Proliferating Rules of Per se Legality in Antitrust: The Great Swiss Cheese and the Myth of Theoretical Unification

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By Chris Sagers

Abstract:

This paper responds to the growing consensus that antitrust law is moving away from the rule-bound approach of yesteryear, toward an open-textured approach based on “standards.” Under this new regime, triers of fact are said to apply a broad, facts-and-circumstances approach in service of the public good. This view also usually takes a position on the relative place of economic theory in antitrust decisionmaking. It is said to have usurped the place formerly held by raw politics or ideology, since the relaxation of old rules is usually said to reflect growing awareness of potential efficiency gains from conduct previously treated as automatically or almost always illegal. In short, the growing consensus is that antitrust is increasingly flexible, economic, and apolitical.

The argument here is that if there is any real change afoot it is that antitrust is really just shifting from one set of rules to another. Moreover, the growing body of new rules—that is, the rules that actually decide antitrust cases—often are not fundamentally economic in character and sometimes are fairly hard even to justify on efficiency grounds. In fact, their unifying theme is if anything just a judicial instinct favoring individual liberty. And, as the paper explains, the claim that recent changes in antitrust doctrine have been apolitical is patently absurd. In short, the claim here is that at least as good a case can be made that antitrust is increasingly rule-bound, libertarian (as opposed to neoclassically economic), and intractably political. The paper demonstrates this by collecting a series of rules currently coalescing in the lower courts, all of which amount to rules of more or less per se legality and all of which are better explained by libertarian individualism than neoclassical price theory.

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1 Associate Professor of Law, Cleveland State University. My thanks for feedback to Peter Carstensen, Andy Gavil, Shubha Ghosh, Rudy Peritz, Maurice Stucke, and participants at the 2009 Colloquium of the Loyola Chicago Consumer Antitrust Institute. I welcome all other feedback at csagers@law.csuohio.edu.
Proliferating Rules of *Per se* Legality in Antitrust: The Great Swiss Cheese and the Myth of Theoretical Unification

One theme in antitrust that ought to be fascinating but is often quite tedious is its long preoccupation with a particular problem of method—how rigidly to apply its own generalizations. The story is really only tedious when it tries to squeeze antitrust history into just the allegedly swinging pendulum between *per se* and rule of reason treatment. One sometimes gets the impression that the entire zeitgeist of American competition policy can be captured by just asking what the courts require as the § 1 plaintiff’s minimum evidence. There are those to whom that seems too simple, 2 and most histories of the subject are more comprehensive. Nevertheless, one apparently growing consensus at the moment is that antitrust is moving away from the rule-bound approach of yesteryear, toward an open-textured approach based on “standards,” under which triers of fact apply a broad facts-and-circumstances approach in service of the public good. The evidence is mainly that during the past thirty years the Supreme Court has repealed several *per se* rules. 3 Persons taking this view usually also take a position on the relative place of economic theory in antitrust decisionmaking, and on its usurpation of the status

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3 Since the mid-1970s the Court has reversed four rules of *per se* liability adopted either under Chief Justice Warren or earlier. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, ___ U.S. ___, 127 S. Ct. 2705 (2007) (reversing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), to the extent it held vertical price restraints *per se* illegal); *State Oil Co. v. Kahn*, 522 U.S. 3 (1997) (limiting *Dr. Miles*, which was then still in force, by holding vertical *maximum* price restraints subject only to rule of reason); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (limiting former *per se* rule against horizontal concerted refusals to deal, though technically not reversing any prior decision); *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (reversing United States *v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), to the extent that it held vertical territorial sales restrictions *per se* illegal). Some other decisions could be thought to have reversed “*per se*” or categorical rules, even though those rules had not been described with the phrase “*per se*.” For example, *Ill. Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), overturned a long-standing rule that the mere possession of intellectual property was sufficient to support the “power” element of the cause of action for tying under Sherman Act § 1 or Clayton Act § 3. The Court has adopted no new *per se* rule since the tenure of Chief Justice Warren and is unlikely to do so in the foreseeable future.
formerly held by raw ideology. The relaxation of the old rules is usually said to reflect growing awareness of potential efficiency gains from conduct that was previously treated as automatically illegal. Those who believe in this trend often see it as a good thing, though they don’t always.

Take, for example, a recent paper in an eminent journal by Daniel Crane. He subscribes to this view and, though by no means is he the only one to state it, his paper is exemplary in its elaborate explanation of it and normative defense of it. It is also exemplary in that its statement of the rules-standards evolution seems to have gotten things seriously wrong. Professor Crane says that, throughout antitrust, “categorical rules” that “have long held sway” are “progressively being replaced by a multi-factor, ex post approach to antitrust adjudication.” Thus, “post-hoc, contextual examination of facts, rather than \textit{a priori} legal categories, [now] take center stage . . . .” All of this, he says, has come about because “antitrust has become de-politicized and de-ideologized”

\footnote{Daniel A. Crane, \textit{Rules Versus Standards in Antitrust Adjudication}, 64 WASH. & LEE L. REV. 49 (2007).}

\footnote{Professor Crane has company among other young scholars, \textit{see}, e.g., Joshua D. Wright, Overshot the Mark? A Simple Explanation of the Chicago School’s Influence on Antitrust (2009), available at http://ssrn.com/abstract=1370641 (explaining “Chicago School’s continuing dominance of antitrust law” on the “simple alternative hypothesis [that] . . . [it] provides a more robust theoretical and empirical account of . . . business practices” than any alternative, and accusing its detractors of “fram[ing] the relevant policy debate as one centered around ideology rather than economic science.”), and among the classics as well, \textit{see} RICHARD A. POSNER, ANTITRUST LAW vii (2d ed. 2001) (noting the discard of past inflexible rules and arguing it reflects the fact that the “political, . . . ideological character [of antitrust law as it once was], has receded in tandem with growing agreement on [that body of law’s] premises.”); Frank H. Easterbrook, \textit{The Limits of Antitrust}, 63 TEX. L. REV. 1, 9-10 (1984) (describing increasingly open-textured § 1 analysis, and arguing that it “follow[s] ineluctably” from advancing economic theory); Isaac Ehrlich & Richard A. Posner, \textit{An Economic Analysis of Legal Rulemaking}, 3 J. LEG. STUD. 257, 266 (1974) (using antitrust as an example of shifting between rules and standards). \textit{See also} Polygram Holdings, Inc. v. FTC, 416 F.3d 29, 3-34 (D.C. Cir. 2005) (“The Supreme Court’s approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, form a dichotomous categorical approach to a more nuanced and case-specific inquiry.”); KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION xiv (2003) (“The tension between economic reasonableness and administrative concerns seems to be the principal, or at least one of the principal driving forces in the evolution of antitrust”). This sentiment presumably also drives the following: Robert H. Bork, Comments, to Antitrust Modernization Commission 1 (undated), available at http://govinfo.library.unt.edu (“The antitrust laws, in my opinion, are performing well, in fact better than at any time in the past seventy-five years.”).}
by way of its incorporation of neoclassical price theory. In other words, Professor Crane believes that antitrust is becoming increasingly:

- flexible,
- economic, and
- apolitical.

I don’t think so. I believe that at least as strong a case can be made that antitrust is becoming increasingly:

- rule-bound,
- libertarian (as opposed to neoclassically economic), and
- polemically, intractably politicized.

The evidence on which this paper will defend each of these claims is a body of developing but little noticed rules in the lower court caselaw, which all amount to rules of per se legality. A handful of rules of more or less categorical legality are well known, and not especially new, like the bar on liability for above-cost pricing, and formalistic limits on liability for exclusive contracts. But many of them, including all of the rules discussed here, are more subterranean, and their proliferation only promises to continue.

Perhaps our most prominent current glossator on this law openly invites the courts to

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6 Crane, *supra* note XXX, at 50.

7 While the Court announced this particular rule of *per se* legality only in 1993, *see* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), solid consensus had developed that above-cost pricing should never be illegal under antitrust, and even those lower courts that allowed for it as a theoretical possibility suggested that it would be extremely rare. Under *Brooke Group* the rule is now imposed in *per se* form despite several courts’ recognition that above-cost pricing strategies could limit long-term efficiency in a given market. They have split that baby on the (unexplored) empirical view that the risk of false positives in such cases outweigh any risk of anticompetitive harm. *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-34 (1st Cir. 1983). This fact is of a piece with the larger theme of this paper, which is that the courts have increasingly mothballed antitrust through immunity rules on empirical arguments that are completely unsupported by evidence.

8 *See, e.g.*, Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997); Roland Machinery Co. v. Dresser Indus., Inc. 749 F.2d 380 (7th Cir. 1984); *cf.* Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987) (requiring even stronger proof of competitive harm where plaintiff seller is foreclosed from selling to an intermediate distributor rather than end-user).
make new ones⁹ and other observers recommend more and more of them all the time.¹⁰ Moreover, the growing number of these rules are all in addition to the literally dozens of statutory exemptions already in force,¹¹ in addition to long-standing doctrines of judicial “immunity,”¹² and in addition to extremely tough pleading standards¹³ and standing

⁹ Hovenkamp’s *The Antitrust Enterprise* contains among its numerous recommendations a six-stage recipe for rule of reason inquiries, the first stage of which begins with this, as the court’s very first question: “Does the challenged practice arguably threaten either to reduce output or raise price? If not, it should generally be declared legal...” HOVENKAMP, supra note XXX, at 106.

¹⁰ See, e.g., Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5 (2004) (calling for *per se* legality for all “intrabrand restraints,” which presumably would mean all restraints imposed vertically anywhere throughout the entire chain of distribution of goods and services integral to producing a good sold to retail consumers under a single trademark, as well as restraints imposed horizontally for the purpose of collaboratively creating a new branded good); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaboration Among Competitors*, 86 IOWA L. REV. 1137, 1177 (2001) (calling for “a conclusive presumption of legality, regardless of the partners’ market shares,” for all purchasing joint ventures and other “upstream” collaborations).

¹¹ At present nearly 30 federal statutes either exempt some conduct from antitrust entirely, limit the applicability of antitrust to it, or limit the penalties that can be assessed against it under antitrust. Thus, for example, the business of common carrier cargo shipping in the ocean-going commerce of the United States is almost completely exempt from antitrust. So are the business of insurance, agricultural cooperatives, agreements fixing scholarship money, certain professional sports broadcasting agreements, newspaper production joint ventures, small business R&D joint ventures, international air carrier operational agreements, and the graduate medical resident matching program. The list goes on. See *SECTION OF ANTITRUST LAW, AM. BAR ASS’N, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW* 1-4, 31-52 (2007).

¹² A thick slug of caselaw immunities completely exempt political petitioning conduct, trade-restraining conduct by state governments, some conduct regulated by other federal statutes, and (the red-headed stepchild of antitrust) baseball. See id. at 1-3.

¹³ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see generally Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 161 (“Taken as a group, the [Court’s four antitrust decisions of 2007] represent a substantial raising of the hurdles that antitrust plaintiffs face, even if each case represents a simple one-step extension of current Supreme Court doctrine.”).
rules that have made private litigation much more difficult. In other words, antitrust is already the most pockmarked and leprous of Swiss cheeses, and most of the holes in it take the form of rigid, categorical rules. So not only is antitrust not becoming more standard-like, it is increasingly the case that whether or not a particular lawsuit is denominated a “rule of reason” case, defendants can find some bright-line rule somewhere under which to seek dismissal, possibly with no discovery or only highly attenuated reception of evidence. For what it may be worth, this seems at odds with how the Supreme Court used to see things; the Court once at least claimed concern about formalism’s invitation to lawyerly subterfuge. Viz.:

[I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions [around 1890], it was deemed essential [by the Sherman Act’s drafters to make] . . . an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.

I am not the first to notice this trend, on a general level, though the lack of comment

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15 Exemption rules of this kind are jurisprudentially interesting, as they highlight antitrust’s fascination with generalization. What is especially interesting is that not only has U.S. competition law always been full of exceptions, but competition policy overseas has also almost always contained some special concepts or processes for exempting specific persons or procedures. European Union law, for example, from its very inception contained an explicit, detailed treaty mechanism by which private persons could petition the EC for transaction-specific or general exemptions from EU competition law. The competition laws of most other major jurisdictions have had at least some explicit exceptions; for example, the business of ocean shipping was until recently explicitly exempted from the competition laws of almost every jurisdiction that had such a law. See Chris Sagers, *The Demise of Regulation in Ocean Shipping: A Study in the Evolution of Competition Policy and the Predictive Power of Microeconomics*, 39 VAND. J. TRANSNATIONAL L. 779, 795-97 (2006). See generally ABA, supra note XXX. See also James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 521-22 (1987) (noting that even before the Sherman Act state antitrust statutes contained exemptions for various activities).

16 Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

17 See Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A [Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations*, ANTITRUST BULL., Summer 2000, at 349 (arguing that the practical consequence of several evolving antitrust rules was to render certain kinds of horizontal price and output restraints per se legal, even though the courts characterized their rules
on some of the more alarming rules, and what they say about the future of antitrust, is surprising.

As to the second point above—that antitrust is increasingly driven by neoclassical economics—that impression is surely unmistakably when judging only from the rhetoric surrounding the law, but not so much form the substance of the rules themselves. The rules discussed here are each to some greater or lesser degree at odds with the alleged theoretical unification of antitrust in neoclassical price theory. The economic unification is at best incomplete. Though they seem like they might not have that much in common, each of the rules discussed here is at least historically based in a libertarian individualism, as opposed to the currently dominant neoclassical economic theory, and some of them remain fairly hard to defend on neoclassical grounds. In fact, despite notorious efforts to say otherwise, antitrust has never served one solitary policy or had

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otherwise); Mark A. Lemley & Christopher R. Leslie, Categorical Analysis in Antitrust Jurisprudence, 93 IOWA L. REV. 1207 (2008) (pointing out that, despite the claimed trend favoring standards in antitrust, as opposed to rules, antitrust continues to rely on several very categorical distinctions, and is unlikely to abandon them); Rudolph J.R. Peritz, Forward: Antitrust as Public Interest Law, 35 N. Y. L. SCH. L. REV. 767, (1990) (Noting, “[p]erhaps with some irony,” that despite the rise of the “obscure language of neoclassical economics,” antitrust “has concurrently become much simpler.”).

There has been much, often polemical debate over generalizations of what “economics” is or what specific schools of it hold to be true, especially the “Chicago” or “Chicago-Harvard” school or, as it has more recently been called, “conservative” economics. See HOW THE CHICAGO SCHOOL OVERSHTOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky, ed. 2008) (collecting a series of essays critical of this approach, and describing it as “conservative economics”). For an example of how hot disputes of this nature can be, see Wright, supra note XXX.

It is actually a bit beside the point in this paper to say precisely what any given school of economic thought believes, since it will not criticize any of them in their substance. See infra notes XXX and accompanying text. But it necessarily does bring into question whether given legal rules are driven by that body of economic theory commonly said to explain our antitrust. For what it might be worth, while no court has systematically stated any such set of economic principles, capturing the essence of them is simple enough. In their surface explanations of what they do, modern antitrust courts say that they presume firms and individuals to maximize their own welfare (and in the case of firms take that to mean maximization of profits). Second, in the absence of some compelling proof to the contrary, courts take entry into markets to be easy, and they usually presume that entry will occur wherever short-run supra-competitive profits are available. Information is usually presumed to be plentiful and cheap. Finally, a mixed claim of law and economics is the presumption that antitrust should seek to maximize consumer welfare by ensuring that output is maximized. Obviously this brief list of arguments does not capture all that is or could be “economics,” but it captures most of what the courts say when they say they are applying economic arguments in antitrust cases.
one unifying theoretical theme. Since its beginning antitrust has served and continues
to serve values that can only be described as politically individualist, which may but
frequently do not clearly promote allocational efficiency. They are sometimes fairly hard
to defend on price theory grounds, and a good case can be made that some allocational
efficiency is sacrificed in their service. That is not necessarily bad—there is no reason to
doubt that values other than optimal allocation should sometimes be purchased at the
price of some efficiency. But it is at odds with neoclassical fundamentals.

