

A COMMENT ON LOUIS KAPLOW'S *THE MEANING OF  
VERTICAL AGREEMENT AND THE STRUCTURE  
OF COMPETITION LAW*

MARK S. POPOFSKY\*

In his article entitled *The Meaning of Vertical Agreement and the Structure of Competition Law*, Professor Louis Kaplow makes a persuasive case that the distinction between unilateral and concerted action in many vertical settings is difficult to maintain.<sup>1</sup> Antitrust practitioners will find this unsurprising. Doctrines such as *Colgate*, it long has been understood, rest in part on legal fictions designed to exclude certain conduct from Sherman Act Section 1's coverage. Such unilateral conduct instead is subject to Sherman Act Section 2, the "heavy artillery of antitrust."<sup>2</sup>

Section 2, in turn, applies only when conduct threatens to create or maintain monopoly power. Otherwise, unilateral conduct falls into the so-called *Copperweld* gap. "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."<sup>3</sup> "Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by [concerted action]—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability."<sup>4</sup>

Kaplow concludes that the *Copperweld* gap in reality is vanishingly small because "the simple fact of the matter is that nearly all of the relevant unilat-

---

\* Member, California and District of Columbia Bars; Adjunct Professor of Advanced Antitrust, Georgetown University Law Center. The author would like to thank David Young for his assistance and Douglas Melamed, Jonathan Jacobson, Steven Salop, and the Editors of this Journal for their helpful comments.

<sup>1</sup> Louis Kaplow, *The Meaning of Vertical Agreement and the Structure of Competition Law*, 80 ANTITRUST L.J. 563 (2016).

<sup>2</sup> *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 328, 337 (1992).

<sup>3</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

<sup>4</sup> *Id.* at 775.

eral action is implemented through contracts.”<sup>5</sup> This implies, according to Kaplow, that “a wide swath of activity taken to be governed by Section 2—and only by Section 2—. . . actually falls . . . well within Section 1.”<sup>6</sup>

In the last part of his article, Kaplow explores the implications of this observation. Because the vast majority of conduct subject to Section 2 also can be reached under Section 1, Kaplow asserts, the structure of U.S. and many other competition regimes, featuring distinct statutes (and ostensibly more stringent standards) governing agreements on the one hand and the conduct of dominant firms on the other, merits reexamination.<sup>7</sup> As he puts it: “[R]ecognition of the incoherence of the unilateral action defense makes the collapse of Section 2 into Section 1 harder to miss.”<sup>8</sup>

Kaplow’s argument thereby provokes the question of whether (apart from the vanishingly small *Copperweld* gap) the need ever arises for invoking Section 2. The reason: If the conduct does not violate Section 1, the conduct cannot violate “the more lenient standards of Section 2”; and “anyone seeking to challenge any practice subject to both provisions may simply choose the easier (more aggressive) one.”<sup>9</sup> Indeed, Kaplow finds it “hard to understand why those challenging firms’ practices often choose the tougher [Section 2] route when an easier [Section 1] path is available”<sup>10</sup>

But recourse to Section 2 is understandable if circumstances exist where Section 2 may condemn conduct that Section 1’s rule of reason exonerates. Indeed, Section 2 has dual independent significance. First, principles developed in the Section 2 setting can supply a distinct substantive rule of decision even when Section 1 as a formal matter could also govern the conduct. For example, in some settings, Section 2 principles preclude a more expansive balancing test Section 1 might otherwise permit. Second, as illustrated by *United States v. Microsoft Corp.*,<sup>11</sup> Section 2 may invalidate conduct that Section 1 fails to condemn.

Section 2’s relevance reflects that neither Section 2 nor Section 1 is one-size fits all. Both implement the rule of reason. But the rule of reason’s expression is not the same in all settings. Properly understood, the rule of reason is a principle for generating applicable antitrust legal tests, not merely a case-specific step-wise rule of decision that produces an ideal weighing of benefits

---

<sup>5</sup> Kaplow, *supra* note 1, at 624.

