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The Demise of the Intra-Enterprise Conspiracy Doctine: Flexible Antitrust Enforcement Policy Abandoned in a Maze of Economic Certainty—Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984)

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THE DEMISE OF THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE: FLEXIBLE ANTITRUST ENFORCEMENT POLICY ABANDONED IN A MAZE OF ECONOMIC CERTAINTY—*Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

In *Copperweld Corp. v. Independence Tube Corp.*[1] the United States Supreme Court held that corporations and their wholly owned subsidiaries cannot conspire and, thus, cannot violate section 1 of the Sherman Act.[2] The decision signals an important shift in interpretation of the Sherman Act. Before *Copperweld,* corporations and their wholly owned subsidiaries were subject to conspiratorial liability under the Act.[3] The Supreme Court had recognized intra-enterprise conspiracies on at least six occasions.[4] Despite their diverging views on how broadly the doctrine was to be interpreted, the federal courts of appeals had unanimously applied the doctrine.[5]

The intra-enterprise conspiracy doctrine has generated much commentary. Most of the commentary has focused on the inconsistency inherent in holding parent corporations and their subsidiaries liable while not extending liability to corporations and their divisions.[6] The inconsistency is criticized because the form of corporate organization bears little, if any, relationship to a firm's ability to restrain trade.[7]

1. 104 S. Ct. 2731 (1984).

2. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (1982). Section 1 declares illegal "[e]very 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."

3. *See, e.g.*, United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947) (common ownership and control of corporations does not preclude a finding of combination or conspiracy under the Sherman Act); *see also infra* notes 13–18 and accompanying text.

4. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141–42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Griffith, 334 U.S. 100, 109 (1947); Schine Chain Theatres v. United States, 334 U.S. 110, 116 (1947); *see also* United States v. Crescent Amusement Co., 323 U.S. 173, 183–84 (1944) (charging § 1 conspiracy and, alternatively, § 2 monopoly). *But see* Areeda, *Intraenterprise Conspiracy In Decline,* 97 HARV. L. REV. 451, 457–62 (1983) (suggesting that the intra-enterprise doctrine was not responsible for the result reached in many of these cases).

5. For a summary of the various approaches to the intra-enterprise conspiracy doctrine, see Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 CARDOZO L. REV. 23, 39–61 (1981). *See also infra* notes 27–28 and accompanying text.

6. *See infra* notes 20–27 and accompanying text.

7. As the majority noted in *Copperweld,* "there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary." 104 S. Ct. at 2743. Rather, a firm's ability to restrain trade is a function of its market power or the market power that it shares with others through cartel arrangements. *Id.* at 2752 (Stevens, J., dissenting). If the firm does not have a significant degree of market power it cannot "unreasonably" restrain trade, because pressure from its competitors will force

This debate over the intra-enterprise conspiracy doctrine has clouded the true issue. By merely identifying the inconsistent application of the doctrine, the debate has failed to address two fundamental questions: first, whether it is desirable to control what is essentially single-firm conduct; and second, if it is desirable, whether the intra-enterprise conspiracy doctrine is an appropriate control mechanism.

In *Copperweld,* the Court resolved the previously inconsistent approach without explicitly addressing the two fundamental questions. The Court freed corporations and their divisions and subsidiaries from antitrust scrutiny by adopting a per se rule of nonliability under section 1.[8]

The Court implicitly addressed the two fundamental questions underlying section 1 analysis, however, by rejecting alternative ways of resolving the intra-enterprise inconsistency.[9] This Note suggests that the *Copperweld* Court implicitly concluded that it is desirable to police single-firm conduct only when such conduct violates the monopoly provisions of section 2.[10] The Note examines the assumptions and rationales that underlie this conclusion, and challenges the persuasiveness of such assumptions in light of the specific fact pattern presented in *Copperweld.* Specifically, this Note challenges the "efficiency" interpretation of the Sherman Act adopted by the Court.

Additionally, this Note questions whether a narrow interpretation of the "restraint of trade" provision remains faithful to the broad and flexible nature of section 1 as previously interpreted by the Supreme Court. The Note suggests that the complex philosophical and political presumptions

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it to adopt a competitive stance. *See* P. SAMUELSON, ECONOMICS 463, table 25-1 (11th ed. 1980) (the degree of control that a firm is able to exercise over pricing decisions is a function of the size of its market share and differentiation of its products).

8. *See infra* notes 37–38 and accompanying text. Many commentators have urged the Court to adopt this solution. *See, e.g.,* Handler & Smart, *supra* note 5, at 72–75.

9. The Court could have resolved the inconsistency by applying the intra-enterprise conspiracy doctrine to both forms of corporate organization and looking to the reasonableness of the challenged action on a case by case basis. If both corporate forms were subject to § 1 conspiratorial liability, the antitrust laws would not favor one form over another and the inconsistency would be resolved. The Court, by adopting a per se rule of nonliability, necessarily concluded either that it is not desirable to reach single-firm conduct previously reached with the intra-enterprise conspiracy doctrine, or that the doctrine is an inappropriate means for reaching such conduct.

Several commentators have urged that intra-enterprise conspiracies be extended to intra-corporate dealings, but this has historically been the minority position. *See, e.g.,* Kessler & Stern, *Competition, Contract and Vertical Integration,* 69 YALE L.J. 1, 90 (1959). *Contra* ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS, REPORT at 31 (1955) (rejecting the extension of intra-enterprise conspiracy to corporations and their officers or divisions) [hereinafter cited as ATTORNEY GENERAL'S REP.].

10. Sherman Antitrust Act § 2, 15 U.S.C. § 2 (1982). Section 2 provides: "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 . . . ."

that underlie antitrust analysis are essentially concerns for the legislature and not the courts. The Court, therefore, must make these critical presumptions explicitly and not disguise them in a circuitous maze of economic certainty.

The Note proposes, in conclusion, that a rule of reason test, incorporating an open balancing of policy objectives, is a more appropriate tool for assessing the reasonableness of restraints of trade by corporations and their subsidiaries or divisions. Congress should prescribe a flexible rule of reason test to preserve legislative review of these crucial policy choices.

I. SECTION ONE INTRA-ENTERPRISE CONSPIRACY DOCTRINE BEFORE *COPPERWELD*

Section 1 of the Sherman Act declares illegal "[e]very 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."[11] Nothing in the literal meaning of section 1 requires that the contract, combination, or conspiracy involve two separate corporations or two separate economic entities, although two parties are required.[12] Before *Copperweld,* the Supreme Court had held that corporations and their wholly-owned subsidiaries constituted two separate actors for section 1 purposes.[13] The Court had not addressed the related question of whether a corporation and its divisions, officers, or directors constituted two separate actors.[14]

A. The Early Application of the Doctrine

The seminal case regarding intra-enterprise conspiracy is *United States v. Yellow Cab Co.*[15] In *Yellow Cab,* the Court noted that a restraint of trade could be produced as easily by affiliated or integrated corporations as by independent corporations.[16] The corporate form was not determinative of

11. 15 U.S.C. § 1 (1982).

12. Two parties, however delineated, are required by the plain meaning of the terms "contract," "combination," and "conspiracy." As the court in *Copperweld* observed, however, there is no requirement within the statute's plain meaning that the two parties be separate economic entities. 104 S. Ct. at 2741.

13. *See supra* notes 3–4 and accompanying text.

14. *Copperweld,* 104 S. Ct. at 2741–42 & nn.15–17. The Court had previously left the issue unresolved. *See, e.g.,* Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 469 n.4 (1962).

15. 332 U.S. 218 (1947). In *Yellow Cab,* the Government charged Morris Markin and several taxi manufacturing and operating corporations that he owned in part with a conspiracy to restrain trade in purchasing cabs and providing cab services. By insisting that the cab operating companies purchase cabs exclusively from the subsidiary corporation (Cab Sales), Checker Cab Manufacturing was able to exclude all other manufacturers from 86% of the Chicago market, 15% of the New York market, 100% of the Pittsburgh market, and 58% of the Minneapolis market. *Id.* at 224.

