

# THE POWER OF ANTITRUST PERSONHOOD

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## INTRODUCTION

Only “persons” can violate the antitrust laws or sue for private injuries. Section 1 of the Sherman Act condemns “[e]very person who shall make any contract” in restraint of trade.<sup>1</sup> Section 2 applies to “[e]very person who shall monopolize.”<sup>2</sup> Section 2 of the Clayton Act, amended by the Robinson-Patman Act, makes it unlawful “for any person . . . to discriminate in price.”<sup>3</sup> Section 3 prohibits “any person” from engaging in anticompetitive exclusive dealing or tying.<sup>4</sup> The merger provision, section 7 of the Clayton Act, makes it unlawful for any “person” to acquire the assets or shares of

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1. 15 U.S.C. §1 (2018).
2. 15 U.S.C. §2 (2018).
3. 15 U.S.C. §13 (2018).
4. 15 U.S.C. §14 (2018).

another “person.”<sup>5</sup> As plaintiffs, “any person who shall be injured in his business or property”<sup>6</sup> may sue for damages.<sup>7</sup>

All of antitrust law’s violation provisions, except one, require an agreement between two or more persons. The exception, section 2 of the Sherman Act, condemns monopolization and attempts to monopolize by one person acting unilaterally. Single actor offenses are by far the most difficult to prove. Some practices, such as setting prices or refusing to deal, are almost always lawful if the actor is one person acting alone, but they face significant liability exposure if they result from an agreement. Mergers can be unlawful, but they require that one person “acquire” another person. Further, section 2 of the Sherman Act has market power requirements that are more severe than they are for any other antitrust provision.

Antitrust strongly favors “persons” acting alone over groups of persons acting tougher, and with good reason. Aggregations of persons, particularly if they involve competitors, can assemble large market shares and acquire dominance very quickly. Single persons are rarely able to do that on their own.

The way that antitrust personhood is defined has also affected structural business decisions, particularly mergers and vertical integration. Given the narrow construction of section 2 of the Sherman Act, a firm can often avoid liability by acting as a single antitrust “person.” For example, aggressive rules governing price fixing very likely drove many firms to merge, including the creation of the great merger wave around the turn of the twentieth century.<sup>8</sup> While the rules against collaborative price fixing were aggressive, those against unilateral price setting were virtually non-existent.

5. 15 U.S.C. §18 (2018).

6. 15 U.S.C. §15 (2018).

7. Inexplicably, antitrust’s private equity provision give the right to seek an injunction to any “person, firm, corporation, or association,” even though those classifications all fall within the statutory definition of antitrust personhood. 15 U.S.C. §26 (2018). See *N.Y. v. Meta Platforms*, 66 F.4th 288 (D.C. Cir. 2023) (inconclusive discussion about whether a state is a “person” under this provision, and holding that if it is, it must also be subject to laches on a stale claim for injunctive relief). Cf. *Ga. v. Pa. R. Co.*, 324 U.S. 439, 447 (1945) (state is a “person” entitled to sue for antitrust damages).

8. See George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985); John J. Binder, *The Sherman Antitrust Act and the Railroad Cartels*, 31 J. L. & ECON. 443 (1988); Almarin Phillips, *A Critique of United States Experience with Price-Fixing Agreements and the Per Se Rule*, 8 J. INDUS. ECON. 13 (1959) (explaining that harsh antitrust rules condemning trade association led members to merge). See also Brian Cheffins, *Investor Sentiment and Antitrust Law as Determinants of Corporate Ownership Structure: The Great Merger Wave of 1897 to 1903* (U.C. Berkeley: Berkeley Program in Law and Economics, Working Paper, 2022), <https://escholarship.org/uc/item/21805510>. [<https://perma.cc/CH47-T9AL>].

The only likely antitrust liability that merging firms faced was legal challenges to the mergers themselves. Once they came to be regarded as a single entity for antitrust purposes, any internal pricing conduct moved from suspicious to virtually untouchable.

The same thing applies to vertical integration. A vertical agreement between two independent firms is covered by the section 1 of the Sherman Act, as well as the Robinson-Patman Act and the Clayton Act's section 3 provision governing exclusive dealing and tying. On the other hand, vertical ownership completely eliminates Robinson-Patman Act liability,<sup>9</sup> and exclusive arrangements between two actors within the same firm are virtually per se lawful.

While antitrust also applies to natural persons, it does so by inference. The statutory definition of "personhood" includes only corporations and associations, reflecting a long history of treating corporations that way under state corporate law.<sup>10</sup> Building on that tradition, the antitrust laws provided their own statutory definition of "person," which has appeared in the Sherman Act since 1890 and was restated in the Clayton Act. The Clayton Act provision, which is identical to the Sherman Act provision, reads:

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States,<sup>11</sup> the laws of any of the Territories, the laws of any State, or the laws of any foreign country.<sup>12</sup>

While natural persons are not included, they must be there by implication. For example, both sections 1 and 2 of the Sherman Act call for imprisonment as a possible criminal penalty, and only biological persons can be imprisoned. The omission of natural persons in the personhood provision may explain why it took nearly a century for the Supreme Court to hold that a natural person who paid a "higher price for goods purchased for personal

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9. See discussion *infra* text accompanying notes 139–151.

10. See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988).

11. On corporations chartered by the United States, see *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 746 (2004) (ruling that Congress could have created the postal service as a corporation, and then it would be covered by this section, but USPS is not a corporation and thus not a federal "person" who can be sued).

12. 15 U.S.C. §12 (2018). The Sherman Act provision is identical except that it explicitly references the several sections of the Sherman Act. 15 U.S.C. §7. It was historically §8 of the Sherman Act. 26 Stat. 210 (July 2, 1890).

use” could sue for antitrust damages.<sup>13</sup>

These definitional statutes are not frequently cited, although nearly all decisions that raise the issue of antitrust personhood are consistent with them. The scarcity of citation may simply reflect a common attitude toward the antitrust statutes, which is that antitrust policy is not driven so much by the statutory text but rather by the idea that the antitrust laws enable development of a “common law” of anticompetitive practices.<sup>14</sup> As argued below, however, a more substantial reason is that the statutory personhood provisions simply do not speak to the many more complex issues that arise in distinguishing unilateral from multilateral conduct.

Nevertheless, the fact that Congress re-enacted the Sherman Act’s personhood provision in 1914 without any changes is notable. The quarter century between the Sherman and Clayton Acts experienced a great deal of controversy concerning the nature and power of the corporation.<sup>15</sup> The Progressives were particularly agitated about corporations’ use of holding companies, or incorporated firms that owned the stock of other corporations.<sup>16</sup>

Today, the Supreme Court decision most closely associated with antitrust personhood is *Copperweld v. Independence Tube Corp.*<sup>17</sup> The Supreme Court held that a parent corporation and its wholly owned subsidiary must be treated as a single person, incapable of conspiring with one another. Dicta in that decision also stated the established view that “officers or employees of the same firm do not provide the plurality of actors imperative for a section 1 conspiracy.”<sup>18</sup> Virtually all antitrust decisions on

13. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979). Then Associate Justice Rehnquist concurred, but expressed concern that the decision would “add a substantial volume of litigation to the already strained dockets of the federal courts . . .”. *Id.* at 345.

14. *E.g.*, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute”); *California Dental Ass’n v. F.T.C.*, 526 U.S. 756, 780 (1999) (speaking of the “quasi-common-law realm of antitrust”). See Herbert Hovenkamp, *The Antitrust Text*, IND. L.J. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4277914](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277914) [<https://perma.cc/8VMS-EFFZ>].

15. See MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* (1988) (examining antitrust debates from 1890-1916); GLENN PORTER, *THE RISE OF BIG BUSINESS, 1860-1920* (1973). See also Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 AM. J. LEGAL HIST. 160 (1982) (discussing how the rapid industrialization and growth of big business influenced federal law on corporations).

16. See discussion *infra* text accompanying notes 38–56.

17. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

18. *Id.* at 769. See *Willsea v. Theis*, 1999 WL 595629 (S.D.N.Y. 1999) (stating that



the issue ever since have been interpretations, qualifications, or extensions of the *Copperweld* doctrine.

The statutory antitrust person is a natural person by implication, or else a corporation or association “existing under or authorized by the laws” of a state or other sovereign.<sup>19</sup> Antitrust’s personhood provisions are deferential to state law because most corporate actors are state chartered corporations. Under these provisions state corporate law becomes the central determinant of the boundary between unilateral and conspiratorial conduct.<sup>20</sup>

Some antitrust persons are unincorporated associations who fit under the statutory definition of associations “authorized” under state law.<sup>21</sup> In sharp distinction to corporations, however, trade and professional associations are very frequently treated as collaborations of individual actors. That is the case even if their association falls into this definition.<sup>22</sup> Municipal corporations are also “persons,”<sup>23</sup> as are United States, territorial, and foreign corporations. Many sovereigns, including both states and foreign governments, have also been treated as “persons,” although the statute does not expressly include them.<sup>24</sup> After the Supreme Court held that the United

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corporate officers could not conspire with its own employers); *Borg-Warner Protective Serv. Corp. v. Guardsmark, Inc.*, 946 F.Supp. 495 (E.D.Ky. 1996), *aff’d*, 156 F.3d 1228 (6th Cir. 1998) (holding that a security firm was incapable of conspiring with its employees).

19. 15 U.S.C. §12 (2018).

20. *See* *Melrose Distillers, Inc. v. U.S.*, 359 U.S. 271, 272 (1959) (stating that whether a corporation is a “person” under the Sherman Act definition is “determined by reference to state law”).

21. *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 392 (1922) (holding that unincorporated labor unions could be a “person” who may be sued under §8 because although “[Congress] thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, [...] they used language broad enough to include all associations which might violate its provisions . . . .”). The Court cited several previous examples of unincorporated associations who were held to be antitrust persons. *See* *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 290 (1897); *United States v. Joint-Traffic Ass’n*, 171 U. S. 505 (1898); *W. W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *E. States Lumber Dealers’ Ass’n v. United States*, 234 U. S. 600 (1914); *See also* *United States v. Conn. Package Stores Ass’n.*, 205 F.Supp. 789, 792 (D.Conn. 1962) (holding that antitrust personhood extends to authorized unincorporated associations); *United States v. Greater New York Live Poultry Chamber of Com.*, 30 F.2d 939, 939 (S.D.N.Y. 1928) (speaking of “a definite organization, with officers and directors, although unincorporated”).

