The Incredible Shrinking Antitrust Law and the Antitrust Gap

C. Paul Rogers III.
Southern Methodist University, Dedman School of Law

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I. INTRODUCTION

Substantive antitrust law has dramatically shrunk. The shrinkage, which began in the 1970s with the transition from the Warren Court to the Burger and then Rehnquist Courts, has accelerated in the last decade. Much of the shrinkage has to do with the expansion of the rule of reason and its displacement of per se rules.\(^1\) The Supreme Court has gone so far as to state that it “presumptively” applies the rule of reason while per se illegality is limited to a “narrow category of activity.”\(^2\)

It is axiomatic that the rule of reason has an inverse effect on the breadth of Section 1 of the Sherman Act (Section 1).\(^3\) Rule of reason cases are far more difficult to win than are per se cases and are thus much less frequently even initiated.\(^4\) Instances of actual antitrust liability are significantly reduced even among cases that are litigated.\(^5\) Thus, the broader the rule of reason, the more limited is the reach of Section 1. The result is fewer wins for private plaintiffs, who often cannot prove the

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\(^1\) See David L. Meyers, We Should Not Let the Ongoing Rationalization of Antitrust Lead to the Marginalization of Antitrust, 15 GEO. MASON L. REV. 1175, 1179–81 (2008).

\(^2\) See Texaco Inc. v. Dagher, 547 U.S. 1, 5, 8 (2006). This is a far cry from the Supreme Court’s position forty years ago. For example, in United States v. Topco Associates, Inc., 405 U.S. 596, 609–10 (1972) the Court described how it favored per se rules because of their predictability and the judiciary’s “limited utility in examining difficult economic problems.” The Court went on to opine that Congress could always strike down per se rules and “leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.” Id. at 609 n.10.


\(^4\) See, e.g., Texaco, Inc., 547 U.S. 1 (2006); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998). The government enforcement agencies never pursue rule of reason cases and many private suits are abandoned once a court rules that the underlying offense is subject to the rule of reason. See, e.g., Texaco, Inc., 547 U.S. at 4.

\(^5\) See Stucke, supra note 3, at 1423–24.
market effect required by the rule of reason. In addition, the Supreme Court’s Twombly and Iqbal decisions have wrought more exacting pleading requirements to state a viable Sherman Act claim.

Section 2 of the Sherman Act (Section 2) has seemingly followed the same path, with the Supreme Court limiting, or perhaps simply refusing to expand, what constitutes exclusionary conduct by a monopolist. In the last decade, the Court has rejected Section 2 claims based on a dominant company’s refusal to cooperate with a competitor, as well as so-called predatory bidding and price squeezes.

Thus, it is apparent that substantive antitrust law, under both Sections 1 and 2, is indeed shrinking. Of course, all of this is part and parcel of a seemingly ever-changing antitrust paradigm. In the last fifty years, we have seen a Supreme Court shift from a scenario where plaintiffs always won, to a scenario where they rarely do. We have gone from an unworkable, multi-purposed antitrust law, which sometimes (but who knew when) protected small business, to an efficiency and consumer welfare model, to recognition that sometimes efficiency and consumer welfare are not simpatico.

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6 Id. at 1423–26.
9 Twombly, 550 U.S. at 570; Iqbal, 556 U.S. at 684
14 See United States v. Von’s Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins.”).
15 See, e.g., Ellen Meriwether, Putting the “Squeeze” on Refusal to Deal Cases: Lessons from Trinko and linkLine, ANTITRUST, Spring 2010, at 65 (“The U.S. Supreme Court has issued a number of significant antitrust decisions since 2004, in each case ruling in favor of the defendants, and in each case making it more difficult for plaintiffs to commence or maintain actions arising under the Sherman Act.”).
But what impact has this recalibration of antitrust law had on the antitrust gap, that divide between Sections 1 and 2 first recognized in the 1919 *United States v. Colgate & Co.* decision and reaffirmed and more elaborately described by the Supreme Court in its 1984 *Copperweld Corp. v. Independence Tube Corp.* decision? In the first twenty-five or so years after *Copperweld*, many believed the case to be a seminal one, not because of its dismantling of the so-called intra-enterprise or "bathtub" conspiracy doctrine, but because of its distinction of Sections 1 and 2 of the Sherman Act. The *Copperweld* Court's rearticulation of the antitrust gap nicely illustrated the point that the antitrust laws seek to protect competition, not competitors, since it posits that unilateral conduct by non-monopolists cannot violate either section of the Sherman Act. This undeterred middle is where firms compete, unfettered by antitrust concerns.

Stated somewhat differently, the gap signifies that the Sherman Act does not reach "unfair" competition unilaterally engaged in by non-monopolists, leaving that type of conduct for recourse under state tort law or perhaps Section 43(a) of the Lanham Act. Thus, if one understands the gap, one has a good grasp of the essential structure of the antitrust laws.

In an insightful article published in 2000, however, Professor Andrew Gavil argued that the importance of the antitrust gap was diminishing because, in oversimplified terms, antitrust decisions had increased Section 1's proof standards while relaxing the proof requirements of Section 2. Professor Gavil's arguments cast doubt on the ability of the gap to vividly demonstrate the intent of the Sherman Act to outlaw only monopolistic conduct or collective action which restrains trade but to leave alone
unilateral action by non-monopolists, even though some bad market behavior may go unfettered.\textsuperscript{25}

But the question remains of what impact has the continued shrinkage of antitrust law in the new millennium, substantively and procedurally, had on the gap? For example, what is the impact on the gap of the recent \textit{American Needle v. National Football League} decision in which the Supreme Court relied heavily on \textit{Copperweld} in holding that the thirty-two National Football League (NFL) franchises were not a single entity when exclusively licensing their various logos?\textsuperscript{26} Also, what is the impact on the gap of the expansion of the rule of reason, increasing procedural hurdles, and the restriction of what can constitute exclusionary conduct in an action under Section 2?\textsuperscript{27}

In sum, it would seem to be an appropriate time to consider the impact of modern antitrust law on the gap. Is it shrinking, shifting, or is there now perhaps an inverse gap whereby conduct now insufficient to prove a Section 1 violation might establish a Section 2 offense?\textsuperscript{27} The \textit{Copperweld} Court itself recognized that "the size of any such gap is open to serious question."\textsuperscript{28} I thus hope in this Article to shed some light on the impact of antitrust law's continuing shrinkage on the antitrust gap and to suggest what that impact signifies for the future of antitrust.

\textbf{II. \textit{Copperweld}, \textit{American Needle}, and the Gap}

\textit{Copperweld} involved the attempts of a parent company, the Copperweld Corporation, and its wholly owned subsidiary, Regal Tube Company, to thwart the entry of the Independence Tube Corporation, a potential competitor of Regal, into the structural steel tubing market.\textsuperscript{29} Independence's founder was a former president of Regal who was not covered by a non-compete clause when Copperweld purchased Regal from

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.} at 87.
  \item \textsuperscript{26} \textit{Am. Needle, Inc. v. NFL}, 560 U.S. 183, 130 S. Ct. 2201, 2215 (2010).
  \item \textsuperscript{27} If, for example, proof of concerted action under Section 1 has continued to become more difficult while proof standards for exclusionary conduct under Section 2 have continued to become less exacting, we could conceivably have circumstances in which conduct insufficient to violate Section 1 may nonetheless constitute exclusionary conduct under Section 2. \textit{See} Gavil, \textit{supra} note 24, at 88.
  \item \textsuperscript{28} \textit{Copperweld}, 467 U.S. at 776–77.
  \item \textsuperscript{29} \textit{Id.} at 756–77. The Yoder Company was also sued and alleged to be part of the conspiracy. \textit{Id.} at 757. It had entered into an agreement to build a mill for Independence but breached the contract in the face of an intimidating letter from Copperweld. \textit{Id.} The jury, however, found that Yoder was not part of the conspiracy but liable only for breach of contract. \textit{Id.} at 757–58. Thus, the jury verdict against Copperweld and Regal for $2,499,009 before trebling rested solely on the actions of Copperweld and Regal, raising the validity of the intra-enterprise conspiracy doctrine on appeal. \textit{See} \textit{id.}.
\end{itemize}
its former parent company, Lear Siegler, Inc. The alleged conspiracy took the form of a variety of actions by Copperweld and Regal designed to hinder or stop Independence’s entry into the market, including threatened legal action against banks and other entities considering doing business with Independence. As a result of the defendants’ actions, Independence’s entry into the market was delayed by nine months.

The Supreme Court considered only the “narrow issue . . . whether a parent and its wholly owned subsidiary are capable of conspiring in violation of [Section] 1 of the Sherman Act.” In holding that they could not since “[a] parent and its wholly owned subsidiary have a complete unity of interest” and common objective, the Court relied on Congress’s “purposeful choice to accord different treatment to unilateral and concerted conduct” which created an acknowledged gap in the reach of the Sherman Act. The Court concluded that to find a conspiracy on the facts before it would require it to “second guess the judgment of Congress to limit [Section] 1 to concerted conduct.” By striking the intra-enterprise doctrine, the Court believed it was simply eliminating “private state tort suits masquerading as antitrust actions.”

In identifying the antitrust gap by name for the first time, the Court noted that Congress had left it “for eminently sound reasons” since “[s]ubjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.” Further, if unreasonable restraints of trade were unlawful absent collective action, “[Section] 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of [Section] 2.”