16. *Id.* at 227.

conspiratorial capacity.[17] The Court, using a rule of reason approach, emphasized that the rationale behind the Sherman Act was the prevention of unreasonable restraints of trade.[18] Distinctions between corporate interrelationships were merely formal, and did not outweigh the Act's substantive concerns.

B. A Critical Response

The *Yellow Cab* decision has elicited mostly critical commentary.[19] Some critics argue that a parent and subsidiary do not constitute the "two actors" that section 1 contemplates.[20] Others argue that separate incorporation has no significance for antitrust law and should be rejected as a tool for measuring conspiratorial capacity.[21]

Critics of the intra-enterprise conspiracy doctrine suggest that section 1 conspiratorial capacity is premised only upon Congress' desire to encourage and preserve independent centers of initiative.[22] Yet a conspiracy

17. *Id.*

18. *Id.* "The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce."

19. For a partial listing of commentaries critical of the intra-enterprise conspiracy doctrine see *Copperweld*, 104 S. Ct. at 2739–40 n.12.

The intra-enterprise conspiracy doctrine has supporters as well. Some commentators urge that the doctrine be extended to intra-corporate dealings. Kessler & Stern, *supra* note 9, at 90. Others are content to accept the inconsistency involved in extending liability to subsidiaries but not to corporate divisions. The doctrine's supporters note that enforcement of the principles of the Sherman Act in one case is preferable to eliminating liability for the sake of consistency. *See* Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 198 (1962).

The doctrine's advocates assert that substantive principles should govern the antitrust laws. The substance of § 1, according to these supporters, is the prevention of unreasonable restraints of trade that are not justified by efficiency considerations. *See* Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, 11 FED. B.J. 130, 141–42 (1951). Underlying this argument is the premise that the Sherman Act is intended to promote the free movement of goods in competitive markets. Barndt, *supra*, at 198 n.281. Moreover, the advocates of the doctrine are much less likely than its critics to view single firm restraints of trade as efficiency inducing. Efficiency gains are to be weighed in light of other competitive concerns in a "rule of reason" context. *See* Comment, *Intra-Enterprise Conspiracy under the Sherman Act*, 63 YALE L.J. 372, 387–88 (1954).

20. *See, e.g.*, Sprunk, *Intra-Enterprise Conspiracy*, 9 A.B.A. ANTITRUST SECTION REP. 20, 26 (1956) (suggesting that separate legal incorporation cannot alone provide two actors for § 1 liability).

21. Corporations choose subsidiary forms for many legitimate business reasons that do not relate to the corporation's ability to restrain trade. *See* Handler & Smart, *supra* note 5, at 62–63; McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183, 186 (1955). However, the recognition that corporate form does not affect a firm's ability to restrain trade does not imply that single entities are incapable of restraining trade. This would, of course, depend on the degree of market power possessed by the firm. *See supra* note 7.

22. *See* Handler & Smart, *supra* note 5, at 72–73; McQuade, *supra* note 20, at 185; Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717, 737 (1977). The preservation of independent decisionmakers ensures that the market will allocate resources to the most efficient firms since prices will be set through competition. When decisionmakers

between parent and subsidiary corporations does not involve the combination of previously independent decisionmakers. These critics view the two corporations as a single economic unit pursuing profit maximization for the corporation as a whole.

Critics of the intra-enterprise conspiracy doctrine also disapprove of the doctrine because they believe that closely integrated enterprises afford economies of scale that offset any gains that might be realized by division and competition.[23] They argue that the intra-enterprise conspiracy doctrine discourages subsidiaries as a form of corporate organization and thereby misallocates corporate resources.[24] Critics see the inefficiencies that result as inimical to the purposes of the Sherman Act.

In addition, the critics fear that the doctrine would be manipulated by overzealous attorneys and courts, and extended to virtually all corporate planning activity.[25] They believe that section 1 per se liability (for certain inherently anticompetitive activities) and intra-enterprise conspiracy could be combined to create de facto conspiracies in normal business planning activities.[26] Because of this fear, critics have developed various limiting tests for intra-enterprise conspiracy or have repudiated the doctrine altogether.[27]

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collude they can manipulate price and supply to obtain monopoly profits.

23. *See* Handler & Smart, *supra* note 5, at 62–63, 73; McQuade, *supra* note 21, at 185, 215.

These economies of scale can, however, be realized in one corporate form as easily as another, unless it is assumed that one corporate form is more readily adaptable to specialization of function or division of labor. *See, e.g.*, P. SAMUELSON, *supra* note 7, at 25 (listing factors responsible for this phenomenon). Moreover, a concern about independent decisionmakers mistakes the purpose of § 1 intra-enterprise conspiracy theory by assuming that this theory is meant to make parent and subsidiary compete with one another. The intra-enterprise conspiracy doctrine historically has been used only to prevent parent and subsidiary from coercively restraining the trade of outsiders. *See* ATTORNEY GENERAL'S REP., *supra* note 9, at 34–35. The firm, in other words, is not asked to compete with itself but only to refrain from actions that unreasonably restrain competition. This interpretation of the statute recognizes that it is not the conspiracy itself that is objectionable (a firm conspires with its subsidiaries when it makes pricing decisions), but rather it is the effect of the conspiracy that makes the conspiracy objectionable.

24. McQuade, *supra* note 21, at 186; Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 28 (1968). This argument assumes, of course, that one form of corporate organization is more efficient than the other in certain contexts. Moreover, this argument assumes that the risks and costs of intra-enterprise conspiratorial liability outweigh the benefits of separate incorporation. If the benefits are substantial, as claimed, it seems unlikely that the doctrine could have had a substantial effect on the allocation of corporate resources. Any effect on the distribution of corporate resources would occur at the margin; only firms with a high probability of antitrust liability or a potentially large antitrust penalty would be affected.

25. Handler & Smart, *supra* note 5, at 38–39; Willis & Pitofsky, *supra* note 24, at 29–30, 34–35.

26. This fear seems irrational in light of the Supreme Court's approach to intra-enterprise conspiracy. The Supreme Court had always analyzed these conspiracies in a rule of reason context. *Copperweld*, 104 S. Ct. at 2746 (Stevens, J., dissenting). Additionally, many commentators have urged that the intra-enterprise conspiracies be analyzed under a rule of reason. *See, e.g.*, Kessler & Stern, *supra* note 9, at 90; ATTORNEY GENERAL'S REP., *supra* note 9, at 34–35 (urging application of intra-enterprise conspiracy doctrine only in cases of coercive restraint on third parties).

27. For a summary of several of the limiting proposals suggested see Comment, *All in the Family:*

C. *The Judicial Response*

In response to the criticism generated by the intra-enterprise conspiracy doctrine, several of the federal courts of appeals adopted limitations on the doctrine. The Seventh, Eighth, and Ninth Circuits applied a fact-specific single entity limitation, using the doctrine only when the parent and subsidiary corporations were not acting as a coordinated whole.[28] In contrast, the First, Third, and Fifth Circuits broadly applied the doctrine in tandem with the traditional section 1 rule of reason analysis.[29]

II. *COPPERWELD:* THE CHALLENGED ACTIONS AND THEIR EFFECTS

The antitrust violations asserted in *Copperweld* were triggered by the actions of the Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Corporation. In 1972, Copperweld purchased Regal, a steel tube manufacturer, from the Lear Siegler Corporation. The contract of sale included a noncompetition agreement.[30] David Grohne, an employee of Lear Siegler who was not bound by the noncompetition agreement, attempted to establish his own steel tubing business, Independence Tube Corporation.[31] Copperweld and Regal, through various means, attempted to stop Independence from entering the steel tubing market.

During 1972 and 1973, Mr. Grohne contacted several banks and suppliers of both steel products and manufacturing equipment.[32] Throughout this same period Copperweld, in conjunction with Regal, wrote to these potential financiers and suppliers and warned that Copperweld was "greatly concerned" with Mr. Grohne's contemplated entry into the structural tube market in competition with Regal.[33] The letters threatened to take

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When Will Internal Discussion Be Labeled Intra-Enterprise Conspiracy?, 14 DUQ. L. REV. 63, 69–87 (1975); *see also* Handler & Smart, *supra* note 5, at 72–75 (the doctrine should be "jettisoned").