22. *See* discussion *infra* text accompanying notes 88–102.

23. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (incorporated municipality is a “person” who can be sued).

24. *E.g.*, *State of Ga. v. Evans*, 316 U.S. 159 (1942) (state is a “person” who can be a plaintiff under the Sherman Act); *Pfizer, Inc. v. Govt. of India*, 434 U.S. 308 (1978) (foreign

States itself was not a “person” who could sue for damages under the antitrust laws,<sup>25</sup> Congress overruled the decision legislatively, permitting the United States to sue for treble damages as well.<sup>26</sup>

The consequences of being an antitrust “person” are far reaching.<sup>27</sup> Employees or even administrators working within the same firm cannot “conspire” with one another; their jointly made decisions are considered to be unilateral. The same thing is true of subsidiaries and divisions. Suppose that Ford’s division making electric vehicles decides that components will be supplied exclusively by other Ford divisions rather than by outside firms.<sup>28</sup> That decision cannot be treated under antitrust law as exclusive dealing, tying, or any other kind of exclusionary agreement, because it is entirely unilateral. That is true whether or not these divisions are separately incorporated.<sup>29</sup>

This definition of personhood under the antitrust laws has other important enforcement implications. For example, while a merger can be challenged under the antitrust laws, once the acquisition has occurred, the acquiring and acquired firms become a single legal person. At that point, its unilateral conduct cannot be reached by any antitrust provision other than section 2 of the Sherman Act. This is true no matter what the level of operational integration between the two. The only thing that is required is single ownership.

For example, Facebook (Meta) acquired Instagram in 2012.<sup>30</sup>

sovereign is a person who can sue for treble damages in United States court). *But see* New York v. Meta Platforms, Inc., 66 F.4th 288, (D.C. Cir. 2023) (expressing some doubts that a state is a “person” for purposes of equity relief under 15 U.S.C. §26 (2018), which gives a right to an injunction to “any person, firm, corporation, or association . . .”).

25. United States v. Cooper Corp., 312 U.S. 600 (1941) (holding that the United States is not a person who can sue).

26. 15 U.S.C. §15a (2018) (permitting United States to be an antitrust plaintiff in private treble damages actions). The United States has always had the power to sue for injunctive relief in its capacity as enforcer, both in original §4 of the Sherman Act and today in 15 U.S.C. §25 (granting the Attorney General the power to “prevent and restrain” antitrust violations).

27. See Sanjukta M. Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).

28. See CNBC, “Ford Says Making Its Own Parts for Electric Vehicles Could Offset Job Losses” (Nov. 15, 2022), <https://www.cnbc.com/2022/11/15/ford-working-to-build-its-own-parts-for-electric-vehicles-to-offset-job-losses.html> [<https://perma.cc/D429-UZNA>].

29. Although exclusive dealing can be condemned as a unilateral act under §2, the conduct itself involves an exclusive agreement with other entities. *E.g.*, United States v. Dentsply Int’l, Inc., 399 F.3d 181 (3d Cir. 2005) (defendant’s exclusive dealing agreements with independently owned distributors violated §2 of the Sherman Act).

30. Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, DealBook (April 9, 2012, 1:15 PM), <https://archive.nytimes.com/dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/> [<https://perma.cc/X5P7-P9F5>].

Instagram has never been fully integrated into Facebook, however. It continues to maintain its own website, membership list, and many of its operational rules.<sup>31</sup> Nevertheless, because Meta owns Instagram, any arrangement between the two cannot be treated as a cartel or joint venture. If it were purely contractual, the arrangement between Facebook and Instagram would be challengeable under section 1 of the Sherman Act, but because the two are now a single antitrust person the only things that can be challenged are the original acquisition,<sup>32</sup> or else exclusionary practices that Meta might commit unilaterally upon a finding that it is an antitrust monopolist. If Meta should make a decision that Facebook and Instagram will refrain from competing with one another in a particular area, or if they agree with each other on the price of advertising, those decisions are unilateral and largely unreachable under the antitrust laws. By contrast, if Facebook and Instagram as separate firms should agree to stay out of one another's markets, that decision could be unlawful *per se* and, under appropriate circumstances, even be a criminal violation.

Aside from mergers, complete ownership vertical integration is addressable only under section 2, at least if it involves wholly owned subsidiaries. By contrast, vertical integration or distribution *by contract* is reachable under several antitrust provisions.<sup>33</sup> For example, franchising as a business method involves contractual agreements between a franchisor and independently owned franchisees. As a result, it is covered by section 1 of the Sherman Act, as well as sections 2 and 3 of the Clayton Act. The courts have largely rejected attempts to treat franchises as single entities.<sup>34</sup> Because franchisees are independent firms, not subsidiaries, they can sue for practices

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31. See INSTAGRAM, <https://www.instagram.com/>.

32. The FTC's amended complaint, which a district court has sustained at this writing, challenged the acquisition under §2 standards. *Federal Trade Commission (F.T.C.) v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) (complaint stated claim that acquisition of actual or potential competitors was unlawful exclusionary practice). See *Id.* at 53–4 (“Facebook’s leaders began to focus on the prospect of acquiring Instagram rather than competing with it . . . in order to neutralize actual and likely future competitors . . .”).

33. At least since the 1950s contracting has been viewed as creating an alternative to ownership vertical integration. See Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957); on economic rationales for the choice between ownership and contractual vertical integration, see Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971).

34. *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1256 (11th Cir. 2022) (reversing district court decision that would have treated Burger King franchise system as a single entity).

such as unlawful tying or exclusive dealing.<sup>35</sup> By contrast, a parent company and its wholly owned stores are a single entity, whether or not the stores are separately incorporated. A parent's decision that its stores should carry its own products exclusively, or that it must stock and sell a full range of aftermarket parts, would be considered purely unilateral and virtually untouchable under the antitrust laws.

Within the last few decades, the possibility of antitrust exposure for franchises has been relatively unimportant, because franchises rarely have very much market power.<sup>36</sup> Most intra-franchise practices such as tying and exclusive dealing, although technically reachable, are lawful. This is driven by substantive antitrust standards, not by the legal status of franchises as collaborations of multiple persons.

This essay considers several important issues surrounding the antitrust personhood provisions. *First* is the traditional concern about the scope of corporate power, and particularly with holding companies, where one corporation owns all or part of the stock of another. *Second* are limitations on antitrust personhood that arise from partial ownership or actors who have separate economic interests. *Third* is the distinctive treatment of trade and professional associations; while also treated as "persons" under the statutes, they are often not regarded that way by the courts. *Fourth* is the problem of firm maximization and disloyal agents acting contrary to the interests of the firm that they represent.

*Fifth* is the problematic extent to which antitrust's definition of corporate personhood has driven firm decisions to integrate vertically. Whether or not vertical integration is efficient business practice, a firm may do it simply in order to achieve single person antitrust status. As a result, decisions that affect industry structure and performance are sometimes driven more by the linguistic peculiarities of the antitrust laws than by their effect on economic performance. Overly aggressive rules governing vertical contractual territorial restraints can force firms to choose ownership vertical integration as an alternative.

*Sixth* is the status of employees—namely when are they a part of the firm, and when are they contracting agents with potentially adverse interests? *Finally*, it evaluates the possibility of compulsory management restructuring as an antitrust remedy.

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35. See *Schlotsky's, Ltd. v. Sterling Purchasing and Nat. Distribution Co.*, 520 F.3d 393, 408 (5<sup>th</sup> Cir. 2008) (addressing franchise tie; dismissing complaint for lack of market power); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9<sup>th</sup> Cir. 1971) (sustaining tying claim brought against franchisor by franchisee).

36. *E.g.*, *Schlotsky's*, 520 F.3d at 408 (explaining that franchises lack market power).

## CORPORATE POWER AND HOLDING COMPANIES

The Progressive Era debate about monopolies and trusts leading up to the Sherman and Clayton Acts reflected deep distrust of the business corporation, most of which were chartered by the states. During this period there was about as much support for using corporate law to control the large trusts as there was for a statute built on the model of trade restraints.<sup>37</sup> Many Progressives wanted to pass national incorporation legislation, and there was particular animosity toward holding companies, or corporate ownership of the shares of another corporation.<sup>38</sup>

Pressure from the other direction was pushing individual states to liberalize their corporate law in order to accommodate multistate business. Corporate franchise taxes were lucrative. At one point, New Jersey obtained about 60% of its budgetary receipts from them.<sup>39</sup>

Liberalization of corporate law typically involved three things: expansion of traditionally restrictive corporate business purpose clauses so as to permit corporations to engage in a wide range of activities; permission to own and operate out-of-state productive assets; and permission for one corporation to own the shares of other corporations.<sup>40</sup>

In 1888, just prior to the Sherman Act's passage, New Jersey amended its corporate law so as to permit all three of these things.<sup>41</sup> The first federal antitrust merger decision, *Northern Securities Co. v. United States*,<sup>42</sup> was a challenge to a New Jersey holding company that had acquired the Northern Pacific and Great Northern Railroads, which operated parallel east-west railroad lines entirely outside of the state of New Jersey.<sup>43</sup> State chartered corporations with such far flung assets could not exist until the New Jersey amendment.

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37. See Herbert Hovenkamp, *The Invention of Antitrust*, South Calif. L. Rev. 133, 135 (2023) (on the diverse schools of thoughts regarding trusts, including concerns about deficiencies in state corporate law).

38. Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L. J. 75, 77–82 (1990).

39. Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 681–83 (1989).

40. Hovenkamp, *supra* note 38 at 77–82.

41. N.J. Laws, 385, 445 (1888); see Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 200 (1899) (explaining that New Jersey permitted corporations to hold stocks of other corporations, to own out-of-state assets, and to engage in wide range of activities).