The Copperweld Court noted that under the Sherman Act concerted conduct is treated more strictly than unilateral conduct because it

30 Id. at 756.
31 Id. at 756–57.
32 Id. at 757.
33 Id. at 767.
34 Id. at 771.
35 Id. at 775.
36 Id. at 776.
37 Id. at 777.
38 Id. at 775.
39 Id. at 775. Here, the Court referenced United States v. Colgate & Co., 250 U.S. 300 (1919) as “at least” the starting point of its recognition “that [Section] 1 is limited to concerted conduct[.]” Copperweld, 467 U.S. at 775–76.
“inherently is fraught with anticompetitive risk.”40 According to the Court, collusion deprives the marketplace and consumers of the competition that flows from rival and independent decision makers.41 In contrast, the Court pointed out that an overzealous enforcement of single-firm conduct would increase the risk that robust competition by an aggressive competitor would be deemed unreasonable.42

Thus, the Copperweld gap seems predicated on (1) an assumption that Section 1 should be enforced more aggressively than Section 2 and (2) single-firm conduct, absent monopoly or near monopoly power, should be beyond the antitrust pale. The rationale for the gap is that concerted action is more likely to be anticompetitive than single-firm conduct and that to target single-firm conduct, at least by non-monopolists, could have the inverse effect of curtailing competitive zeal.43

In American Needle,44 the Supreme Court recently relied heavily on Copperweld in holding that the NFL was not a single entity for purposes of entering into exclusive licensing agreements for the trademarked apparel of its thirty-two franchises.45 The league, through its NFL Properties (NFLP) entity, had negotiated an exclusive licensing agreement with Reebok to supply trademarked headwear for all thirty-two teams.46 The plaintiff, a competing headwear manufacturer, sued, asserting that the exclusive license was in fact a concerted refusal to deal in violation of Section 1 of the Sherman Act.47 Interestingly, American Needle was the obverse factually of Copperweld since it presented a group of separately owned entities operating in an environment controlled by a central organization, the league.48 The Court followed Copperweld’s substance over form approach to find that the refusal of the NFL to license the intellectual property of individual NFL teams should be treated as an agreement among the teams because it “‘depriv[es] the marketplace of independent centers of decisionmaking,’ and therefore of actual or potential competition.”49

40 Id. at 768–69.
41 Id.
42 Id. at 768. The Court was further concerned with the difficulty of always “distinguish[ing] robust competition from conduct with long-run anticompetitive effects[.]” Id. at 767–68.
43 See id. at 767–69.
45 Id. at 2211–12, 2217.
46 Id. at 2207.
47 Id.
49 Am. Needle, 130 S. Ct. at 2213 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 568 (1984)).
While the American Needle Court did not directly refer to the antitrust gap, it did reaffirm Copperweld's dual tenets that concerted conduct is more strictly scrutinized than independent action because of the heightened anticompetitive risk of the former and the threat of deterring procompetitive conduct from the latter. As a result, the Court noted, a Section 1 violation may occur even though the conduct does not "threaten monopolization." The Court then observed that, "because concerted action is discrete and distinct," the vast amount of non-collusive business conduct is left untouched.

Thus, as recently as the 2010 American Needle decision, the Supreme Court has pointed to the reasoning of Copperweld to reaffirm the relationship of Sections 1 and 2 of the Sherman Act and thus, implicitly at least, recognized the continued existence of the gap. But the fact that the gap continues to exist, at least theoretically, is only the beginning of the inquiry about its vitality, size, and breadth. What is seemingly a straightforward, rather simple proposition is in fact complicated by a number of factors including: (1) the impact of the growth of the rule of reason in Section 1 cases and the requirement of proof of market power; (2) the seeming contraction of what constitutes exclusionary conduct by an alleged monopolist for purposes of establishing a Section 2 offense; and (3) the impact of heightened pleading requirements following the Twombly decision.

III. THE RULE OF REASON

Of course, generally speaking, resort to the rule of reason favors the defendant, particularly where proof of market power is required. Thus, as Professor Gavil noted, an expanding rule of reason accompanied by the proof of market power arguably tends to blur the line between Section 1 and

752, 769 (1984)).
50 Id. at 2209.
51 Id. (quoting Copperweld at 467 U.S. at 768).
52 Id.
53 See Gavil, supra note 24, at 98; see also Am. Needle, 130 S. Ct. at 2213, 2216.
54 See Copperweld at 467 U.S. at 775–76.
55 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). To that list, one might add the Federal Trade Commission's prior attempts to use § 5 of the Federal Trade Commission Act to attack unilateral actions by non-monopolists, see for example E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984), but there has been little enforcement activity along these lines in recent years. See also Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980).
56 A notable exception is NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984), where the Court struck down the National Collegiate Athletic Association's [NCAA] television plan for the telecast of collegiate football games as unreasonable under the rule of reason. Id. at 120.
Section 2 and diminish the gap. That is, if both Sections 1 and 2 require proof of market power, the two statutes may not be all that distinct after all. Further, Section 2 may be, in some instances, a more powerful antitrust enforcement tool than Section 1, which requires proof of collective action in addition to market power.

As it turns out, both Copperweld and American Needle were rule of reason cases, albeit for different reasons. In American Needle, the Court followed the reasoning in its National Collegiate Athletic Ass'n (NCAA) v. Board of Regents decision and held that the interests of NFL teams in the success of the league and the need to cooperate in scheduling games "provides a perfectly sensible justification for making a host of collective decisions." Indeed, the Court appeared to have provided heavy-handed guidance about the likely outcome of the case under the rule of reason on remand when it noted that "[f]ootball teams that need to cooperate are not trapped by antitrust law" and concluded by stating that "[i]n such instances, the agreement is likely to survive the Rule of Reason." Thus, the American Needle Court's resort to the rule of reason may have been outcome determinative. Under the per se rule, the NFLP's exclusive licensing of trademarked headwear to one vendor, Reebok, would seem to be unlawful price fixing, since it effectively eliminates all price competition among the thirty-two teams who formed the NFLP. If it was

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58 Of course, one could profitably argue that the converse is more often true since Section 2 requires proof of exclusionary or "bad" conduct, which in recent years appears to be an increasingly difficult hurdle to surmount. See infra text accompanying notes 126–35.
59 NCAA, 468 U.S. at 117.
60 Am. Needle, Inc., v. NFL, 130 S. Ct. 2201, 2216 (2010). It relied on both Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting), stating "'[t]he special characteristics of this industry may provide a justification' for many kinds of agreements[.]" and NCAA, 468 U.S. at 101, stating "[w]hen 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason." Am. Needle, 130 S. Ct. at 2216.
61 Id.
62 Id. The "instances" referred to were from the NCAA decision justifying the rule of reason because "'a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved.'" Id. (quoting NCAA, 468 U.S. at 101).
63 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of commodity . . . is illegal per se."). See also Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (holding that a market division between rivals with resulting price increase was per se price fixing); NCAA, 468 U.S. at 99–100 (suggesting that the NCAA's television plan which limited output and eliminated price competition among member schools would ordinarily be per se illegal); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (per curiam) (holding that an agreement
so characterized, no assessment of the relevant market and proof of market power would be necessary.  

Application of the rule of reason, however, provides a different kettle of fish. In order to prevail, the plaintiff must prove an adverse market impact and thus must provide proof that the defendant has some indicia of market power. To show market power, a plaintiff must typically define the relevant market narrowly so as to establish that the defendant has a sizeable market share, which can translate into market power. For example, in *International Boxing Club v. United States*, the Supreme Court held that championship boxing matches were uniquely attractive to fans and thus constituted a market separate and distinct from non-championship fights. In the *NCAA* case, the Supreme Court affirmed the district court's finding that college football broadcasts were a market separate and apart from broadcasts of other sporting or entertainment events and that, as a result, the NCAA possessed market power with respect to those broadcasts.

None of the courts in the *American Needle* case considered the relevant market issue, given the focus of the litigation on the single entity defense. Presumably, determination of the issue would involve whether NFL teams' trademarked apparel competed with the trademarked apparel of other professional sports franchises as well as colleges with so-called "big-time" athletics programs. Although demand for trademarked apparel is no doubt somewhat localized, many highly successful teams, such as the New England Patriots, the New York Yankees, the Los Angeles Lakers, and the University of Texas Longhorns appear to have national followings, at least judged by the appearance of their licensed apparel throughout the country.

among beer wholesalers to eliminate short-term credit sales to retailers was illegal price fixing per se); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (holding that an agreement not to compete in terms of price or output is illegal without an "elaborate industry analysis"). It might also be subject to attack as a per se illegal boycott under the reasoning of cases such as *FTC v. Super. Ct. Trial Lawyers, Ass'n*, 493 U.S. 411, 435-36 (1990) (agreement of court-appointed criminal lawyers to refuse court appointments characterized as per se illegal boycott and per se illegal price fixing), and *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 552-53 (1978) (refusal of malpractice insurance companies to issue policies on an "occurrence" rather than "claims made" basis held to be a boycott even though conspirators' competitors were not the target of the conspiracy).

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64 See, e.g., *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (holding that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an agreement not to compete in terms of price or output).
65 See *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 743 (7th Cir. 2008).
66 *Id.* at 252.
67 *NCAA*, 468 U.S. at 111-12.
69 See, e.g., Corporate Information: About Us, LIDS, http://www.lids.com/HelpDesk/Corporate/About
It is, of course, not my purpose to hazard a guess as to the relevant market, but rather to explore the impact of the likely options. If, for example, the relevant market is limited to the licensed apparel of NFL franchises, the exclusive licensing agreement would likely be deemed to be unreasonable. Consumer choice would be limited to one brand in the relevant market and the plaintiff could probably establish a resulting reduction of output and increase in price.