28. *See* Handler & Smart, *supra* note 5, at 38–39. The single entity limitation has been criticized because of its internal inconsistency; namely, evidence of collusion between a parent and subsidiary indicates close integration that, under a single entity defense, exempts the firm from § 1 scrutiny. *See* Areeda, *supra* note 4, at 464.

29. *See* Handler & Smart, *supra* note 5, at 38–39.

30. *Copperweld*, 104 S. Ct. at 2734.

31. *Id.* at 2734–45.

32. *Id.*

33. *Id.* at 2734. Copperweld and Regal sent these letters on several occasions. Copperweld wrote to the machinery supplier on three occasions during 1973. *See* Record at app. 454, Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984). The parent and subsidiary also contacted the president of the secondary supplier on three occasions during this period. *See id.* at app. 624–26. When Copperweld realized that Mr. Grohne was attempting to lease land in an industrial park, Copperweld's president wrote letters to all potential lessors. *See id.* at app. 575–78. Finally, on several occasions Regal sent letters to representatives of U.S. Steel informing them that "[i]t is a source of great concern to Regal Tube . . . to find that . . . Independence Tube . . . is receiving shipments of steel from your

"any and all steps" necessary to protect Copperweld's rights under its purchase agreement with Lear.[34] A supplier that had agreed to provide Independence with manufacturing equipment voided its agreement as a result of these threats. Independence was able to secure another supplier, but its entry into the steel tubing market was delayed by nine months.[35]

The trial court held Copperweld liable for conspiracy under section 1 and the Seventh Circuit affirmed the judgment.[36] The Supreme Court reversed the finding of conspiratorial capacity.[37] The Court held that a parent corporation and its wholly owned subsidiaries are legally incapable, under section 1 of the Sherman Act, of conspiring with each other.[38]

The Court's decision was obviously influenced by the critical commentaries discussed above.[39] The Court adopted the view that section 1 conspiracy doctrine is premised only upon the desire to preserve independent centers of initiative.[40] The Court emphasized that a conspiracy between parent and subsidiary corporations does not involve a combination of previously independent decisionmakers.[41] The Court expressed its belief that these corporations, if unfettered by unreasonable interference, could generate significant efficiency gains. The intra-enterprise conspiracy doctrine had, according to the Court, unreasonably reduced the competitive zeal of aggressive entrepreneurs and thereby encouraged inefficiency.[42] In addition, the doctrine had misallocated corporate resources and deprived consumers of the benefits of decentralized management.[43]

In an effort to cure these perceived shortcomings, the Court announced a new test: section 1 requires that conspirators have distinct and diverse economic interests before conspiratorial capacity is present.[44] Parent

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Gary works." *Id.* at app. 758. There is also evidence that Copperweld and Regal telephoned at least one of these suppliers and told the supplier that Copperweld was contemplating legal action against it. *See id.* at app. 627.

34. *Copperweld,* 104 S. Ct. at 2734.

35. *Id.* at 2734–35.

36. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 313 (7th Cir. 1982). The Seventh Circuit applied a fact-specific, single-entity limitation. Analyzing a variety of factors, the court attempted to decide whether Copperweld and Regal were one entity or two for § 1 conspiracy purposes. The appellate court concluded that the trial court was justified in holding that Regal and Copperweld did not constitute one actor for § 1 purposes. *Id.* at 320. This fact-specific analysis has been criticized by some commentators. *See supra* note 28.

37. *Copperweld,* 104 S. Ct. at 2745.

38. *Id.*

39. *See supra* notes 19–27 and accompanying text.

40. 104 S. Ct. at 2741. *See also supra* note 22.

41. 104 S. Ct. at 2741.

42. *Id.* at 2740, 2742. The Court apparently linked these efficiency benefits with the form of corporate organization (for example, decentralized management), rather than with the size of the firm. *Id.* at 2742 (divisions have "presumed benefits" and decentralized management creates efficiency).

43. *Id.* at 2742; *see also infra* note 52.

44. 104 S. Ct. at 2740 (§ 1 reaches "separate entities"). "[T]he ultimate interests of the subsidiary

corporations and their subsidiaries, which are a "single enterprise," cannot alone violate section 1.

III. ANALYSIS: A DECISION TO LIMIT ANTITRUST SCRUTINY OF SINGLE-FIRM RESTRAINTS OF TRADE

The *Copperweld* decision, in addition to explicitly rejecting the doctrine underlying *Yellow Cab* and its progeny, implicitly rejects the result of these previous cases. This signals a fundamental shift in the Court's interpretation of section 1 of the Sherman Act. The Court states that the intra-enterprise conspiracy doctrine is merely an inappropriate control mechanism. However, the Court implicitly concludes that it is no longer desirable to control the types of conduct previously reached with the doctrine. The following section analyzes four aspects of the Court's decision that reveal this fundamental shift in section 1 interpretation.

A. *The Indicia of an Intent to Lessen Antitrust Scrutiny of Single-Firm Restraints of Trade*

Several factors indicate a shift towards less intensive scrutiny of single-firm restraints of trade. First, the Court asserted that alternative antitrust provisions are appropriate for suppressing anticompetitive single-firm behavior. However, it then failed to assess the likelihood of prosecution under these provisions.[45] The Court's rejection of the intra-enterprise conspiracy doctrine is not contingent on the availability of other control mechanisms. Some commentators believe that the other statutory provisions suggested by the Court are not acceptable alternatives.[46] If these commentators are

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and the parent are identical, so the parent and subsidiary must be viewed as a single economic unit." *Id.* at 2743 n.18; *see also* United States v. Colgate & Co., 250 U.S. 300, 305 (1919) (Colgate's unilateral decision not to sell to wholesalers not in violation of § 1).

45. *Copperweld*, 104 S. Ct. at 2745 ("[a]ny anticompetitive activities . . . may be policed adequately without resort to an intra-enterprise conspiracy doctrine"). The Court asserted that § 7 of the Clayton Act, 15 U.S.C. § 18 (1982), and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), could be used, in addition to § 2 of the Sherman Act, to police parent and subsidiary conduct. *Id.*

46. *See, e.g.*, Comment, *The Intra-Enterprise Conspiracy Doctrine: Toward an Equitable Approach*, 33 DE PAUL L. REV. 105, 145–46 (1983). The § 2 monopoly provisions require proof of monopoly power or an attempt to monopolize. *See* 15 U.S.C. § 2 (1982). Courts applying this provision require a particular concentration-ratio within an industry to prove a monopoly. The Supreme Court has held that the "attempt" provision of § 2 requires a showing of specific intent and a dangerous probability of success. *See* American Tobacco Co. v. United States, 328 U.S. 718, 785 (1946); Swift v. United States, 196 U.S. 375, 396 (1905). This treatment of § 2 ignores the fact that monopoly power may be exercised in varying degrees. Thus, section 2 does not reach restraints of trade by single firms that possess a degree of monopoly power less than the required concentration-ratio. *See* ANTITRUST SECTION, AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 141–42 (2d ed. 1984) (predatory tactics by firms unlikely to achieve monopoly power not within reach of § 2). Furthermore, the Clayton

correct, the practical effect of the Court's decision is to create a "gap" in antitrust enforcement.[47] That is, there are no longer any provisions that can be effectively used to reach unreasonable single-firm restraints of trade not involving a monopoly or an attempt to monopolize.[48]

Second, the *Copperweld* Court rejected a doctrine proven to be effective for fighting single-firm restraints of trade. The Court concluded that the intra-enterprise conspiracy doctrine was not necessary to the results of previous cases.[49] This conclusion is doubtful. In one previous decision, for example, the alternative grounds of liability were not available for the Court to use.[50] In addition, the Court erroneously assumes that it is as easy to prosecute and prove violations under these alternative theories as it is under a theory of intra-enterprise conspiracy.[51] Moreover, even if prosecution would have resulted under the particular circumstances presented in these cases, a flexible restraint of trade provision is valuable because it deters the development of new forms of trade restraints.

