrimental to the subsidiary, although beneficial to the parent, by malcontent minority stockholders. See, e.g., *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720-21 (Del. 1971) (parent owning 97% of subsidiary owes three-percent minority a fiduciary duty in parent-subsidary dealings, e.g., where parent causes subsidiary to declare dividends in excess of earnings). See generally H. HENN & J. ALEXANDER, *supra* note 173, at 651-61.

177. For a more thorough discussion of the single entity test, see *supra* notes 76 & 91-92 and accompanying text.

178. See *supra* note 108.

treated as part of the same economic entity for purposes of section 1. Examples of this situation would arise where the minority is comprised of (1) directors, officers, or employees of the parent or subsidiary or of other subsidiaries of the parent,<sup>179</sup> (2) stockholders of the parent or individuals related to them, and (3) institutional or individual stockholders holding the subsidiary's stock only for investment purposes. The second additional factor entails considering the latent power of a parent over its subsidiary. The courts should initially examine the percentage of the subsidiary's stock controlled by the parent to determine those instances where the parent possesses the power to change the corporate form of the subsidiary through merger.<sup>180</sup> The courts should then ap-

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179. See Baxter, *Supreme Court Update—Horizontal Cases*, 53 ANTITRUST L.J. 423, 425 (1984) (*Copperweld* should be extended to the situation where, for example, the parent owns 98% of the subsidiary with the other two percent outstanding as qualifying shares in the hands of directors).

180. See H. HENN & J. ALEXANDER, *supra* note 173, at 980. Every state contains as part of its corporate law statutes authorizing mergers and consolidations without the necessity of unanimous shareholder approval. *Id.*; Lynch, *A Concern for the Interest of Minority Shareholders Under Modern Corporate Laws*, 3 J. CORP. L. 19, 27 (1977). Required shareholder approval ranges from a simple majority in some states to over two-thirds in others. *Id.* at 24. The merger statutes are generally predicated on the notion of increasing management's flexibility in dealing with modern business demands and commercial growth. *Id.* at 21-22. The majority's power was expanded under this rationale in reaction to the courts' confrontations with "professional privateers," minority shareholders who sought to frustrate majority action intended to promote desirable business objectives by holding the corporation "hostage for a king's ransom." *Id.* In order to protect minority shareholders from oppressive mergers or consolidations orchestrated by the majority, however, courts generally apply equitable limitations through "unfairness" or "good faith" tests, which recognize the fiduciary duties of good faith and fairness owed the majority to the minority by reason of the former's absolute dominance over the latter's interests. *Id.* at 35-36.

One type of merger authorized by the so-called "short merger" statute, however, allows a parent corporation owning the requisite percentage of outstanding shares of a subsidiary corporation to unilaterally eliminate, or "freeze-out," the minority shareholders of the subsidiary. *Id.* at 29-30, 37. The percentage varies among the states from 80% in Nebraska to 99% in Illinois, and not all states possess short-form merger statutes. *Id.* at 29 n.78. See ILL. ANN. STAT. ch. 32, § 157.66a (Smith-Hurd Supp. 1984-85); NEB. REV. STAT. § 21-2074 (1983). These short-form merger statutes grant "raw, unbridled, and unchallengeable power to a parent" possessing the requisite share ownership to "take over publicly held shares at any time it so determines," and to become the "sole owners of the business enterprise." Lynch, *supra* at 31, 37 (emphasis added). The statutes generally provide the minority shareholders only the right to be compensated for the fair value of their shares. *Id.* at 37; H. HENN & J. ALEXANDER, *supra* note 173, at 984 n.8. The rationale behind such statutes is that the nuisance aspects of an insignificant minority outweigh the risk of abuse by the majority of the grant of power which only, in effect, permits "the reorganization of what is essentially a single business." Lynch, *supra*, at 43.

The primary difference between short- and long-form mergers is that in the latter the minority may seek judicial intervention to prevent the merger where its only purpose is to eliminate the minority or where the terms are grossly unfair. In the former, however, judicial redress is available only to settle a dispute concerning the value of the minority's interest. *Id.* Also, in the long-form merger,

ply an analysis along the lines of section 7 of the Clayton Act in order to determine whether a hypothetical merger of the two affiliates would be lawful under the antitrust laws.<sup>181</sup> In those situations where the parent possesses the power to lawfully merge with its subsidiary, it is suggested that the courts should attach a rebuttable presumption of unity of interest between the two corporations for the reason that the parent may always "freeze-out" the minority, thereby eliminating all adverse interests.<sup>182</sup>

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shareholder approval of both the parent and subsidiary is generally necessary to effectuate the merger, whereas in the short-form merger, the parent's board of directors may take action without first obtaining shareholder approval of either the parent or the subsidiary. H. HENN & J. ALEXANDER, *supra* note 173, at 984.

Where the parent owns the requisite percentage of stock of its subsidiary to effectuate a merger, because the parent also usually controls the subsidiary's board of directors, the parent possesses the potential power to fully own the subsidiary or to be able to convert it into an unincorporated division. Thus, the affiliates in effect possess a unity of interest. Because the parent's power to merge is essentially absolute where the parent owns the percentage of stock required for a short-form merger, it is urged that a unity of interest be conclusively presumed in these situations.