If, on the other hand, the NFLP is found to compete with other professional sports leagues and/or colleges, its market share would likely reveal something less than monopoly power. If, however, professional football is found to indeed be the most popular sport in the United States, as is reputed, the market foreclosure of the exclusive license could still be substantial. Further, the Court in the NCAA case, while finding market power existed, asserted that its proof was not necessary where collective action restricted price or output.

Although the Supreme Court has long applied the rule of reason to exclusive dealing arrangements because of the long-term efficiencies they are said to engender, those cases typically involve bilateral contractual arrangements, not a collective decision by competitors to deal with one supplier. In any event, if the Copperweld admonition about the

(last visited Sept. 15, 2013). One can find "lid" or cap stores in most malls and major airports in the country, offering trademarked caps of professional teams of all sports and many "major" colleges side by side. See, e.g., id.


72 See HDC Med., Inc. v. MinnTech Corp., 474 F.3d 543, 547 (8th Cir. 2007) ("To establish that a defendant possesses the requisite market power required for monopolization liability, a plaintiff must establish that the defendant has a dominant market share in a well-defined relevant market.").

73 Major competitors would probably be Major League Baseball, the National Basketball Association, major college football and basketball, and perhaps NASCAR. Michael McCarthy, Look Out, Baseball. College Football is Hot on Your Cleats, ADVERTISING AGE (Jan. 7, 2013), http://adage.com/article/news/baseball-college-football-hot-cleats/239014/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+AdvertisingAge+LatestNews+%28Advertising+Age+-+Latest+News%29. The National Hockey League might follow along with Major League Soccer and other professional individual sports such as tennis and golf. Id.

74 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109–10 (1984). Of course, the exclusive licensing in American Needle may not have contained any express output limitations and may have reduced costs. See Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010). But more licensed vendors would presumably produce more trademarked hats which would have the tendency to lower prices. See FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 460–61 (1986) (holding that "proof of actual detrimental effects such as" loss of market power can eliminate need to prove market power); see also Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 (3d Cir. 1999); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); United States v. Brown Univ., 5 F.3d 658, 668–69 (3d Cir. 1993).


76 Hyde, 466 U.S. at 5–7; Brown Shoe Co., Inc., 384 U.S. at 317–19; Tampa Elec. Co., 365 U.S. at
anticompetitive dangers of concerted action remains valid, an agreement of rivals, even among those who must cooperate in some respects, which forecloses a substantial hunk of a market through a collective exclusive licensing agreement must be highly suspect.\(^7\) If it is not, then the antitrust gap is surely shrinking or, at a minimum, becoming more blurred as the demarcation between what constitutes a restraint of trade under Section I becomes more uncertain.

_Copperweld_ is also, at least implicitly, a rule of reason case. In addition to the intra-enterprise conspiracy question, the petitioners’ writ of certiorari had asked the Court to consider whether injury to competition could be established in a rule of reason case without a relevant market analysis and proof of sufficient market power to adversely affect that market.\(^8\) Although the Court denied certiorari on the issue, it nonetheless managed to briefly but meaningfully weigh in on the question.\(^9\) After pointing out that the per se rule applies to certain types of concerted action, the Court noted:

> Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm’s efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination’s actual effect.\(^8\)

Although one could assert that _Copperweld’s_ market power language should be limited to the types of combinations described, it does go beyond the Court’s prior articulations of rule of reason content.\(^8\) Thus, ironically, the decision that acknowledged the antitrust gap and its importance is also responsible for diminishing its size. While the _Copperweld_ Court “note[d] that the size of any such gap is open to serious question,”\(^8\) its requirement of market power for rule of reason cases arising under Section 1 is not far from Section 2’s requirement of monopoly or near monopoly power.\(^8\)

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78 Petition for Writ of Certiorari at 1–2, _Copperweld_, 467 U.S. 752 (1984) (No. 82-1260). Petitioners claimed that it was undisputed that the affected market was highly competitive and argued that the lower courts had found a violation without duly considering market factors. _Id_. at 40–41.
79 _Copperweld_, 467 U.S. at 768–69.
80 _Id_. at 768 (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918)).
82 _Copperweld_, 462 U.S. at 776–77.
83 See _id_. at 767–68.
The continued contraction of the per se rule and expansion of the rule of reason in the last decade would seem to have further minimized the gap. For example, after *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* all vertical price fixing and resale price maintenance are subject to the rule of reason. In *Texaco Inc. v. Dagher*, the Supreme Court rejected per se characterization of a joint venture’s setting of prices. The Court has also resisted employment of the so-called “quick look” rule of reason to strike down certain advertising restrictions of a professional dentist association, preferring a full-blown rule of reason inquiry. Further, some per se offenses appear to require proof of market power or significant market foreclosure. For example, the Supreme Court has held that market power is a trigger for the per se rule in both group boycott and tying cases.

Additionally, the *Twombly* decision raised the bar for a plaintiff to satisfactorily plead the “contract, combination, or conspiracy” requirement of a Section 1 offense, jettisoning the “no set of facts” standard of *Conley v. Gibson*. In doing so, the *Twombly* Court ruled that the plaintiff must, to

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85 *Id.* at 882. See also *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (employing the rule of reason for vertical maximum price fixing).
86 *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006).
91 *Id.* at 553, 561–63. See also *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). *Conley* had held that “the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.*
state a valid claim and withstand a motion to dismiss, plead facts that show more than a mere possibility of concerted action but bridge the gap to show the "plausibility" of the alleged conspiracy. 92 Stated somewhat differently, the Court held that, although "detailed factual allegations" are not required, the complaint must include enough factual information "to raise a right to relief above the speculative level."93

Of course, the proof required for a conspiracy for a Section 1 offense has long been a stumbling block to antitrust plaintiffs. 94 Plaintiffs often have no direct proof of a conspiracy and must prove concerted action by inferential or circumstantial evidence.95 Historically, the courts have utilized summary judgments, after discovery has taken place, to throw out cases where the evidence of an inferential conspiracy is insufficient to raise a "genuine issue of fact" to proceed to trial.96 While that hurdle remains in

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92 Twombly, 550 U.S. at 555–57.
93 Id. at 555. Subsequently, in Ashcroft v. Iqbal, the Court elaborated in a discrimination case pled under the First and Fifth Amendments by holding that mere abstract recitals of the elements of a cause of action supported by conclusory statements are insufficient to state a valid cause of action. 556 U.S. 662, 678–79 (2009).
95 See United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); Am. Tobacco Co. v. United States, 328 U.S. 781, 808–10 (1946); United States v. Masonite Corp., 316 U.S. 265, 280–83 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221–22 (1939); E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 612 (1914); Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 934–35 (7th Cir. 2000).
place for antitrust plaintiffs seeking to prove a conspiracy by circumstantial evidence, *Twombly* raises the bar at the pleading stage and gets rid of cases with a lack of factual "plausibility" before discovery takes place.  

As a result, the last decade has certainly continued the reduction of the reach of Section 1 against concerted action. The classic per se rule, which does not require proof of market power, is now limited to horizontal price fixing, bid rigging, and market division conspiracies. Thus, *Copperweld*’s admonition that concerted action "inherently is fraught with anticompetitive risk" can be called into question given the contraction of Section 1. It may be, in the new age of antitrust, that the underpinnings as well as the size and existence of the *Copperweld* gap should be reconsidered, at least from the collective action side.

**IV. EXCLUSIONARY CONDUCT UNDER SECTION 2 SINCE 2000**

Section 2 litigation and scholarship have both been vigorous in the last decade as the debate about what constitutes or should constitute exclusionary conduct has intensified. A number of significant

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101 *Copperweld* Corp. v. Independence Tube Corp., 467 U.S. 752, 768–69 (1984). Of course, one can fruitfully argue that the expansion of the rule of reason is a necessary scaling back of Section 1 to insure that only concerted action, which is at its core anticompetitive, comes under scrutiny. See id.

monopolization cases were decided, three by the Supreme Court and the United States v. Microsoft Corp. decision by the United States Court of Appeals for the D.C. Circuit for starters. In addition, the Department of Justice has recently brought a Section 2 case for the first time since suing Microsoft in 1999.

In his 2000 article, Professor Gavil asserted that the Supreme Court had relaxed Section 2’s proof requirements and had become more likely to deem a monopolist’s conduct exclusionary. Since Section 1’s proof standards were increasing and Section 2’s decreasing, Professor Gavil argued that Copperweld’s theorized gap was vanishing as the Supreme Court increasingly merged the concepts of market power and monopoly power.

While the Supreme Court had pretty much put the kibosh on predatory pricing as a form of exclusionary conduct by the year 2000, two other decisions had seemingly restricted what a monopolist could lawfully do. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., the Court had held that a monopolist had a duty to continue to cooperate with a rival where the monopolist had no legitimate business justifications for discontinuing its collaborative arrangement and where consumers were disadvantaged by the cessation. Subsequently, in Eastman Kodak Co. v. Image Technical


Gavil, supra note 24, at 88.

Id. at 88–89.


Id. at 600–11.
Services, Inc.,\textsuperscript{112} the Court ruled that a company who seeks to protect its monopolies in so-called aftermarket repair and service markets through contractual restrictions with its customers may have engaged in exclusionary behavior if it can proffer no legitimate business justifications.\textsuperscript{113}

Both \textit{Aspen Skiing} and Kodak arguably stand for the proposition that a monopolist's refusal to deal with rivals is okay only if valid business reasons exist for the refusal.\textsuperscript{114} If that is what the two cases stand for, exclusionary conduct standards might seem to be heading back towards the \textit{United States v. Aluminum Co. of America (Alcoa)} standard where monopolists must compete with one hand tied behind their back.\textsuperscript{115} Lower courts, however, were quick to distinguish and limit the reach of both \textit{Aspen Skiing}\textsuperscript{116} and Kodak.\textsuperscript{117}

With those two cases as a backdrop, Supreme Court jurisprudence about conduct which does not directly involve price but which may foreclose markets to competitors through devices such as exclusive dealing arrangements is strikingly sparse, at least prior to the 2004 \textit{Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP} decision.\textsuperscript{118} Although there are a number of Supreme Court decisions after \textit{Alcoa},\textsuperscript{119} the

\textsuperscript{112} Eastman Kodak, 504 U.S. 451.