And finally, these trends are decidedly political. Whether the state of antitrust at the
time is a good one or not, to say we reached it because of decisions that are not
“political” or “ideological” is patently absurd. To the extent they discuss it explicitly, the
courts and most commentators mainly purport to avoid politics by giving “empirical”
answers, or approaching questions with “science.” In principle, it is thought, antitrust
policy problems can be phrased as falsifiable hypotheses, and these can be tested.
Admittedly, that in and of itself seems not political. But generally speaking the evidence
necessary for such a method is either absent or limited and subject to hot controversy, and
in many cases it is hard to imagine how our existing statistical technology could even
begin to answer the questions that are raised. For example, it no doubt seems to many
participants in the debate that market power is difficult to come by and that once obtained
it is usually self-defeating and quickly dissipated. But it seems to many others that
significant pockets of persistent market power are common in our economy. It is a rather
poignant fact that in teaching an Antitrust course one cannot assign a commercially

19 See WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE
SHERMAN ANTITRUST ACT (1954); RUDOLPH R.J. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992;
HISTORY, RHETORIC, LAW (1996). See also THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM (1937);
Andrew I. Gavil, Competition and Cooperation on Sherman Island: An Antitrust Ethnology, 44 DEPAUL L.
produced casebook without requiring students to spend in excess of $100 per copy. My wild guess is that the resources devoted to producing each copy have an opportunity cost rather substantially less than that.\textsuperscript{20} It also seems to me that exploitation of that market power has very large distributional consequences, and is partly to blame for the ballooning American income inequality of the past few decades. Antitrust enforcement might actually help remedy that problem and correcting it is arguably the real congressional purpose of antitrust law.\textsuperscript{21} But the point here is not these beliefs are correct or better than the alternative view, that market power is rare and self-correcting. The point is that the lack of empirical support for either side has left our competition policy in a state of absolute normative equipoise.

The courts themselves are usually the players least of all interested in looking for the evidence that might answer such questions in any objectively “empirical” sense. Thus, those “empirical” answers purportedly given in antitrust practice can at best satisfy only the \textit{a priori}, metaphysical scholasticism that now passes in some quarters for empirical argument.\textsuperscript{22} Where no “empirical” answer is thought to be clearly enough available,\textsuperscript{20} For this reason, I assign my students my own home-grown course materials, at a cost to them of about fifteen dollars for copying.
\textsuperscript{22} Take for example the asserted dynamic value of innovation, which has led both the Supreme Court and the Antitrust Division during the second Bush administration enthusiastically to defend outright monopoly power. \textit{See} Verizon Commc'ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004) (arguing that monopoly should be attacked only with great care, because striving for its attainment drives innovation); DOJ \textit{SECTION 2 REPORT, supra} note XXX (making similar arguments throughout). Even if it were known empirically that rents from large market share actually encourage innovations on some systematic basis, and that they are valuable enough to outweigh not only deadweight loss but the other social costs associated with corporate size—and should it not go without saying that, emphatically, those things are not now and possibly cannot be known?—that just begs the question why a similar social expenditure should not be made to serve other values, even though they happen not to favor the personal self-interests of managers of large corporations. For example, why is it not at least as defensible to accept the possibly comparatively small allocational efficiency losses to preserve the cultural values traditionally associated in America with neighborhoods, local community, and small entrepreneurship? That is, if it is okay for society to bribe monopolists so that they may slightly differentiate their widgets, why isn’t it okay for society to bribe Mom and Pop to maintain their soda fountain, even though the outfit is productively
either on such published evidence as there may be or on a priori microeconomic arguments, the doubt is resolved against plaintiffs by that other inescapably political argument to the effect that antitrust is inordinantly costly. Now, making normative judgments that beg empirical questions, the answers to which cannot currently be known, is not necessarily a bad thing. But it is also more than just the making of a guess or making do with the resources at hand. It is precisely the core nature of politics. And it is on the basis of this politics that antitrust, even more than other contemporary law, is now emphatically law made for defendants.

less efficient than a warehouse super-store? Price theory has no a priori answer to this question, and there is no present likelihood that our statistical tools could even begin to answer the empirical questions raised. Cf. Mark A. Lemley, Property, Intellectual Property, and Free-Riding, 83 Tex. L. Rev. 1031, 1049-65 (2005) (questioning assumption that extensive supra-competitive returns are needed in intellectual property law to incentivize innovation).

Admittedly, in making antitrust rules the courts sometimes make use of actual empirical evidence, but when they do they have a way of cherry-picking or overstating it. See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589-90 (1986) (citing research purportedly to establish a “consensus” that price predation is “rarely tried, and even more rarely successful.”).

See, e.g., Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc., 129 S.Ct. 1109, 1120 (2009) (expressing concern that antitrust liability might chill healthy competition); Bell Atl. Corp. v. Twombly, 550 U.S. 544 & n.6 (2007) (enhancing § 1 pleading standards, “lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of settlement value”; expressing concern that plaintiff’s case would be “a sprawling, costly, and hugely time-consuming undertaking”); Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412-14 (2004) (measuring, “[a]gainst the slight benefits of antitrust intervention,” its “sometimes considerable disadvantages”); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725-27 (1988) (sharply limiting evidence that could support proof of price-fixing, largely for fear of chilling competitive conduct; also expressing doubt that one asserted danger of RPM, facilitation of retailer price-fixing, was serious, because “[c]artels are neither easy to form nor easy to maintain”); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 593-94 (1986) (emphasizing the risk of deterring competitive conduct in predation cases); Monsanto Co. v. Spray-Rite Serv. Corp., 405 U.S. 752, 762 (1984) (demanding certain minimum proof of conspiracy, to avoid chilling competitive conduct). See also Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (making similar arguments; this opinion was thought by then-Professor Easterbrook to be “magnificent.” Easterbrook, supra note XXX, at 25 n.52).

I think no one has made this point quite so well as Michael S. Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. Rev. 219 (1995), especially at id. at 250-58.

See Linda Greenhouse, In Steps Big and Small, Supreme Court Moved Right, N.Y. TIMES, July 1, 2007 (quoting Yale law professor Judith Resnik’s name for the Supreme Court’s October Term, 2006: “the year they closed the courts.”).

No antitrust plaintiff has won in the Supreme Court in nearly twenty years, since Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992), notwithstanding the hefty sampling of antitrust decisions that has been before the Court during that time. See Joshua P. Davis, The Real New Antitrust Paradox: Selective Formalism, One-Sided Reasoning, and the Judicial Resolution of Contested Facts 1-3
The paper proceeds in five parts. Part I, for the sake of clarity, states the exact purpose and method of the paper a bit more precisely. The remainder of the paper then considers the series of rules I take to exemplify the growth of a rules-oriented and pro-defendant judicial approach. Part II begins with a series of rules that all fairly directly reflect some concern for individual freedom to contract. First it considers the Supreme Court’s “single-entity” caselaw under § 1, beginning with the familiar rule of *Copperweld Corp. v. Independence Tube Corp.*,\(^{28}\) which has spawned a surprising range of cases in which the courts now believe that seemingly distinct defendants cannot conspire, and which might shortly be coming to a climactic head, depending on how the Court rules in the pending *American Needle, Inc. v. National Football League.*\(^{29}\) It then considers what may seem like quite a different problem, but which is not: the developing safe harbors for “ordinary business practices” and “legitimate competitive advantages.” Part III then considers another seemingly separate issue: the various efforts of lower courts to set limits around what may constitute a “restraint” of trade under § 1. Some courts have come to believe that the mere expression of an opinion cannot be a restraint. Some believe that if conduct can be cabined as an effort at differentiation or the development of reputation, it cannot be a restraint. And some believe that “restraint” can never be established by evidence concerning product design or market assessments of product quality. Again, it will be my contention that these rules are not fundamentally economic, but serve mainly a political individualism. Finally, Part IV considers a fairly different development, but one that again illuminates the basic ideas here: the emerging

\(^{29}\) 538 F.3d 736 (7th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-661). *American Needle* is discussed in detail at infra notes XXX and accompanying text.
rule that broadly protects staffing decisions at hospitals.

Ultimately, these developing rules show that if there is a robustly unifying theme in antitrust law at the moment, it is not to be found either in a standards-oriented, apolitical judicial approach or in price theory. Rather, it is this: Where there is a neoclassical economic basis for dismissing an antitrust cause of action, it will be adopted, and increasingly such bases are favored if they can be stated in broad and categorical (that is, rule-like) terms. Where there is no clear economic basis for summary dismissal, but some other basis is conveniently at hand, it seems never to have mattered to any court that such a basis was not part of some harmonious theoretical unit, rooted in allocational efficiency or consumer welfare. “The [only real] consistency,” in other words, is coming to be that “the [defendant] always wins.”

I. PRELUDE: WHAT THE CASES SHOW, IN SUMMARY, AND SOME PRELIMINARY POINTS OF METHOD

A. A Summary of the Caselaw Evidence

I should stress that, as a matter of method, I do not actually believe that the case can be proved conclusively one way or the other. However, the evidence collected here will show that there is at least as good a case to be made that antitrust is increasingly rule-bound, libertarian, and politicized, as that it has moved to some new regime of fact-rich standards. A bit more could be said as to these three points.

As to the first, there is plenty of evidence that antitrust is either becoming more rigidly rule-bound, or at least that it remains about as rule-bound as it ever was. There are two reasons to suspect it. First, meaningful, multi-factor deliberation under any “standard” has rarely played any significant role in actual antitrust litigation. It is true that private

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rule-of-reason claims have always been brought in some proportion at any given time since the statute’s early history. However, because of their difficulty they very rarely reach the point of actual deliberation on the merits by the trier of facts. And it is a mistake to presume that because some ultimate test of liability is phrased with less precision that the outcome of a case is therefore less pre-determined. Just because some legal test is phrased in facts-and-circumstances terms (e.g., it is phrased as a rule-of-reason test rather than a per se test) does not in itself alter the probability of any outcome. Either because of the burdens the test puts on one or the other party, or disproportionate litigation costs of some kind, or because of the character of the many other legal rules that might matter, facts-and-circumstances liability standards can be extremely “rule”-like. That is in fact true of rule-of-reason antitrust cases, which plaintiffs most commonly lose. In other words, adopting rule-of-reason rules does not mean that decision-makers will actually ever weigh the costs and benefits of anything.

The second reason to believe antitrust is increasingly rule-like is shown by the cases that are gathered in this paper. During this same modern period in which, admittedly, the Supreme Court has reversed a handful of rules of per se liability, the lower courts have often gone the other direction, setting up an increasing number of bright rules of more or

32 See HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION 8 (2005) (“it has become something of a commonplace that rule of reason antitrust violations are almost impossible to prove, particularly in private plaintiff actions.”); Stephen Calkins, California Dental Association: Not a Quick Look, But Not the Full Monty, 67 ANTITRUST L. J. 495, 521 (2000) (“Although [the rule of reason] has surface appeal as an elegant assignment of responsibilities, beneath the surface lies a truth that plaintiffs and prosecutors understand all too well: when the full, formal rule of reason is the governing standard, plaintiffs almost never win. . . . Making a decision turn on a full, formal proof of market power, the antitrust equivalent of the Full Monty, is a defendant’s paradise.”); Richard A. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. CHI. L. REV. 1, 14 (1977) (“the content of the rule of reason is largely unknown; in practice, it is little more than a euphemism for non-liability.”).
33 See supra note XXX..
less *per se* legality. It was just this turn of events for which certain famous proposals were made at the very beginning of the antitrust revolution of the 1970s—shortly after the Court began turning back the tradition of *per se* treatment, suggesting that a whole lot more antitrust litigation would be handled under the rule of reason.

As to the second of these three points, the growing consensus is wrong to believe that antitrust is increasingly explained by neoclassical price-theory. Again, it has never been the case that antitrust has served any one, solitary purpose. The body of developing caselaw rules discussed in Part II suggests that it does not do so now any more than it did in the past. The case will further be made that at least one value not part of the neoclassical paradigm is coming to explain more and more of antitrust: libertarian individualism.

In its earliest origins antitrust spent much of its time wrestling with what now seem like problems of political philosophy. Those issues were part and parcel with the then ongoing struggle over constitutional issues of contractual liberty and substantive due process. This is not to say that the early antitrust decisions were non-economic, but rather that they were not concerned with what we would recognize as problems of

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34 For what it may be worth, the Supreme Court has never used the phrase “*per se* legal” to describe any substantive rule of antitrust law, and has on occasion cast doubt on the idea of such rules. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (rejecting suggestion of United States as amicus “to adopt in effect a *per se* rule ‘denying competitors standing to challenge acquisitions [under Clayton Act § 7] on the basis of predatory pricing theories.’”).

35 See Easterbrook, supra note XXX, at 14-18 (advocating adoption of a “filter” procedure under which antitrust suits would be dismissed unless plaintiff could sequentially make each of five minimum demonstrations, presumably all at the pleadings or summary judgment stage; arguing that such a series of simple, categorical rules is needed because of the very costly and indeterminate new world of open-ended litigation that would be invited by the new rule-of-reason regime); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 CHI. L. REV. 6 (1981).

36 See supra note XXX and accompanying text.

microeconomic theory. Thus, the still influential Colgate decision was not even purportedly based on any reasons we would now think of “economic,” and rather was driven by concern for the freedom of individuals and private property. Admittedly this solicitude for “individuals,” then and now, mainly protects the non-human corporations that predominate among antitrust defendants, and therefore perhaps it seems not particularly driven by a libertarian “individualism.” But in fact it merely reflects the ubiquitous American reification of business entities into quasi-human “individuals.” As Thurman Arnold put it, in our political thought we imagine even the largest corporation as really just “a big man.” In any case, in less familiar ways, too, an individualist theme has explained other antitrust rules, some old, but some of which still persist. For

38 At the time, neoclassical price theory was not of much interest to either Court or Congress. James May makes this point, arguing not only that a vibrant and sophisticated economic debate existed among academics and policymakers in the late nineteenth century, but that it played an important role in early antitrust debate and caselaw. It simply was in many respects different from economic theory that is mainstream now. See May, supra note XXX, at 561-88. See also HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); PERITZ, supra note XXX.

As is often noted, the synthesis that would become known as the marginalist revolution was in place by the time of the Sherman Act, as Alfred Marshall’s Principles of Economics was first published in the year of the statute’s adoption. Marginalism became well known among American economists during the early years of antitrust decisionmaking, and was prominent in academic criticism of antitrust law. However, it was of apparently little concern to Congress or the courts. See JOHN D. CLARK, THE FEDERAL TRUST POLICY (1940).