42. 193 U.S. 197 (1904).

43. See James Wilford Garner, *The Northern Securities Case*, 24 ANNALS AM. ACAD. POL. & SOC. SCI. 125 (1904) (largely defending the merger on economic grounds).

The *Northern Securities* merger raised two quite different issues. One was the anticompetitive effects of a merger between two close and parallel railroad lines. The other was the state's power to create such a powerful entity operating outside of its own territory. The challenge was brought under the Sherman Act, and the Court's opinion dwelt exclusively with the competition issue, finding the acquisitions to be unlawful. It did not condemn holding companies categorically, nor ownership of out-of-state assets.

The Court's own discussion of state power in *Northern Securities* was in rejection of a *defense* that the acquisition had been authorized by state corporation law.<sup>44</sup> The Court conceded New Jersey's power to create the extraterritorial holding company at issue, but also held that this power was trumped by the federal government's power to condemn combinations in restraint of interstate commerce:

[E]ven if the state allowed consolidation, it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress. . . .<sup>45</sup>

Commentators soon noted that the Court's decision was not a prohibition on holding companies generally, but only on acquisitions deemed to be anticompetitive.<sup>46</sup> Subsequent decisions prior to passage of the Clayton Act confirmed that the holding company was not inherently unlawful under the antitrust laws.<sup>47</sup>

That was not sufficient for some Progressives, who wanted them

44. *Northern Securities*, 193 U.S. at 332–33.

45. *Id.* at 338; *see also Id.* at 337 (holding that antitrust law forbids “any combination which . . . destroys or restricts free competition among those engaged in interstate commerce. . .”).

46. Henry Wolf Biklé, *The Northern Securities Decision: A Review*, 52 AM. L. REV. 358, 375 (1904); Herbert Pope, *The Legal Aspect of Monopoly*, 20 HARV. L. REV. 167, 188 n. 2 (1907).

47. *E.g.*, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) (New Jersey holding company); *United States v. Reading Co.*, 226 U.S. 324, 341 (1912) (Pennsylvania holding company). *See also United States v. Union Pac. R. Co.*, 226 U.S. 61, 85 (1912) (seeing no difference between a merger accomplished through a holding company and one involving an asset acquisition).

abolished outright.<sup>48</sup> Of the three political party platforms<sup>49</sup> in the 1912 Presidential election, the ultimately victorious Democratic platform was the only one that explicitly called for a prohibition of holding companies.<sup>50</sup> Mostly true to its word, Woodrow Wilson's new Democratic Congress enacted the Clayton Act. Rather than including the promised provision prohibiting holding companies, however, it did just the opposite. The new section 7 of the Clayton Act prohibited anticompetitive stock acquisitions, but it also expressly permitted holding companies:

Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.<sup>51</sup>

That provision, which remains the law,<sup>52</sup> was effectively an authorization to the states to create holding companies if they wished to, provided that they did not behave anticompetitively. The provision also effectively established that a corporation and its wholly owned subsidiary are a single person for antitrust purposes. A state authorized corporation is a statutory "person" under the antitrust laws, and a corporation necessarily includes its shareholders.<sup>53</sup> The state holding company provisions simply

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48. *E.g.*, J. Newton Baker, *The Evil of Special Privilege*, 22 *YALE L.J.* 220, 225–26 (1913) (holding that the "power for a corporation to hold stock in another corporation or association gives to the holding company the unlimited and unbridled power to regulate sales and prices"); Frederick N. Judson, *The Control of Corporations*, 18 *GREEN BAG* 662 (1906) (opposing holding companies). *Contra* J.P. Goodrich, *The Public Welfare and the Holding Company*, 57 *ANNALS AM. ACAD. POL. & SOC. SCI.* 323, 323 (1915) (explaining the need to distinguish good from bad holding companies); Pope, *supra* note 46 (providing that not all holding companies are bad).

49. The Democrats (Wilson, who won), Republicans (Taft), and the Progressive "Bull Moose" Party (Theodore Roosevelt).

50. *See* DEMOCRATIC PARTY PLATFORM OF 1912 (1912), <https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform> [<https://perma.cc/3KHM-LX5P>] ("We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies. . .").

51. 15 U.S.C. §18 (2018).

52. *Id.* A later amendment extended its reach to "engaged in commerce or in any activity affecting commerce . . .".

53. The dissenters in *Copperweld* seem confused on this point. They objected that "the

state that one corporation is entitled to be a shareholder of another corporation.

To be sure, corporations may often have too much power, but the holding company issue is largely a red herring. One cannot create market power by the simple device of incorporating one or more subsidiaries. Incorporation does not make them grow larger or enable them to wield more power. It does serve to give subsidiaries separate legal status which may be important for purposes (both legitimate and illegitimate) of tax policy, internal management, limited liability,<sup>54</sup> or compliance with the different laws of different states.

On the other hand, mergers can increase market power, whether or not they are carried out by a holding company. To that extent they are unlawful under the antitrust law. One thing that the availability of holding companies does is make certain types of mergers easier to accomplish, particularly hostile takeovers. One firm cannot ordinarily force another firm to sell its assets. Once a firm's shares become publicly tradeable, however, anyone can buy them. But that hardly establishes a link to anticompetitive outcomes.

In combination, the *Northern Securities* decision and section 7 of the Clayton Act state the current antitrust position on holding companies. First, as section 7 makes clear, holding companies are lawful provided that they are authorized under state law and do not engage in unlawful activities. Second, however, an anticompetitive *acquisition* by means of a holding company can still be unlawful, not because of any prohibition of holding companies, but rather because the acquisition itself threatens competition. Indeed, the illegality of a particular merger under the antitrust laws almost never depends on whether the transaction occurred via a holding company.

#### PERSONHOOD'S LIMITS: THE PROBLEM OF INTRACORPORATE CONSPIRACIES

The publicly held business corporation is a single entity, or legal person.

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corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed." 467 U.S. at 788. However, the early trusts were not parent/subsidiary relationships, which were not authorized by corporate law at the time. Rather they were looser aggregations of corporations under a common law trust agreement, and were found not to be authorized under state law.

54. One fear that the *Copperweld* decision acknowledged is that a corporation might be willing to risk bankruptcy of a separately incorporated subsidiary when it would not do so for an unincorporated asset that might place the entire enterprise at risk. See *Copperweld*, 467 U.S. at 794. ("A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks.")



Two important characteristics drive that treatment. One is that it is a profit-maximizer, continuously seeking to maximize its own value. That creates a unity of purpose, or at least one that is assumed for many policy purposes. Another is separation of ownership and control, or the idea that the firm operates to further its own interests, independently of the interests of individual shareholders or other constituencies.

The conception of the corporate person reflected in the antitrust statutes is consistent with the theory of the firm in neoclassical economics. For example, the major theorems of corporate behavior<sup>55</sup> and finance all assume complete unity of purpose among a firm, its shareholders, and other constituents.<sup>56</sup> Managers act so as to maximize the firm's value, and the conflicting views of shareholders, employees or other agents are disregarded. Neither economics nor the statutory personhood provisions acknowledge schizophrenic corporate actors with multiple and internally inconsistent interests.

When the firm steps out of these boundaries and reflects conflicting interests, antitrust case law has creatively taken the position that the challenged actions are not those of a "firm" at all, but rather of a cartel or other combination of independent actors, perhaps using the firm as a smokescreen.

Antitrust's statutory person behaves in just the way a single human person would behave. A biological person would maximize his or her own interests, and at least neoclassical economics does not trouble itself much about situations in which persons act irrationally, or contrary to their own interests. Nor do the antitrust provisions contemplate any kind of corporate schizophrenia, in which a firm's multiple personalities seek to maximize different things. The statute simply indulges the assumption that the corporation acts as a single entity with a single set of values to maximize whatever it wishes to maximize. While factual disputes might exist among the firm's constituencies about what those values should be, these are irrelevant to the question of single person status or antitrust legality. The

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55. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (explaining behavior in particular).

56. The important theorems of corporate finance, including Fisher's separation theorem, the Modigliani-Miller theorem, and the efficient capital market hypothesis, require strong assumptions that the firm and all of its shareholders have exactly the same preferences, or else that the separate preferences of shareholders are irrelevant. José Azar, *The Common Ownership Trilemma*, 87 *U. CHI. L. REV.* 263 (2020); Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 *VA. BUS. & L. REV.* 373 (2009); Eugene F. Fama & Michael C Jensen, *Separation of Ownership and Control*, 26 *J.L. & ECON.* 301 (1983).

firm's ultimate decision, no matter how much internal debate it took to get there, is treated as a unilateral act. Further, this decision is strictly a matter of structure, not of inquiry into the subjective intent of a firm's numerous individual actors.

Under antitrust law, when a corporation's organization structure deviates from these assumptions the case for "conspiratorial capacity" is greater.<sup>57</sup> One such situation is when separation of ownership and control is lacking because active shareholders act individually or collectively to use the corporation to serve their independent interests.<sup>58</sup> Another is when "disloyal" agents of the corporation, including employees, act in behalf of their own interests.<sup>59</sup> A third is partial ownership, which can occur when one corporation is not the sole owner of another corporation. At least in situations falling short of a controlling interest, arrangements between a partial owner and an asset are best treated as contractual, and thus conspiratorial.<sup>60</sup>

#### *The Firm as a Cartel of its Owners or Agents*

While any business asset can have multiple owners, corporations are more prone to situations that can raise competitive concerns. The common law "trust" under which many of America's early giant firms were formed, initially created such threats. Gilded Age corporate law prohibited the far-flung, multistate business arrangements that developing technology and the

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57. *E.g.*, *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1234 (10<sup>th</sup> Cir. 2017); *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1131 (3d Cir. 1995); *Capital Imaging Assocs, P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544 (2d Cir. 1993).

58. *See* discussion *infra* text at notes 100–101.

59. *See* discussion *infra* text at notes 103–109.

60. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (parent company could conspire with a subsidiary in which it owned a one-third interest; *see id.* at 595, noting that the defendant owned roughly 30% of British Timken, and divided ownership of French Timken with one other firm, although the Court did not specify the percentages). *A fortiori*, it could also conspire with competitors who owned the other two-thirds. *See also* *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 856 F.Supp. 990 (E.D. Pa. 1994), *aff'd*, 54 F.3d 1125 (3d Cir. 1995) (firm could not conspire with 99 percent owned subsidiary); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330 (N.D. Ill. 1997) (nursing home operator, its wholly owned subsidiary, and an 82.34 percent owned pharmacy lacked conspiratorial capacity); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data Sys. Corp.*, 849 F. Supp. 702 (N.D. Cal. 1994) (firm could not conspire with 80 percent owned subsidiary); *P & M Distribs., Inc. v. Prairie Farms Dairy, Inc.*, 2013 WL 5509191, 2013-2 Trade Cas. 78, 553 (C.D. Ill. Oct. 4, 2013) (corporation could conspire with another in which it owned a 50 percent interest); *In re Sulfuric Acid Antitrust Litig.*, 743 F.Supp. 2d 827 (N.D. Ill. 2010) (firm with minority interest in another corporation and engaged with it in a joint venture could nevertheless be guilty of per se unlawful conspiracy; denying summary judgment).

business climate were beginning to facilitate. As a result, owners sought out organizational alternatives. Under the trust agreement the owners of the shares of multiple corporations transferred their shares to a common board of trustees, who then managed the various corporations as a single unit.<sup>61</sup> They believed that this arrangement would enable them to avoid the legal limitations that state corporate law placed on corporations at that time.

The trust as a corporate organizational form was a legal failure. Some states declared them to be *ultra vires*, or unlawful under state corporate law, because they created unauthorized inter-corporate alliances.<sup>62</sup> As a result they were also not entities “authorized” by state law for federal antitrust purposes.<sup>63</sup> One implication of this is that early enforcers could go after large firms organized as trusts under the Sherman Act section 1’s conspiracy provisions. They did not fit into the statutory definition of a single “person.” For example, while the defendant in the giant 1911 decision in *Standard Oil Co. v. United States* was a New Jersey holding company, many of the claims related back to conduct that occurred when it was still a trust. The Supreme Court repeatedly referred to this structure as an unlawful “combination” in restraint of trade.<sup>64</sup>

Liberalization of state corporate law to permit holding companies, ownership of extraterritorial assets and multi-product firms made the trust form of organization unnecessary. Already by 1898 influential corporate law treatise writer William W. Cook concluded that the trust form was obsolete and rapidly being abandoned.<sup>65</sup> Today, not only is it lawful for a corporation to own and control multiple incorporated subsidiaries in multiple states, the resulting entity is a single person under the antitrust laws. Its conduct that does not involve an agreement with a separately owned actor is largely unreachable under any antitrust provision other than section 2 of the

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61. See Hovenkamp, *supra* note 38 (explaining the structure of stock-transfer trust).

62. See, e.g., *Bishop v. American Preservers Co.*, 41 N.E. 765 (1895) (common law trust arrangement unlawfully created partnership among corporations); *People v. N. River Sugar Ref. Co.*, 121 N.Y. 582, 626 (1889) (common law trust was an unlawful attempt to create a partnership among multiple corporations); *State ex rel. Atty. Gen. v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892) (*ultra vires* for trustees to act as agents for distinct member companies). See also *Nat’l Lead Co. v. S.E. Grote Paint Store Co.*, 80 Mo. App. 247 (1899) (trust agreement inconsistent with Missouri Antitrust Act).

63. 14 U.S.C. §§7, 12.

64. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30–44 (1911).

65. WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK, §503a at 915–16 (4th ed. 1898); accord ERNST VON HALLE, TRUSTS, OR, INDUSTRIAL COMBINATIONS AND COALITIONS IN THE UNITED STATES 94 (1895).

Sherman Act.<sup>66</sup>

Equally important is the upside-down question: what happens when two or more corporations share ownership of a single subsidiary or other productive asset? The issue has special relevance when the owner corporations are competitors. For example, there is nothing wrong with two or more firms forming a joint venture to do research, or perhaps to engage in joint production or distribution. Further, they may want to incorporate their jointly owned enterprise separately.<sup>67</sup> This can take a variety of forms. In *United States v. Topco Assocs.*,<sup>68</sup> Topco itself was a Wisconsin Corporation whose shareholders were 25 independent grocery retailers and wholesalers. They actively operated the Topco production facilities and distribution network but also sold products produced in those facilities individually.<sup>69</sup> Thus, each of Topco's incorporated shareholders was itself a holding company holding a fraction of Topco's shares. The Supreme Court applied section 1 of the Sherman Act to condemn the arrangement without even discussing the issue of conspiratorial capacity. It simply treated the arrangement as a cartel of Topco's shareholders.

The complexity of these arrangements sometimes serves to obscure the issues. For example, in *Century Oil Tool v. Production Specialties*,<sup>70</sup> three natural persons fully owned two corporations. Two of them each owned 30% of the two firm's shares, and the third owned 40%. The claim was that the corporations conspired with each other, but the Fifth Circuit denied it, applying *Copperweld* after finding "no relevant difference" between common ownership by a corporation and common ownership by a biological

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66. Since *Copperweld*, lower court decisions have agreed with this result. *E.g.*, *González-Maldonado v. MMM Healthcare, Inc.*, 693 F.3d 244 (1st Cir. 2012) (wholly owned subsidiaries of same parent could not conspire); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990), *on remand*, 846 F. Supp. 488 (W.D. Va. 1994). *See also* *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 630 F. Supp.2d 842 (S.D. Ohio, 2007), *aff'd*, 552 F.3d 430 (6th Cir. 2008) (*Copperweld* precluded claim that affiliated Blue Cross insurance companies owned by a common parent conspired); *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2003 WL 21479192, (D.Kan. June 16, 2003), *aff'd*, 112 Fed.App'x. 730 (10th Cir. 2004) (a bank holding company and its subsidiaries lacked conspiratorial capacity).

67. *Cf.* *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) (potential competition merger case involving two firms that formed and incorporated a joint venture); *cf.* *Timken Roller Bearing v. United States*, 341 U.S. at 593 (showing where the parent corporation and one other firm shared ownership of subsidiaries and organized territorial division agreements among them; Court found conspiratorial capacity).

68. 405 U.S. 596 (1972).

69. *United States v. Topco Assocs., Inc.*, 319 F. Supp. 1031, 1032–33 (N.D. Ill. 1970).

70. 737 F.2d 1316 (5th Cir. 1984).

person.<sup>71</sup>

But that was asking the wrong question. The more important issue in *Century Oil* was whether the *human* owners could conspire. To be sure, that avenue may have been cut off by inartful pleading presenting the issue as a conspiracy between the two corporations rather than among the three human shareholders.<sup>72</sup> For example, if Ford, GM, and Chrysler created two separate, incorporated research ventures to develop electric vehicles in one and lower emission gasoline vehicles in the other, our primary concern would not be whether the two research companies could conspire, but rather whether the shareholders, Ford, GM, and Chrysler, could conspire. That fear reflects antitrust law's general concern with horizontal agreements: by aggregating market shares and eliminating competitive alternatives, they can lead to lower output and higher prices.<sup>73</sup>

Questions about partial or divided interests create situations that the antitrust personhood provisions did not contemplate. Dozens of federal judicial decisions have addressed situations roughly resembling *Topco*, and most have responded the same way. They found conspiratorial capacity without even addressing the personhood issue. For example, the Trans-Missouri Freight Association, the defendant in the first Supreme Court antitrust decision on the merits, was an association owned by its member railroads. The Court treated it as nothing more than a cartel of the railroads themselves.<sup>74</sup> The Chicago Board of Trade, defendant in a well-known Supreme Court antitrust decision that was instrumental in developing the rule of reason, was an Illinois corporation. The challenge was to a price

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71. *Id.* at 1317.

72. *Cf.* *Guzowski v. Hartman*, 969 F.2d 211 (6th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993) (two corporations owned by identical sets of stockholders could not be conspiring entities). *Contra* *Fishman v. Wirtz*, 807 F.2d 520, 542 n. 19 (7th Cir. 1986) (where several of the same investors owned an incorporated athletic stadium and an incorporated real estate company, the mere fact of "some overlap in the shareholders" was not sufficient to turn the two into a single entity).

73. *See also* *Sonitrol of Fresno, Inc. v. Am. Tel. & Tel. Co.*, 1986 WL 953 (D.D.C. Apr. 30, 1986), which addressed the possibility of "intrafamily" conspiratorial capacity among the various incorporated segments of the AT&T telephone network after its breakup. The court concluded that *Copperweld* precluded conspiratorial capacity between the parent and a wholly owned subsidiary, but not between two subsidiaries where AT&T owned 32.6% of one and 23.9% of the other. *See also* *P & M Distributors, Inc. v. Prairie Farms Dairy, Inc.*, 2013 WL 5509191, 2013-2 Trade Cas. ¶78, 553 (C.D. Ill. Oct. 4, 2013) (a corporation had conspiratorial capacity with a different corporation in which it owned a 50 percent interest); *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp.2d 827 (N.D. Ill. 2010) (firm with minority interest in another corporation and engaged with it in a joint venture could nevertheless be guilty of per se unlawful conspiracy; denying summary judgment).

74. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897).

agreement among its members, who were active traders on the Board.<sup>75</sup> The Terminal Railroad Association was a Missouri corporation whose shareholders were railroads and suppliers of collateral services.<sup>76</sup> Both the Associated Press<sup>77</sup> and the Fashion Originators Guild<sup>78</sup> were New York corporations. What all of these decisions had in common was that the Supreme Court treated their nominally internal decision making as an “agreement” among multiple principals, without discussion of single entity status.

The Supreme Court did discuss the single entity claim fully in *American Needle, Inc. v. NFL*.<sup>79</sup> There, the individually owned football teams granted licenses of their individual team trademarks and other intellectual property to NFL Properties (NFLP), an incorporated association owned by the teams. NFLP then granted an exclusive license to make logoed headwear such as caps and helmets to one manufacturer, excluding the plaintiff.