\textsuperscript{113} \textit{Id.} at 483–86. The Kodak decision was an affirmance of a denial of summary judgment by the Ninth Circuit. \textit{Id.} at 486. Subsequently, that Court of Appeals approved a finding of unlawful monopolization. Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1203–04 (9th Cir. 1997).

\textsuperscript{114} See Jonathan B. Baker, \textit{Promoting Innovation Competition Through the Aspen/Kodak Rule}, 7 GEO. MASON L. REV. 495, 496 (1999); \textit{see also} Alan J. Meese, \textit{Property, Aspen, and Refusals to Deal}, 73 ANTITRUST L.J. 81, 82 (2005) (arguing that Aspen impinged property rights and was thus wrongly decided).

\textsuperscript{115} See United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 432 (2d Cir. 1945) ("[N]o monopolist monopolizes unconscious of what he is doing."); \textit{see also} United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953) (characterizing Alcoa as holding that "one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business, . . apparently even if there is no showing that his business involves any exclusionary practices." (citation omitted)).

\textsuperscript{116} See, e.g., SmileCare Dental Grp. v. Delta Dental Plan, 88 F.3d 780, 786 (9th Cir. 1996); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 377–79 (7th Cir. 1986).


opinions provide precious little guidance about what constitutes exclusionary conduct, leaving “jur[ies] to divine the metaphysical difference[s] between” exclusionary conduct and conduct on the merits.\textsuperscript{120} Those cases are all remnants of the big is necessarily bad era of antitrust when the attainment of monopoly power was viewed with great skepticism; thus, the conduct analysis typically “present[ed] no major problem.”\textsuperscript{121}

Into this void stepped the D.C. Circuit in the \textit{Microsoft} case.\textsuperscript{122} When the Court of Appeals issued its opinion in 2001, the Supreme Court had not considered a non-price exclusionary conduct case under Section 2 for almost a decade.\textsuperscript{123} Apart from the case’s notoriety due to its high profile defendant, the mere fact that it represents a per curiam decision by an en banc Court of Appeals for the District of Columbia on an important substantive issue of law with little meaningful precedent suggests its significance.\textsuperscript{124}

Initially, it is important to note that \textit{Microsoft} was not a pricing case.\textsuperscript{125} Rather, the court focused on the defendant’s conduct in dealing with its various vendors, customers, and rivals.\textsuperscript{126} The government’s Section 2 case centered on the defendant’s actions that (1) foreclosed Netscape, the only significant browser competitor to its own Explorer, from efficient access to a critical mass of users and (2) stifled threats to companies developing “middleware” technologies.\textsuperscript{127} In both instances, Microsoft was alleged to be protecting its monopoly in the Intel compatible PC operating system from threats from “nascent” middleware competitors who could eventually support software applications that could be run on any operating system, which could thus circumvent Windows, its own operating system.\textsuperscript{128}

\textsuperscript{120} Elhauge, \textit{supra} note 102, at 266.
\textsuperscript{122} United States v. \textit{Microsoft Corp.}, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).
\textsuperscript{124} \textit{See Microsoft}, 253 F.3d at 45, 48.
\textsuperscript{125} \textit{Id.} at 68. The government argued before the district court that Microsoft had engaged in predatory pricing by pricing below cost on its browser, Explorer. \textit{Id.} That was said to enable it to preserve its monopoly profits on its Window Operating System, thereby more than recouping its losses on Explorer. \textit{Id.} The District Court, however, did not assign liability for predatory pricing, however, and the government did not press the theory on appeal. \textit{Id.}
\textsuperscript{126} \textit{Id.} at 59–60.
\textsuperscript{127} \textit{Id.} at 59–60, 77–78.
\textsuperscript{128} \textit{Id.} at 52–54. Not surprisingly, the relevant product market was hotly disputed. \textit{Id.} 51–54. Microsoft argued that “middleware” products and non-Intel compatible operating systems should be included, especially since the government’s case centered on Microsoft’s conduct against those very competitive threats. \textit{Id.} at 53–54. The court ruled, however, that the middleware threat was only nascent and that the applications barrier to entry dictated that the narrower market was proper since both
The court noted that determining whether Microsoft’s conduct was exclusionary or simply vigorous competition could pose a difficult challenge. It then, however, went on to define as exclusionary a monopolist’s conduct which has an anticompetitive effect. That means, according to the court, that the conduct “must harm the competitive process and thereby harm consumers.”

In sorting through the myriad actions of the defendant that the government argued were exclusionary, the court focused on whether a specific conduct foreclosed competition on the merits and was not efficiency justified. Thus, market foreclosure became the key ingredient for anticompetitive conduct. Implicit in the court’s analysis was that if a nascent potential competitor was foreclosed from eventually entering the operating systems market, consumers were or would be harmed. Also implicit was that the amount of the market foreclosure was significant, although the court seemingly did not require or note the actual percentage foreclosed.

The Microsoft court also considered the relationship of Sections 1 and 2 in conjunction with the defendant’s exclusive dealing agreements with so-called Internet Access Providers (IAPs). Those agreements required the IAPs to promote Explorer exclusively and to keep shipments of Internet access software using the competing Navigator under a specified percentage, often 25%, in exchange for certain inducements. The government had argued at trial that these exclusive dealing contracts violated both Sections 1 and 2. The district court had ruled that since Microsoft had not completely excluded Navigator from reaching potential users, even though it had blocked the most efficient channels, it had not

software application developers and users much preferred the multiple applications capability of Windows. Id. at 54. 129 Id. at 58. “The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.” Id. 130 Id. at 58–59. 131 Id. at 58. 132 Id. at 64. 133 See, e.g., Eleanor M. Fox, What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L.J. 371, 387 (2002). 134 Microsoft, 253 F.3d at 79. 135 Id. at 54. The court had concluded that Microsoft had 95% of the relevant operating systems market (80% if the Mac Operating System was included). Id. Thus, any market foreclosure had the potential to be quite significant, although the foreclosure was to “nascent” potential competitors which posed a threat sometime in the future. Id. at 79. 136 Id. at 70. “IAPs include both Internet Service Providers [ISPs] . . . and Online Services [OLSs]” and provide consumers with access to the Internet among other services. Id. at 67. 137 Id. at 68. 138 Id. at 70.
violated Section 1 exclusive dealing law.\(^\text{139}\) For a Section 1 violation, the trial court held that the evidence should have shown that Microsoft’s agreements completely excluded Navigator from about 40% of the market.\(^\text{140}\)

The trial court, however, found that the same exclusive dealing contracts did violate Section 2, stating that “the fact that Microsoft’s arrangements with various [IAPs and other] firms did not foreclose enough of the relevant market to constitute a [Section] 1 violation in no way detracts from the Court’s assignment of liability for the same arrangements under [Section] 2.”\(^\text{141}\)

The government did not appeal the trial court’s ruling on its Section 1 claim, but Microsoft argued before the Court of Appeals that the trial court’s finding of no liability under Section 1 necessarily precluded a finding of liability under Section 2 for the same conduct.\(^\text{142}\) The appellate court noted that the district court had apparently based its Section 1 holding on a “‘total exclusion test’ rather than the 40% standard drawn from the caselaw.”\(^\text{143}\) But either way, it rejected Microsoft’s argument, specifying that a monopolist’s use of exclusive contracts could sometimes violate Section 2 “even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a [Section] 1 violation.”\(^\text{144}\) The court went on to rule that the defendant’s exclusive dealing agreements had in fact violated Section 2, particularly as it entered into them with fourteen of the top fifteen IAPs in North America.\(^\text{145}\) It did not specify a market foreclosure percentage.\(^\text{146}\)

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id. (quoting United States v. Microsoft Corp., 87 F. Supp. 2d 30, 53 (D.D.C. 2000)).

\(^{142}\) Id.

\(^{143}\) Id.


\(^{145}\) Microsoft, 253 F.3d at 70–71.