Third, the Court's emphasis on the efficiency losses caused by intra-enterprise conspiratorial liability reveals that it elected to relax antitrust scrutiny of single-firm conduct. The Court identified two distinct forms of efficiency gains that it believed would be realized if the doctrine were abandoned. First, the Court asserted that the threat of section 1 antitrust liability for subsidiaries could encourage corporations to organize into divisions instead of subsidiaries even if this form is inefficient.[52] The Court

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Act and Federal Trade Commission (FTC) Act will likely prove ineffective. *See* Comment, *supra* at 145–46. The FTC Act lacks the deterrent power of § 1 because it does not allow private actions or treble damage awards. In addition, it exempts entire industries and is susceptible to political manipulation. The Clayton Act provisions may well be "too specialized to provide an adequate substitute for the more comprehensive Sherman Act." *Id.* at 146. Some commentators argue that the gap was intentional. *See, e.g.*, Willis & Pitofsky, *supra* note 24, at 22 (single enterprise conduct may fall between §§ 1 and 2).

47. The Court in *Copperweld* recognized this gap but asserted that the size of the gap is "open to serious question." *Copperweld*, 104 S. Ct. at 2745.

48. Unreasonable single-firm restraints of trade not actionable as monopolies or attempts to monopolize are per se legal unless some other provision of the antitrust laws is applicable. Indeed, some commentators have argued that the intra-enterprise conspiracies were merely a judicial attempt to fill this gap. *See, e.g.*, Willis & Pitofsky, *supra* note 24, at 22; Note, *supra* note 22, at 717–19.

49. *Copperweld*, 104 S. Ct. at 2745.

50. The *Copperweld* Court concluded that the same result could have been reached in Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), under an alternative conspiracy theory. *Copperweld*, 104 S. Ct. at 2738 n.9. This theory, however, was not available at the time. This is one example of how objectionable conduct could, in the absence of a flexible antitrust theory, go unprosecuted simply because the courts do not have a recognized label for the conduct.

51. Actions brought under § 1 "have strategic and procedural advantages over other forms of antitrust relief, including criminal penalties, treble damages, private actions, avoidance of market analysis, and elimination of certain defenses." Comment, *supra* note 46, at 146 (footnotes omitted).

52. *See Copperweld*, 104 S. Ct. at 2741 ("Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively."). Discouraging the divisional form "could well deprive consumers of the efficiencies that decentralized management may bring." *Id.* at 2742. The

intended, by rejecting the intra-enterprise conspiracy doctrine, to end any judicial influence on the allocation of corporate resources.[53]

In addition, the Court expected that a further efficiency gain would result if firms were free to pursue their competitive instincts. In the free market, the efficient firm captures customers from its inefficient rivals who will eventually be driven from the market. According to the Court, subjecting parents and their subsidiaries to section 1 liability had preserved inefficient competitors by dampening the competitive zeal of aggressive entrepreneurs.[54]

Since the Court expressly recognized that single-firm behavior may be anticompetitive,[55] its decision reveals a preference for an efficient though potentially uncompetitive market. Not surprisingly, the Court avoided explicitly making this difficult policy decision. The Court instead declared that Congress had made this fundamental choice when it drafted the Sherman Act.[56] This assertion is questionable because the wording of section 1 is ambiguous,[57] and since the Court did not analyze the legislative history of section 1 to find evidence of this choice. Moreover, this interpretation of the Sherman Act repudiates prior Court pronouncements on the proper interpretation of section 1.[58]

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same rationale applies to parent and subsidiary corporations. *Id.*

53. The Court could have cured the misallocation of corporate resources, if indeed there is any such phenomenon, by extending liability to divisions rather than by eliminating the intra-enterprise conspiracy altogether. *See supra* note 9 and accompanying text.

54. The Court stated:

> [B]ecause it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Copperweld, 104 S. Ct. at 2740.

55. *Id.* at 2744. This Note uses the term "competition" in its commonly understood sense: a market situation in which market pricing and production decisions are determined through "rivalry" with other firms in the market. This definition assumes nothing about the economic efficiency of the firms in the industry. Thus, it is possible that a firm obtaining market power through its own efficiency gains may also use that power to unreasonably restrain trade through anticompetitive tactics. Anticompetitive tactics are tactics that eliminate rivalry and do not promote efficient production or efficient allocation of resources.

56. *Id.* at 2745. This interpretation of § 1 is supported by Judge Robert Bork, a proponent of the use of economic analysis in antitrust law. R. BORK, THE ANTITRUST PARADOX 15–71 (1978). *But see infra* notes 67–71.

57. The language of § 1 does not reveal a congressional preference for efficiency. Neither does it explicitly apply only to distinct economic entities. *See supra* notes 11–13.

58. *See* P. AREEDA, ANTITRUST ANALYSIS 57 (3d ed. 1981) (the purpose and function of the Act could not have been accomplished if the courts had interpreted the Sherman Act narrowly); *see, e.g.,* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1932) (The Sherman Act is a "charter of freedom" and is to have a "generality and adaptability comparable to that found to be desirable in constitutional provisions." The Act's phrases are to be interpreted flexibly enough to frustrate all efforts to unreasonably restrain trade); Standard Oil Co. v. United States, 221 U.S. 1, 59–60 (1911) (the classes within § 1 were intended "to embrace every conceivable contract or combination which could be made

Finally, other recent antitrust decisions reveal the Court's intention to substantially decrease the threat of antitrust prosecution by limiting the scope of the antitrust laws.[59] Several commentators have noted that this development has paralleled the rising influence of economic analysis, especially Chicago-style economics, in antitrust enforcement.[60]

B. A Critical Analysis of the Rationale for Exempting Single Firm Restraints of Trade from Section One Scrutiny

Two implicit premises underlie the conclusion that the antitrust laws should not reach single firm "gap" behavior. The first premise implicit in the *Copperweld* decision is that efficiency is the only criterion for judging Sherman Act violations. The second premise is that a successful firm's behavior is inherently and necessarily efficient and that government interference can only distort the naturally efficient market outcome. Both of these premises, however, are open to challenge.

1. The Efficiency Interpretation: An Impermissibly Narrow Interpretation of Congressional Intent

Promoting consumer welfare is universally accepted as the goal of the Sherman Act.[61] Authorities disagree, however, about how to achieve this goal.[62] Some commentators believe that the best way to promote consumer welfare is to maximize the gross national product.[63] This theory assumes

concerning trade" and courts must keep apace of evolving restraints of trade); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 427–29 (2d Cir. 1945) (Hand, J.) (Sherman Act expresses a preference for atomistic markets and framers were motivated by social and moral concerns in addition to economic concerns).

59. *See* Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984); Cantalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) (professional societies); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (learned professions).

60. *See* Bickel, *The Antitrust Division's Adoption of a Chicago School Economic Policy Calls for Some Reorganization: But is the Division's New Policy Here to Stay?*, 20 HOUS. L. REV. 1083, 1086–87 (1983) (the "Antitrust Division personnel are now following policy set forth in Robert Bork's *The Antitrust Parodox* and the writings of Richard Posner"); Gerhart, *The Supreme Court and Antitrust Analysis: The Near Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 319 (1982). *But see* Hay, *Is Antitrust Obsolete? A Forecast on the Role of Antitrust Policy in the Eighties*, CORNELL L.F. Feb. 1982, at 2, 6 (despite a change in the underlying enforcement philosophy, it is not likely that a significant relaxation of antitrust enforcement will occur).

61. *See* R. GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 2.01, at 2–6 (1984).

62. *See, e.g.*, Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67–70 (1982) (the primary method of promoting consumer welfare is through wealth redistribution not the pursuit of efficiency). *Contra* R. BORK, *supra* note 56, at 90 (consumer welfare is maximized when prosperity is maximized, without regard to the resulting income distribution).

63. *See, e.g.*, R. BORK, *supra* note 56, at 90–91.

that an action that improves efficiency perfects societal use of scarce resources by increasing gross national product.[64] Thus, business action should be judged reasonable or unreasonable depending solely upon whether it is efficient. The proponents of this statutory interpretation argue that the Sherman Act should not punish an efficient firm's activity even if that firm eliminates some or all business rivalry through means unrelated to its superior efficiency.[65] The Supreme Court adopted this efficiency interpretation of the Sherman Act in *Copperweld*.[66]

The efficiency interpretation is deficient for three distinct reasons. First, it ignores distributional effects, which are a primary concern of the Sherman Act. Second, it ignores goals, other than efficiency, that are primarily political in nature. Finally, efficiency is often hard to quantify[67] and is therefore inappropriate as a sole or primary goal of the legislation since the courts are ill-suited to the task of measuring and comparing such illusive quantities.