The Seventh Circuit’s decision finding single entity status,<sup>80</sup> which the Supreme Court reversed, was consistent with the Seventh Circuit’s own precedent at that time,<sup>81</sup> but inconsistent with all of the previously discussed Supreme Court decisions finding conspiratorial capacity when the owners of a corporation agree about their separate business interests.<sup>82</sup>

In retrospect, the Seventh Circuit had been overly focused on the fact that the NBA was engaged in joint activity—namely, scheduling and playing games, where “cooperation is essential,” because “a league with one team would be like one hand clapping.”<sup>83</sup> While that is true, all of the previously discussed organizations, including the Chicago Board of Trade, Associated Press, and Topco, were engaged in production that required cooperation. However, that does not mean that every decision they make does so, or that some decisions cannot be collusive exercises of market power. For example, the decision in *Topco* did not concern the Topco venture’s own production decisions, but rather the decision by its shareholder owners to space out the locations of their own individually owned stores. The decision in *American*

75. *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231 (1918).

76. *United States v. Terminal R.R. Ass’n*, 224 U.S. 383 (1912).

77. *Associated Press v. United States*, 326 U.S. 1, 3–4 (1945).

78. *Fashion Originators’ Guild of Am., Inc. v. Federal Trade Commission (F.T.C.)*, 312 U.S. 457 (1941).

79. 560 U.S. 183 (2010).

80. *Am. Needle Inc. v. National Football League*, 538 F.3d 376 (7<sup>th</sup> Cir. 2008).

81. *See Chi. Pro. Sports Ltd. P’ship v. National Basketball Ass’n*, 95 F.3d 593 (7<sup>th</sup> Cir. 1996) (concluding that the NBA should be treated as a single entity).

82. The Court acknowledged this, referring to *Topco*, *Associated Press*, *Terminal Railroad*, among others. *See American Needle Inc.*, 560 U.S. at 192.

83. *Chi. Pro. Sports*, 95 F.3d at 598–99.

*Needle* concerned the licensing of each NFL team's independently owned intellectual property rights.

The common focus of the forementioned cases is that the shareholders had business interests distinct from the corporation itself, and the challenged agreement was motivated by or affected those distinct interests. For example, in *Associated Press*, the joint venture composed of separate newspapers operated the incorporated wire service, but the individual member newspapers had made a rule that reduced competition among themselves as newspapers, limiting access to the service's new stories. Viewing it that way, these companies were not so much "intraenterprise" conspiracies as opposed to conspiracies by owners or agents with respect to their separate business.

The Fourth Circuit did discuss conspiratorial capacity in *Robertson v. Sea Pines Real Estate*, which involved an incorporated real estate multiple-listing service.<sup>84</sup> The individual owners of the service were real estate brokerage firms who allegedly agreed with one another to a membership scheme that discriminated against low price brokers.<sup>85</sup> The court concluded that:

Although appellants stress that the defendants passed the MLS by-laws in their capacity as MLS board members, the relevant question is whether defendants acted "on interests separate from those of the firm itself."<sup>86</sup>

All of these decisions are quite correct insofar as they reflect a heightened antitrust concern about collusion.<sup>87</sup> If they seem inconsistent with antitrust law's corporate personhood provision, it is because the statutes never contemplated corporate interests that were distinct from the interests of the corporation's shareholders or its other agents.

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84. *Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278 (4th Cir. 2012).

85. *Id.* at 291 (The gravamen of the complaints here is that the brokerages colluded to use the MLS corporate vehicle to "exclude lower-cost brokerages from effectively competing . . ."). *Accord Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1140 (9th Cir. 2003) (realtors set up an incorporated firm to manage the multiple listing service database, in which each of them was a shareholder).

86. *Robertson*, 679 F.3d at 285–86.

87. Some such as *Topco* are very likely incorrect as a matter of antitrust policy, but not on the question of conspiratorial capacity. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §5.2b, 260–68 (6th Ed. 2020) (explaining that the reason for *Topco*'s criticism is due to the opinion ignoring the distinction between naked and ancillary horizontal market division schemes).

*Trade and Professional Associations*

Some trade and professional associations are incorporated while others are not. The statutory definition of “person” does not require incorporation. It applies alike to “corporations and associations existing under or authorized” by state or federal law.<sup>88</sup> Corporations and trade or professional associations can exhibit other important differences, however. While active management of a widely held business corporation by shareholders with independent business interests is somewhat exceptional, that is not true of trade and professional associations. They are generally created in order to benefit a particular industry or profession, and many, if not most, are actively run by market participants who have independent business interests. The definition of “corporation” in the Federal Trade Commission Act, contemplates this by using the term to cover not only corporations but also any association, whether incorporated or unincorporated, “which is organized to carry on business for its own profits or that of its members.”<sup>89</sup> Interpreting that provision, the Supreme Court held in *California Dental Assn. v. FTC* that a state professional association of dentists fell within the definition even though the association was operated by individual dentists with independent practices.<sup>90</sup> Although it disagreed with the FTC on the merits, it did not dispute the conclusion that the CDA should be treated as an agreement among its members rather than as unilateral conduct.<sup>91</sup>

As a result, trade and professional associations do not have the presumptive separation of ownership and control that business corporations do. Apart from closely held firms, business corporations typically produce products or services that are not uniquely related to the interests or activities of their shareholders. Indeed, share ownership in widely held corporations is a form of business investment in which shareholders are presumed to be uninvolved except as investors.

Because of this degree of active participant involvement, the presumption is properly stronger that the actions of a trade or professional association are not unilateral but rather reflect an agreement among its members. Most of the important decisions involving membership associations, including the Supreme Court’s recent decision in *NCAA v.*

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88. Sherman Antitrust Act of 1890 15 U.S.C. §7; Clayton Act 15 U.S.C. §1212 (2018).

89. 15 U.S.C. §44 (2018).

90. *Cal. Dental Ass’n v. Federal Trade Commission (F.T.C.)*, 526 U.S. 756, 768–69 (1999).

91. *Id.* at 770.



*Alston*,<sup>92</sup> simply assume conspiratorial capacity without discussing the issue.<sup>93</sup> The NCAA rule limiting collegiate athlete compensation was in fact a conspiracy among the individual members.

Nearly all of the trade and professional association cases from other areas reach that result as well.<sup>94</sup> The lower court's decision in the *North Carolina Dental* case, which the Supreme Court subsequently affirmed on other grounds, found that the Board's decision prohibiting teeth whitening by non-dentists was conspiratorial because the decision makers were "actual or potential" competitors with the people who were excluded.<sup>95</sup> Very few cases, very likely overruled by *American Needle*, have found unilateral conduct.<sup>96</sup>

Professional associations often have a quasi-legislative or quasi-judicial power that gives them state-sanctioned control over nonmembers. For example, by regulating the "unauthorized practice" of medicine, dentistry, or law, professional associations have a power that corporations generally do not have, which is to make legally enforceable rules governing people who are not members or agents of the association. In the *North Carolina Dental* case, state law authorized the association to make rules about unauthorized dental practice.<sup>97</sup> Until the FTC challenged them, they excluded nonmembers

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92. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

93. One reported decision mentions the issue, only to conclude that the members of the NCAA have conspiratorial capacity. Metropolitan Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004) (holding that members of the NCAA have conspiratorial capacity, citing *Copperweld*).

94. E.g., Robertson v. Sea Pines Real Estate Companies, Inc., 679 F.3d 278 (4th Cir. 2012) (restrictive rules promulgated by local real estate board treated as conspiratorial); Alvord-Polk, Inc. v. F. Schumacher & Co. 37 F.3d 996 (3d Cir. 1994) (rejecting defendants' claim that association of wallpaper sellers was a single person); Mastercard Intern. v. Witter, 1993 WL 338213, 1993-92 Trade Cas. ¶70,352 (S.D.N.Y. Aug. 27, 1993) (finding conspiratorial capacity among association of banks delivering credit card services). Cf. *Osborn v. Visa, Inc.*, 797 F.3d 1057 (D.C. Cir. 2015), cert. dismissed as improvidently granted, 137 S. Ct. 289 (2016) (similar, Visa).

95. N.C. State Bd. of Dental Exam'rs v. Federal Trade Commission (F.T.C.), 717 F.3d 359, 371 (4th Cir. 2013) (citing the FTC's final order, 2011 WL 6229615, at \*20).

96. E.g., Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005) (organization of dog breeders and affiliates should be regarded as a single entity). Cf. *Ultrasound Imaging Corp. v. Am. Soc'y of Breast Surgeons*, 358 F. Supp. 2d 475 (D. Md. 2005) (professional association's decision not to authorize plaintiff's imaging equipment for display at its annual meeting must be considered as unilateral; worth noting that the association and the plaintiff were not competitors).

97. E.g., N.C. Bd. of Dental Exam'rs v. Federal Trade Commission (F.T.C.), 574 U.S. 494, 499 (2015) (observing that the defendant association was declared by statute to be "the agency of the State for the regulation of the practice of dentistry," quoting N.C. Gen. Stat. Ann. §90-22(b) (2013)).

of the association, such as cosmetologists, from the market for teeth whitening.<sup>98</sup> While the regulatory statutes did not themselves prohibit teeth whitening by non-dentists, they did give the Board the authority to define unauthorized practice.<sup>99</sup> A majority of the Board was made up of actively practicing dentists.<sup>100</sup>

Of course, not every decision by a professional association impacts the separate business of its members. Suppose that a professional association should decide to repaint its association headquarters, or to switch away from paper mailing and move to email for internal communications. Those decisions very likely have no impact on individual members, other than to expose them to a new paint color or perhaps the convenience or inconvenience of receiving communications electronically. There is no good reason to deviate from the statutory definition declaring that an association “authorized by state law” is a single person. For example, if a painter upset by the association’s selection of a different painter should sue, that refusal to deal is best treated as unilateral, at least if we assume that the individual members have no independent interest in which painter is selected.