40 In Colgate, Justice McReynolds—one of the “Four Horsemen” whose notorious obstruction of New Deal legislation would later bring on the crisis of 1937—held that all sellers are free unilaterally to choose with whom they deal. This rule still survives and has been enthusiastically reaffirmed in recent Supreme Court decisions. But Justice McReynolds explained it not on any theory we might nowadays think of as “economic,” and rather on the right of private persons freely to choose how to use their own property. Colgate, 250 U.S. at 307-08. The District Court in Colgate quashed a criminal indictment, finding that a mere refusal to sell, on whatever basis, was not a “contract, combination . . . , or conspiracy,” and framed the issue as “how far one may control and dispose of his own property.” Justice McReynolds approved, adding that “the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” See 250 U.S. at 305-07. He distinguished the earlier rule in Dr. Miles—prohibiting per se vertical price restraints wherever an upstream seller had parted title—by pointing out that such arrangements contractually restrain the retailers’ freedom to choose with whom to deal. See 250 U.S. at 307-08.

41 ARNOLD, supra note XXX, at 191.

42 Interestingly, individualism plays a role in the “populism” that once led to much more plaintiff-friendly antitrust rules, and to which some observers still attribute everything that is wrong in antitrust. For example, antitrust was once solicitous of small businesses because of its concern with the commercial
example, one cannot violate § 2 without some deliberate acquisition or maintenance of market power. Pricing by a monopolist at supra-competitive levels, in and of itself, is not illegal. But from a modern and purely economic perspective this seems like not an especially needed distinction. The harm of supra-competitive pricing does not depend on how the seller acquired market power. Admittedly, an economic rationale is often stated for the rule—that where a person acquires market power “as a consequence of a superior product, [or] business acumen,” then to expose that person to antitrust risk could chill “precisely the sort of competition that promotes the consumer interests the Sherman Act aims to foster.” The peculiarity is that by all the other free-market rhetoric with which antitrust caselaw is laced, that hypothesized outcome should be highly unusual. It should be rare for any firm to acquire genuine market power by superior productive efficiency, and once acquired it should be quickly fleeting.

Finally, whatever may best characterize the courts’ relative preference for rules or standards, and regardless how true they are to any economic orthodoxy, the driving force in antitrust policy making is unequivocally political. As much as needs be said on this point appeared above.

B. A Few Points of Methodology

liberty of individual entrepreneurs, see PERITZ, supra note XXX (noting the longstanding commitment to “rough equality” under which U.S. policy has sometimes favored the interests of small entrepreneurs, in spite of allocational efficiency losses that policy might represent), and similarly tying law was once justified on the ground that tie-ins reduce consumers’ liberty to make their own choices.

Incidentally, that these latter non-economic philosophical points have both been discarded actually just proves my point. Even as non-economic points like these ones are discarded, non-economic policy choices that benefit antitrust defendants are preserved. (Populist defenses of small business or consumers would tend to favor antitrust plaintiffs; both disappeared long ago from antitrust.)

43 See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).
45 Moreover, in its origins the rule is pretty clearly non-economic, and rather is rooted in fairness and individualism. It begins in Senator Hoar’s familiar rendition of the common law relating to monopoly, which never penalizes monopoly acquired by “superior skill and intelligence . . . .” E.g., United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 390 n.15 (1956), quoting 21 CONG. REC. 3151.
46 See supra note XXX.
Debate about antitrust and the use of economic theory in law tend to be shrill and rather Manichean, and as one consequence it is now easy to be misunderstood when saying anything about the judicial use of theory. It is easy to attack straw-men inadvertently and also to be accused of doing that when you are not. It is important to be clear about what one is saying and not saying.

First and foremost, this paper does not critique “economic theory” as such or any particular argument of economic theory, or even, as a matter of principle, the use of such things by the courts. Of course there has been much of that, and a brief bibliographic digression will explain what I am not concerned with. A whole sub-genre in legal scholarship internally criticizes price theory and its application to law. There has also been critique of the rationality assumption, both theoretical and empirical, of price

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A large portion of the criticism of law and economics concerns its normative aspect. It has normally claimed to be “positive” in orientation, in that it claims to favor description over prescription; this has been a key claim in the argument that the movement is “scientific.” To the extent that it does make normative claims, they are made on what is purported to be the objective and (in principle) empirically falsifiable criterion of allocative efficiency. Critics have savaged these claims. See, e.g., Baker, supra note XXX; Crespi, supra note XXX.

48 Beginning in the 1950s, especially in the work of Herbert Simon and Charles Lindblom, the claim came to be made that the rationality assumption was systematically at odds with the actual intellectual capacities of real-world humans. Human individuals, it was said, could not “maximize” their welfare in the manner presumed in price theory unless they had access to perfect information and had infinite computational prowess with which to assess it. Simon introduced his famous concept of “satisficing” under “bounded rationality” as an alternative basis for constructing economic theory. See Herbert A. Simon, Theories of Rational Decision-Making in Economics and Behavioral Science, 49 AM. ECON. REV. 253 (1959); Herbert A. Simon, A Behavioral Model of Rational Choice, 69 Q. J. ECON. 99 (1955); see also Charles A. Lindblom, The Science of Muddling Through, 19 PUB. ADMIN. REV. 79 (1959).
theory’s failure to capture phenomena like intertemporal strategy and exogenous change over time, of its disregard of non-market institutions, and of the fact that, given its

Of course, defenders of the neoclassical model could argue that even if individuals behaved irrationally sometimes, all that matters is how people behave on average. If on average people behave rationally then all irrational behavior amounts to random outlier data that is cancelled out in the aggregate. Milton Friedman made this argument in one very famous essay. See Milton Friedman, The Methodology of Positive Economics, in Essays in Positive Economics 3 (1953). But if human behavior is systematically at odds with rationality, that claim is no longer true and both descriptive and normative claims made by price theory are undermined to some (as yet unknown) extent.

Building in part on the work of Simon, Lindblom, and other critics of the theoretical rationality assumption, see supra note XXX, “experimental” or “behavioral” economists have designed laboratory experiments to identify systematic behavior that is inconsistent with rational utility maximization. In an immense literature they have reported many such systematic irrationalities, and have speculated about what they imply for economic analysis and for law. Again, that individuals might act irrationally sometimes can be tolerated in neoclassical orthodoxy, see Friedman, supra note XXX, but it is a serious problem for price theory if human behavior is systematically irrational.

During the 1980s an explosion of theoretical research began among industrial organization economists seeking to explain how strategic interactions might alter firm behavior and the structure of industries. Their fundamental argument has been that results at odds with short-term profit maximization might be observed if, given sunk costs (which imply some necessity or likelihood of repeated interaction with other players in a given market) and relaxation of perfect information, short-term irrational choices might be strategically superior for given firms. This body of theory is extensively covered in Jean Tirole, The Theory of Industrial Organization (1988); and in the now three volumes of the Handbook of Industrial Organization, 1 Handbook of Industrial Organization (Richard Schmalensee & Robert Willig, eds. 1989); 2 Handbook of Industrial Organization (Richard Schmalensee & Robert Willig, eds. 1989); 3 Handbook of Industrial Organization (Mark Armstrong & Robert H. Porter, eds. 2007). See also Carl Shapiro, The Theory of Business Strategy, 20 RAND J. ECON. 125 (1989) (summarizing and recounting the early development of the movement, and responding to some criticisms).

In particular, Nelson and Winter have argued that firms are always subject to a continuous barrage of exogenous change, which is inherently unpredictable. They therefore model firm behavior and the likelihood of given firms’ success differently than in the traditional static partial equilibrium of neoclassical theory. They argue that except where a series of special circumstances are true, results under this “evolutionary” model may differ from price-theoretic predictions, and depend on firms’ capacity to learn and adapt. One major consequence of their alternative model is to suggest that rather the reaching price-driven equilibria, some markets may experience very frequent or perpetual disequilibria. See generally Richard R. Nelson & Sidney G. Winter, An Evolutionary Theory of Economic Change (1985); Richard R. Nelson & Sidney G. Winter, Evolutionary Theorizing in Economics, J. ECON. PERSP., Spr. 2002, at 23.

Since even before the late-nineteenth-century synthesis that has come to be known as neoclassical price theory, alternative approaches have sought to show that price theory’s exclusive concern with markets ignores social forces that also determine behavior and should inform policy. The oldest are probably the German Historical School, which had extensive influence in the United States in the nineteenth century, see Herbert Hovenkamp, Enterprise and American Law, 1836-1937, at 298-307 (1991) [hereinafter “Hovenkamp, Enterprise”]; Daniel Rodgers, Atlantic Crossings: Social Politics in a Progressive Age 76-111 (2000), and American “Institutionalism” of the early twentieth century, see Malcolm Rutherford, Institutionalism, Old, in The New Palgrave Dictionary of Economics (Steven N. Durlauf & Lawrence E. Blume, eds., 2d ed. 2008), both of which argued that understanding mere market forces could not explain all social phenomena, and urged a consideration for the influence of “institutions.”

Of course these movements in their older variants have been much criticized for their lack of theoretical rigor, see, e.g., Mark Blaug, Economic Theory in Retrospect 712 (3d ed. 1978) (stating that institutionalism “was never more than a tenuous inclination to dissent from orthodox economics”), and disagreement about them is politicized, as historicism and case-specific empiricism have long been
similarity to a religion\textsuperscript{53} or a body of rhetoric,\textsuperscript{54} its pretensions to “science” are not very realistic.\textsuperscript{55} But none of that is actually the point here. As far as this paper is concerned, the mainstream price theory on which antitrust doctrine claims to rely can be presumed to be associated with left-leaning political instincts. See Hovenkamp, Enterprise, supra note XXX, at 300-04.

But it also seems important that interest in non-market institutions and disappointment with price theory’s failure to capture them has never disappeared, and have enjoyed a renaissance in the past thirty years or so, though with often differing results. \textit{Compare} The New Institutionalism in Organizational Analysis (Walter W. Powell & Paul J. DiMaggio, eds. 1991) (collecting essays urging that institutions of various kinds must be accounted for by social theory, but not necessarily using economic arguments of any sort), with Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 1 (1975) (stating a fealty to the old institutionalists’ view that “institutions matter,” but describing them as the product of self-interested individual contracting; describing his work as “complementary to, rather than a substitute for, conventional analysis”).

Possibly a more fundamental critique appeared in the late work of Herbert Simon. Particularly in reply to the rising “neo-institutionalist” or “transaction cost” economics of Oliver Williamson and others, Simon argued that a range of powerful institutions in society had some power to make decisions by fiat, relatively unconstrained by market pressures. \textit{See}, e.g., Herbert A. Simon, Organizations and Markets, J. Econ. PERPS. 25 (1991). The range of this non-market decision-making might be vast, Simon thought, \textit{see id.} at 25 (“Counted by the head, most of the actors in a modern economy are employees.”), and his view had plenty of antecedents, \textit{see}, e.g., Alfred Dupont Chandler, The Visible Hand: The Managerial Revolution in American Business (1977); Paul J. DiMaggio & Walter W. Powell, The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, 48 AM. SOCIOLOGICAL REV. 147 (1983); Kurt L. Hanslowe, Regulation by Visible Public and Invisible Private Government, 40 Tex. L. REV. 88, 130 (1961); (“[I]t is plain that substantial proportions of economic activity are presently not governed by rules that come anywhere near approximating the power-neutralizing, classical, atomistically individualistic, liberal, competitive model.”); Ronald L. Jepperson & John W. Meyer, The Public Order and the Construction of Formal Organizations, in The New Institutionalism, supra, at 204.

For an elaboration on theoretical consequences for bringing non-market institutions into social theory, see Chris Sagers, The Myth of “Privatization,” 59 ADMIN. L. REV. 37, 63-71 (2007).

\textsuperscript{53} Interestingly, one main effort in this vein is by a practicing professional economist who stresses that his comparison of economic and theological theory is not meant as a criticism, except of what he finds to be an inaccurate claim to scientific character. See Robert H. Nelson, Economics as Religion: From Samuelson to Chicago and Beyond (2001). For something a bit less charitable, see Jeanne Lorraine Schroeder, The Triumph of Venus: The Erotics of the Market 2 (2004) (“[M]ost law-and-economic proposals [consist of] . . . nonfalsified theories [that] are applied to untested assumptions in order to produce nonverifiable conclusions. Law-and-economics has all the characteristics of a cult.”).

\textsuperscript{54} See Dierdre N. McCloskey, The Rhetoric of Economics (2d ed. 1998). As with Nelson, supra note XXX, McCloskey is herself a formally trained economist (and in this case an internationally renowned academic one) who stresses her own commitment to neoclassical price theory, but simply rejects its claim to scientific character.

\textsuperscript{55} See McCloskey, supra note XXX; Nelson, supra note XXX; Bernstein, supra note XXX; Crespi, supra note XXX; Fink, supra note XXX. Wright’s uncited claim that “[r]hetorical battles . . . aside, there is no serious debate that the antitrust economics literature conforms to the scientific method,” Wright, supra note XXX, at 1 n. 3, is therefore perplexing, unless he can personally decide the “seriousness” of the dozens of academic lawyers, philosophers, and economists who disagree with him. It has also been observed that even if the theory could be scientific, in principle, its application in law has not been. See Christopher J. Bruce, A Positive Analysis of Methodology in the Law and Economics Literature, 12 Hamline L. Rev. 197 (1989) (analyzing methodology in a sample of law-and-economics literature, and finding it to be predominantly normative and lacking in empirical foundation; arguing on this basis that the movement is not true to its claims to positive scientific orientation).
remain intact within its domain. For one thing, it is hard to imagine how antitrust doctrine could be designed without some broadly defined “economic theory” that in some way finds its origins in classical microeconomics. But more importantly, nothing I have to say in this paper requires criticism of any theoretical claim of economics whatsoever.

Instead, my point is simpler and it is fundamentally a legal one. The series of currently developing rules of per se legality show that antitrust is either becoming increasingly rule-like or that at least it is not becoming more flexible or standards-driven. Moreover, there are two respects in which the purported influence of economic theory on antitrust law has not rendered it a depoliticized scientific inquiry. First, whatever may be the rules of “economics” on which courts purport to base antitrust, many of the specific rules discussed here are not well explained by them. Second, such economic theory as is used begs empirical questions that are not now and often cannot be answered by empirical evidence. Resolving the resulting doubts through judicial fiat is quintessentially political.

A separate preliminary issue concerns the use of evidence in this paper, and what might be thought its weaknesses. The approach here is essentially a casual empiricism of

56 In fact I agree with Jack Hirshleifer that “economic” theory, in some broad sense, will inevitably “constitute[] the universal grammar of the social sciences” because of the immense generalizability of its deepest concepts. Jack Hirshleifer, The Expanding Domain of Economics, 75 AM. ECON. REV. 53, 53 (1985); see also GEORGE C. HOMANS, THE NATURE OF SOCIAL SCIENCE (1967) (laying out foundations of a “rational choice theory” based fundamentally on the model of price theory, to be the template for all social science). Possibly for this reason predictions of the death of the economic turn in law have remained premature, having been made for about the past forty years. See, e.g., Crespi, supra note XXX, at 231 (describing the movement, as of 1991, as undergoing a “crisis of confidence” associated with the onset of its “middle age”); Bruce, supra note XXX, at 219-20 (arguing, in 1989, that because law and economic literature had not been true to its initial positivist commitments, it would not fare well against other modes of legal argument); Owen M. Fiss, The Law Regained, 74 CORNELL L. REV. 245, 245 (1989) (“law and economics . . . seems to have peaked.”); Morton J. Horwitz, Law and Economics: Science or Politics?, 8 HOFSTRA L. REV. 905, 905 (1980) (law and economics, as of 1980, has “ ‘peaked out’ as the latest fad in legal scholarship”). Moreover, that this body of reasoning will remain irremediably rhetorical and normative rather than scientific, is not a bad thing at all. On this point, see MCCLOSKEY, supra note XXX; Donald N. McClosky, The Rhetoric of Law and Economics, 86 MICH. L. REV. 752, 763 (1988) (“Economics is rhetoric . . . . [But] [r]hetoric is not a fault to be overcome.”).
an old-fashioned kind. The paper will collect judicial opinions and argue that, taken
together, they show a trend in what the law currently is and how the courts handle certain
problems of methods and value. This sort of argument could never be very complete or
conclusive, and for each of the points I will make there are at least a few counter-
examples in contemporary caselaw. But that is

But for what it may be worth, while I will focus only on one set of specific rules, I
believe that abundant other evidence supports my view. For example, my view explains
the radically different behavioral models the federal courts employ to assess the
allegations of plaintiffs and the allegations of defendants: specifically, legal rules
presume economic rationality only when it helps defendants.57 It also explains the so-

57 Consider two examples. First, the recent Twombly decision erects a surprisingly strong presumption
that antitrust defendants behave rationally, but employs that presumption only in measuring the sufficiency
of a plaintiff’s proof or pleadings. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (requiring
pleadings of § 1 conspiracy to be made with “enough factual matter” to render plaintiff’s theory of
conspiracy economically “plausible”). In principle Twombly may only have applied the same rule that
and Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984), but Twombly makes it apply at the
12(b)(6) stage—before plaintiff will ordinarily have engaged in discovery. The Court therefore has
adopted, as a matter of law and based on a priori theoretical excogitation, a particular factual view of the
world in which markets function well and defendants behave only as short-run profit-maximizers, except
when it benefits them in antitrust litigation to presume otherwise.