Essential to the first criticism is the belief that Congress intended, by favoring competitive markets, to apportion to consumers the entire surplus income[68] generated by competition. This interpretation is consistent with

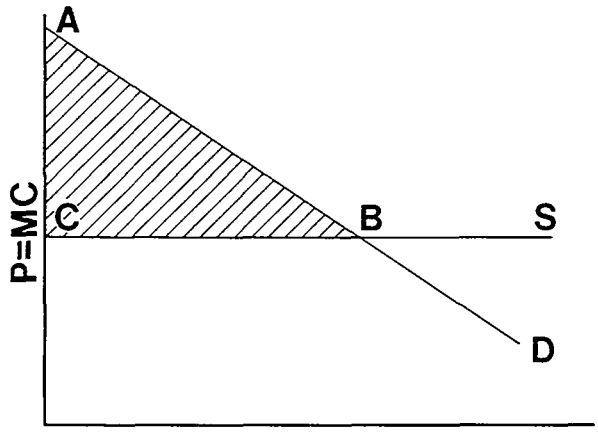
64. *Id.* The efficiency goal is a shorthand expression for two distinct goals: the proper allocation of available resources among industries (allocative efficiency) and the effective use of resources within each industry (productive efficiency).

65. *See, e.g., id.* at 134–35 ("[T]he agreed elimination of rivalry and the infliction of injury upon rivals are not merely means of injuring the competitive process; they are, even more importantly, means by which productive efficiency is created and by which the forces of competition allocate resources.").

66. *See supra* notes 54–56 and accompanying text.

67. *See infra* note 84 and accompanying text.

68. The consumer surplus is generated because some consumers are willing to pay more than the market price in order to receive a good. The surplus is the sum of the amounts by which the prices that all consumers would pay for the good exceed the price that is actually charged for the good. Graphically, this surplus of imputed income is the area under the demand curve but above the supply curve. In a purely competitive market this surplus is maximized because prices are driven to the lowest profitable level. Triangle A*B*C, depicted below, represents the consumer surplus in a purely competitive market.

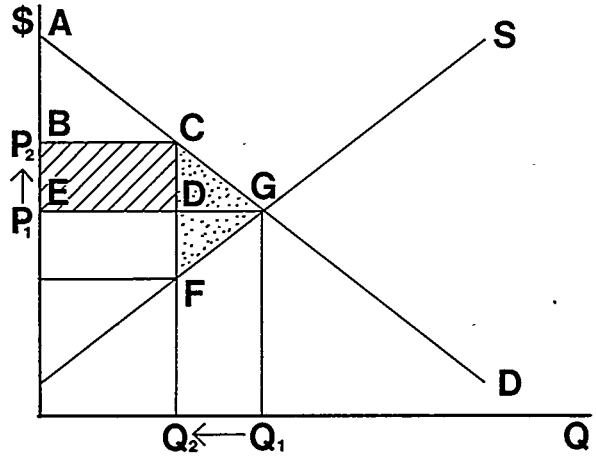


the protectionist nature of the legislation.[69] When an efficient firm obtains a degree of monopoly power, it will raise the market price above the prevailing price if it can do so without losing market power. This transfers a portion of the consumer surplus to producers and wastes another portion.[70] If one views consumers and producers as generally distinct interest groups, a distributional change has occurred that is antithetical to the Sherman Act's intent.[71]

This interpretation is also based on the presumption that efficiency and income equality are often mutually exclusive or inconsistent goals. The efficient firm that gains a significantly large market share can control pricing decisions by restricting its output or threatening its rivals. It can, therefore, control the allocation of the consumer surplus and divert the surplus to itself. Income inequality can result.[72]

69. *See* Lande, *supra* note 62, at 70 (consumers' surplus was a "rightful entitlement of consumers" under the Sherman Act).

70. When markets are not competitive one firm may be able to restrict output and consumers may lose a portion of the surplus. The lost surplus is reflected in the following graph:



When the firm restricts output from Q_1 to Q_2 the price level rises from P_1 to P_2. The consumer surplus (originally triangle A*E*G) is reduced to triangle A*B*C. Rectangle B*C*D*E represents the portion of the surplus that is transferred to producers. Triangle C*D*G represents the portion of the surplus that is lost. Triangle D*F*G represents an efficiency loss to producers, but they are benefited on the whole if this loss is less than the portion of consumer surplus transferred to them. For a more complete explanation, see J. HIRSCHLEIFER, PRICE THEORY AND APPLICATIONS 212–24 (2d ed. 1980); P. SAMUELSON, *supra* note 7, at 486 n.6; Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 10–14 & n.51 (1982).

71. Lande, *supra* note 62, at 74–77. *But see* R. BORK, *supra* note 56, at 90, 110 (the antitrust laws should not be concerned with the distribution of wealth since producers are consumers and any transfer of income to them benefits the "collectivity" of consumers).

72. *See* Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1194 (1977) (this tradeoff is "well-known"). The decrease in rivalrous competition is the result of increasing market concentrations held by the largest and most

Even assuming that the efficiency gains generated by economies of scale are passed to consumers rather than captured by the producers, society as a whole may be willing to forego the benefits of these economies in order to preserve competitive markets. This is a possibility that the *Copperweld* Court fails to acknowledge. The efficiency interpretation, in other words, naively and deceptively emphasizes the unwillingness of consumers to pay a market premium for societal welfare.[73] Society as a whole has chosen through the political and legislative process to preserve these political and economic freedoms. The fact that consumers are individually unwilling to pay a premium to preserve these freedoms (by purchasing the more costly goods of less efficient producers) should not denigrate the value of these freedoms.[74]

The antitrust laws are a charter of economic and political freedom. The Court has, in the past, consistently acknowledged this.[75] Accordingly, the pursuit of consumer welfare should incorporate the desire to limit aggregations of economic and political power.[76] The antitrust laws should, moreover, enhance individual freedom of opportunity that would otherwise be threatened by large aggregations of wealth.[77] The political process, and not market transactions, is the appropriate forum for deciding which goals will promote consumer welfare.[78] The Court should not, therefore, invalidate its past holdings without serious reflection.

2. *The Competitive Market Assumption in* Copperweld: *Misguided Faith in the Preachings of the Chicago School*

The *Copperweld* decision implicitly relies upon the competitive market model. This model consistently predicts efficiency gains from single-firm

efficient firms.

73. *See* Hovenkamp, *supra* note 70, at 10.

74. An efficiency interpretation assumes that the market outcome that consumers favor with their pocketbooks is the societally preferred outcome. However, by transforming dollars into "votes" this scheme discriminates against the poor who are given fewer "votes." Moreover, the efficiency interpretation ignores the salient fact that the benefits of competitive markets are public goods that, if left to the competitive market, would not be adequately provided.

75. *See supra* note 58 and accompanying text.

76. For a discussion of the non-efficiency goals of the Sherman Act, see generally Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Lande, *supra* note 62, at 96–105; Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979). *But see generally* Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

77. Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1078 (1979) (the antitrust laws should pursue fairness and equal treatment); *accord* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1932).

78. *Contra* R. BORK, *supra* note 56, at 90 ("Consumer welfare . . . permits consumers to define by their expression of wants in the marketplace what things they regard as wealth.").

behavior.[79] The Court's reliance is probably the result of the influence of Chicago-style economics.[80] The reliability of this model's predictions depends, however, upon the validity of the assumptions made in the Chicago model.