The decisions that have a more immediate impact on individual members, or certainly on nonmembers, cannot be analyzed in that way, lest we end up facilitating the cartelization of entire industries through the device of trade associations. For example, the AMA once used its accrediting power over hospitals to deny market access to chiropractors, who were not AMA members.<sup>101</sup> The Seventh Circuit treated the decision as an agreement and condemned it as an unlawful boycott under section 1.<sup>102</sup>

For trade and professional associations then, the issue of antitrust personhood is rarely important. More problematic is how to apply section 1, and use of the rule of reason.

### *Disloyal Agents*

In its *Robertson* decision involving real estate multiple listing services, the Fourth Circuit observed:

[I]t is clear that defendants’ alleged efforts to exclude innovative

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98. *Id.* at 500–01.

99. *Id.* at 503–04.

100. *Id.* at 499.

101. *Wilk v. Am. Med. Ass’n*, 895 F.2d 352 (7th Cir. 1990) (condemning anticompetitive AMA accreditation decision as unlawful boycott under §1 of the Sherman Act).

102. *See also Weiss v. York Hosp.*, 745 F.2d 786 (3d Cir. 1984) (board rejection to extend hospital staff privileges to osteopaths should be treated as a conspiracy).

competitors conflicted with the economic interest of the MLS [multiple listing service] to admit additional dues-paying members and to expand its database of property listings.<sup>103</sup>

A corporation necessarily acts through its various human agents. Sometimes these agents have divided loyalties, including multiple business interests. The result may be to bias the firm's behavior, often in ways that conflict with the firm's own interest in maximization of its value. Only a subset of these situations raises competition concerns, but when they do antitrust liability is possible, and even for activities that are located inside the firm. For example, in the *Robertson* case the multiple listing service was an incorporated network,<sup>104</sup> which would ordinarily profit by maximizing participation by all those able to contribute, as the court observed. But as independent brokerage firms, the individual owners had an interest in excluding lower cost participants.

One strong assumption about the neoclassical firm is that it operates so as to maximize its value. That assumption can be a useful device for identifying anticompetitive conduct occurring among a firm's own agents. That is, conspiratorial capacity exists when a firm's employees or other agents agree to act in a way that is not in the firm's best interest, but rather that reflects an interest of their own. Although the actions are profitable to the disloyal agents, they are unprofitable to the firm whose interests they are supposed to be representing.

To illustrate, hospitals profit by hiring medical staff who are as competent as possible and who deliver services in an efficient matter. That is how hospitals maximize their value. They are better off as employees are more loyal and as their work is of a higher quality and performed at a lower price. In making such decisions, however, the hospital relies on staff members who have expertise in various specialties, and these will often have ongoing business interests of their own. The result can be conflicts.

In *Weiss v. York Hospital*,<sup>105</sup> the court found that a hospital's board that

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103. *Robertson*, 679 F.3d at 86 (detailing the scope of the rules and MLS' intention in enacting them).

104. *See Id.* at 282 (noting that the defendant multiple listing service was incorporated).

105. 745 F.2d 786 (3d Cir. 1984). *Accord* *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) (finding executive committee members as independent actors comparable to medical staff in *Weiss*); *Bolt v. Halifax Med. Ctr.*, 891 F.2d 810, 828 (11th Cir. 1990) (finding defendant medical staff with individual practices, some in competition with plaintiff, and hospital legally capable of conspiring to terminate the plaintiff's staff privileges); *see also* *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988). *Cf.*

granted admitting privileges and that was composed of physicians with their own private practices could conspire to exclude plaintiff osteopaths.<sup>106</sup> While a hospital would have no interest in excluding physicians who were qualified and charged lower prices, individual practitioners on the staff admitting board might be motivated to do so. Therefore, what the plaintiff was really complaining about was a conspiracy among the admitting staff to deny the plaintiffs access to the hospital, in a way that harmed not only the plaintiff, but also the hospital itself. The court observed:

The “substance” of an arrangement often depends on the economic incentive of the parties. The York [Hospital] medical staff is a group of doctors, all of whom practice medicine in their individual capacities, and each of whom is an independent economic entity in competition with other doctors in the York medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis.<sup>107</sup>

Or as the Fourth Circuit subsequently observed:

Given that hospitals compete for the admission of patients, they have an incentive to maximize the number of physicians to whom they grant admitting and staff privileges. If a physician is qualified and does not disrupt the hospital’s operations, it is in the hospital’s interest to include, not exclude, that physician.<sup>108</sup>

A sensible route in such cases is liability for the disloyal agents, although not necessarily for their principal. For example, in one case the

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Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 615–17 (6th Cir. 1990) (finding that members of admitting staff could conspire with one another, but not with their hospital). There may be agency antitrust liability for a principal such as the hospital for the act of an agent. See Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel, 456 U.S. 556 (1982) (finding such liability).

106. When the admitting staff lacked a sufficient independent stake, the same court denied conspiratorial capacity. Am. Chiropractic Ass’n v. Trigon Healthcare, Inc., 367 F.3d 212, 224 (4th Cir. 2004). *Accord* Podiatrist Ass’n, Inc. v. La Cruz Azul de P.R., Inc., 332 F.3d 6, 16 (1st Cir. 2003) (finding that the plaintiffs failed to establish that defendant physicians exercised the requisite degree of control for conspiratorial capacity); Oksanen v. Page Mem’l Hosp., 945 F.2d 696, 704–05 (4th Cir. 1991) (finding that the defendant medical staff did not have sufficient control over the decision-making process).

107. Weiss, 745 F.2d at 815.

108. Oksanen v. Page Mem’l Hosp., 945 F.2d at 704. The court then held that a purely advisory panel that had recommended against the plaintiff’s admission to staff privileges did not reflect a conspiracy with the hospital. *Id.* at 710.

Sixth Circuit decided that a hospital had no interest in excluding midwives from staff privileges.<sup>109</sup> However, the admitting board, which was dominated by MD obstetricians competing with midwives, might have such an interest. As a result, a conspiracy among them was plausible. To be sure, in such cases the principal may have been negligent in selecting its board, giving it excessive authority, or policing its operations inadequately. While those behaviors might create liability for mismanagement, antitrust law does not permit merely negligent violations of section 1 of the Sherman Act.

*The Employee as Agent, or Not*

As *Copperweld* observed, a firm cannot ordinarily conspire with its own employees.<sup>110</sup> For example, numerous employees in General Motors might be involved in a decision about the price to be charged for a new model of automobile. That fact does not turn the price setting discussion into a conspiracy. If it did, then every act by a moderately sized or large corporation, or even a firm with only two employees, could be price fixing.

An important premise to this conclusion, however, is that the employees are acting as agents of the corporation. In fact, employees present the same problem as other agents with independent business interests, discussed in the previous section. When acting as agents of a corporation they are part of it and treated as a single person. However, when acting in their own personal interest this may not be the case.

A corollary of lack of conspiratorial capacity is that employers and employees cannot sue each other because they are the same legal “person.” That rule was clear already in nineteenth century corporate law, although an exception developed in the corporate derivative action, which permitted shareholders to sue the corporation for breach of trust that harmed the interests of the shareholders.<sup>111</sup>

Antitrust developed an analogous rule by holding that employees could not sue their employers for violations that occur in the firm’s product market. However, antitrust suits were permitted between employers and employees

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109. *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d at 617.

110. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (holding that “officers or employees of the same firm do not provide the plurality of actors imperative for a §1 conspiracy”). In a footnote, the Court noted a few exceptions, such as employee fraud or civil rights violations against the employer.

111. *Dodge v. Woolsey*, 59 U.S. 331, 342–44 (1855).

for violations in labor markets.<sup>112</sup> Employees generally lack standing to sue their employers for antitrust violations that occur in product markets, but antitrust suits are permitted for violations that occur in labor markets.<sup>113</sup> In the product market employees are agents of the corporation. By contrast, in the employment market they and their employees are related by contract and have conflicting interests. In that market they may also sue their employers, not only for antitrust violations, but also for civil rights violations, torts or related claims for on-the-job injuries, or violation of employment agreements.

Notwithstanding corporate personhood, the common law had also permitted employers to sue employees over issues that arose in the labor market.<sup>114</sup> The Sherman Act did not change that, even though its definition

112. The leading Supreme Court decision is *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545–46 (1983) (finding that plaintiff labor union lacked standing to sue for product market injuries); *see also* *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1338 (11th Cir. 2017) (finding that plaintiff terminated employee lacked standing to complain of restraint in the product market); *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 732 (10th Cir. 1973) (holding that plaintiff employee allegedly terminated as a result of unlawful product market merger lacked standing). *Cf.* *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987) (holding that employees of bankrupt airline allegedly ruined by defendant’s predatory conduct lacked standing). On the antitrust law of employee standing, *see* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶352 (5th ed. 2021) (reviewing employee lack of standing for product market suits); *but see* Herbert Hovenkamp, *Worker Welfare & Antitrust*, 90 U. CHI. L. REV. 511, 537–41 (2023).

113. *E.g.*, *Natl Collegiate Athletic Assn. v. Alston*, 141 S.Ct. 2141, 2144 (2021) (sustaining lawsuit by student athletes challenging low compensation); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (sustaining lawsuit by employee that their employers were engaging in a no-poach market division agreement limiting the power of employees to move from one market to another. The court subsequently certified a class); *In re High-Tech Emp. Antitrust Litig.* 985 F. Supp.2d 1167 (N.D. Cal. 2013) (sustaining a similar lawsuit brought by former software engineer employees); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp.3d 464 (W.D.Pa. 2019) (sustaining a similar suit involving an alleged no-poach agreement); *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270 (N.D. Cal. 2016) (sustaining a similar lawsuit brought by former employees alleging conspiracy to fix employee compensation); *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044 (N.D. Cal. 2016) (granting a motion to dismiss due to plaintiffs’ failure to state timely claims). On antitrust in labor markets and the scope of the labor immunity, *see* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶255–57 (5th ed. 2020).