\(^{146}\) Id. In not specifying a market foreclosure percentage, the court avoided determining whether foreclosure of sub-markets, such as for IAPs, should be assessed separately. Id. The relevant market was Intel compatible PC operating systems, but the government’s case focused on the fact that Microsoft was worried about future competition from middleware providers and developers, which were currently all in different markets. Id. at 52–54, 70–71.
Thus, the D.C. Court of Appeals arguably acknowledged the existence of the gap by holding that non-unilateral conduct by a monopolist can be deemed exclusionary, and thus illegal, although that same conduct does not violate Section 1.\textsuperscript{147} That point seems to reaffirm the traditional view that monopolists do not have the same unfettered freedom in the marketplace as do non-monopolists.\textsuperscript{148} While the gap is implicit in the Microsoft decision, its breadth is subject to debate.\textsuperscript{149}

In the 2004 Trinko decision, the Supreme Court ordered the dismissal of a complaint which alleged that local telephone companies had engaged in exclusionary conduct under Section 2 by refusing to facilitate entry by competitors as required by the Telecommunications Act of 1996.\textsuperscript{150} In doing so, the Court sharply curtailed any expansive reading of Aspen Skiing and signaled its discomfort with that decision, stating it “is at or near the outer boundary of [Section] 2 liability.”\textsuperscript{151} The Court stated that it did “not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.”\textsuperscript{152}

The Court distinguished Aspen Skiing, in part, by observing that the case involved “a willingness to forsake short-term profits to achieve an anticompetitive end.”\textsuperscript{153} It noted that the jury verdict there may have been

\textsuperscript{147} Id. at 70–71.
\textsuperscript{148} See E.I. du Pont de Nemours & Co., 637 F.3d 435, 441 (4th Cir. 2011); United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 432 (2d Cir. 1945) ("[N]o monopolist monopolizes unconscious of what he is doing."); see also United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 342 (D. Mass. 1953) (characterizing Alcoa as holding that "one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business ... , apparently even if there is no showing that his business involves any exclusionary practice." (citation omitted)).
\textsuperscript{149} See Popofsky, supra note 102, at 445 (The Microsoft framework for evaluating exclusionary conduct under Section 2 “is virtually indistinguishable from the test courts employ under Section 1’s rule of reason.”).
\textsuperscript{150} Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415–16 (2004). Under the act, defendant incumbent local exchange carriers (LECs) were required to allow new or so-called competitive local exchange carriers access to its local networks through interconnection agreements. Id. at 402. Plaintiff alleged that the defendant LEC was not doing so adequately and was thus impeding the ability of competitive LECs to enter local telephone service markets and compete with defendant’s monopoly. Id. at 403–05.
\textsuperscript{151} Id. at 409. Cf. Eleanor M. Fox, Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act, 73 ANTITRUST L.J. 153, 154 (2005) (arguing that Trinko presents a stronger case for antitrust liability than did Aspen and thus falls within Sherman Act Section 2 liability).
\textsuperscript{152} Trinko, 540 U.S. at 411. The Court also rejected the applicability of the essential facilities doctrine, holding that, even if it applied to the local exchange networks, the extensive government regulation of the telecommunications industry rendered it unnecessary. Id.
\textsuperscript{153} Id. at 409. The Court also distinguished Aspen Skiing by noting that it and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), both involved situations in which a defendant refused to provide its rivals with a product that it already sold at retail, in contrast to the new wholesale product for leasing
based on the defendant’s willingness “to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor.”

As a result, some scholars have argued that the Trinko Court adopted a narrow profit-sacrifice standard for establishing exclusionary conduct under Section 2, at least in refusal-to-deal scenarios. That test appears to be “an intellectual descendant” of the Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. below-cost requirement for predatory pricing, since both focus on short-term loss, followed by the prospect of longer-term gain. Indeed, there is concern that Trinko narrows Section 2’s intent requirement to just proof of profit sacrifice, excluding other potential forms of exclusionary conduct.

Certainly, the Trinko Court signaled a more hospitable view of monopolies in general, noting that “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.” The Court went on to express its concerns about “[t]he cost of false positives” which “counsels against an undue expansion of [Section] 2 liability.”

Irrespective of whether Trinko adopted a limited profit-sacrifice test for exclusionary conduct, it does signal a more lenient approach to the


154 Id at 409 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 (1985)).
156 Compare Salop, supra note 102, at 318–19 (arguing the sacrifice test applies in some non-price exclusion scenarios), with Werden, supra note 102, at 422 n.35 (countering that the sacrifice test is a general principle sometimes used to rationalize a price-cost test).
157 Lao, supra note 155, at 173. The Trinko Court did quote Microsoft approvingly for recognizing that “[u]nder the best of circumstances, applying the requirements of [Section] 2 ‘can be difficult’ because ‘the means of illicit exclusion, like the means of legitimate competition, are myriad.’” Trinko, 540 U.S. at 414 (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam)). But of course, recognizing that the task is difficult is not inconsistent with employing a limiting standard against which to measure the “myriad” types of conduct a court may encounter. See id.
159 Trinko, 540 U.S. at 414. See Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (warning that false positives “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”).
activities of monopolists. That suggests, at a minimum, that the Court is likely to reduce rather than expand the types of monopoly conduct it believes to be exclusionary.

The *Trinko* Court twice took pains to identify collusion as a greater menace to competition than monopolization, referring to it as "the supreme evil of antitrust[.]" Subsequently, in a footnote, it distinguished *United States v. Terminal Railroad Ass'n*, an early case that ruled unlawful an agreement by fourteen railroads to deny access to a jointly controlled terminal that was necessary for ingress or egress from St. Louis, and *Associated Press v. United States*, a decision rendering illegal an agreement by the Associated Press prohibiting member newspapers from disseminating news to non-member papers. In *Trinko*, the Court noted that those "cases involved concerted action, which presents greater anticompetitive concerns. . . ."

Thus, at least in the context of deciding a Section 2 case, the Court in 2004 was still espousing the *Copperweld* view that concerted action was more troublesome than conduct by a monopolist.

Three years later, in *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Court scuttled an attempt to characterize as exclusionary predatory bidding by a monopsonist buyer. The Court believed that the risk of chilling procompetitive behavior was as significant as with predatory pricing and thus imposed the two-prong *Brooke Group* test on predatory bidders. In spite of some scholarship to the contrary, the *Weyerhauser*
Court repeated its earlier admonition "that predatory pricing schemes are rarely tried, and even more rarely successful." Whether that statement is correct or not, it is true that predatory pricing and bidding cases are rarely successful.

Although the Supreme Court has yet to consider the issue, attempts to establish as exclusionary conduct so-called loyalty discounts, package pricing, or the bundling of a product in which a seller faces vigorous competition with products in which it is dominant have met with uneven success in the lower courts. In LePage's Inc. v. 3M, the Third Circuit, in an en banc opinion, affirmed a Section 2 judgment where 3M, the producer of Scotch Tape, the leading transparent tape, offered rebates on condition that its customers purchase non-tape related 3M product lines such as post-it notes and staples. The plaintiff produced only transparent tape and argued that it was unable to match the bundled discount, asserting that it was an equally efficient tape producer. The court found the conduct to be exclusionary under Section 2 without requiring any proof of below-cost pricing or analysis of how many customers offered the bundled rebate actually accepted the deal.

Not surprisingly, some courts considering bundled or package discounts have been reluctant to follow LePage's because if neither the individual nor the bundled price is below cost the characterization of the bundle as exclusionary is questionable since both prices are profitable on their own. Recognizing that, in general, discounted pricing is procompetitive, several courts have subsequently adopted an "attribution test" to determine whether a bundled discount is exclusionary in effect.
Under that approach, one attributes the entire discount in the package or bundle to the product for which exclusion is claimed.\textsuperscript{178} Only if the resulting price is less than the defendant's cost for that product is the bundled discount deemed exclusionary.\textsuperscript{179}

In one bundling case, \textit{Masimo Corp. v. Tyco Health Care Group}, the Ninth Circuit affirmed the district court's vacating of a jury verdict, ruling that the plaintiff could not establish the unlawfulness of defendant's bundled pricing because it had not alleged that the prices were below some appropriate measure of defendant's costs.\textsuperscript{180} However, the court affirmed the part of the jury verdict which held that defendant's sole-source and market-share contracts were exclusionary and violative of Section 2.\textsuperscript{181} Under those agreements, customers were required to purchase 90\% to 95\% of their requirements for all the bundled products in order to receive the bundled discount.\textsuperscript{182}

In a subsequent case against the same defendant, the Ninth Circuit ruled that its sole-source and market-share discount agreements were not exclusionary since they were easily terminable, allowing customers to forgo the discounts and purchase cheaper generic products.\textsuperscript{183} The court distinguished \textit{Masimo} by noting that there defendant's patent was still in place, obligating customers to buy its complementary sensor product.\textsuperscript{184} Further, the \textit{Masimo} sole-source contracts required customers to purchase a set percentage of their requirements to obtain the discount, whereas in the

\textsuperscript{178} \textit{Cascade Health Solutions}, 515 F.3d at 906.
\textsuperscript{179} \textit{Id.} at 903. \textit{But see} J. Shahar Dillbary, \textit{Predatory Bundling and the Exclusionary Standard}, 67 \textit{WASH. & LEE L. REV.} 1231, 1234 (2010) (arguing that below-cost test is over-inclusive and that some below cost bundles may enhance consumer welfare).
\textsuperscript{180} \textit{Masimo}, 350 F. App'x at 96–97.
\textsuperscript{181} \textit{Id.} at 97–98.
\textsuperscript{182} \textit{Id.} at 98–99. The court noted that the sole source component of the agreement is "the hallmark of exclusive dealing" because it "effectively prevents customers from dealing in the goods of competitors, if the customers want to obtain [defendant's] discount." \textit{Id.} at 97.
\textsuperscript{183} \textit{Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP}, 592 F.3d 991, 997 (9th Cir. 2010).
\textsuperscript{184} \textit{Id.} at 997 n.2.
subsequent case the discount and requirements percentages were graduated.\footnote{185}

Thus, although there has been some judicial recognition that sole-source and market-share discounts can have exclusionary effects,\footnote{186} some courts have tended to treat bundling discounts as akin to predatory pricing, requiring proof of below-cost selling. In its 2009 \textit{Pacific Bell Telephone Co. v. linkLine Communications, Inc.} decision,\footnote{187} the Supreme Court appeared to affirm a hard-line position that all above-cost challenges to pricing are beyond the Sherman Act pale.\footnote{188} There it considered a price-squeezing claim against a vertically integrated monopolist by a non-integrated rival.\footnote{189} The Court, still mindful of chilling vigorous price competition and finding no duty to deal with a rival after \textit{Trinko}, held that the plaintiff must meet the two-prong \textit{Brooke Group} requirement to state a Sherman Act claim.\footnote{190} It emphasized that the charging of monopoly prices by a monopolist does not run afoul of Section 2\footnote{191}