When favorable to defendants, however, the Court indulges the possibility of behavior not, strictly
speaking, rational, or at least not in the same short-run, static sense as is employed against plaintiffs. This
was true in Twombly itself. The Court considered the possibility that defendants, each a regionally
dominant provider of local telephone service, would unilaterally have refused to enter into each others’
territory, even though it might have been profitable to do so. Though acknowledging that “i[n a
traditionally unregulated industry with low barriers to entry, sparse competition among large firms
dominating separate geographical segments of the market could very well signify illegal agreement,” the
Court came up with a purely speculative, oligopoly explanation on which these defendants’ sparse
competition in this case might have been purely uncoordinated:

[Here we have an obvious alternative explanation. In the decade preceding the
[Telecommunications Act of 1996] and well before that, monopoly was the norm in
telecommunications, not the exception. The [regional local telephone monopolies] were born in
that world, doubtless liked the world the way it was, and surely knew the adage about him who
lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former
Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same
thing.

550 U.S. at (citations omitted).
called “Chicago-Harvard double-helix,” which makes essentially empirical claims about the costs and risks of antitrust litigation, without much empirical evidence beyond the anecdotal experiences of particular judges and the abstract arguments of some law professors. 58

II. IMMUNITY RULES DRIVEN BY CONTRACTUAL LIBERTY

And with that, then, on to consideration of a range of specific “rules” and their theoretical foundations, and what they have to say about the future of antitrust. I will group them into three broad classes: rules based on freedom of contract, discussed in this Part, rules concerning the meaning of “restraint,” in the next, and a special set of cases dealing with hospital administration, addressed in Part IV. But the point to be made is the same as to each. Each set of rules is comparatively recent and rigid in nature, each is better explain (so I will argue) by a libertarian individualism than neoclassical theory, and each reaches results that are necessarily political for their lack of empirical support.

A. Dagher and Copperweld Eat Section One for Breakfast


Second, as a matter of law, a § 2 predation defendant cannot be found liable merely for failing to charge prices that will cover its opportunity costs. This is so even though a rational profit-maximizer considers opportunity cost to be the cost of its decisionmaking. See, e.g., Rebel Oil Co., Inc. v. Atl. Richfield Co., 146 F.3d 1088, 1095-96 (1998) (so holding); In re IBM Peripheral EDP Devices Antit. Litig., 459 F. Supp. 626, 631 (N.D. Cal. 1978); 3 PHILIP I. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736c2 (2d ed. 2002); see also U.S. v. AMR Corp., 335 F.3d 1109, 1118-19 (10th Cir. 2003) (rejecting any proof of predation based on failure to maximize short-run profit). In principle this is at odds with the presumption of defendants’ strict rationality, which currently makes it nearly impossible to prove illegal price predation. See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223-25 (1993); Matsushita, 475 U.S. at 588-91.

58 The “double helix” is Commissioner Kovacic’s imagery, see William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 COLUM. BUS. L. REV. 1, but his point is now widely accepted—that while lawyers and economists more or less associated with the University of Chicago had altered substantive antitrust rules, much of the modern law’s prophylactic emphasis on limiting antitrust to account for bad plaintiff incentives, the costs of litigation, and the limitations of the courts came from academics at Harvard. The Harvard contribution is primarily associated with Philip Areeda, Donald Turner, and Stephen Breyer. See id.; see also, e.g., HOVENKAMP, supra note XXX.
Some of the more alarming emergent rules discussed in this paper concern the separate-entities issue under § 1. Despite the fact that, when they were decided, the two Supreme Court decisions driving this law—Copperweld Corp. v. Independence Tube Corp. and Texaco, Inc. v. Dagher—just didn’t really seem that bad, their use among the lower courts is turning out to pose quite a threat to the enforceability of § 1.

It is fitting to start with Copperweld, as that case states a famous, explicit, de jure immunity rule: that a corporation cannot conspire with its wholly owned subsidiary. In 1984, when Copperweld overturned the so-called “intra-enterprise” conspiracy rule that followed Yellow Cab, it seemed sensible enough. As Chief Justice Burger wrote, “it is perfectly plain that an internal ‘agreement’ to implement a single, unitary firm’s policies does not raise the antitrust dangers that § 1 was designed to police.” The Court’s solicitude for internal freedom from antitrust was likewise logically consistent with the prevailing view that antitrust concerns itself mainly with interbrand competition.

Dagher likewise seemed superficially very commonsensical, and indeed it was pretty clearly anticipated in Copperweld dicta, though for a case with so much daunting,

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59 Sherman Act § 1, 15 U.S.C. § 1, one of the Act’s two operative provisions, prohibits “contract[s], combination[s] . . . or conspirac[ies], in restraint of trade . . . .” It has long been presumed to require that two or more legally distinct persons took some joint action; a single person acting alone cannot violate § 1. See, e.g., Copperweld, 467 U.S. at 767-78 (citing as the earliest authority for this rule United States v. Colgate, 250 U.S. 300 (1919)).
63 467 U.S. at 769.
64 See 467 U.S. at 767-68 (noting that losses imposed by one unitary firm on others are at the core of the competition envisioned in the Sherman Act; noting as well that the Copperweld rule is consistent with rule-of-reason treatment of “[o]ther combinations, such as mergers, joint ventures, and various vertical agreements,” which “hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively,” and citing in support Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).
65 The Copperweld Court wrote that:
ominous potential it seems to have gotten not all that much attention. The opinion arguably states only the simple rule that where an otherwise legal integration of two firms effectively ends competition between them, their post-integration conduct is not subject to § 1 liability. Unlike Copperweld there are some serious doubts about just what exactly Dagher means and potentially serious criticisms of its rule. But, like

Any anticompetitive actions of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to intra-enterprise conspiracy doctrine. A corporation’s initial acquisition of control will always be subject to scrutiny . . . [and] [t]hereafter the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the FTC Act . . . .

Copperweld, 467 U.S. at 777.

66 Plaintiff gasoline retailers sued Texaco and Shell Oil, which had formed a five-year joint venture to refine and distribute gasoline from the crude oil they each independently continued exploring and drilling. Plaintiffs complained that by setting one price for the venture’s product Texaco and Shell had horizontally fixed their prices. Because the suit seemed to attack the post-transaction internal decisions of an essentially merged entity, whose formation had already been approved by the Federal Trade Commission, Justice Thomas ruled that plaintiffs had no § 1 cause of action at all.

67 It may perfectly well be that Justice Thomas intended no more than some narrow rule applying only to the conduct of a “fully integrated” venture. If limited to the facts of that case as the Court characterized them, the result might be no more than a rule requiring merger analysis of those ventures that are the literal equivalent of mergers, with no remaining competition among the venturers, and that have had the approval of a merger review agency. See Jeffrey L. Kessler et al., The Supreme Court’s Decision in Dagher: Canary in a Coal Mine or Antitrust Business as Usual?, ANTITRUST, Fall 2006, at 40 (so characterizing the case). But on another plainly permissible reading Dagher might actually imply that all “legitimate joint ventures” are Copperweld single entities as to their “core functions,” even if their “integration” is not so complete as to render them de facto merged entities. That result is arguably pretty different than previously had been the case. See infra note XXX.

68 A first criticism is that Dagher seemed either confused on existing law or to reverse sub silentio a large body of lower court caselaw and agency interpretation. Previously, even very tightly integrated joint ventures could comfortably be addressed under the traditional ancillarity rule. That is, even where a restraint was part of the venture’s basic work it still had to be “reasonable” (even if, were it a naked restraint, it would be per se illegal). See, e.g., Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995); Yamaha Motor Co. v. FTC 657 F.2d 971 (8th Cir. 1981); Collaboration Guidelines, supra note XXX (setting out agencies’ view of the ancillarity doctrine). But in one fairly surprising portion of the opinion the Dagher Court reversed the Ninth Circuit for applying ancillarity, holding that “the . . . doctrine has no application . . . where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by [the joint venture].” Id. at 7-8. Moreover, this new ancillarity approach sets up a minor logic puzzle which, if defendants and the lower courts are paying attention, should engender quite a lot of confused caselaw grooping to define yet another metaphysical distinction. Conduct might be “outside” or other than “core” venture activity, but also be “reasonably necessary” to the venture’s procompetitive purposes. But when will that be? And by the way, what could be the theoretical defense for drawing this distinction, except for the familiar one of dismissing more “frivolous” cases?

Anyway, Dagher also seems demonstrably wrong in its equation of the agreement before it to an outright merger of the parties. First, the arrangement before the Court was for only a four-year duration. Second, while the parties combined their U.S. gasoline refining and distribution businesses, they continued to compete in those lines abroad and competed in other businesses in the U.S. See Peter C. Carstensen, Using Dagher to Refine the Analysis of Mergers and Joint Ventures in Petroleum Industries and Beyond, 19
Copperweld, the opinion seems to have based its reasoning on the view that the combination before it was already one unitary entity, whose formation itself might have been challenged, but whose post-formation conduct was not a § 1 issue. Thus, as eminent lower courts have read it, Dagher adopts a categorical antitrust immunity for the post-formation “internal” decisions of joint ventures, so long as those ventures are “economically integrated.”

Anyway, the concern here is not really whether Copperweld and Dagher were right or wrong, but to examine their spreading consequences in the lower courts. At first those consequences seemed not so serious. Whether or not Justice Stevens was right in his Copperweld dissent, that rule of reason inquiry could have sufficiently handled truly harmless single-entity cases by quick dismissal, most early applications of the Copperweld rule were straightforward and not terribly alarming. Thus there quickly

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LOYOLA CONSUMER L. REV. 447 (2007). Interestingly, the agencies’ Collaboration Guidelines in fact recognize that some joint ventures would be so tightly integrated that they should be analyzed as mergers, and offer as a hypothetical example a gasoline refining venture very similar to the defendants’ venture in Dagher. But under the Guidelines they would ordinarily only do so where the venture is to last at least ten years. See Collaboration Guidelines, supra note XXX at App. 1. The Guidelines make no mention at all of “core” or “inside” venture activities.

These issues were all foreseen in a prescient article written shortly after the decision, tellingly by a defense-side practitioner who represents sports leagues, and has an interest in advocating their “single entity” treatment. See James A. Keyte, Dagher and “Inside” Joint Venture Restraints, ANTITRUST, Summer 2006, at 44.

Second, Dagher happened to involve an agreement between two very large corporations not to compete with one another anywhere in the United States for a period of four years. This was attacked by the FTC under a Clayton Act § 7 theory, but permitted under a consent decree requiring only certain local divestitures. Specifically at issue in Dagher was one of two arrangements the parties established, this one constituting an agreement not to compete with respect to about 25% of gasoline sold in the Western United States. The venture, despite the inevitably presumed productive synergies, also managed to produce a substantial price increase despite evidence of falling costs. See Carstensen, supra note XXX, at 448. So Dagher really just begs a huge question: has merger policy not gone simply, utterly insane?


70 See 467 U.S. at 778 (Stevens, J., dissenting).
developed the inevitable rules that something less than sole ownership could suffice and that subsidiaries with a common parent could not conspire horizontally with each other. It even seemed not that serious—at least eminently predictable—that some court somewhere would find single-entity status among corporate defendants with no more than 51% share ownership.

The problem with these seemingly commonsensical, straightforward little rules is that they would never stop with cases of meaningfully integrated corporate children and siblings. They spread, raising many more questions than those that they answer simply. For example, since the early twentieth century the courts have held that a “principal” is incapable as a matter of law of conspiring with its “agent.” Lately, a serious problem is developing from the fact that this rule has come to be seen as merely one application of the Copperweld rule. A case from 2005, Day v. Taylor, explicitly held that the

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71 See, e.g., Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1132-34 (3d Cir.1995); Williams v. I.B. Fischer Nevada, 999 F.2d 445, 447 (9th Cir.1993) (holding that “[t]o be capable of conspiring,” it need only be shown that “corporate entities [are] sufficiently independent of each other,” an inquiry “requir[ing] an examination of the particular facts of each case”).


74 United States v. General Electric Co., 272 U.S. 476 (1926) is the leading case for this rule, but it was anticipated in Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Dr. Miles distinguished between two possible applications of its rule against vertical price fixing. In cases of consignment, in which a manufacturer did not part title with its goods when selling them through an agent, antitrust would not apply at all. Where manufacturer did part with title, agreements on resale price were per se illegal. The Fourth Circuit reaffirmed the rule just this March in Valuepest.com v. Bayer Corp ___ F.3d ___, 2009 WL 756901 (4th Cir. 2009), and made clear that it survives Leegin’s repeal of Dr. Miles. In Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) the Court reversed Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), which had held that resale price maintenance per se illegal. One might have expected that General Electric could be discarded or softened in light of Leegin. As with the rules in United States v. Colgate & Co., 250 U.S. 300 (1919) and Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988), one might have thought that the General Electric principal-agent rule was preserved only to soften the perceived harshness of the Dr. Miles rule prohibiting resale price maintenance per se.

75 400 F.3d 1272 (11th Cir. 2005).
“vastness” of the network of distributor-agents is irrelevant. The courts also seem not especially concerned with how dissociated the principal and agent might be, or how much at odds are their pecuniary interests. For example, the Fourth Circuit relied on the rule in *Oksanen v. Page Memorial Hospital* to hold en banc that a denial of staff privileges at a hospital could not violate § 1, even though the denial decision is made by the plaintiff’s horizontal competitors. The Eleventh Circuit’s rather similar decision in *Todorov v. DCH Healthcare Authority* did not invoke *General Electric* or agency concepts, but held that where a hospital’s board of directors took a personnel action disadvantageous to plaintiff doctor, it was the hospital’s unilateral act alone and therefore not a basis for § 1 liability, even if based on the recommendations of plaintiff’s horizontal competitors within the hospital’s medical staff.