The Chicago school's position[81] begins by assuming that promoting efficiency is the primary goal of the Sherman Act.[82] A more efficient use of resources, even if it results in a less competitive market environment, is never objectionable. Second, the Chicago school assumes that courts must rely upon market modeling to predict and assess the effects of firm behavior.[83] Courts must rely upon theoretical models because economic analysis cannot quantify the tradeoff between efficiency and competitiveness.[84]

Third, the Chicago school assumes that rational firms in competitive markets will not engage in predatory tactics.[85] Predatory tactics are more expensive than merger as a means of eliminating rivalry. Therefore, merger will always be preferred. This assumption is enormously important. It eliminates all concern of unreasonable single-firm restraints of trade by suggesting that, apart from monopoly activity, single-firm predatory activity does not exist. From this assumption flows an intermediate conclusion: firms in competitive markets are able to exclude less efficient rivals only to the extent that they are more efficient.[86]

79. If the Court did not believe that the competitive model accurately predicts market consequences, it would have adopted a rule of reason approach rather than a new per se rule of nonliability. As the dissent notes in *Copperweld*, "[t]he Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of § 1." *Copperweld*, 104 S. Ct. at 2746.

80. The Chicago school is noted for its reliance on the static analysis of the purely competitive market. *See infra* notes 81–92 and accompanying text.

81. The most complete statement of the Chicago school position is found in R. BORK, *supra* note 56. *See generally* Posner, *The Chicago School of Antitrust Analysis*, 22 CORP. PRAC. COMMENTATOR 583 (1981).

82. *See supra* notes 62–65 and accompanying text; *see also* Bork & Bowman, *supra* note 76, at 365.

83. R. BORK, *supra* note 56, at 95 ("[T]he model represents the ultimate situation toward which economic forces tend to drive the firm."). *But see id.* at 92 (warning that such models can be misused).

84. *See id.* at 123. This predictive ability "is well beyond the present powers of economic analysis and is likely forever to remain so." *Id.* If it is true that "[p]assably accurate measurement of the actual situation is not even a theoretical possibility," *id.* at 125, then the analysis should openly embrace other noneconomic objectives.

85. *Id.* at 144–60. Bork's assertions are based upon the well-known study of the *Standard Oil* litigation conducted by John S. McGee.

86. *Id.* at 137. Interestingly, Bork believes that "competitive effectiveness" is synonomous with efficiency. *Id.* at 105–06. However, efficiency will lead to competitive effectiveness, but competitive effectiveness is not always caused by efficiency. Competitive effectiveness can be the result of monopoly power, predatory tactics or even collusion among firms.

The school assumes, finally, that in most cases market forces naturally and inexorably drive the firm and industry toward pure competition.[87] Competitive markets provide obvious advantages to consumers. By definition, each firm in a purely competitive market produces such a small portion of the aggregate industry output that it cannot influence the market supply in any significant manner, nor the price that it receives for its goods.[88] All competitors, facing the same market price, will produce until marginal cost and price are equal.[89]

This competitive process equates social costs with social desires. The process eliminates inefficient rivals within industries and determines the relative resource allocations among industries.[90] Conversely, when markets are not purely competitive, social costs and social desires are no longer in equilibrium and allocative inefficiency results.[91]

This final assumption, that markets are driven to competitive equilibrium, completes the circle. The obvious conclusion, having defined all markets as purely competitive, is that superior efficiency of one firm is the sole cause of another firm's exclusion from the marketplace.[92]

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87. *Id.* at 95. Theoretically, firms cannot avoid their Darwinian fate; they are forced to compete with one another because of the ever present temptation for the most efficient firms to lower prices in order to capture other firms' customers. This conclusion is reached by ignoring oligopoly theory, *id.* at 92, 180–83, collusion, *id.* at 175, and barriers to entry, *id.* at 195. The Chicago school believes that resources are fluid and gravitate to the highest return. Firms cannot for long maintain an uncompetitive stance while reaping abnormal profits; market forces will soon attract competition to bid away the abnormal profits. Posner, *supra* note 81, at 585–87.

88. R. GIVENS, *supra* note 61, § 2.01, at 2-1; P. SAMUELSON, *supra* note 7, at 430; R. WARREN, ANTITRUST IN THEORY AND PRACTICE 16–17 (1975). In the competitive market, firms are "price takers"; that is, they accept the price that the market has determined. If a firm is unwilling to charge this price, it will not find buyers because other firms in the market are offering a sufficient supply at the lower price.

89. This occurs because a profit is made until the price of the last good is equal to the cost of producing the good. If the price level exceeds marginal cost, firms in the industry are earning excess profits, and new firms will enter the market to compete for these profits. As supply increases the price is driven downward to the lowest profitable level. P. SAMUELSON, *supra* note 7, at 430–31; *see also* R. WARREN, *supra* note 88, at 17 (cautioning that purely competitive markets do not exist in reality).

90. P. SAMUELSON, *supra* note 7, at 432–36; *see also supra* note 64. When competitive markets do function as the model suggests, all consumers benefit. The societal use of scarce resources in the most efficient manner leads to a state of so called "Pareto optimality." P. SAMUELSON, *supra* note 7, at 435 n.12, 591.

91. *See* R. BORK, *supra* note 56, at 101. On the contrary, if firms are not acting in purely competitive markets, and if the market is not being driven towards competitive equilibrium, some firms will be able to exclude other firms in ways unrelated to superior efficiency. P. SAMUELSON, *supra* note 7, at 470–71 (the imperfect competitor contrives to keep his good in scarce supply—presumably by using his market power to control pricing decisions).

92. As an alternative to the premise that predatory tactics do not occur, the Chicago school suggests that predatory tactics create efficiency and allocate resources in the most efficient manner. *See supra* note 65 and accompanying text. Therefore, even if predatory tactics exist, antitrust surveillance is unwarranted since efficiency is seen as the primary goal of the Sherman Act. As this Note demonstrates, predatory tactics do occur. *See infra* notes 94–106 and accompanying text. Moreover, the belief that predatory tactics are not inconsistent with the goals of the Sherman Act conflicts with past

The Chicago school concludes that a successful firm's conduct is exclusively efficiency-inducing. The Court in *Copperweld* concludes, in a similar vein, that single-firm conduct, at least within the gap between conspiracy and monopoly, is efficiency-inducing and does not merit antitrust surveillance.[93] The Court's conclusion, therefore, is rooted in the assumption that single firms are acting in competitive markets. An examination of the fact pattern presented in *Copperweld,* however, reveals the weaknesses of this competitive market assumption. The exclusion of Independence from the structural steel tubing market was unrelated to any superior efficiency on the part of Regal.

Copperweld and Regal believed that they could control market pricing by maintaining their market share.[94] This, of course, is contrary to the premise that firms will exclude other firms from the market only by superior efficiency. The trial record indicates that they had in fact successfully controlled market pricing decisions for some time.[95] To preserve the status quo, these corporations attempted to preclude Independence from entering the market altogether.[96] Eventually, however, Independence was able to enter the market and lower prices on at least three occasions.[97] Regal and Copperweld resisted these changes and continued to rely on their past

interpretations by the Supreme Court. *See supra* note 58 and accompanying text. Such a radical reinterpretation of the Sherman Act should be made explicitly, not implicitly as was done here. *See supra* notes 45–60 and accompanying text.

93. *See supra* notes 52–54 and accompanying text. Even though the Court acknowledges that single firm activity not reaching monopoly proportions may be anticompetitive, *Copperweld,* 104 S. Ct. at 2744, it either does not believe this to be true, or believes that it is of no significant consequence. This is evidenced by the Court's treatment of other types of conspiracies.

> Certain agreements . . . are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. Other combinations . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

Id. at 2740–41 (citations omitted). A combination that merits per se nonliability must be viewed, then, as both efficiency inducing and not significantly anticompetitive. The decision to exempt single-firm restraints of trade from all but § 2 scrutiny illustrates the Court's belief that, on balance, the "gap" activity is more likely to be socially beneficial than socially harmful. This conclusion is, of course, at odds with past intra-enterprise conspiracy cases.

94. Record at 2482, *Copperweld* (deposition of Mr. Philipp: "Q. Did Mr. Smith [Copperweld's CEO] ever elaborate on how increase of market share would help Regal be a price leader? A. By increasing one's market share one had a better control of the market and pricing.").