Shortly thereafter the Ninth Circuit, in \textit{Doe v. Abbott Laboratories}, ruled that \textit{linkLine} mandated dismissal of a bundling case that plaintiffs attempted to characterize as monopoly leveraging.\footnote{192} There, defendant had a monopoly in the HIV “booster” drug market through a drug called Norvir, which boosts the effectiveness of protease inhibitors used to fight the disease.\footnote{193} It sold Norvir as part of its own “boosted” protease inhibitor drug, Kaletra.\footnote{194} After the FDA approved the use of Norvir with the protease inhibitor drugs of other companies, defendant quadrupled the price of Norvir but it did not increase the price of Kaletra.\footnote{195} The Ninth Circuit

\begin{footnotes}
\item[185] \textit{Id.} That is, the greater percentage of requirements purchased, the higher the discount. \textit{Id.} at 995.
\item[188] \textit{Id.} at 457.
\item[189] \textit{Id.} at 442. In a price-squeezing claim, the vertically integrated defendant increases prices in a wholesale market where it has market power while selling low in a retail market. \textit{Id.} at 449. The resulting price squeeze raises competitors' costs because they have to pay more at wholesale while lowering their revenues because it must reduce retail prices to match the defendant's. \textit{Id.}
\item[190] \textit{Id.} at 451. \textit{But see} \textit{Bonjomo v. Kaiser Aluminum & Chem. Corp.,} 752 F.2d 802, 808, 810–11 (3d Cir. 1984) (finding liability where price squeeze drove plaintiff's revenue down to a level just above its average variable costs but insufficient to allow it to earn a profit).
\item[191] \textit{linkLine Commc'ns, Inc.,} 555 U.S. at 454.
\item[192] \textit{Doe v. Abbot Labs.,} 571 F.3d 930, 935 (9th Cir. 2009).
\item[193] \textit{Id.} at 932.
\item[194] \textit{Id.}
\item[195] \textit{Id.}
\end{footnotes}
found that absent proof of below-cost pricing the defendant had acted legally.\(^{196}\)

Thus, the Ninth Circuit in *Doe* was quick to treat what appears to be a bundling claim as predatory pricing controlled by *linkLine*, even though there was nothing to suggest that the *linkLine* price squeeze had anything to do with bundling. The case suggests a trend in some circuits to create a safe haven for any pricing decisions by a monopolist which are not below cost.\(^{197}\) It may also indicate a disinclination to treat as bundling what can be otherwise characterized as predatory pricing, even though *Doe* involved the raising of prices rather than the lowering of prices to force out rivals.\(^{198}\)

In *ZF Meritor, LLC v. Eaton Corp.*, the Third Circuit, however, recently veered away from such a hardline approach in a loyalty discount case.\(^{199}\) It held that the cost-price test applies to loyalty discounts only if “price [itself] is the clearly predominant mechanism of exclusion” and proceeded to apply the rule of reason to what it characterized as “*de facto* exclusive dealing contracts[].”\(^{200}\)

Although one can persuasively argue that a circuit split exists with respect to the exclusionary effects of bundling, package pricing, and loyalty discounts, the Supreme Court has so far declined to enter the fray, most recently denying certiorari in the *Meritor* case.\(^{201}\) Thus, at this writing, predatory pricing analysis has yet to swallow all forms of monopolist conduct that involves price in some fashion.

V. SECTION 2 “TRENDING”

In assessing the current state of exclusionary conduct law, one should first acknowledge that the two principal non-price Section 2 decisions since 2000, *Microsoft* and *Trinko*, may conflict.\(^{202}\) If *Trinko* did indeed establish a profit-sacrifice test for determining exclusionary conduct,\(^{203}\) it is doubtful

\(^{196}\) *Id* at 935.

\(^{197}\) *See id.*

\(^{198}\) *See Abbot Labs.*, 571 F.3d at 935.


\(^{200}\) *Id.* at 269.

\(^{201}\) *Id.*


\(^{203}\) The test was first proposed in Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 9–10 (1981). *See also* Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 148 (4th Cir. 1990) (explaining a short term sacrifice harms competition when it furthers an exclusive, anticompetitive objective); Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986) (placing otherwise valid business practices in the context of predation and
that *Microsoft* meets the standard for much of the conduct found unlawful.\textsuperscript{204} As noted, the court there focused on the market foreclosure resulting from the various market machinations of the defendant in suppressing potential competitors, not whether that foreclosure cost Microsoft any short-term profits.\textsuperscript{205} It is unlikely, for example, that Microsoft lost sales by its exclusive dealing agreements with fourteen of the fifteen largest IAPs.\textsuperscript{206} Arguably, there it was just using its monopoly position to bludgeon the IAPs into exclusivity contracts, a long identified type of exclusionary conduct.\textsuperscript{207}

Secondly, it is apparent that the *Brooke Group* predatory pricing paradigm has expanded beyond classic predatory pricing scenarios.\textsuperscript{208} As noted above and in the literature,\textsuperscript{209} *Trinko*’s emphasis on proof of short-term loss with the prospect of long-term monopoly profits is, if not derived from *Brooke Group*, perfectly consistent with it. Further, the Court has directly applied the *Brooke Group* standard to all Section 2 conduct involving the setting of prices, making it clear that above-cost pricing by a monopolist is not exclusionary.\textsuperscript{210} Lower federal courts have split when faced with more cutting-edge conduct issues like bundling or loyalty discounts.\textsuperscript{211}

In *linkLine* the Supreme Court, in dicta, suggested its present view about whether price and non-price conduct should be treated differently when it wrote that, “for antitrust purposes, there is no reason to distinguish between price and non-price components of a transaction.”\textsuperscript{212} To the extent that Section 2 conduct issues are all progeny of *Brooke Group*, the range of what can constitute exclusionary conduct narrows considerably.\textsuperscript{213} In

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\textsuperscript{204} See *Microsoft*, 253 F.3d 34.

\textsuperscript{205} Id. at 57.

\textsuperscript{206} See id. at 67–71. Some of Microsoft’s conduct might meet the *Trinko* standard, however. See id. at 72–74. For example, Microsoft’s threat to Apple to cancel Mac Office if Apple did not make Internet Explorer the standard installed web browser on Apple computers appears to satisfy the profit-sacrifice standard. *Id.*

\textsuperscript{207} See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143, 148, 154–55 (1951) (holding the dominant newspaper violated Section 2 by requiring advertisers to advertise exclusively with it and not on a competing radio station).

\textsuperscript{208} See *supra* text accompanying notes 166–86.

\textsuperscript{209} See *Salop*, *supra* note 102, at 318–20.


\textsuperscript{211} See *supra* text accompanying notes 172–86.

\textsuperscript{212} Pac. Bell Tel. Co. v. *linkLine Commc’ns*, Inc., 555 U.S. 438, 450 (2009). The Court also stated that “[t]here is no meaningful distinction between the . . . claims we rejected in *Trinko* and the plaintiffs’ price-squeeze claims[,]” although it did go on to apply the *Brooke Group* predatory pricing test. *Id.* at 450–452.

contrast, the Microsoft foreclosure standard is not so limiting and may even be expansive in application, particularly when one considers its ruling that exclusive dealing contracts that run afoul of Section 2 may not violate Section 1.214

Thirdly, Trinko and Microsoft appear to disagree philosophically about the relationship of Sections 1 and 2. While the Court in Trinko took pains to note that collusion was of greater antitrust concern than monopolization,215 Microsoft identifies exclusive dealing contracts that violate Section 2 but not Section 1.216

The conflict between Trinko and Microsoft may play out in cutting-edge conduct cases involving, for example, loyalty, sole-source, or market-share discounts. There is substantial literature that these types of discounts from monopolists in reality exact penalties for non-compliance and foreclose markets to rivals, even where the discounted prices are above cost.217 Under the Microsoft approach, a court could find that kind of conduct to be exclusionary, particularly since that type of pricing behavior produces no discernible efficiencies.218 If, however, the courts treat the conduct as pricing falling under the Brook Group rubric, any loyalty prices set above cost would fall beyond the exclusionary pale.219 Further, under the profit-sacrifice test it would be presumably very difficult to show that a monopolist was sacrificing profits when selling goods or services above cost.220

Of course, much of what may constitute exclusionary conduct is not, strictly speaking, unilateral conduct. Exclusive dealing agreements are, after all, two-party contracts.221 Similarly, often sellers with market power require buyers to agree to sole-source, dual-source, or loyalty requirements,


218 See Microsoft Corp., 253 F.3d at 70–71.


220 See id.

221 1 WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 8:3.
whether formally in writing or only verbally. In contrast, conduct involving pricing and refusals to deal more readily fit what we normally consider to be single-firm conduct.

But, as noted above, Microsoft stands for the proposition that a monopolist’s exclusive dealing contracts are more suspect than exclusive dealing contracts by a non-monopolist. Similarly, the academic literature and a growing number of cases suggest that monopoly-driven loyalty and other restrictive agreements are more likely to effectively foreclose rivals than those not involving market power.

All of this is to say that there remains a great deal of uncertainty about the parameters of and appropriate test or tests for discerning exclusionary conduct under Section 2. If the Trinko Court’s language about the desirability of monopolists and monopoly prices continues to have judicial legs, however, it would seem that monopolists will continue to have far greater competitive leeway than previously thought possible.