In fact, over time, the law in this area has gone quietly haywire. Often neither long lineage nor much in the way of explicit economic theory supports extensions of single-entity reasoning. Consider the fairly surprising rule of the Ninth Circuit of some years ago, that an entire, nation-wide retail franchise system can be a single entity under § 1, at least with respect to vertical restraints between franchisor and franchisee, and solely as a result of the arm’s length contracts among them. Similarly, supplier members of cooperative associations, even though they may be organized as independent corporations and compete in other respects, cannot conspire. Non-profit groups likewise have been

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76 See id. at 1277 n.3.
77 945 F.2d 696 (4th Cir. 1991) (en banc).
78 921 F.2d 1438 (11th Cir. 1991).
79 921 F.2d at 1456-47. The health care cases might seem somewhat sui generis given their context, but in fact *Oksanen* and similar cases may have laid the ground work for categorical, *per se* immunity of professional self-regulatory groups and at least some standard-setting outfits. They are discussed further at notes XXX, infra, and accompanying text.
80 Williams v. I.B. Fischer Nevada, 999 F.2d 445 (9th Cir. 1993).
held incapable of conspiring with umbrella “parent” organizations with which they are affiliated, even if otherwise unrelated by ownership and without common members.\textsuperscript{82} For what it may be worth these decisions have perverted the central policy argument in \textit{Copperweld}. The Court there said that allowing intra-enterprise liability simply because a parent and its subsidiary are formally separate would be “formalistic.” But in these more recent cases, despite the frequently evident fact that the entities in question \textit{could} take jointly anticompetitive action and are not meaningfully integrated, they are completely exempted from § 1 liability on the grounds only of their formal organizational relationships.

What seems most ominous is extension of \textit{Copperweld} and \textit{Dagher} to situations of collective action that once were thought to involve § 1 “conspiracies” fairly obviously. There was a time when trade associations and other formal groups that include horizontal competitors would satisfy the § 1 multiplicity requirement virtually by their very natures.\textsuperscript{83} That time, now that \textit{Copperweld} and \textit{Dagher} have shown the Court’s solicitude toward collaboration, has evidently passed. For example, the Fifth Circuit’s 2007 decision in \textit{Tunica Web Advertising v. Tunica Casino Operators Ass’n}.\textsuperscript{84} held that where the plaintiff propositions a group seeking collective action and the group unanimously refuses, the refusal cannot as a matter of law be “an unreasonable agreement

\textsuperscript{83} See, \textit{e.g.}, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (holding without consideration of multiplicity that restraint imposed by standard setting body, which was orchestrated by private business members of the organization, could violate § 1).
\textsuperscript{84} 496 F.3d 403 (5th Cir. 2007). Plaintiff, an accused cybersquatter who had tried to lease out desirable domain names to casinos in the burgeoning gambling market of Tunica, Mississippi, and already settled prior litigation brought against her by those casinos, accused them of collectively refusing to deal with her following the settlement. They did so even after she retooled her business model, creating an actual website that would sell ad space to the casinos and organize group tours to Tunica. The refusal was made, she alleged, through a formal decision of their trade organization.
in restraint of trade.” The court openly characterized the group refusal following a proposal to the group as the action of a “single entity,” citing Copperweld without elaboration. Likewise, defendant in the unpublished district court decision in Menkes v. St. Lawrence Seaway Pilots Assn. was an association of ship captains who were federally licensed to pilot ships on the St. Lawrence Seaway. Because the association was formally organized as a corporation in which the member captains each owned one share, the court found that there could be no conspiracy. Decisions like these potentially render § 1 very easy to evade through simple lawyerly maneuvering.

But by far the biggest single case to address the single-entity problem is one now pending before the Supreme Court, American Needle, Inc. v. National Football League. The case involves the long-running and underappreciated debate over whether professional sports leagues are “single entities.” They have been insisting that they are for a long time, but until American Needle they were singularly unsuccessful. So far...
this has probably been because, despite the purported economic peculiarities team owners face, their behavior to one another is adverse and more like that of horizontal competitors than joint venturers. In fact, their interests are in fairly direct pecuniary conflict even as to the activity that is allegedly least commercial, on-field play.

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89 Competitive sports require (or at least benefit substantially) from some centralized decision making in order for the product to be produced. First, teams need some means by which to schedule games and they need some agreement on the rules by which games will be played. It also became apparent as long ago as the 19th century that fans desire play to be organized in some way to ensure that teams are appropriately matched by skill and that there be some systematic means to judge their performance (as by holding a regular season with playoffs and a championship). This is to say that professional sports is thought to require some rules to support parity of team skill, and that in turn is thought to require some reason treatment of a horizontal output restraint on the fact that defendant NCAA had the need for internal cooperation in order to produce its product.

However, the many federal opinions to address the question have almost unanimously disagreed. It is probably not fair to say that the circuits have categorically ruled it out, since most of the opinions describe the issue as fact-sensitive. However, the First, Second, Third, Sixth, and Ninth Circuits have ruled against single entity status for sports leagues. Fraser v. Maj. League Soccer, LLC, 284 F.3d 47 (1st Cir. 2002); Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994); N. Am. Soccer League v. NFL, 670 F.2d 1249 (2d Cir. 1982); Mid-South Grizzlies v. NFL, 720 F.2d 722, 786-87 (3d Cir. 1983); NHL Players Ass’n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005); L.A. Mem. Coliseum Cmm’n v. NFL, 726 F.2d 1381 (9th Cir. 1984). Somewhat less clear authority can be found in the Eighth and D.C. Circuits. In both Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), and Smith v. Pro Football, Inc., 593 F.2d 173 (D.C. Cir. 1978), the courts upheld judgments against the NFL and member teams for Section 1 violations.

There is also the problem that the Supreme Court itself once opened the door for Section 1 liability as against the NFL, though admittedly it did not directly address the single-entity issue. In Radovich v. NFL, 352 U.S. 445 (1957), the Court reversed dismissal of a player’s antitrust claim against the league, which had been granted on the district court’s view that the “baseball exception” of Federal Baseball Club of Baltimore v. National League, 259 U.S. 200 (1922), should apply to football as well. The Court did not explicitly address the single entity issue. However, as the petitioner observed before the Court in American Needle, the Court did purport to find all of the defendant NFL’s “remaining contentions” to be “lacking in merit,” and the NFL’s briefing before the Radovich Court included an argument that the teams were “quasi partners” and that “to refer to a conspiracy among the member teams of the [NFL] is to disregard the nature of the enterprise.” American Needle, Inc. v. NFL, No. 08-661 (U.S. Nov. 17, 2008) (petition for certiorari).

The only authority supporting single-entity treatment had been from the Seventh Circuit, and prior to American Needle it had remained dicta. Chicago Prof’l Sports Ltd. v. NBA., 961 F.2d 667 (7th Cir. 1992) Chicago Prof’l Sports Ltd. v. NBA, 95 F.3d 593 (7th Cir. 1996).

90 Despite the evident need to preserve team parity for the sake of the overall product’s quality, see supra note XXX, individual team owners are also quite hostile to parity: an individual team’s greater
Nevertheless, in the most striking ruling in the long line of sports-league cases, the Seventh Circuit in *American Needle* found the National Football League’s member teams to be a single entity for purposes of their collective licensing of their intellectual property. The court so held even though the license was granted as to *individual team property*. Specifically at issue in the case are: (1) the teams’ use of a marketing agent wholly owned by them as their exclusive licensor of all team intellectual property; and

athletic success, other things equal, usually means greater profitability in gate receipts, broadcast revenues, and the sale of ancillary products like memorabilia and sponsorship rights.

This is best demonstrated by the fact that all efforts to create true single-entity organization have failed financially. True single-entity leagues have been created, but most have failed and those that have survived have done so only following organizational changes to permit separate team ownership. It appears that the single-entity form’s chief weakness as a business model is that investors oppose it. The best evidence on point was the creation of Major League Soccer (MLS) and the creation of the Women’s National Basketball Association (WNBA). The MLS was initially conceived as literally a single entity—one corporation that would own all the teams as well as the facilities, the referees, and the central administration. What is so interesting is that it didn’t work. The league in that structure could not attract sufficient capital, and the general explanation has been individual investors’ desire to own a team with better prospects than others, and hope to outperform the others, for the sake of greater profitability. So the MLS settled on a fairly complex hybrid structure combining a strong central hierarchy with some individual autonomy for team “investor-operators.” See Edelman *supra* note 19, at 900-03. At the moment, in fact, there is agitation to make the MLS teams even more independent. See Grahame L. Jones, *MLS Looks Way Down the Field*, L.A. TIMES, Mar. 29, 2006, at D8. The WNBA’s experience was similar. Originally conceived as a single entity wholly owned by the existing NBA teams, the league founndered financially and its governing board decided in 2002 that the only way to attract sufficient new capital was to allow individual team ownership. See CONRAD, *supra* note 19, at 18-20.

Interestingly, most experiments with single-entity organization occurred during the mid-1990s, and it seems generally acknowledged that they were aimed at securing *Copperweld* immunity. While their centralized organization was also said to promise scale economy, a chief purpose of these new leagues’ single-entity form was antitrust strategy. See CONRAD, *supra* note 19, at 15-17; Edelman, *supra* note 19, at 900-03.  

91 538 F.3d 736 (7th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-661).

92 Prior to 1963 the teams had individually licensed their own marks directly to manufacturers or through agents, and in many cases a team would license more than one manufacturer to make products bearing its mark. In 1963, some of the teams established a California corporation to act as their licensing agent. In 1982 a successor entity was given the exclusive right to license all the teams’ marks. Even after that the agent continued to license more than one maker to use its marks. In other industries an exclusive sales agency among horizontal competitors would ordinarily be considered a *per se* illegal price fixing conspiracy, but in a league sports context would likely be subject only to rule of reason treatment. See NCAA v. Board of Regents, 468 U.S. 85 (1984); Major League Baseball Properties v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008) (finding a nearly identical sales agency employed by the member teams of the MLB subject only to rule of reason treatment).

Interestingly, each of the major league sports organizations in the United States have created wholly owned licensing arms with some exclusive rights to license the teams’ marks, and these arrangements all date to about the same time—the early 1980s. See CONRAD, *supra* note 19, at 268-76 There also was a boom in licensing revenues beginning shortly thereafter, during the 1980s and 1990s, and some league officials have fairly frankly attributed it to the consolidation of league-wide licensing in these entities. See
(2) the agent’s choice to license Reebok as the exclusive maker and distributor of team-licensed hats. Judge Kanne, writing for a unanimous court, found these to be the actions of a single entity. He based his opinion almost exclusively on his view, supported by no evidence in the very spare record before the court, that “the NFL teams share a vital economic interest in collectively promoting NFL football.” In other words, a unanimous panel of a federal court of appeals has now used the reasoning of Copperweld and Dagher to categorically exempt a garden variety price fixing conspiracy as to one product, merely because the conspirators shared an “economic interest in collectively promoting” a different product, which had quite different economic characteristics and as to which they had recently competed.

The Supreme Court’s consideration of this case, in other words, may wind up being the single most important antitrust decision since Continental T.V., largely because it will likely resolve questions left open in Dagher. It will make clear whether Dagher is to be a comparatively limited case (by reversing) or possibly a very, very big case, with consequences potentially reaching throughout the law of § 1 (by affirming, especially if the Court does so in explicit reliance on Dagher).

That the courts could, through such a range of different factual scenarios, so frequently find single-entity defendants partly reflects the indeterminacy lurking beneath the simplicity of Copperweld and Dagher. In trying to flesh out the rules of those two cases, the lower courts now frequently express the test for single-entity status merely to

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Stuart B. Chris, Sports Logo Licensing Boom Keeps Growing, DAILY NEWS RECORD, June 9, 1988, 2 (quoting official of Major League Baseball Properties, MLB’s licensing unit, as attributing rise in license revenue to “taking control of licensing from the 26 individual clubs”).

93 The court affirmed summary judgment for defendant NFL, which had been entered after discovery limited only to the question of whether the league was a single entity.

94 538 F.3d at 743.
be whether the defendants shared such a “unity of interest” that they are not separate enough to conspire.\textsuperscript{95} Though most courts likely do not intend to expand the doctrine as far as this formulation implies, it really puts no constraint at all on their freedom to immunize combinations. On the one hand it surely characterizes naked horizontal price-fixing that cartel members have some unifying common interests. On the other, it is also surely the case that internal divisions and conflicts of interest are endemic among very legitimate joint ventures—which unravel with frequency—and even among fully integrated corporate families. One court, which happened to be very fond of single-entity arguments, accordingly wrote that there can be a unity of interest even when there are serious conflicts. “As a proposition of law,” wrote the court, to require otherwise “would be silly,” because “[e]ven a single firm contains many competing interests.”\textsuperscript{96} To top it off, the courts pretty impressionistically and in the abstract judge for themselves whether they think a given relationship has some core of shared interests, and they sometimes rather drastically underestimate the degree of conflicting interest that seems likely to be present. \textit{Oksanen}, for example, was decided on the court’s view that “a unity of interest” similar to that between a corporation and its wholly owned subsidiary “is present in the relationship between [a] hospital and its [medical] staff, both of which seek to upgrade the quality of health care.”\textsuperscript{97} That view was not supported with reference to any evidence in the record. It was, more to the point, absurd. The context in which the court made that claim was effectively an \textit{employment} decision, on behalf of a hospital that in a competitive market might try to offer lower priced medical services, but made by a group

\textsuperscript{95} See, e.g., Am. Chiropractic Ass’n v. Trigon Healthcare, Inc., 367 F.3d 212, 224 (4th Cir. 2004); Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1135 (3d Cir. 1995).

\textsuperscript{96} Chi. Prof’l Sports Ltd. P’ship v. NBA, 95 F.3d 593, 598 (7th Cir. 1996) (Easterbrook, J.).

\textsuperscript{97} 945 F.2d at 703.
with an interest in keeping prices high.  

Finally, a separate problem is how far the Supreme Court’s single-entity rules may have had simply unintended consequences. Particularly in conjunction with the past few decades-worth of multi-faceted support of competitor collaboration by the Court, Congress, and the agencies, it is not surprising that use of *Copperweld* and *Dagher* in the lower courts has been the site of some mission-creep: expansions of solicitude toward combinations that even the *Copperweld* and *Dagher* likely could not have intended. As one fairly dramatic example, a respected trial judge, in wading through the Supreme Court’s § 1 caselaw of the past few decades, seems to have held as a matter of law that lack of market power is a sufficient basis in itself to deny *per se* treatment of a horizontal market allocation. Among the opinion’s other alarming features was a footnote suggesting that the agreement at issue—literally no more than an exclusive supply deal coupled with an otherwise naked, absolute horizontal market allocation covering the entire world—was presumptively wholesome, with an unexplained citation to *Dagher*.  

In any case, a deeper purpose of this paper is to show that none of the rules discussed here is fundamentally driven by neoclassical price theory. Admittedly, both *Copperweld* and *Dagher* asserted some economic reasoning for their rules. First, *Copperweld* said that the purpose of the § 1 multiplicity requirement is the congressional judgment that unilateral conduct is less dangerous than multilateral. But, interestingly, whatever

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99 See Meijer, Inc. v. Barr. Pharm., Inc., 572 F. Supp. 2d 38, 50 (D.D.C. 2008). Admittedly, the underlying agreement involved not only a payment not to compete by a branded drug maker to a would-be generic entrant, but also an agreement with the same entrant to supply the pills that the branded maker would sell. Judge Collar-Kotelly observed as one independent basis for withholding *per se* treatment that the “entire agreement” was both horizontal and vertical. But a lengthy stretch of her discussion implies pretty strongly that the presence of other actual and potential competitors in the relevant market was a sufficient basis to deny *per se* treatment. See id. at 50.