95. *Id.* at 2483 (Regal was successful in several of its product lines at maintaining an "orderly market" through its leadership); *see also id.* at app. 352–76 (report to Copperweld concerning Regal's marketing strategies).

96. *Id.* at app. 598 (letter of Phillip Smith: "I still remain convinced, however, that there is plenty we can do to block Grohne [from going into business].").

97. *Id.* at 353, 6778–79.

record of "price leadership"[98] to bring prices back in line with Regal's profit objectives.[99] Only when lower price levels persisted and Copperweld's attempts to buy out Independence failed[100] was Regal forced to conform by lowering its prices.[101] Obviously, superior efficiency alone does not explain the exclusion of Independence from the steel tubing market.

Neither the trial court opinion nor the trial record and exhibits demonstrates that the steel tubing market was competitive. Independence's ability to enter the market and reduce prices on three occasions indicates, to the contrary, that pricing was not previously equated with marginal cost. More importantly, pricing was not determined by competitive rivalry. Copperweld's testimony substantiates this fact.[102]

Moreover, the record does not reveal any efficiency objective that would justify Copperweld's and Regal's threats to the suppliers.[103] Their allegedly valid business concerns about trade secrets, customer lists, and the hiring of their employees by Independence seem to have been manufactured concerns with no real basis in fact.[104] The parent and subsidiary were, as the trial record indicates, attempting to erect barriers to entry in order to preserve their share of an uncompetitive market and maintain Regal's position as a price leader.

The Seventh Circuit, accordingly, found sufficient evidence of unreasonable anticompetitive effect to sustain the trial court's findings.[105] Economists examined the market demand, price, and cost of manufacturing and determined that Independence had lost profits totaling $8,298,245.[106]

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98. *Id.* at 2484 (deposition of Smith [Copperweld C.E.O]: A price leader is a company who when they move up or down in prices, the other people who are in the market either go up or down after them."). For a more complete discussion of the effects of "price leadership" and its relationship to other collusive practices, see P. SAMUELSON, *supra* note 7, at 484 ("[I]f sellers are few, and if they are large relative to the total demand, not very fearful of new entrants, and keenly conscious of the *mutuality* of their interest, the tacit price pattern may become a very high one relative to long-run or short-run marginal cost.").

99. Record at 2480–81, 2896–99, 2905, *Copperweld.*

100. Brief for Independence Corp. at 7, *Copperweld.*

101. Record at 2905–06, 3914–16, *Copperweld.*

102. *See supra* notes 94–101.

103. If there was an underlying efficiency justification, Copperweld and Regal failed to expose it. The parent and subsidiary desired, on the contrary, to prevent the entry of a formidable competitor into the structural steel tubing market. *See supra* notes 94–96 and accompanying text.

104. Record at app. 677, *Copperweld* (there are no trade secrets in the manufacturing of welded steel tubing, everyone in the business knows who the customers are, and the majority of people in the business have worked for two or more competing companies).

105. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 323 (7th Cir. 1982), *rev'd,* 104 S. Ct. 2731 (1984).

106. *Id.* at 329–31 (the jury awarded damages totaling $2,449,099).

The belief that markets are purely competitive and the conclusion that predatory tactics, oligopoly, attempted barriers to entry, and even collusion do not occur in a rational world is at odds with the factual scenario presented in *Copperweld*. The facts presented in previous cases that have utilized the intra-enterprise conspiracy doctrine also contradict these assumptions.[107] The "eminently sound" reasons that persuaded the Court to reject the intra-enterprise conspiracy doctrine and leave a "gap" in antitrust enforcement appear less sound in light of the factual scenario presented in *Copperweld*.

IV. THE NEW PER SE RULE OF NONLIABILITY: SOME CRITICISMS AND SUGGESTED REFORMS

A. *The Manipulation of Economic Modeling*

The *Copperweld* Court's reliance on economic models poses three problems. First, the theoretical component of market modeling is unproven; it consists merely of generalizations about the way that markets operate and individuals behave.[108] As this case demonstrates, even eco-

107. Similarities between the occurrences in *Copperweld* and those in previous intra-enterprise conspiracy cases reveal a common thread; namely, the doctrine has been used primarily to police coercive actions of firms with a significant degree of market power. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (dealers who accepted and acquiesced in the exclusive dealing and resale price maintenance schemes did not do so voluntarily. Rather, the advantages that the parent and subsidiary were able to secure were a function of their market power); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951) (evidence showed that a subsidiary that normally followed a separate pricing policy had been coerced by its affiliated corporation into supporting a boycott of a distributor); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116 (1948) (motion picture theater chain used monopoly power generated by its ownership of theaters in "one theater" towns, to obtain advantages over competitors in "open" cities); United States v. Griffith, 334 U.S. 100, 101–04 (1948) (theater coercion); United States v. Yellow Cab Co., 332 U.S. 218, 224–25 (1947) (firm with monopoly in taxicab industry coerced cab companies into purchasing cabs from a subsidiary); United States v. Crescent Amusement Co., 323 U.S. 173, 178–79 (1944) (theater coercion); United States v. General Motors Corp., 121 F.2d 376, 398–403 (7th Cir. 1941) (General Motors Corp. and its wholly owned subsidiary, G.M. Financing Corp., threatened to revoke independent dealership outlets in order to coerce dealers into accepting GMAC financing. Most dealers could not afford the consequences of losing a lifetime investment and acceeded to the demands.), *cert. denied*, 314 U.S. 618 (1941); *see also* ATTORNEY GENERAL'S REP. *supra* note 9, at 33–34.

108. The Chicago model is frequently criticized because it invokes a static price theory analysis. Static models ignore all of the dynamic variables that exist in an actual market. *See, e.g.*, Sullivan, *Antitrust, Micro-economics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 10 (1980) [hereinafter cited as Sullivan, *Recent Relationships*]; Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust*, 125 U. PA. L. REV. 1214, 1216 (1977) (the Chicago model assumes that markets work with supreme efficiency) [hereinafter cited as Sullivan, *Economics*]; *Foreword: On the Road with 'Chicago School' Antitrust and Those Who Don't Like It*, 13 ANTITRUST L. & ECON. REV. 1, 5 (1981). One significant dynamic variable that static models ignore is technological innovation, which some economists contend is more likely to be generated in small firms as opposed to large firms. *See* P. SAMUELSON, *supra* note 7, at 488–89.

nomic experts can reach different conclusions when viewing the same set of facts. Second, the assumptions made determine, in large part, the result achieved. Thus, the economic models can be manipulated by changing the underlying philosophical component.[109] The Chicago school's belief that single-firm conduct is harmless has philosophical origins that emphasize freedom of individual action and a minimum of government interference in market transactions.[110] This philosophical orientation conflicts with the philosophy of the Sherman Act, which stresses the need for government intervention in the marketplace. Finally, these models can be deceivingly persuasive. They appear capable of providing rational solutions to any conceivable problem.[111]

In the final analysis, economic models cannot replace legal reasoning.[112] Easily manipulated models founded on unproven generalizations are a precarious foundation for judicial evaluation of antitrust law. The policy choices that must be made between income allocation and efficiency and between the diffusion of economic and political power and efficiency should be made explicitly. The Supreme Court should not bury these judgments in a host of economic assumptions. The Court should not abdicate these crucial policy choices to any group of economic theorists. The Court, after all, may choose the wrong theory from among competing paradigms.[113]

B. Toward a Flexible Analysis

The Court in *Copperweld* attempted to reform the inconsistent application of section 1 doctrine by adopting a new per se rule of nonliability for parent and subsidiary corporations. The result, however, was merely to substitute an inflexible approach for an inconsistent approach. The *Copperweld* Court's per se rule divests courts of the power to assess, on a case by case basis, the two questions underlying section 1 intra-enterprise conspiracy cases: first, whether it is desirable, given the accepted legislative objectives, to control the conduct presented in a particular case; and second, whether the intra-enterprise doctrine is an appropriate control

109. Sullivan, *Recent Relationships, supra* note 108, at 12 ("[E]conomic theories are not simply means for analyzing problems. Each theory comes linked to a particular view of the world, to a set of convictions about what is important.").