<sup>6</sup> *Id.* at 625.

<sup>7</sup> *Id.* at 627–28.

<sup>8</sup> *Id.* at 625.

<sup>9</sup> *Id.* at 627–28.

<sup>10</sup> *Id.* at 627; *see also id.* at 620 n.158.

<sup>11</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 80–83 (D.C. Cir. 2001) (en banc) (per curiam).

and harms. Appropriate expressions of the rule of reason, as *Microsoft* teaches, may differ depending not only on whether courts deem the conduct unilateral or concerted, but also on the type of claim and whether Section 2 is triggered because the actor possesses monopoly power.

Kaplow's suggestion that, if conduct is *subject* to Section 1, Section 2 lacks independent operation overlooks this important aspect of the relationship between the two provisions. As Justice Scalia reminded many years ago, certain conduct, whether executed through agreement or not, "that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."<sup>12</sup> An implication is that circumstances exist where Section 2 principles makes a difference.

In short, even if "testing for the existence of a contract or other form of agreement is not very helpful"<sup>13</sup> because Section 2 may supply the operative rule of decision independent of Section 1, it does not follow that "all the effort devoted to debating and refining the proper treatment of arguably exclusionary practices under Section 2 and Article 102 should be abandoned."<sup>14</sup> Courts and commentators should continue the common-law process of identifying settings, if any, where otherwise lawful conduct might be found exclusionary when practiced by a dominant firm.

### I. FALLING THROUGH THE *COPPERWELD* GAP

Kaplow deploys numerous variations of *Colgate*-type situations to demonstrate that conduct deemed unilateral by the courts readily could be characterized as the product of "agreements."<sup>15</sup> He "characteriz[e]s existing law" in this area as follows: "Unilateral Action + Makeweight(s) = Vertical Agreement."<sup>16</sup> In other words, he concludes, the law of vertical agreements rests on legal fictions that do not produce "a plausible, meaningful, independent vertical agreement requirement."<sup>17</sup>

Kaplow's observation that both the criteria for finding vertical agreements and their underpinning in antitrust policy are murky is not novel.<sup>18</sup> Indeed, several additional examples further prove Kaplow's point.

---

<sup>12</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

<sup>13</sup> Kaplow, *supra* note 1, at 628.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 567–71.

<sup>16</sup> *Id.* at 582.

<sup>17</sup> *Id.* at 617–18.

<sup>18</sup> *See, e.g.*, Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 88 (2000) (noting that "[Sections 1 and 2] are converging; *Copperweld*'s theorized gap is vanishing."); *see also* Mark S. Popofsky, *Section 2*,

One is *Virginia Vermiculite*.<sup>19</sup> There, the Fourth Circuit found no Section 1 “agreement” where a mining monopolist owning rights to the only available undeveloped reserves of a rare mineral donated the land to a nonprofit committed to preserving the land as a historic landmark district.<sup>20</sup> Restrictive covenants barring any mining activity accompanied the donations. Although a court later invalidated the covenants, the mining defendant later made a second donation on the unwritten understanding prohibiting the receiving nonprofit from mining the land.<sup>21</sup> Even though the parties clearly engaged in “joint activity”—including an understanding to abide by the terms of the original covenants—the court deemed the gift unilateral conduct beyond the reach of Section 1.<sup>22</sup>

So-called pawn cases provide another example. These cases ask whether the distinction between blowing up a rival’s factory oneself (unilateral conduct) and contracting a third party to do so (arguably concerted action) has antitrust significance. Many courts now answer no and deem the conduct unilateral and, therefore, subject only to Section 2.<sup>23</sup> The “pawn” cases, too, ar-

---

*Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1266–67 (2008) (“Th[e] difficulty in defining and ascertaining concerted action pervades the entire field of vertical agreements.”); Glenn O. Robinson, *Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 620 (1994) (“The shortcomings of the [Colgate] doctrine’s theoretical foundations are only compounded by the practical difficulty of divining its application.”); Thomas A. Piraino, Jr., *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 NOTRE DAME L. REV. 1, 10–11 (1988) (concluding that “[t]he distinction set forth in the cases between unilateral and concerted conduct is simply illogical”).