VI. GAP IMPACT

As noted above, the Copperweld Court observed that the size of the antitrust gap “is open to serious question.” What the Court did not acknowledge, at least explicitly, is that the size of the gap may in fact change as the ever-fluid antitrust law evolves and shrinks. For example,
to the extent that Section 2 exclusionary conduct standards become narrower, one might argue that the size of the gap increases commensurately. That is, the expansion of the *Brooke Group* predatory pricing paradigm and the imposition of a profit-sacrifice test would give monopolists considerably more competitive leeway, restrict what constitutes exclusionary conduct, and thus arguably expand the gap from the Section 2 side.

Similarly, the expansion of the rule of reason and the tougher conspiracy pleading standards emanating from *Twombly*, making it more difficult for plaintiffs to prevail in Section 1 cases, may have had the same effect from the collective action side of the gap. That is, one can argue that the gap widens as potential Section 1 liability narrows because non-monopolists have more latitude in the marketplace than previously as fewer contracts, combinations, or conspiracies are likely to be found to restrain trade.

As a result, one might assert that case law has widened the gap from both sides of the aisle in the last decade or so as antitrust law has in general retracted. Monopolists and non-monopolists alike would seem to have more latitude to operate in the marketplace free from potential antitrust liability. Further, one might posit that, with the retrenchment from both sides, the gap is now considerably wider than it was at the time of the *Copperweld* decision in 1984.

But it is important to keep one’s eye on the ball. One might assert that, with the shrinking of the antitrust law today, the only real antitrust gap lies between collusion among competitors, “the supreme evil of antitrust[,]” and exclusionary conduct by a monopolist, which may or may not be unilateral, but typically does not involve agreements with competitors.

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229 One may argue that the *American Needle* decision, in rejecting the single entity defense, actually expands conduct that is considered collective in nature. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010). While that may be true, the Court there specified that the professional sports league activity falls under the rule of reason where market power and impact are sure to be predicates to liability. See *id.* at 2216.


231 An exception is the reverse payment drug cases where the patent holder pays a generic manufacturer to stay out of market. See, e.g., *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 110 (2d Cir. 2010) (no antitrust violation); *Kaiser Found. Health Plan, Inc. v. Abbot Labs., Inc.*, 552 F.3d 1033, 1053 (9th Cir. 2009) (remanded for fact determination); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1341 (Fed. Cir. 2008) (no antitrust violation); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005) (no antitrust violation); *Valley Drug Co. v. Geneva Pharmas., Inc.*, 344 F.3d 1294, 1313 (11th Cir. 2003) (full rule of reason required); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 915 (6th Cir. 2003). See generally HOVENKAMP, supra note 48, at 271–72. See generally C. Scott Hemphill, *An
Perhaps, but to do so belies the gap's Colgate vertical origins.\textsuperscript{232} Indeed, Copperweld, which spawned the modern version, involved not an alleged horizontal conspiracy but an agreement between a parent steel manufacturer and its subsidiary steel tubing maker.\textsuperscript{233}

In this case, the ball is unilateral conduct by non-monopolists, which the Court has recognized as sacrosanct since its 1919 Colgate decision.\textsuperscript{234} Indeed, Colgate is the foundation of the antitrust gap, focusing as it does on the untrammelled right of a non-monopolist seller to refuse to deal with anyone without fear of antitrust liability.\textsuperscript{235} Since Colgate involved a vertical, rather than a horizontal restraint, it is a fundamental error to consider the gap relevant, at least historically, only with respect to horizontal combinations.

To take an older example, consider the impact of the 1977 Continental T.V., Inc. v. GTE Sylvania, Inc. decision,\textsuperscript{236} which held that vertical non-price restraints such as manufacturer-imposed location or customer restrictions should be judged under the rule of reason, overruling an earlier decision.\textsuperscript{237} As a result, only manufacturers with substantial market power have anything to fear under the rule of reason. Most courts, following the Sylvania Court's lead, view non-price restraints as potentially pro-competitive, at least where the manufacturer has little market share.\textsuperscript{238} Not surprisingly, successful attacks of vertical non-price restraints are very rare.\textsuperscript{239}


\textsuperscript{233} Copperweld, 467 U.S. at 755-56.

\textsuperscript{234} Colgate, 250 U.S. at 307 ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal."). As noted, Copperweld acknowledged that the sanctity of unilateral conduct goes back to Colgate. See Copperweld, 467 U.S. at 775–76.

\textsuperscript{235} See Colgate, 250 U.S. at 307


\textsuperscript{238} See Sylvania, 433 U.S. at 54–55. Absent a manufacturer's holding of substantial market power, the impact of downstream non-price restraints on the interbrand wholesale or retail markets is likely to be insignificant. See Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1200 (9th Cir. 2012); Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1335–36 (11th Cir. 2010); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978); Campbell v. Austin Air Sys., Ltd., 423 F. Supp. 2d 61, 67–69 (W.D.N.Y. 2005).

\textsuperscript{239} One exception is Graphic Prods. Distrib., Inc. v. ITEK Corp., 717 F.2d 1560, 1563 (11th Cir. 1983).
More recently, the Supreme Court, in overturning per se rules for maximum and minimum resale price maintenance, has also pointed to the potential efficiencies of those practices.\(^{240}\) As with non-price restraints, the switch to the rule of reason for resale price maintenance brought about by the *Leegin* decision\(^{241}\) signals that most sellers, absent significant market power, can impose resale price agreements on wholesalers and retailers with a high degree of impunity.\(^{242}\) Thus, all vertical price and non-price practices are unlikely to run afoul of the antitrust laws absent market power significant enough to adversely impact the interbrand market and to overcome efficiency assertions.\(^{243}\)

By the same token, a restricted view of what can constitute exclusionary conduct under Section 2 simply permits greater latitude for those with monopoly power to compete.\(^{244}\) But if a company does not possess monopoly power in a relevant market, the exclusionary conduct issue is quite sensibly moot.\(^{245}\) Thus, strictly speaking, a more lenient application of Section 2 has no direct impact on single-firm conduct by a non-monopolist, leaving the antitrust gap unaffected.\(^{246}\)

\(^{240}\) See *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877, 894–99 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 14–16 (1997); see also *Jacobs*, 626 F.3d at 1342 (undercutting the minimum distributors’ price on its online product would harm distributors ability to display the product and harm consumers); *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 293 (4th Cir. 2009) (finding resale price maintenance can promote interbrand competition); *Trane U.S. Inc. v. Meehan*, 563 F. Supp. 2d 743, 751 (N.D. Ohio 2008) (finding the principal’s commissioned agents were not a separate legal entity and thus not capable of conspiring with the principal); *Babyage.com, Inc. v. Toys “R” Us, Inc.*, 558 F. Supp. 2d 575, 585 (E.D. Pa. 2008) (applying the rule of reason to find a causal nexus between a retailer monopoly power and retailer’s higher price).

\(^{241}\) *Leegin*, 551 U.S. at 897–99.

\(^{242}\) See id.

\(^{243}\) In the Section 2 context, downstream price and non-price restrictions by a monopolist often may not amount to exclusionary conduct under Section 2, which typically requires an impact on a rival of, rather than a buyer from, the seller. See, e.g., *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 927 (9th Cir. 1980).

\(^{244}\) Section 2, of course, pointedly outlaws monopolizing, not just the acquiring or holding of monopoly power. 15 U.S.C. § 2 (2012). Although the Court in *United States v. Aluminum Co. of Am.* (Alcoa), 148 F.2d 416, 432 (2d Cir. 1945) ("no monopolist monopolizes unconscious of what he is doing"), arguably came close to a so-called no-conduct standard, *Trinko*, as noted, presents a 180-degree shift. See supra text accompanying notes 155–59.

\(^{245}\) See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). That is, under the two-prong analysis necessary to prove a Section 2 violation, one does not get to the second or exclusionary conduct prong unless the target company is found to possess monopoly power in a relevant market. *Id.* at 381.

\(^{246}\) See *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). It could, however, have an indirect effect by not constraining the market conduct of those who may have market power but believe they do not. *Id.* at 457–58. The attempt to monopolize offense of Section 2, however, may work in the opposite direction and constrain the market behavior of those firms. *Id.* at 459. Although, since the
Section 2 application does affect, however, allowable behavior by monopolists which in turn does impact the gap.\textsuperscript{247}

As noted, the gap’s précis is that it allows competitors free reign in the marketplace if acting unilaterally because antitrust law is about protecting competition, not just fair competition and certainly not competitors.\textsuperscript{248} Thus, a non-monopolist’s dirty tricks such as the disparagement of a competitor’s products, or the stealing of a rival’s trade secrets, customer lists, or valued employees does not an antitrust cause of action make. To the extent that monopolists are allowed more and more latitude to compete vigorously rather than just fairly, a monopolist’s conduct may more closely resemble unassailable, even though unfair or unethical, unilateral conduct by a non-monopolist.\textsuperscript{249}

For example, today the difficulty of proving predatory pricing means that monopolists have almost free reign with their pricing decisions, just as do non-monopolists. Perhaps that is as it should be, but the point is that the freedom of monopolists to compete in the market means that, as a practical matter, there is little difference between antitrust scrutiny of monopolists and non-monopolists, at least where pure unilateral conduct is concerned.\textsuperscript{250} In fact, the Supreme Court expressly so stated in \textit{linkLine}, holding “there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct.”\textsuperscript{251} The more closely the allowable unilateral conduct of monopolists resembles that of non-monopolists, the smaller the antitrust gap.\textsuperscript{252}

The reduction of the gap is even more stark when one considers its \textit{Colgate} origins. The greater the expansion of permissible monopolist behavior, the less significant the \textit{Colgate} exception.\textsuperscript{253} That is, the less

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\textsuperscript{249} That is, unassailable from an antitrust perspective. There is support, however, for the notion that deceptive advertising by a monopolist that targets a rival may be deemed exclusionary. See Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998); Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916–17 (2d Cir. 1988); Alternative Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322, 331–32 (E.D.N.Y. 2009); Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 530 (E.D.Tex. 2004).