110. Posner, *supra* note 81, at 609 n.67 (a "deep distrust of government intervention . . . is associated with the Chicago School of Economics"); Sullivan, *Recent Relationships, supra* note 108, at 5 (describing the underlying political ideology as "eighteenth century liberalism").

111. Sullivan, *Recent Relationships, supra* note 108, at 9.

112. Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos,* 49 ANTITRUST L.J. 1593, 1598 (1980); Sullivan, *Recent Relationships, supra* note 108, at 12.

113. Sullivan, *Economics, supra* note 108, at 1223–32 (suggesting that the assumptions of the Chicago school may be wrong).

mechanism in the given circumstances. The new per se rule of nonliability for single entities under section 1 of the Sherman Act is insensitive to the myriad of economic, political and social variables that should govern the analysis of whether a particular action effects an "unreasonable" restraint of trade.

An alternative to the per se rule is the rule of reason approach, which prevailed before *Copperweld*.[114] This approach should establish evidentiary presumptions and allocate the burden of proof.[115] The rule of reason approach, by itself, will not identify and expose the policy choices made by the Court.

The approach can, however, provide flexibility and accountability if applied in conjunction with a tort-like analysis of the duty owed and risk taken.[116] A flexible and open balancing approach is appropriate because it reserves the ultimate resolution of political questions to Congress. By revealing the legislative policies on which they rely, the courts would subject themselves to legislative review. Moreover, a flexible balancing approach is capable of meeting the threats posed by new forms of undue restraints of trade.[117]

To meet this need, Congress should draft new legislation explicitly covering the single-firm restraints of trade exempted by the *Copperweld* Court.[118] The legislation should carefully define the intended policy objectives, in particular the desired relationship between competitiveness and efficiency. The courts, for their part, must weigh the risk of anticompetitive effect inherent in the defendant's action and the extent of the harm realized

114. *See supra* note 26.

115. Flynn, *supra* note 112, at 1599.

116. *Id.* at 1600–01; Sullivan, *Economics*, *supra* note 108, at 1229–30 (the traditional approach to antitrust analysis has invoked "tort concepts and methodologies").

117. A current "gap" problem not reachable under § 2 of the Sherman Act is the practice of raising barriers to entry in oligopolistic markets; specifically, practices such as excessive advertising and annual style changes act to exclude would-be competitors from entering the market. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 114, at 324 (1977).

118. Such legislation might provide:

> No person shall engage in any activity the effect of which is to substantially lessen competition or unreasonably restrain trade or commerce among the several states or with foreign nations. *Provided*, that any activity promoting or tending to promote the efficient use or allocation of resources shall raise a rebuttable presumption that the activity does not substantially lessen competition or unreasonably restrain trade or commerce.

Such legislation should be accompanied by a policy section explicitly detailing the desired tradeoff between the goals of efficiency and competitiveness. This Note does not attempt to suggest where this line should be drawn. This is a question that must be resolved by Congress. However, the above language is suggested for three reasons. First, it extends antitrust liability to corporations and their subsidiaries, divisions, and officers and eliminates the purely formal distinction drawn by the Court. Second, it provides that any claim of an efficiency justification must first be established and may not be presumed as was done in *Copperweld*. Finally, by providing a rebuttable presumption, the suggested language allows the incorporation of goals other than efficiency.

against any benefits that might have resulted or might have been expected to result from the action.[119] The courts should undertake an analysis of the challenged restraint of trade by asking whether a duty to refrain from injurious anticompetitive behavior should be imposed upon the firm and its subsidiary or division. This approach should be analogous to the traditional proximate cause analysis in tort litigation.[120]

The action would be analyzed in the context of predetermined policy objectives, and the balancing of risks and benefits could be done in general terms. This would avoid the objections of economists who assert that the precise tradeoff between competitiveness and efficiency cannot be measured.[121]

This solution requires tradeoffs. Businesses would endure a period of uncertainty as to what restraints of trade violate the Sherman Act as amended. However, increased uncertainty would be offset by the benefits of open balancing of the relevant antitrust concerns. In *Copperweld,* the Court was reluctant to accept this uncertainty for fear it would inhibit vigorous competition.[122] The relevant consideration is not, however, whether uncertainty is created, but whether the cost of uncertainty outweighs the corresponding enforcement benefits.[123]

Moreover, the degree of uncertainty generated by the application of section 1's limitations to "single entities" is overstated in *Copperweld.* Several mitigating factors reduce the importance of this concern. First, firms frequently are aware that their actions cross the line of vigorous competition. The Copperweld Corporation, for example, was clearly advised of this possibility by its attorneys.[124] Second, the courts have interpreted the intra-enterprise conspiracy doctrine narrowly and it has been infrequently used as an enforcement tool.[125] The degree of uncertainty

119. The dissent in *Copperweld* urges that this type of balancing approach be applied in § 1 analysis. *See* 104 S. Ct. at 2746 (Stevens, J., dissenting).

120. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 42 (5th ed. 1984). The question of proximate cause is closely analogous to a determination of legally imposed duty of care. Ultimately, both questions involve a policy judgment of whether "the law will extend the responsibility for the conduct to the consequences which have in fact occurred." *Id.* at 273.

121. *See supra* note 84 and accompanying text.

122. *See supra* note 54 and accompanying text.

123. *See Copperweld,* 104 S. Ct. at 2751–52 (Stevens, J., dissenting) (because the Court's per se rule of nonliability creates a gap in antitrust enforcement, it must be rejected as inconsistent with the Act's intent, despite any uncertainty that it creates). *But see* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act,* 95 HARV. L. REV. 661, 664–65 (1982) (the costs of uncertainty outweigh enforcement benefits).

124. Record at app. 622, *Copperweld* (letter from Copperweld's attorneys to Copperweld's CEO: "We must be careful not to open ourselves up to an antitrust suit by Grohne that we have harassed potential financial and equipment suppliers from doing business with him, thus restricting competition.").

125. Willis & Pitofsky, *supra* note 24, at 30–35.

generated by a single-firm restraint of trade provision could, similarly, be limited by a judicious application. Third, uncertainty would decrease as courts determine which patterns of conduct violate section 1. This appears to have occurred, to an extent, in the previous Supreme Court cases on intra-enterprise conspiracy.[126] Finally, it must be recognized that uncertainty exists for all business planning activity. Firms have been able to integrate the risks of products liability into the business calculus. By analogy, they ought to be able to adapt to the risks of antitrust liability by accepting this risk as a cost of doing business.[127] If all firms face the same risks and costs, the more efficient firms will be at a competitive advantage over their inefficient rivals and the market will have incorporated this externally imposed cost.

V. CONCLUSION

When courts interpret section 1 and other antitrust provisions they must provide a clear antitrust analysis soundly rooted in an accurate assessment of the statutory intent. The goal of consistent antitrust enforcement should not be affected by a court's preference for business autonomy or vigorous antitrust enforcement. Scholars have interpreted the Sherman Act in entirely inconsistent ways. Courts, therefore, must be clear and explicit in interpreting the Act. Particularly where legislative interpretation is concerned, a court should not defer crucial public policy choices to particular economic paradigms.

Neither can a court abdicate its responsibility for implementing intentionally vague and inherently flexible antitrust legislation. The Supreme Court's adoption of a strict conspiracy construction of section 1 fails to address the problems posed in *Copperweld,* and closes all avenues for pursuing restraints of trade brought about by oligopolistic market structures.[128] The new restraint of trade provision must specify the underlying policies that are fundamental to the question of whether an action "unreasonably" restrains trade. The new provision should also be flexible. Since

126. *See supra* note 107.

127. This analogy is useful but not perfect. Firms can plan for products liability by purchasing insurance. While insurance cannot be purchased in the antitrust context, firms are still able to plan for antitrust risk. If a firm does not wish to incur this risk it will plan accordingly. Some firms may view the potential to make short run monopoly profits as outweighing this risk and undertake anticompetitive activity regardless of the consequences.

128. *See, e.g.,* L. SULLIVAN, *supra* note 117, at 324.

the Court appears unwilling to apply the Sherman Act flexibly to meet the changing demands of the American marketplace, Congress must require the Court to do so by enacting new legislation.

S. John Goodwin