181. *See* 15 U.S.C. § 18 (1982). Section 7 of the Clayton Act is the principle statutory tool for challenging mergers. L. SULLIVAN, *supra* note 2, § 202. Section 7 prohibits the acquisition by a corporation of all or any part of the stock or assets of another corporation where the effect would be a substantial lessening of competition. *Id.* Section 7's test with respect to the merger's detrimental effect upon competition is generally more rigorous than is the unreasonable restraint of trade test of § 1 of the Sherman Act. *Id.* Injecting a § 7 analysis at this stage would serve to point up those combinations whose merging would not eliminate competition from the marketplace under the antitrust laws. *Id.* Thus, a § 7 analysis is suggested because although a parent may own the requisite shares to effectuate a merger with its subsidiary, the parent may be legally precluded from doing so. *Id.* In such situations, the parent would be unable to "freeze-out" the subsidiary's minority shareholders as a matter of antitrust policy and no unity of interest between the two corporations would therefore exist. Where, however, a merger would be found lawful under § 7, it is suggested that the parent would possess a unity of interest with its subsidiary. *Id.* It should be noted that the § 7 inquiry, which measures the product market and geographic market of the two firms, could potentially be very complex. *See id.* Thus, the courts should perform a truncated § 7 analysis.

182. *See* Handler & Smart, *supra* note 15, at 73 ("[w]here a corporation wholly owns another or has sufficient voting control over it so that it can change the corporate form of the subsidiary, there can be little doubt that only one economic entity exists, and that any agreement that it reaches is with itself"). The obstacles faced by a parent in a short-form merger would be substantially less than those involved in a long-form merger. *See supra* note 180. Because of this fact, it is suggested that a strong presumption of single entity existence should arise where the parent owns the requisite percentage of its subsidiary to effectuate a short-form merger.

It is recognized that the parent's ability to merge with its subsidiary, which would be partially dependent upon state merger statutes, would differ from state to state. To those who would shun use of such a standard because it would make application of federal antitrust law revolve partially around state law and because it would lead to a lack of uniformity, there are three responses. First, the *Copperweld* Court, by defining single entities in terms of unity of interest, as determined by power to control, recognized that the substance of the parent-sub-



One commentator has suggested that the ideal standard in a section 1 plurality of actors determination must be sensitive to section 1's basic antitrust concern of promoting independent centers of initiative, must reflect an understanding of modern business structures, must possess a resistance to manipulation by businesses seeking to avoid antitrust liability, and must be simple to apply.<sup>183</sup> It is suggested that a consideration of the single entity test, the nature of minority stockholders, and the parent's power to change the subsidiary's form are factors which, in accordance with *Copperweld*, determine whether the subsidiary is either an independent center of initiative or a mere arm of its parent. Because these factors are flexible, yet evidentiary, it is submitted that they will advance the Sherman Act's procompetitive goals while simultaneously comporting with the ideal standard noted above.

### CONCLUSION

A violation of section 1 of the Sherman Act requires, as a threshold element, the existence of a plurality of actors. In abrogating the intra-enterprise doctrine in *Copperweld*, the Supreme Court focused on the substantive relationship between legally separate entities in order to resolve when they should be considered a single economic entity for purposes of the antitrust laws. The Court determined that "unity of interest," as measured by power to control, is the appropriate yardstick to employ in making the inquiry. Thus, once control has been lawfully acquired, the question becomes what control suffices to create a "unity of interest," or a single economic entity, for purposes of section 1. In *Copperweld*, the Supreme Court proclaimed that such a unity necessarily exists where a parent corporation fully owns a subsidiary corporation, because of its power of full control. This note has made several suggestions as to the factors lower courts should consider in answering the question where a parent and its less than wholly owned subsidiary are involved. It is, therefore, urged that the lower courts first apply the single entity test to measure situations of actual control by a parent over its less than wholly owned subsidiary. Courts should then perform an analysis of the nature of the minority stockholders and of the parent's power

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subsidiary relationship is governed to an extent by state law. Second, the Congress enacting the Sherman Act certainly was aware that states give life to corporations and thus have the power to supervise and regulate them. As Congressman Wilson stated:

The States, not Congress, grant the charters for these corporations. It is at once their duty, as it is clearly within the sphere of their lawful power, to supervise the creatures which they bring into being, so as to prevent the franchises granted by the people [from] being used for the oppression and detriment of the people.

21 CONG. REC. 4093 (1890). Finally, this note only suggests a presumption which the courts need not treat as conclusive if other factors warrant a different finding.

183. See Comment, *supra* note 5, at 1753.

to merge with the subsidiary in order to determine whether the parent possesses the latent power to control the subsidiary. By performing these tests, the courts will be able to ascertain the existence of a unity of interest between a parent and its less than fully owned subsidiary such that the two are incapable of violating section 1 of the Sherman Act.

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