114. *E.g.*, *Hopkins v. Oxley Stave Co.*, 83 F. 923 (8th Cir. 1897) (permitting incorporated manufacturer of barrels to sue two unincorporated unions for organizing a strike); *Bowen v. Matheson*, 96 Mass. 499 (1867) (dismissing the action for lack of allegation of unlawful activity, but not because an employer could not sue an employee). *Cf.* *Employing Printers’ Club v. Dr. Blosser Co.*, 122 Ga. 509 (1905) (permitting incorporated printer to sue a combination of those providing printing services). *See generally* Herbert Hovenkamp, *Lab. Combinations in Am. L., 1880-1930*, 66 TEX. L. REV. 919, 922–30 (1988) (reviewing the history of labor combinations prior to the Sherman Act).

of “person” included corporations. While Congress had debated inclusion of a labor immunity in the Sherman Act and Senator Sherman had even drafted proposed language, immunity never passed.<sup>115</sup> Thus, the Sherman Act became a powerful strike breaking tool that facilitated labor injunctions by defining horizontal agreements as unlawful and providing federal jurisdiction over such agreements.<sup>116</sup>

The Clayton Act had attempted to get rid of such suits through its section 6, which created a substantive antitrust exemption for labor, and section 20 which was intended to bar labor injunctions.<sup>117</sup> The courts responded with hostility, virtually construing both provisions out of existence.<sup>118</sup>

Section 20 of the Clayton Act facially was intended to bar employer injunctions in actions against striking employees:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or

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115. On the debate over whether the Sherman Act contained a labor immunity, as well as Senator Sherman’s attempt to have one included, *see* Hovenkamp, *supra* note 112, at 512–16, 522.

116. *E.g.*, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (Sherman Act suit brought prior to passage of Clayton Act, permitting employer to obtain injunction against striking union); *Irving v. Neal*, 209 F. 471 (S.D.N.Y. 1913) (recognizing Sherman Act suit by employer against striking union). *See generally* Hovenkamp, *supra* note 114, at 921, 928–35, 948–64 (1988) (detailing the impact of the Sherman Act). For a critique of expanded federal jurisdiction on behalf of the labor injunction, *see* FELIX FRANKFURTER AND NATHAN GREEN, *THE LABOR INJUNCTION* (1930).

117. 15 U.S.C. §17 (2018) (“The labor of a human being is not a commodity or article of commerce. . . .”); 29 U.S.C. §52 (2018) (by its terms, prohibiting injunctions in labor disputes).

118. *E.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (permitting employer to obtain injunction against employee strike); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (similar; sustaining injunction); *Truax v. Corrigan*, 257 U.S. 312 (1921) (holding that the Equal Protection clause granted employer right to enjoin strike); *Great N. Ry. Co. v. Brosseau*, 286 F. 414 (D.N.D. 1923) (similar); *Great N. Ry. Co. v. Loc. Great Falls Lodge of Int’l Ass’n of Machinists*, 283 F. 557 (D. Mon. 1922) (similar).

attorney.<sup>119</sup>

The Supreme Court in *Duplex Printing* interpreted it very narrowly to cover only the immediate parties to a lawsuit and not to provide any protection against secondary boycotts.<sup>120</sup> During the New Deal that statute was superseded by the Norris-LaGuardia Act, whose anti-injunction provision was much broader.<sup>121</sup>

In sum, corporate personhood bars employee actions against employers for injuries in product markets, where employees are simply treated as a part of the firm. It does not bar such actions for injuries that occur in labor markets, however. For those, the firm is treated as a purchaser of labor, the same as any other input, and that contractual relationship is subject to antitrust intervention by both buyers and sellers. However, legislation passed subsequent to the Sherman Act creates a significant antitrust immunity for such suits and bars most labor injunctions.

#### ANTITRUST PERSONHOOD AS FACILITATOR OF VERTICAL INTEGRATION

Business firms have many reasons to integrate vertically, which entails either ownership or tighter contractual control over suppliers or other inputs into the distribution system. For example, an automobile manufacturer might build a string of dealerships in order to distribute its cars, or else it might enter longer term franchise agreements to do the same thing. Among the inducements to vertical integration are savings in production or transaction costs and better quality control.<sup>122</sup> Most of these exist quite aside from any market power that a firm may have.<sup>123</sup> That is, their profitability does not depend on any power to reduce output and charge great than competitive prices, but rather on a firm's ability to reduce costs or improve product quality. Nevertheless, vertical integration has been subject to attacks from

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119. 29 U.S.C. §52.

120. *Duplex Printing*, 254 U.S. at 472; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Assn. of N. Am.*, 274 U.S. 37, 42–43 (1927).

121. See the Court's explanation in *Brady v. Nat'l Football League*, 644 F.3d 661, 669–70 (8th Cir. 2011) (explaining the implementation of the Norris-LaGuardia Act); see also *Confederacion Hipica de Puerto Rico, Inc. v. Confederacion de Jinetes Puertorriquenos, Inc.*, 30 F.4th 306 (1st Cir. 2022) (applying the statutory labor immunity and injunction bar, and holding that it also applies to independent contractors, provided that the dispute is purely about labor).

122. On economies from vertical integration, discussing the literature, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §9.2 (6th ed. 2020).

123. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).



the antitrust left, although at this writing the theory for doing so is weak. The principal concerns seem to be that it makes firms bigger or injures smaller or unintegrated competitors.<sup>124</sup>

Aside from its economics, one unsettling phenomenon is inducement to integrate vertically that results, not from beneficial gains but rather because the antitrust personhood statutes inadvertently favor a certain type of business structure. The structure of the antitrust laws, but particularly its definition of a single “person,” favors ownership vertical integration over all contractual forms. Vertical ownership under the statutory personhood provision yields unilateral conduct. This could be sensible policy if we believed that contractual vertical integration as a general matter produces fewer benefits and greater costs than ownership vertical integration, but that has never been established. Nor is there any evidence that the framers of the Sherman and Clayton Acts reflected on it.

Nevertheless, the differences in liability exposure are real. For example, a supplier selling to independently owned stores or franchises can be guilty of tying,<sup>125</sup> exclusive dealing,<sup>126</sup> resale price maintenance,<sup>127</sup> or vertically imposed territorial restraints.<sup>128</sup> By contrast, if a firm owns its retail outlets it can specify product choice and exclusivity, retail pricing, and territorial location very largely at will. These are all treated as unilateral acts and antitrust exposure is minimal at best. They are unilateral even if a firm’s various stores and outlets are separately incorporated subsidiaries.

In the *Standard Stations* decision Justice Douglas objected in dissent that the Court’s decision condemning exclusive dealing furthered vertical ownership unnecessarily.<sup>129</sup> Douglas, who was usually aggressively pro-enforcement, believed a rule requiring Standard Oil to permit its franchise gasoline stations to sell its gasoline exclusively would have perverse

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124. E.g., BARRY LYNN, *LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE* (2020). See Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement*, 94 NOTRE DAME L. REV. 583, 593 (2019) (describing negative views concerning vertical integration).

125. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) (condemning tying of food products by franchisor).

126. *Federal Trade Commission (F.T.C.) v. Brown Shoe Co.*, 384 U.S. 316 (1966) (exclusive dealing).

127. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (holding resale price maintenance per se unlawful), *overruled by* *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

128. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (holding vertical territorial restraints unlawful, per se), *overruled by* *Continental TV v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

129. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293 (1949).

consequences. His reason was not hostility toward aggressive antitrust rules. Rather, he argued, the decision would encourage the large gasoline refiners to build “service station empires of their own.”<sup>130</sup> That is, under the previous regime distribution restrictions were lawful and Standard had found it profitable to distribute its gasoline through independent stations. However, if it were required to permit “split pump” stations selling more than a single brand of gasoline it would respond by simply substituting wholly owned stations.<sup>131</sup>

The Robinson-Patman Act, enacted during the Depression in 1936, was a particularly unfortunate example of inadvertent inducement to integrate vertically. The principal target of the statute was the rapidly rising chain store, which was driving small single-store owners out of business. The RPA was part of a multi-pronged attack on the chains, including many state statutes that attempted to put them out of business by assessing progressively larger taxes as a chain owner had more stores.<sup>132</sup> The RPA was special interest legislation targeting mainly A&P (the Great Atlantic and Pacific Tea Company), whose expanding multistore grocery retailing was ruining many independently owned single-store grocers.

The RPA took a different approach from the chain store taxes. It identified the root of the chain store problem as discriminatory wholesale prices. That is, the chains were thought to harm smaller rivals by pressuring suppliers to sell to them at lower prices than they charged to smaller retailers. The statute responded by making it unlawful for a seller to sell the same goods to two different purchaser-resellers where the two buyers were in competition with each other;<sup>133</sup> and the effect of the differential was to injure the buyer forced to pay a higher price. The requisite injury sounded more in

130. *Id.* at 320 (“The elimination of these requirements contracts sets the stage for Standard and other oil companies to build service station empires of their own.”).

131. See D. F. Dixon, *Gasoline Marketing in the United States – The First Fifty Years*, 13 J. INDUS. ECON. 23, 25 (1964) (noting that early independent gasoline stations were “split pump,” offering as many as five brands of gasoline and discussing the many ways that the refiners tried to limit the practice). See also *Id.* at 28 (noting Standard’s use of company-owned stations as a way of maintaining tighter control over distribution). See also Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982) (describing the relationship between exclusive dealing and business efficiency).

132. On the attempts to kill the chain stores legislatively, see Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, NYU J. LEG. & PUB. POL’Y (2023) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4121866](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121866) [https://perma.cc/2TUR-2NSE].

133. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (holding that favored and disfavored purchasers must compete with one another); see also *The Shell Co. (Puerto Rico) Ltd. v. Los Frailes Serv. Station, Inc.*, 605 F.3d 10 (1st Cir. 2010).

tort rather than antitrust. A purchaser forced to pay a higher price needed to show only injury to itself, not to market competition.<sup>134</sup>

By the time the RPA was drafted the growth of chain stores had provoked a fair amount of legal and economic study.<sup>135</sup> To be sure, one problem was that they bought in large quantities and at lower prices that the independent grocers could not match. More significant, however, was that vertical integration was changing the shape of American retail distribution. This included the chains' development of their own warehousing, transportation, and in some cases, even production facilities. Another feature was the elimination of independent brokers, or people who matched suppliers and retailers, but whose services were no longer needed under organized distribution.<sup>136</sup> These several developments undoubtedly had more to do with the chains' ability to undersell to smaller retailers than simply obtaining lower prices. In its 1935 *Annual Report*, the FTC emphasized the chains' advantages "flowing from the integration of production and of wholesale and retail distribution . . ." It recommended against "any change in the law in order to eliminate such advantages."<sup>137</sup> Other effects included large retailers' decisions to sell exclusively to larger buyers, discontinue sales to smaller outlets, and excessive differentiation of goods in order to avoid the RPA's requirement of "like grade and quality."<sup>138</sup>

In any event, the resulting statute completely ignored the vertical integration problem and condemned only discriminatory prices, as well as

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134. *Chroma Lighting v. GTE Prod. Corp.*, 111 F.3d 653 (9th Cir. 1997), *cert. denied*, 522 U.S. 943 (1997) (requiring only injury to the disfavored competitor, not to competition).

135. See Hovenkamp, *supra* note 132 (analyzing the growth of chain stores); George J. Feldman, *Legislative Opposition to Chain Stores and its Minimization*, 8 L. & CONTEMP. PROBS. 334 (1941).

136. See Hovenkamp, *supra* note 132 at 20.

137. Federal Trade Commission (F.T.C.), ANNUAL REPORT OF THE FTC, U.S. GOV'T PRtg. OFF. WASH. 3, 32 (1935), [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-1935/ar1935\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1935/ar1935_0.pdf) [<https://perma.cc/THC3-LK4G>].

138. Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 ANTITRUST BULL. 733, 753–54 (1986) ("Vertical integration, exclusive dealing, product differentiation, and other practices above are frequently efficient. The preceding discussion does not suggest otherwise. However, the effect of Robinson-Patman is to induce these practices in market settings where they may otherwise not have occurred"); See also Thomas W. Ross, *Winners and Losers under the Robinson-Patman Act*, 27 J.L. & ECON. 243, 253 (1984) (chains able to avoid the costs of the RPA by integrating vertically); Thomas M. Lofton, *Dual Distribution and Vertical Integration Under the Robinson-Patman Act*, 41 IND. L.J. 4, 31–32 (1985) (explaining that under the RPA, suppliers enjoy a unique advantage over distributors because suppliers may integrate forward their chain of distribution and thus obtain functional discounts).

discounts for unneeded brokerage services.<sup>139</sup> In fact, it went further than that. Under the RPA both the higher price transaction and the lower price transaction had to be “sales,” and the Act explicitly permitted firms to refuse to deal.<sup>140</sup> That is, they had to be bargains negotiated between independent legal persons, and not intrafirm transactions among the divisions or subsidiaries of a single firm.<sup>141</sup> In retrospect, the RPA was an obsolete response to an evolving retail distribution structure.

While condemning price differences, which were only a small part of the challenge that the chains imposed, the RPA also provided a recipe for evasion: a firm could completely avoid liability under the RPA by vertically integrating so that either the higher price or the lower price transfer became internal to the firm. That is, they were no longer sales.<sup>142</sup> The problem of vertical integration in order to avoid RPA liability was sufficiently severe that in 1963, Congress entertained a bill that would have modified the RPA so that it would cover internal transactions within the same firm.<sup>143</sup> It never passed.

The Justice Department’s *Report on the Robinson-Patman Act*, published in 1977, emphasized the reasons other than price differences for

139. See 15 U.S.C. §13(c) (detailing rules of limitations on brokerage discounts). See also *Federal Trade Commission (F.T.C.) v. Henry Broch & Co.*, 363 U.S. 166 (1960) (holding that it is unlawful for a broker to cut its commission in order to bring a buyer and seller to a deal).

140. See 15 U.S.C. §13(a) (“nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . .”).

141. *Bruce’s Juices v. Am. Can Co.*, 330 U.S. 743, 755 (1947) (reaffirming that the RPA does not prohibit all quantity discounts because they are common in retail trade and pricing structures, but they become illegal only under certain conditions).

142. See *Shaw’s, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939) (“The discrimination in price referred to must be practiced ‘between different purchasers.’ Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends.”); see generally *Naifeh v. Ronson Art Metal Works*, 218 F.2d 202, 205–06 (10th Cir. 1954) (a supplier who simply terminated a dealer did not violate the RPA); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1319 (9th Cir. 1979) (termination of a plaintiff’s franchise agreement did not violate RPA); *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 641 (10th Cir. 1973) (while sales at different prices can violate RPA, a refusal to sell to one party cannot); *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863, 866 (7th Cir. 1949) (refusal to sell did not violate RPA). For more history on the RPA as applied to retailers, see Stanley C. Hollander & Mary Jane Sheffet, *The Robinson-Patman Act: Boon or Bane for Retailers?*, 31 ANTITRUST BULL. 759 (1986).

143. H.R. RES. 9195, 88TH CONG., 1ST SESS. (1963); S. RES. 1842, 89TH CONG., 1ST SESS. (1965).

independent retailer decline and the growth of the chains. First, a seller seeking to sell to a vertically integrated buyer is under the threat that the buyer would integrate vertically with respect to the seller's good and would make the deal only by charging a lower price.<sup>144</sup> Second, a large part of the chains' ability to charge lower prices results from product transfers among vertically owned facilities, not from discriminatory buying.<sup>145</sup> Facilities were able to integrate warehousing operations and retailing, and thus "decrease the cost of interbusiness transactions . . . ."<sup>146</sup> As a result, particularly strong support for the RPA had come from independent wholesalers who correctly "saw the coming of chain stores and their vertically integrated wholesaling-retailing operations as a threat to their survival."<sup>147</sup>

The *Report* also noted that if the purpose of the RPA was to slow the growth of chain retailing, it failed miserably. Chains grew apace during the period from the 1930s through the 1960s, mainly because customers wanted them.<sup>148</sup> As the *Report* observed:

A realistic view of retailing shows that its entire structure is changing from the model of independent manufacturers, wholesaler, and retailers which characterized the distribution sector in the early 1930s. For example, 'vertical marketing systems' have emerged as the dominant organizations for selling goods. . . .<sup>149</sup>

A fundamental problem concerning vertical integration was that antitrust's personhood provision always forced it to think about vertical integration by contract and vertical integration by ownership in radically different ways. Ownership vertical integration turned the actor into a single person, reachable only under the monopolization provisions of section 2 of the Sherman Act. By contrast, vertical integration by contract became a potential agreement in restraint of trade, and subjected the firm to harsher treatment under section 1 of the Sherman Act, as well as the Clayton Act,

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144. DEP'T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 1, 50 (1977). *See also Id.* at 55 (observing that "many of the larger buyers will integrate rather than pay the high oligopoly prices . . . .") <https://catalog.hathitrust.org/Record/000171463/Home> [<https://perma.cc/LC6M-VXZP>].

145. *Id.* at 132.

146. *Id.* at 173.

147. *Id.* at 178–79.

148. *Id.* at 181 (detailing how the percentage of sales represented by chains of four or more stores has grown from about 36% in 1939 to about 63% in 1972).

149. *Id.* at 182, citing William R. Davidson, *Changes in Distribution Institutions*, 34 J. MARKETING 1 (1970), in E. J. Kelly & W. Lazer, (eds.), *MANAGERIAL MARKETING: PERSPECTIVES AND VIEWPOINTS*, 422–23 (1973).

including some per se illegality. A practice such as requiring a restaurant to use its own parent company's cooking equipment, which would never receive a second glance under ownership integration, became per se unlawful.<sup>150</sup>

#### RESTRUCTURING AS AN ANTITRUST REMEDY

The rules of antitrust personhood and their exceptions do open up some important avenues for possible antitrust remedies. If a firm's conduct can be changed from unilateral to collaborative, a firm may face liability for a far wider range of antitrust violations. To illustrate, if product selection and promotion by a firm such as Amazon were transferred to a board of Amazon's participating business, the resulting consequences would be more aggressive antitrust control.<sup>151</sup> And activities such as price setting or refusal to deal can move from the "virtually no liability" to "substantial liability." Thus, restructuring a firm may act as a remedy and can be done without interfering unnecessarily with the overall structure of the firm in question.

#### CONCLUSION

Antitrust policy exhibits stark differences in its treatment of unilateral as opposed to multilateral conduct. The antitrust laws attempt to identify the distinction between the two by defining the antitrust "person." Only persons, which include corporations, can violate the antitrust laws unilaterally. The provisions are not sufficiently nuanced or detailed, however, to address formally "intracorporate" activities that are inconsistent with the theory of the firm as a single actor. The antitrust legal system has responded by finding conspiratorial capacity for some activities that are nominally within a single firm.

Antitrust law's harsher treatment of multilateral conduct is justified as a general matter. Single firm monopoly power is uncommon and difficult to acquire, while collaborative power can be achieved by simple agreement. While that is correct, the easy distinction that it makes obscures some problems that the antitrust personhood provisions fail to address. One problem historically regarded as vexing, but no longer today, is the status of

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150. *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 44 (9th Cir. 1971) (detailing an antitrust class action suit in which it is per se unlawful for franchisor to require franchisee to use its own cooking equipment and certain food items).

151. For more detailed exploration of these options, see Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2021–32 (2021).

holding companies, where one corporation owns the shares of other corporations. The solution was a compromise, which is that holding companies are lawful as a matter of corporate structure, but anticompetitive acquisitions through them are not. Other problems arise when cartels or other collaborations between competitors can hide behind statutory personhood in order to obtain the more permissive status accorded to single actors.

The identification of the corporation as a person has also inclined the courts to exaggerate the differences between ownership and contractual integration. The former is a unilateral act while the latter is collaborative. The result of the distinction is different treatments of vertical relationships, depending on whether the vertically integrated pieces are commonly owned, or else separately owned and related by contract. In some cases, differential treatment may be justified, but in many it is not. Those cases account for many of the historical excesses of the law of vertical restraints as well as internal contradictions in antitrust law generally.