100 572 F. Supp. 2d at 52 n.17.
Congress may have said about it,\textsuperscript{101} it is not clear that the normative claim itself is correct. For one thing, formally uncoordinated interdependence might be extremely harmful.\textsuperscript{102} And consider the conduct that Copperweld and Regal Tube, its subsidiary, undertook in the *Copperweld* case itself. There was evidence that their campaign to interfere with plaintiff’s business prospects enjoyed some success, even though the plaintiff ultimately was able to get its business up and running. Had they jointly undertaken it under circumstances in which Copperweld owned only, say, 35\% of Regal (where the two would still share a keen interest in killing off Regal’s competitors, and would still not compete in the same geographic territory, as Copperweld had never sold metal tubing there), their conduct would at least have been subject to rule of reason inquiry and might have survived summary judgment on proof of actual competitive effects.

More persuasive is the *Copperweld* Court’s explanation why the traditional intra-enterprise conspiracy rule elevated economic form over economic substance,\textsuperscript{103} in a way that might reduce efficiency benefits thought to be associated with flexible rules of corporate governance,\textsuperscript{104} and of the value of a general rule protecting truly “single” entities except those with monopoly, given that truly competitive unilateral conduct

\textsuperscript{101} There is serious doubt that the Court had its legislative history right in this respect. See LETWIN, supra note XXX, at XXX (discussing the language of Sherman’s initial bill and that of the substitute amendment drafted by the Senate Judiciary Committee, both of which were drafted deliberately to avoid major gaps in the Sherman Act’s coverage). And, incidentally, § 1 does not so clearly state a distinction between unilateral and multilateral conduct as has been routinely assumed. It relates to any “contract, combination, . . . or conspiracy . . .” Claims against the post-formation conduct of related corporate entities can often easily be recharacterized as simply the consequence of an initial, anticompetitive acquisition. Cf. *Copperweld*, 467 U.S. at 787-90 (Stevens, J., dissenting). And, after all, § 2 by its terms imposes penalties identical to those in § 1.

\textsuperscript{102} Nicely explained in Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143 (1993).

\textsuperscript{103} 467 U.S. at 772-74.

\textsuperscript{104} 467 U.S. at 771.
might be confused with anticompetitive conduct. But these arguments lose their force pretty quickly outside the polar case of the corporation and its wholly owned subsidiary. The possible permutations of contractual or ownership relations among corporate affiliates, franchise participants, or members of a “joint venture” are very numerous, and the risks for anticompetitive restraint they pose are at least complex and hard to generalize or predict ex ante.

So on what economic basis can the expansive single-entity caselaw really be defended? To the extent that they state an economic rationale at all, cases like *American Needle*, *Day v. Taylor*, *Oksanen*, *Todorov*, *Jack Russell Terrier Network*, *Fischer Nevada*, and *City of Mount Pleasant* typically say very little more than that, in the court’s view, the defendants share some unifying economic interest. That typically is said with very little (or, in cases like the Seventh Circuit opinion in *American Needle* no) real analysis or evidence (from the record or otherwise). An explanation for the courts’ glib approach that is at least as plausible as any commitment they may have to neoclassical price theory is simply that they see these “single entities” as comparable to individuals, and seek to respect their liberty as such.

2. The Flip Side: You Can’t Use § 7 Either. With a telling symmetry, loosely integrated collections of firms that now have some access to single entity treatment—that is, they might be able to dismiss § 1 challenges under *Copperweld* and *Dagher*—might also evade Clayton Act § 7 scrutiny of the initial formation of their integrations. This fact is at odds with one significant premise in *Copperweld* and *Dagher*. Both decisions defended broad single-entity treatment by observing that even though single-entity firms

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105 467 U.S. at 775-76.
cannot be subject to § 1, their formation remains subject to merger review under § 7.\textsuperscript{106} But in one of the sports-league cases, \textit{Fraser v. Major League Soccer},\textsuperscript{107} while the First Circuit refused to find Major League Soccer (MLS) to be a single entity, it also refused to find any § 1 liability, and it then held the league categorically immune from § 7 scrutiny. In an opinion that was otherwise very careful and theoretical, Judge Boudin—formerly a high-ranking antitrust official in the Justice Department—reasoned that prior to the league’s creation there was no major professional soccer league, and therefore that the creation of one as a matter of law could not be anticompetitive.\textsuperscript{108} This is a rather piquant result. The MLS was initially formed as a genuine single entity in a deliberate attempt by an antitrust-savvy lawyer to avoid § 1 liability under \textit{Copperweld}.\textsuperscript{109} Moreover, by the time of the \textit{Fraser} decision the MLS had been reorganized into a multi-owner format permitting a fair bit of team independence, because its initial single-entity financial structure was unattractive to investors.\textsuperscript{110} But the broader effect of the court’s reasoning could be this: where some integration is formed that is said to produce a new or somehow different product or service, which had not been available before, its formation

\textsuperscript{106} See \textit{Dagher}, 547 U.S. at 6 n.1 (suggesting in dicta that one appropriate challenge to the defendant joint venture would have been a § 7 challenge to its formation); \textit{Copperweld}, 467 U.S. at 776-77 (arguing that the “size of any . . . gap” left open by doing away with the intra-enterprise conspiracy doctrine “is open to serious question” because “[a] corporation’s initial acquisition of control will always subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act.”). Moreover, \textit{Copperweld} relied heavily on an article by Phillip Areeda that was written in anticipation of the \textit{Copperweld} case itself. In addition to its explicit citations to the article, see 467 U.S. at 766 n.12, 773 n.20 (citing Phillip Areeda, \textit{Intraenterprise Conspiracy Doctrine in Decline}, 97 HARV. L. REV. 451 (1983)), the majority’s reasoning at many points borrows directly from it without attribution. Areeda specifically says we need not worry if single entity doctrine leaves some dangerous intra-entity conduct beyond the reach of the Sherman Act, because the formation of powerful entities will still be subject to “the rather stringent prophylactic standards of § 7 of the Clayton Act . . . .” Areeda, \textit{supra}, at 456 n.14.

\textsuperscript{107} 284 F.3d 47 (1st Cir. 2002).

\textsuperscript{108} 248 F.3d at 69-70 (affirming the district court’s view that “prior to the formation of MLS, there was no enterprise engaged in providing Division I soccer in the United States and thus that a combination that added Division I soccer in this country could hardly reduce competition where none before existed.”).

\textsuperscript{109} See \textit{supra} note XXX. The league’s initial design was the work of attorney Alan Rothenberg, who was also the league’s most prominent founding investor. See Edelman, \textit{supra} note XXX

\textsuperscript{110} See \textit{supra} note XXX.
might be immune from Clayton Act § 7. If it can establish single entity status, its members might also avoid § 1 liability for post-formation conduct that would be per se illegal had they entered as two or more unintegrated firms. Knowing this, existing competitors or investors who could enter as competitors might cooperate in the introduction of a new good in a way amounting to naked price-fixing, rather than introducing the good independently and facing price competition. In any case in which two or more potential entrants developing some arguably “new” good are aware of one another’s existence, their legally rational approach should now always be to conspire as to price and output prior to entry.

B. “Ordinary Business Conduct”

The Eight Circuit decision in *Trace X Chemical, Inc. v. Canadian Indus., Ltd.* would really just be another garden-variety § 2 refusal to deal case except for the following gloss on the exclusionary conduct requirement: “Acts which are ordinary business practices typical of those used in a competitive market do not constitute anticompetitive conduct violative of Section 2.” In the factual context of the case this language was not so unusual. The court so wrote mainly to disregard one of plaintiff’s several allegations of exclusionary conduct, which was that, in the context of a deteriorating relationship defendant supplier discontinued its practice of providing goods

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111 738 F.2d 261, 266 (8th Cir. 1984).
112 Sherman Act § 2, 15 U.S.C. § 2, the second of the Act’s two operative provisions, prohibits “monopoliz[ation]” and attempts or conspiracies to monopolize. However, it has almost always been held to require more than the acquisition of a large share of any given market. Defendant must have acquired or maintained that market share by way of “exclusionary” or “predatory” conduct of some kind. Among the handful of ways that courts have found dominant firms to have committed exclusionary or predatory conduct is the refusal in some circumstances to do business with other firms. *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
113 Section 2 plaintiffs, as an element of the cause of action for “monopolization,” must show not only that defendant holds monopoly power, but also that it acquired or maintained that power through “exclusionary” conduct. *See supra* note XXX.
114 738 F.2d at 266.
to plaintiff buyer on credit. Its innocuous character was also made clear by the court’s reliance on well-known discussion from the *Telex* case and Judge Kaufman’s views on new product introduction in *Berkey Photo*. That this sort of talk is not ordinarily meant to open up some safe harbor of clearly defined immunity is also made clear by more sober courts, which explain that references to “legitimate” or “ordinary” business behavior are just another way of saying that “the key to distinguishing legal exclusion from improper, or predatory, exclusion is whether the exclusion was based on superior efficiency.”

But thereupon came the Fifth Circuit’s uncommonly disturbing *Stearns Airport Equipment Co. v. FMC Corp.* Relying only on *Trace X*, *Stearns* again held as a matter of law that “ordinary business practices” cannot violate antitrust law. But it is clear that this time the phrase was meant not just as a loose, general characterization of ordinarily non-exclusionary conduct, but rather as the technical definition of a new category of conduct that cannot be exclusionary. At issue was whether bidders for municipal contracts engaged in exclusionary conduct when they lobbied the purchasing entities to sole-source or to set specifications that uniquely favored them. Analogizing municipal buyers to ordinary “customers,” the court thought that by its lobbying activity defendant was merely “outing the virtues” of its product. As the court said, merely “trying to sell [one’s] product” is an “ordinary business practice[].” But under *Stearns* “ordinary business practices” can include any “arguments on the merits,” even when they

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115 738 F.2d at 266 (citing Telex Corp. v. Int’l Bus. Machs. Corp. 510 F.2d 894, 925-26 (10th Cir. 1975)).
116 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).
118 170 F.3d 518 (5th Cir. 1999).
119 170 F.3d 524 (quoting Trace X Chemical, Inc. v. Canadian Indus., 738 F.2d 261, 266 (8th Cir. 1984)).
120 170 F.3d at 524.
are “wrong, misleading or debatable,” and regardless how much perfectly unassailable market power defendant might hold.\textsuperscript{121} The court added that

[i]nferring an attempt to circumvent competition on the merits is extraordinarily difficult when the alleged violator takes the facially rational and unproblematic step of attempting to sell its product, couches its arguments to the customer in favor of a sale on the merits of the product and procedures it recommends, and the customer agrees.\textsuperscript{122}

But it is plain that not only can deception by a monopolist be harmful, it is a source of “cheap” exclusion potentially so potent that some observers have called for it to be at the very heart of § 2 enforcement, possibly even under some rule of presumptive illegality.\textsuperscript{123} So how can one explain on economic grounds how that behavior cannot violate antitrust merely because it is “ordinary”? The rule seems rather, again, to reflect a judicial solicitude for the private commercial freedom of (even corporate) individuals.

C. “Legitimate Competitive Advantages” (Meaning, So far, Government-Granted Ones)

The Second Circuit recently indulged a related flourish in a case involving Virgin Airlines’ effort to enter service between Heathrow and U.S. markets—\textit{Virgin Atlantic Airways v. British Airways}.\textsuperscript{124} Defendant British Airways, formerly a state-owned enterprise, continued to enjoy regulatory protections for its lucrative, monopoly position

\textsuperscript{121} The \textit{Stearns} court assumed \textit{arguendo} that defendant held market power sufficient to support a § 2 cause of action. \textit{See} 170 F.3d at 522.

\textsuperscript{122} 170 F.2d at 524-25.

\textsuperscript{123} \textit{See} Susan A. Creighton, \textit{Cheap Exclusion: Deception as a Case Study, Hearings Before the Department of Justice and Federal Trade Commission on Exclusionary Conduct} (Dec. 6, 2006), available at www.ftc.gov; Maurice E. Stucke, \textit{How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?} (manuscript on file with author). Ms. Creighton directed the Bureau of Competition of the Federal Trade Commission during the George W. Bush administration, and Prof. Stucke was an enforcement official within the Antitrust Division of the Justice Department.

\textsuperscript{124} Virgin Atl. Airways, Ltd. v. British Airways, Plc, 257 F.3d 256, 266 (2d Cir. 2001). For that rule, oddly, the court cited only Adv. Health-Care Sys., Inc. v. Radford Comm. Hosp., 910 F.2d 139, 147 n.14 (4th Cir. 1990). \textit{Radford} used that language only in offhand dicta in its typical background run-down of the relevant law, and did not employ the rule against plaintiffs; indeed, the court found \textit{for} the plaintiffs as to the adequacy of their pleading of exclusionary conduct.
at Heathrow airport in London. Plaintiff alleged it did so in part by maintaining a large number of government-granted take-off and landing “slots” there, and by lobbying the British government against expanding the airport’s capacity. This, according to plaintiff, was part of a scheme of exclusionary conduct under § 2. The court seems to have swept this theory completely off the table, as a matter of law, writing that “even with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it.”

This same theme finds echoes elsewhere. The hospital staffing cases make another appearance; the *Oksanen* court held as a matter of law that not only could there be no vertical conspiracy between a hospital and its medical staff, but that the members of the medical staff themselves should be held not to have conspired horizontally. The court wrote that it should “weigh against inferring conspiracy” that “the challenged conduct . . . is consistent with legitimate activities.” The court then found the peer-review action in that case “legitimate” in this sense because it was “mandated by state law and by accrediting agencies, [and it was] . . . designed to enhance the quality of care and to provide a harmonious working environment for all the hospital’s staff.” Moreover, it moved the court that the peer-review group had acted with a “fairness [in its] procedures,” the giving of due process further supporting “legitimacy.”

Similar instincts seem to drive matters even further afield. It seems that in quite a lot of cases the courts or commentators just can’t quite imagine antitrust liability where it seems, in one way or another, that the government was the *cause* of something of which

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125 See Virgin Atl. Airways, Ltd. v. British Airways, Plc, 257 F.3d 256, 266 (2d Cir. 2001) (citing Advanced Health Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 147 n.14 (4th Cir. 1990)).
126 945 F.2d at 706.
plaintiff complains. A nice example is a pending FTC challenge in *FTC v. Ovation Pharmaceuticals, Inc.*,\(^{127}\) in which the Commission challenges what appears to have been a massive abuse of market power, involving somewhat grisly facts: defendant owns the only two FDA-approved drugs for treatment of a life-threatening heart defect in premature infants, many of whom are uninsured.\(^{128}\) In voting to issue the complaint, two Commissioners concurred to argue that the Commission should also have challenged defendant’s acquisition of the *first* of the two drugs, even though at the time it had no overlapping products. Their theory was that defendant was not reputationally constrained from exploiting the market power the drug represented, that the initial maker of it was,\(^{129}\) and that the acquisition therefore “tend[ed] to create a monopoly” within the meaning of

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\(^{128}\) Defendant Ovation is accused of acquiring the only two available drugs for a life-threatening heart defect in premature infants. It came to hold this commercially desirable position by two purchases of drug patents, a drug called Indocin from Merck and a drug called NeoProfen from Abbott Laboratories. Ovation purchased NeoProfen just before then-pending FDA approval would have made it Ovation’s only serious threat. Neither of these purchases had been subject to Hart-Scott-Rodino review. According to the FTC complaint, Ovation thereafter caused a price increase of nearly 1300%. Importantly, Ovation caused the price increase before NeoProfen had ever been marketed, and it set its initial sale price for the drug at just slightly less than the monopoly price it had been charging for some time for Indocin.