\textsuperscript{250} See, for example, \textit{ZF Meritor, LLC v. Eaton Corp.}, 696 F.3d 254, 268–89 (3d Cir. 2012) where the court, in its exclusive dealing analysis, seemingly does not differentiate between Section 1 and Section 2 in affirming a jury verdict under both sections and Section 3 of the Clayton Act.

\textsuperscript{251} Pac. Bell Tel. Co. v. \textit{linkLine Commc'ns, Inc.}, 555 U.S. 438, 448 (2009). Predatory pricing was the only example the Court gave of unilateral action that might be exclusionary. \textit{Id.}

\textsuperscript{252} See \textit{id}; see also Gavil, supra note 24, at 88.

scrutiny given the unilateral conduct of monopolists, the smaller the difference between that allowable conduct and the sacrosanct unilateral conduct of non-monopolists extolled in *Colgate*. The smaller the difference between allowable monopolist unilateral conduct and unilateral conduct protected by *Colgate*, the smaller the antitrust gap. Thus, certainly, following *Colgate*, the *Colgate* exception language: "[i]n the absence of any purpose to create or maintain a monopoly," has become largely symbolic.254

As noted, assuming the existence of collective action, the reduction of per se offenses and the expanded use of the rule of reason at least facially mean that more collective conduct is viewed as not trade restraining and not in violation of Section 1. At best, the expansion of the rule of reason creates gap uncertainty, to the extent that the rule of reason makes it harder to predict what is to be tolerated.255 However, as Professor Gavil pointed out, the growth of the rule of reason and the enhanced reliance on market power make Section 1 cases appear more like Section 2 cases, reducing the *Copperweld* gap.256 But, as argued above, the tougher Section 2 exclusionary conduct standards of the last decade, excepting the *Microsoft* case, do not seem to cut the other way, as one might initially believe.

Further complicating the issue is that much of what may constitute exclusionary conduct by a monopolist is really not unilateral action at all.257 This is not a small point because much antitrust history is devoted to determining whether an agreement or conspiracy can be inferred, in both the horizontal and vertical contexts. Indeed, prior to the Supreme Court’s overturning of the per se rule for resale price maintenance in *Leegin*, cases frequently revolved around whether a seller’s resale price maintenance involved an agreement or was shielded by the *Colgate* decision.258 If there

254 Id.
255 The quick look might be thought to reduce that uncertainty, until one recalls the lengthy Supreme Court split in *California Dental Association v. FTC*, 526 U.S. 756 (1999), over whether the quick look should apply or not.
256 Gavil, *supra* note 24, at 88-89, 102-03. Professor Gavil also makes the related point that the market share thresholds for establishing market power will likely be lower than previously thought. *Id.* at 109-10. For monopoly power, however, the courts still seem to require a market share of at least 50% to prove monopoly power. See, e.g., Brian A. Facey & Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70 ANTITRUST L.J. 513, 536-37 & n.100 (2002); see also Elhauge, *supra* note 102, at 336 ("[A]ntitrust courts seem to have intuitively grasped the economic significance of having a 50% market share without articulating the theory that supports it.").
257 See *supra* text accompanying notes 172–86.
was no agreement to be found or inferred, the conduct was protected by *Colgate* and would fall within the antitrust gap, just as with alleged but unproven horizontal agreements.\(^{259}\)

But the expansion of the rule of reason has in many cases rendered the existence of an agreement if not moot then certainly of lesser importance. For example, *Leegin* effectively renders the *Colgate* issue without significance in most resale price maintenance cases because, unless a seller has some significant indicia of market power, a court will not likely consider whether the resale price is a product of agreement or is unilateral action.\(^{260}\) As a result, few private plaintiffs will bring lawsuits where proof of a conspiracy or agreement will have to be established by inference if the underlying conduct is subject to the rule of reason.\(^{261}\)

Thus, as the rule of reason expands to include more and more potential restraints of trade, less conduct by non-monopolists is likely to be considered collective in nature because, under the rule of reason, it simply does not matter. That means that, as a practical matter, less conduct by non-monopolists now comes under antitrust scrutiny at all. Further, although the historical roots of the gap lie in vertical restraints case law, present-day antitrust doctrine is but little concerned with vertical restraints of any shape or color. Thus, viewed in this way, one could posit that the gap has broadened as more single-firm upstream or downstream conduct occurs free from antitrust challenge.\(^{262}\) But in fact it is more likely that the

v. Parke, Davis & Co., 362 U.S. 29, 43 (1960) (finding more than a mere refusal to deal to be an agreement); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452–53 (1922) (finding that a formal contract not necessary to show agreement); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921) (stating that an inferential agreement is a jury question); United States v. A. Schrader’s Son, Inc., 252 U.S. 85, 99–100 (1920) (finding that express agreements not necessary to prove a Section 1 violation); Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 939–40 (7th Cir. 2000) (finding defendant had gone far beyond *Colgate*). Cf. Russell Stover Candies, Inc. v. FTC, 718 F.2d 256, 260 (8th Cir. 1983) (finding widespread practice of complying with manufacturer’s pricing preferences protected by *Colgate*).

\(^{259}\) See supra text accompanying notes 85–89. Thus, the significance of *Colgate* has waned for three reasons: (1) the shift of antitrust law away from vertical restraints; (2) the difference between allowable unilateral monopolist and non-monopolist conduct has shrunk; (3) the shift to the rule of reason in all vertical restraints cases has made the proof of vertical conspiracies to avoid the *Colgate* exception far less important.


\(^{261}\) For example, *Leegin*, 551 U.S. 887, involved strong evidence of a vertical agreement but one wonders how many resale price maintenance cases are likely where the plaintiff has to prove both an agreement by inference and then the unreasonableness of the underlying price fixing.

\(^{262}\) Here one could argue that *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), actually expands the range of Section 2 exclusionary conduct but that expansion involves exclusive dealing agreements rather than purely unilateral conduct. See supra text accompanying notes 122–48.
gap has shrunk as the range of Section 1 liability and the differences between the two sections have narrowed.263

VII. CONCLUSION

While the concept of the antitrust gap seems to be a straightforward and sensible way to easily differentiate between the reach of Sections 1 and 2 of the Sherman Act, in application the contours of the gap are complex. Consideration of the size, shape, and perhaps even the continued existence of the gap involves a number of moving parts.

Conceptually, the gap, as the Supreme Court implicitly recognized in American Needle,264 still has appeal because vigorous unilateral competition by those without appreciable market power makes for lower prices, greater innovation, and higher quality goods and services, at least according to traditional microeconomic theory. But the gap itself is overrated, at least from an antitrust policy perspective, because it purports to provide more clarity than actually exists in the case law. Modern antitrust analysis provides conflicting indicators about the size and direction of the gap; it is at best blurred, confusing, and shifting, depending on which of the several moving parts one considers and how one interprets them.

The increased tolerance for monopolistic behavior, for example, does not necessarily widen the gap because Section 1 cases falling under the rule of reason also require proof of market power and anticompetitive conduct, creating significant convergence between the two substantive sections of the Sherman Act. As the Supreme Court observed in linkLine, that tolerance also suggests that a monopolist’s allowable unilateral behavior more closely mirrors that allowed under Colgate, the gap’s founding case, than previously thought.265 Thus, the contraction of what may constitute exclusionary conduct under Section 2 in fact reduces the size of the gap, which in turn has the effect of minimizing the importance of the Colgate monopolization exception.

Further, the shift of antitrust law away from concerns about vertical restraints means that Section 1 today is chiefly about horizontal rather than

263 Instead, the real divide in modern antitrust law may be between rule-of-reason and per se cases. As noted, rule of reason cases require proof of market power, look more and more like Section 2 cases, and are increasingly difficult to win. Per se cases, once so characterized, are now limited, with the exception of tying and some group boycott cases, to hardcore restraints of trade among rivals. See supra text accompanying notes 98–100. But that is the subject of another article.
vertical combinations. Indeed, almost all of contemporary private antitrust litigation involves allegations of per se violations such as price fixing, market division, or boycott activity underlying an attempt, frequently unsuccessful, of proving a conspiracy among competitors. But more to the point, the growth of the rule of reason continues to narrow the size of the gap as non-per se Section 1 cases look more and more like Section 2 cases.

Further, enhanced conspiracy pleading standards also suggest greater latitude for non-monopolist behavior, although much competitive activity involves contracts or agreements of some kind rather than, strictly speaking, unilateral conduct. It is just that most marketplace conduct does not restrain trade and in the current antitrust world even less is thought to now than historical precedent suggests.

As the antitrust paradigm continues to shift, the overall effect is that substantive antitrust law is shrinking. Monopolists and non-monopolists both have greater latitude to compete vigorously by engaging in conduct once thought to be illegal or at best questionable. That enhanced ability to compete means that today any emphasis on unilateral action stemming from Colgate is overrated and, when one digs down into the weeds, so is the antitrust gap.

While the gap has a broad conceptual utility and was recently implicitly recognized by the Supreme Court in the American Needle decision, its functional importance under modern antitrust law is not significant. It is now more a house of straw than a fundamental antitrust precept. Antitrust law is not only shrinking, but converging and, as a result, the traditional antitrust gap is shrinking as well, and is perhaps on the way to disappearing altogether.