The perceived vileness of the challenged conduct has already made the case stand out in a few respects. As one FTC Commissioner wrote in voting to approve the complaint, “Ovation’s profiteering on the backs of critically ill premature babies is not only immoral, it is illegal.” Concurring Statement of Commissioner Jon Leibowitz Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), available at [http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf](http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf) [hereinafter “Leibowitz Statement”]. There has also already been direct congressional involvement. Upon complaints from a Minnesota children’s hospital concerning the price increase, it was Senator Debby Klobuchar who initially and fairly publicly prevailed on the FTC to take action, and by all accounts the Senator got unusually quick action. See Josephine Marcotty, *Alleging price-gouging, FTC sues maker of drug for preemies*, MINN. STAR TRIB., Dec. 17, 2008, at 5B.

\(^{129}\) They observed that Indocin was for many years the only FDA-approved drug for treating the condition, and yet Merck kept prices low, and so it seems almost ipso facto that Merck forebore from very substantially monopoly profits as to that particular product for reasons of its own. They argued that it must have been because Merck, unlike Ovation, maintained a large portfolio of other products more profitable than Indocin, and so for reasons of its own reputation chose not to exploit the market power it represented. See Leibowitz Statement, supra note XXX; Concurring Statement of Commissioner J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), available at [http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf](http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf)
the Clayton Act.. Even though this view appeared in non-binding opinions of a sort that ordinarily do not get that much attention, this theory was immediately attacked, and the critics tellingly urged that liability for defendant’s first acquisition should be categorically foreclosed, because the transfer of one legally acquired monopoly to another firm with no overlapping products should not, as a matter of law, violate the Clayton Act.131

Likewise, a pretty close analogy appears in Noerr-Pennington law, in a series of cases in which some private standard setting or policy advocacy body manages to get a standard adopted by a state or local entity, even where the government’s adoption is a rubber-stamp and it engages in no oversight of the SSO.132 This trend also seems intriguingly similar to an emerging rule in the common law of torts that conduct denominated “legal” under other law cannot be tortious.133

All of these cases seem prey to several criticisms, and Virgin Atlantic seems demonstrably wrong on the law. The Supreme Court has explicitly held in several different ways that a private entity’s supplication of government assistance in injuring its rivals can violate antitrust.134 More generally these judicial gestures seem like a fairly

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131 See Andrea Agathoklis, In Their Own Words: Predicting Enforcement Under Varney and Leibowitz, ANTITRUST, Summer 2009, at 5, 7 (noting this criticism).
132 See Massachusetts School of Law v. ABA, 107 F.3d 1026 (3d Cir. 1997); Sessions Tank Liners, Inc. v. Joor Mfg. Co., 17 F.3d 295 (9th Cir. 1994); Lawline, Inc. v. ABA, 956 F.2d 1378 (7th Cir. 1992); Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass’n, 813 F.2d 349 (11th Cir. 1987). See generally Christopher L. Sagers, Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction, 25 CARDOZO L. REV. 1393 (2004). One might think a good comeback to my point here is that, under Allied Tube, the Supreme Court actually mandates the result that the lower courts reach here, but that is in fact false. See Sagers, supra, at 1418-20.
134 See, e.g., California Motor Transport Co. v. Trucking Uld., 404 U.S. 508 (1972) (filing of frivolous petitions before state regulatory agency to delay competitor’s entry may violate antitrust); Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., (enforcement of fraudulently procured patent by infringement suit may violate antitrust). Admittedly, both of those cases involved government action procured through
poor approach, particularly in § 2 cases, because “[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad.”\textsuperscript{135} But those ideas have not stopped even eminent courts from wiping entire realms of obviously anticompetitive conduct off the table of liability. Moreover, there was not even an attempt to justify the rule in \textit{Virgin Atlantic} with any economic argument. More importantly, these cases too serve interests that are non-economic, however persuasive one might find their evident foundations in fairness. A genuinely economic perspective might simply have observed the quite significant potential for real economic harm in all the conduct at issue, harm that it is assertedly the purpose of the Sherman Act to constrain under the alleged theoretical unification in price theory. Given that the conduct also enjoys no constitutional protection or statutory exemption, if neoclassical economics really is the unifying theme then these could all have been fairly easy cases for liability (or at least for jury consideration).

\section*{III. New Immunity Rules Deriving From the Content of “Restraint”}

The term “restraint” as used in Sherman Act § 1 actually lacks much in the way of doctrinal definition, and probably was intended to remain flexible so as to capture the many varied forms that restraints might take. Some courts have taken it to be quite the opposite, however, and have used it as a definitional dividing line to exclude some fraudulent means, and therefore the exploitation of competitive advantages that were not “legitimate.” But consider Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, inc., 445 U.S. 97 (1980), under which antitrust liability is available even though plaintiff’s injury was a criminal penalty imposed under state statute in an action brought by a state prosecutor. There was no question in the case that the antitrust claimant had not violated the state statute under which it was prosecuted, or that the antitrust defendants had done anything improper to seek the prosecution. \textit{Cf.} Silver v. NYSE, 373 U.S. 341 (1963) (upholding liability against privately organized by heavily regulated stock exchange—and thereby indirectly against its owner-members—despite argument that it merely was engaged in federally mandated and tightly controlled self-regulation, subject to SEC review).

\textsuperscript{135} United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001).
conduct they expect not to be harmful. In other words, just as with the various rules in Part II, the courts have devised definitions of “restraint” to fashion new rules of _per se_ legality. And again in each of these cases economic theory is not the best explanation for the courts’ rules. They are better explained on a judicial instinct favoring individual liberty.

_A. Mere Language Is Never Enough_

The lower courts have been uncomfortable with theories of antitrust liability that to them seem predicated merely on acts of language or expression, and they have at times come close to suggesting that such liability would be too much at odds with individual liberty, in arguments implicitly rooted in the Speech Clause. The doctrine they have developed so far has mostly not been cast in terms of civil rights or individualism, but rather in that speech in and of itself, the mere expression of opinion or statements concerning one’s own or another’s product, cannot constitute “restraint” within the meaning of the Sherman Act.

Prominent in this line are cases once again involving standard setting groups. In both the well known _Schachar_ 136 and _Clamp-All_ 137 cases and the apparently less well known _Consolidated Metal Prods., Inc. v. American Petroleum Inst._ 138 the courts held that there can be no § 1 liability where a group, though it may consist of horizontal competitors and though it may have a “towering reputation,” 139 merely states an opinion or issues a certification decision concerning some particular person or product. This rule is not based on any particularly economic theory of the benevolence of such conduct, but rather

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137 Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988).
138 846 F.2d 284 (5th Cir. 1988).
139 Schachar, 870 F.2d at 399.
the assertion that it cannot “restrain.” Beginning Schachar with the seemingly self-evident view that “[t]here can be no restraint of trade without a restraint,” Judge Easterbrook considered a press release of the American Academy of Ophthalmology, concerning the then-new procedure of laser eye surgery. Defendant organization publicly identified the procedure as “experimental” and urged “patients, ophthalmologists and hospitals to approach [laser eye surgery] with caution until additional research is completed.” Judge Easterbrook wrote that, as a matter of law, such a statement could not violate antitrust. He indicated that the rule was required not only to preserve competition, but also to protect the liberty to choose with whom to deal and (in dicta) civil rights of expression. Clamp-All and Consolidated Metal Prods. are similar. Both cases involved SSO statements, made publicly, concerning products arguably in competition with those of SSO members, and in both cases the courts held that such conduct as a matter of law could not violate antitrust.

Again these cases seem fairly perilously at odds with some other existing law. The Supreme Court has at least thrice, and twice in opinions that were quite recent when the cases above were decided, held that similar conduct could be illegal and enjoys no

\[^{140}^{140}\text{Schachar, 870 F.2d at 397.}\]^\[^{141}\text{870 F.2d at 398.}\]^\[^{142}\text{“Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law.” 870 F.2d at 399.}\]^\[^{143}\text{As he said,}\]

\[^{[\text{a}]\text{n organization’s towering reputation does not reduce its freedom to speak out. Speech informed, hence affected, demand for radial keratotomy, but the plaintiffs had no entitlement to consumers’ favor. The Academy’s declaration affected only the demand side of the market, and then only by appealing to consumers’ (and third-party payors’) better judgment. If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.” 870 F.2d at 399-400.}\]

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immunity by virtue of its expressive or political nature. Schachar distinguished all such cases as having involved “enforcement devices,” and said that “[w]ithout [such devices] there is only uncoordinated individual action, the essence of competition.” That point is a fairly blatantly incorrect statement of law, under prior Supreme Court and Seventh Circuit authority. But in any event, these cases also ignore for essentially formalistic reasons the power that this conduct can have. The formalistic reason is that the courts equate these large organizations—which may include thousands of members, including large, for-profit corporations, and any number of members with diverse interests—with private individuals, and imagine their public statements as no different than individual speech. But some other courts themselves have recognized this power sometimes, and it is also fairly obvious on the face of it.

A similar case is the Tenth’s Circuit’s 1999 decision in Jefferson Co. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs., Inc. Defendant Moody’s, one of this country’s two

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144 The especially recent and, one would think, apt, opinion was Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). The others were Am. Soc’y Mech. Eng’rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), and Radiant Burners, Inc. v. People’s Gas, Light & Coke Co., 364 U.S. 656 (1961). Cf. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (finding that Missouri could apply its state antitrust statute against labor union picketers, despite their First Amendment defense; “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”).

145 870 F.2d at 399.

146 For a blistering and persuasive explanation why, see Mark R. Patterson, Antitrust Liability for Collective Speech: Medical Society Practice Standards, 27 Ind. L. Rev. 51, 72-74 (1993).

147 See for example Mark Patterson’s excellent discussion of Koefoot v. American Coll. of Surgeons, 10 F. Supp. 1298 (N.D. Ill. 1985). As he notes, the College there held significant sway by way of its ability to bestow reputation on members; the rule at stake in that case, which prohibited members from delegating post-operative care to non-surgeons, but the College could adduce no evidence that the rule was justified on patient-care grounds. See Patterson, supra note XXX, at 60-63. See also Kreuzer v. Am. Acad. of Periodontology, 753 F.2d 1479 (D.C. Cir. 1984).


149 175 F.3d 848 (10th Cir. 1999).
immense, duopolistic credit rating agencies (CRAs),\footnote{A CRA is a private corporation that opines on the creditworthiness of particular securities-issuing firms and on the likelihood of repayment on their debt securities. Moody’s and another U.S. corporation, Standard & Poor’s, are by far the largest CRAs in the world, and between them hold nearly all the market share for ratings of publicly issued U.S. debt securities. See Thomas J. Fitzpatrick, IV & Chris Sagers, \textit{Faith-Based Financial Regulation: A Primer on Oversight of the Credit Rating Organizations}, 61 ADMIN. L. REV. (forthcoming 2009).} issued an unsolicited warning to investors about a municipal bond issue by the plaintiff school district. Though there was evidence that Moody’s did so as a way to exclude its own competitors,\footnote{Plaintiff had used Moody’s as its bond rater in the past, chose not to use Moody’s for that particular issue, and had evidence that Moody’s issued its warning in retaliation. The warning was issued almost immediately after the bond issue was initiated, causing plaintiff to have to increase the payout on its bonds, increasing its cost of borrowing substantially.} the Court found any § 2 challenge to the rating absolutely barred under the First Amendment, on the theory that the warning was just like any other speech.\footnote{For what it may be worth, \textit{Jefferson County} was also fairly demonstrably wrong on the law. For example, in distinguishing Nat’l Soc’y Prof’l Eng’rs v. United States, 435 U.S. 679 (1978), which held a private group’s code of ethics in nearly \textit{per se} violation of § 1, \textit{Jefferson County} argued that the Court somehow explicitly held there that it was not the code of ethics itself that constituted a § 1 conspiracy, but the compliance of the member engineers with it. That is incorrect. For one thing, the individual member engineers were not even named defendants. In any event, see generally Fitzpatrick & Sagers, supra note XXX; Chris Sagers, \textit{Further Perversions in First Amendment Characterization and the Meager Dichotomy of Public and Private: The Case of the Credit Rating Agencies} (manuscript on file with author).} 

Again, what seems particularly troubling in these cases is their often fairly explicit equation of non-human juridical entities, which often enough wield a lot of influence, have at best mixed motives, and may have government-like roles in the making and applying of policy, with simple individuals just speaking their minds. Courts do not merely treat businesses and trade associations—even a large duopolist like Moody’s, a multi-national publicly traded corporation with tens of thousands of employees and revenues measured in the billions—as really just another individual person speaking his or her mind. They find it impossible that in a free society the law could be otherwise. In other words, in all of these cases the rationale is once again not fundamentally economic. It is driven by a native judicial instinct for individual liberty.
B. **Reputation Is Never Enough**

A related problem is how antitrust should deal with “power” that can be characterized as flowing simply from the defendant’s good will. Superficially this seems like a simple problem, in that a seller’s good reputation might flow only from its having innovated in product quality or excelled in service. To hold otherwise might risk holding a seller responsible in treble damages for its “skill, foresight and industry.”

But the question is why that should lead to protection of defendants through a rule of *per se* legality, as indeed it has. A nice case in point is the Ninth Circuit’s * Omega Environmental, Inc. v. Gilbarco.*\(^{153}\) The court considered a defendant, a major supplier of equipment for gas stations and the leading U.S. supplier in that field, which had set up a large number of exclusive contracts for distribution to gas station owners. The contracts were terminable on very short-term notice, and so, true to the courts’ current stance towards short-term exclusive contracting,\(^{154}\) the *Gilbarco* court was overall unimpressed. But as one particular side holding in the case, the court rejected the view of plaintiff’s expert that “no distributor would abandon the Gilbarco line for an untested product with no reputation.” The court “agree[d] with the unremarkable proposition that a competitor with a proven product and strong reputation is likely to enjoy success in the marketplace, but reject the notion that this is anticompetitive. It is the essence of competition.”\(^{155}\)

But what is so interesting is that in this case, which the court portrayed as a more or less laughable excuse for a cause of action, there was significant evidence of competitive harm. While admitting that exclusive distribution arrangements theoretically could impede entry at the supplier level, and while apparently acknowledging that there had in

\(^{153}\) *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997).

\(^{154}\) See *supra* notes XXX and accompanying text.

\(^{155}\) 127 F.3d at 1164.
fact been very little entry in defendant’s field, the court based much of its decision on the fact that one entrant had succeeded. But that entrant, to which the court referred rather glibly as just one more would-be seller in what the court seemed to see as a fairly competitive market, just happened to be the Schlumberger corporation. Schlumberger, a Paris-based multinational, is one of the largest corporations in the world. By the time of decision, it had secured at best a tiny toehold in defendant’s market, and that presumably remained fairly precarious since its presence there was both small and new. Moreover, the court accepted as essentially undisputed that the dominant U.S. manufacturer had foreclosed up to 38% of existing networks of distribution.\(^\text{156}\)

This rule of *Gilbarco* appears to remain fairly untested, at least in this explicit form, but it has been applied elsewhere in the Ninth Circuit.\(^\text{157}\)

C. *Product Design and Market Assessments of “Quality”*

Finally, one other related problem originates in a special free-market confidence most famously expressed in *Berkey Photo*.\(^\text{158}\) There the Second Circuit refused to find any liability for defendant Kodak on the basis of its introduction of a new film compatible with Kodak’s own new “Instamatic” cameras but with no other camera then available, even though in various ways the new film was said to be of disappointing quality. The court so held even though already available, widely compatible Kodak film would have worked in the new Instamatics. (This evidence might have suggested that Kodak introduced the product not for its superiority, but to erect a technological competitive

\(^{156}\) 127 F.3d at 1164.

\(^{157}\) Am. Prof. Testing Servs., Inc. v. Harcourt Brace Jovanovich Leg. & Prof. Pubs., Inc., 108 F.3d 1147, 1154 (9th Cir. 1997) (“[R]eputation alone does not constitute a sufficient entry barrier in this Circuit.”); United States v. Syufy Enterprises, 903 F.2d 659, 669 (9th Cir. 1990) (“We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition.”).

\(^{158}\) Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).
The court said that “no one can determine with any reasonable assurance whether one product is ‘superior’ to another. Preference is a matter of individual taste.”

The Fifth Circuit’s *Stearns* decision makes a second appearance in this paper. In making its case that the monopolist defendant had essentially stacked municipal bidding processes against it, plaintiff pointed out that defendant’s salespeople were directed to urge municipalities to include contract specifications favoring its product, including terms deliberately meant to introduce “complexities” relating to contractual certifications and restrictions, which defendant believed would disadvantage plaintiff. The court made a genuinely surprising move, based on the arguments underlying *Berkey Photo*: the court recharacterized this as quality competition. It noted that under most state procurement laws, the specifications stage is the point at which competition as to quality and other non-price terms as a practical effect will likely occur. Therefore, the court appeared to hold that, as a matter of law, all efforts to affect public contracting processes to exclude competitors should be understood merely as “quality” competition, and therefore as “competition on the merits.” It doesn’t seem that far a step to extend this reasoning beyond the seemingly specialized public contracts context. Consider the conduct in *Microsoft*: is there not a seeming congruity between an attempt to build restraints relating to product design into statutorily mandated contract rules (*Stearns*) and

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159 603 F.2d at 286-87
160 Again, the court assumed, for purposes of its review of the district court’s summary judgment for defendant, that defendant FMC Corporation held monopoly power sufficient for plaintiff’s monopolization claim. 170 F.3d at 522.
161 Those laws typically require that once bids have been submitted, the only criterion for choice is the lowest price among responsible bidders.
an attempt to build similar product design barriers into software code?\textsuperscript{162}

IV. HOSPITALS: THE NEW BASEBALL?

One might have thought that following cases like \textit{Jefferson Parish}\textsuperscript{163} and \textit{Patrick v. Burget}\textsuperscript{164} a lower court would be loath simply to exempt hospital staffing policies from the Sherman Act. And yet, in various ways some lower courts have done nearly that, and they may eventually go the whole way. In particular, many courts have made it difficult to challenge staff-privileges decisions and exclusive medical service contracts between hospitals and given doctors, and one court appears possibly to have made such matters \textit{per se} legal.\textsuperscript{165}

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\textsuperscript{162} In United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (en banc), the D.C. Circuit sitting en banc ruled among other things that Microsoft illegally monopolized the market for PC-compatible operating systems. One of the bases on which the court found Microsoft to have engaged in “exclusionary” conduct in protection of that monopoly was its efforts to frustrate technological innovations that might have led to substitutes for operating systems altogether. \textit{Id.} at 59-64.

\textsuperscript{163} Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (finding that a hospital’s exclusive arrangement with a firm of anesthesiologists was not illegal as a tie, but plainly indicating it could have been on a different factual showing).

\textsuperscript{164} 486 U.S. 94 (1988) (holding hospital staff peer-review decisions not immune under the state-action doctrine, notwithstanding state statutory mandate to maintain peer-review, because of the lack of “active supervision”; upholding jury damages award).

\textsuperscript{165} Incidentally, the courts and litigants are just a bit inconsistent how they characterize these cases. The cases in this class involve some individual health care provider seeking clinical privileges at a health care institution, or sometimes seeking membership in a professional society. The dispute will typically center on some decision of a privately constituted peer-review entity, which decides on some basis that the plaintiff health care provider may not have privileges or membership. Sometimes the plaintiff provider will have been accorded them in the past, but be denied them upon some alleged wrongdoing, and sometimes the provider will be denied those benefits on initial application. Ordinarily the basis of denial is plaintiff’s personal conduct or qualifications, but sometimes it is based on wholesale refusal of the institution to deal with providers like the plaintiff—e.g., an allopathic hospital might refuse to grant privileges to osteopaths.

In any case, from a legal perspective this conduct can be characterized in different ways. The peer-review decision can be characterized as a horizontal boycott of the plaintiff provider, or as a boycott having vertical elements insofar as a hospital is involved. Plaintiffs often plead both theories and the courts indulge them, though ordinarily only by explaining why on either theory plaintiff must lose. \textit{See, e.g.}, Oksanen v. Page Mem’l Hosp., 945 F.2d 696, 702 (4th Cir. 1991). And, as in \textit{Jefferson Parish}, if the denial is driven by some exclusivity arrangement between a hospital and some group or class of providers, it might also be characterized as a tying or exclusive contract arrangement. The way the arrangement is characterized obviously affects the issues that are relevant. But the courts have been appropriately flexible in allowing plaintiffs to try their luck at challenging similar arrangements in different ways. \textit{See, e.g.}, Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1411 (9th Cir. 1991) (noting that even though plaintiff’s claim was essentially identical to that in \textit{Jefferson Parish}, plaintiff was not foreclosed from challenging the conduct as a boycott rather than a tie).
\end{flushright}
Admittedly the courts must recognize a limited immunity in this area under the Health Care Quality Improvement Act, but only as to private actions for money damages and only as to a limited class of decisions concerning membership or hospital privileges. And yet, health care professionals challenging hospital staffing decisions have fared extremely poorly. That of course does not make this class of cases

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166 42 U.S.C. §§ 11101-52.

167 The Act protects “professional review bod[i]es” and their members and staff from state or federal damages actions, except for federal or state government actions and except for civil rights actions. 42 U.S.C. § 11111(a). Thus the entire range of injunctive relief is still available and money remedies are available in suits by state and federal enforcers. But even this protection is available only where the “professional review body” is properly constituted, see id. at § 11151(11), where it engages in a defined set of “professional review activit[ies]” (meaning in essence decisions about hospital privileges or membership in a bona fide professional society), id. at § 11151(10), on behalf of a hospital or on behalf of a professional medical society that hasn’t violated antitrust within the past five years, id. at § 11151(4). Finally, the review body’s decisionmaking must follow a set of specified due process-like requirements. Id. at § 11112(a). See generally Eleanor D. Kinney, Hospital Peer Review of Physicians: Does Statutory Immunity Increase Risk of Unwarranted Professional Injury, 13 MSU J. MED. & L. 57, 63-74 (2009).

The problem is that even where the Act provides no protection, the courts have been influenced by its several explicit congressional findings supporting the value of physician peer review and self-regulation. 42 U.S.C. §§ 11101. For evidence of the Act’s influence on the courts, even in cases where the Act itself does not immunize defendants, see Lie v. St. Joseph Hosp., 964 F.2d 567, 570 (6th Cir. 1992); Oksanen v. Page Mem’l Hosp., 945 F.2d 696, 704 n.2 (4th Cir. 1991).

168 See, e.g., Am. Chiropractic Ass’n v. Trigon Healthcare, Inc., 367 F.2d 212 (4th Cir. 2004) (medical doctors serving on policy-coverage advisory panel of insurance company could not conspire with insurer as to recommendation not to provide coverage for chiropractic services); Flegel v. Christian Hosp., Ne.-Nw., 4 F.3d 682 (8th Cir.1993) (osteopaths denied privileges because they lacked certification from a particular organization); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537 (2d Cir.1993) (radiologists challenging exclusive contract); Lie v. St. Joseph Hosp., 964 F.2d 567 (6th Cir.1992) (physician's surgical privileges were suspended); Tarabishi v. McAlester Reg’l Hosp., 951 F.2d 1558 (10th Cir.1991) (physician opened up a treatment center and hospital greatly reduced his privileges); Oksanen, 945 F.2d at 696 (physician suspended, put on probation and then terminated); Bhan v. N.M.E. Hosp., 929 F.2d 1404 (9th Cir.1991) (anesthetist was excluded by policy of allowing only physicians to perform anesthesia services); Todorov v. D.C.H. Healthcare Auth., 921 F.2d 1438 (11th Cir.1991) (physician denied radiology privileges); Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484 (9th Cir.1991) (radiologists challenging exclusive contract); Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605 (6th Cir.1990) (midwives and obstetrician allege they were prevented from operating a maternity practice or offering midwifery services at hospitals); Beard v. Parkview Hosp., 912 F.2d 138 (6th Cir.1990) (radiologist challenging exclusive contract); Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119 (7th Cir.1986) (anesthesiologist's privileges terminated); Goss v. Mem. Hosp. Sys., 789 F.2d 355 (5th Cir.1986) (physician's privileges terminated); Konik v. Champlain Valley Physicians Hosp., 733 F.2d 1007 (2d Cir.1984) (anesthesiologist challenging contract); Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr., 684 F.2d 1346 (7th Cir.1982) (ruling only on preliminary injunction for anesthesiologist challenging denial of privileges, but casting doubt on her likelihood of success on the merits).

But see Hahn v. Or. Phys. Serv., 868 F.2d 1022 (9th Cir. 1988) (allowing trial on price-fixing and boycott claims where PPO organized by physicians and involving roughly 90% of all MDs and osteopaths in Oregon as members excluded podiatrists as members); Oltz v. St Peter’s Community Hosp., 861 F.2d 1440 (9th Cir. 1988) (upholding jury verdict for plaintiff nurse-anesthetist on exclusive contract theory).
especially different from most other antitrust causes of action, though for what it is worth there is some reason to believe that hospital staffing decisions are pretty often exclusionary by design and not based on quality of care concerns.\textsuperscript{169}

But what is more to the point here is that on top of the almost universal failure of plaintiffs in these cases, a few courts have come close to suggesting that hospital staffing decisions are \textit{per se} legal. \textit{Oksanen} and \textit{Todorov}, for example, employed single-entity or unilateral action theories to reach more or less this result.\textsuperscript{170} \textit{Todorov} also expressed the slightly alarming view that a doctor applicant for hospital privileges lacks standing to challenge a denial on antitrust grounds.\textsuperscript{171} One must wonder just exactly who else would vindicate that person’s injury if there is such an injury, and if no such plaintiff exists then as a practical matter this decision on standing also amounts to a rule of \textit{per se} legality. These and other courts have also offered some strong general dicta,\textsuperscript{172} and the courts have gotten in the habit in these cases of rehearsing lists of prior decisions against plaintiffs on the same facts, giving the impression that hospital staffing decisions are not subject to challenge.\textsuperscript{173}

The trend may have come to something of a head in 2007, when an eminent trial judge, sitting by designation in the Sixth Circuit’s unpublished \textit{Nilavar v. Mercy Health}

\textsuperscript{169} See Kinney, \textit{supra} note XXX (recounting anecdotal evidence).
\textsuperscript{170} See \textit{supra} notes XXX and accompanying text.
\textsuperscript{171} 921 F.2d at 1453-54.
\textsuperscript{172} \textit{See Oksanen}, 945 F.2d at 708 ("If the law were otherwise, many a physician’s workplace grievance with a hospital would be elevated to the status of an antitrust action."). \textit{See also}, e.g., Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 544, 545 (2d Cir. 1993) (noting that an “ordinary contract between a buyer and seller of medical services at different levels in the market structure . . . poses few antitrust problems” and implying in dicta that if vertical exclusive dealing arrangements between doctors and health care providers might have to be held judicially exempt from antitrust, because otherwise HMOs might be \textit{per se} illegal).
\textsuperscript{173} \textit{See}, e.g., \textit{Dos Santos}, 684 F.2d at 1353-54.
System-Western Ohio,\textsuperscript{174} appears to have written that exclusive hospital staffing decisions are either presumptively or \textit{per se} legal, at least when challenged by doctor competitors. Granted, the court duly considered various merits-related issues raised by plaintiff doctor’s conspiracy claim. But as one basis for rejecting it the court seemed fairly openly to imply that the courts no longer entertain such claims, regardless of the facts. The court wrote that:

it cannot be ignored that this case involves a staffing decision by [a hospital] regarding the provider of radiology services. Extensive circuit precedent, including our own, . . . has upheld hospital-based exclusive provider agreements as not violative of the antitrust laws. Although the reasons vary for the decisions, they offer support for the finding that a hospital’s decision regarding staffing, including privileges, is not anticompetitive.\textsuperscript{175}

**CONCLUSION**

\textit{A propos} of Part IV, this concluding section would ordinarily be the place in a law journal article at which to prescribe doctrinal medicine. I’m afraid all I have is something less enjoyable to swallow.

On the one hand, it might be wise for the courts simply to adopt a rule, like the rule of constitutional avoidance in statutory construction, under which they will find some basis for decision in antitrust cases other than a rule of \textit{per se} legality unless no other reasonable result is available. Several of the cases discussed here prove how true was Justice Marshall’s advice that, sometimes, “\textit{[e]asy cases . . . produce bad law . . . .}”\textsuperscript{176}

Consider \textit{Jack Russell Terrier} network, in which the Ninth Circuit held that non-profit organizations cannot conspire with umbrella groups with which they affiliate. Surely the case was not a good one for antitrust liability, because the choice of breeding strategy

\textsuperscript{174} 2007 WL 2264439, 2007-2 Trade Cas. ¶ 75,897 (6th Cir. 2007) (Avern Cohn, J.).
\textsuperscript{175} Id. at **9.
best to preserve a dog’s desirable traits seems not especially well suited for the antitrust tribunal. But, since a case so poorly suited for liability on the merits could presumably have been handled easily on ancillarity grounds or for lack of “trade,” it would have been better not to use it glibly to toss off another very broad single-entity ruling.

Also, there is an important value in debunking the argument that antitrust policy has been “scientific” or apolitical. The persistent belief that there is some broad and unifying consensus among economists, which is based on extensive empirical evidence—when in fact most issues relevant to antitrust policy remain hotly contested and empirically controversial—is dangerous. Most federal judges are not economists and are not well positioned to independently assess the degree of empirical support or academic consensus for economic issues before them. Their belief that these many questions are well answered therefore has led to a sense of inevitability in the power of markets, and has left them as their main tool in decision making that strong heuristic presumption that most private antitrust plaintiffs ought to lose. In other words, to have succeeded in arguing that antitrust policy is not political is to have made a certain set of inherently political arguments more powerful than they otherwise would be.

But on the other hand, I think this study demonstrates not just a flaw in some current judicial approach or even something to be regretted in the current political balance of the federal judiciary. Rather, I see these developments as demonstrating a fairly serious failing in the law of antitrust itself, or at least in the current position of the political left with respect to it. Fundamentally the left has never been particularly concerned with the one normative criterion currently permitted in antitrust debate: static deadweight loss, or,

\[178\] The Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005). This case is discussed in more detail supra at notes XXX and accompanying text.
somewhat more broadly, allocational efficiency generally. Rather, the left has predominantly been concerned, since the founding of the union, with the problem of private power. The predicament, though, at least in antitrust, is that there is currently no means by which to render that animus a theoretically robust explanation for antitrust rules, and therefore there is no very convincing basis at the moment to render it intellectually respectable (given current mainstream mores). This shows in the fact that even the set of rules discussed in this paper are fairly difficult to counteract, even though in many cases they rest on factual assumptions that are palpably absurd, and are not especially well unified theoretically. The current predicament of the left in antitrust demonstrates that old saying from Capitol Hill: you can’t beat something with nothing.