<sup>19</sup> *Virginia Vermiculite Ltd. v. W.R. Grace & Co.*, 965 F. Supp. 802 (W.D. Va. 1997) (granting motion to dismiss antitrust claims); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 542 (4th Cir. 1998) (*Vermiculite I*) (reversing grant of motion to dismiss and remanding for further proceedings); *Virginia Vermiculite Ltd. v. W.R. Grace & Co.*, 108 F. Supp. 2d 549, 587 (W.D. Va. 2000) (granting in part defendants’ motions for summary judgment with respect to plaintiffs’ antitrust claims); *Virginia Vermiculite, Ltd. v. Historic Green Springs*, 307 F.3d 277, 280–84 (4th Cir. 2002) (*Vermiculite II*) (affirming summary judgment for defendant with respect to plaintiffs’ antitrust claims on alternative grounds).

<sup>20</sup> *Vermiculite II*, 307 F.3d at 282 (“We reaffirm what was made clear by *Copperweld*, that concerted activity susceptible to sanction by section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices).”).

<sup>21</sup> *Vermiculite I*, 156 F.3d at 537–38.

<sup>22</sup> *Vermiculite II*, 307 F.3d at 283 (“This conclusion squares with the long-established tradition of understanding gift-giving as a unilateral activity, despite the all too obvious fact that every gift ultimately involves someone else’s receipt.”).

<sup>23</sup> See, e.g., *Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1219–27 (N.D. Ala. 2011) (holding that an agent’s provision of equipment and services necessary for allegedly anticompetitive scheme “does not trigger the ‘core concern’ addressed by Sherman Act Section 1 . . . because [the pawn] and [defendant] do not compete with each other and [the pawn] lacks any economic interest in the state of competition in the relevant market. . . . Section 1 only prohibits activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests.” (internal quotations omitted)), *aff’d*, 721 F.3d

guably rest on a legal fiction: The conduct clearly involves—indeed, is made possible by—agreements between independent entities. Only by applying *Copperweld*'s underlying rationale do courts deem the conduct of principals and agents (or other actors) one and the same. After all, a distributor subject to a long-term exclusive dealing agreement (typically *not* deemed a pawn) may have less independence, fewer divergent interests, and/or a lesser “economic interest in the state of competition in the relevant market”<sup>24</sup> than pawns.

Product design involving complements is yet another. A monopolist redesigns an interface for the asserted purpose of excluding rivals in a consumable or in another product. As a consequence, customers purchase both products from the monopolist.<sup>25</sup> Even though the conduct involves no agreement, and Section 2 plainly governs the conduct,<sup>26</sup> some courts (but not all)—in what can be viewed as a reverse *Colgate* doctrine—find an implicit tying agreement.<sup>27</sup> These cases would seem to honor in the breach *Copperweld*'s direction not to treat concerted and unilateral conduct equivalently merely because they produce economically indistinguishable outcomes.

---

1281 (11th Cir. 2013); *Pink Supply Corp. v. Hiebert*, 788 F.2d 1313, 1317 (8th Cir. 1986) (manufacturer could not conspire with agents providing sales and promotional services because they were “so closely intertwined in economic interest and purpose . . . as to amount to a unified economic consciousness”).

<sup>24</sup> *Nucor*, 822 F. Supp. 2d at 1220–21 & n.22.

<sup>25</sup> See, e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998) (“Although Bard contended at trial that it modified its biopsy gun to make it easier to load and unload, there was substantial evidence that Bard’s real reasons for modifying the gun were to raise the cost of entry to potential makers of replacement needles, to make doctors apprehensive about using non-Bard needles, and to preclude the use of ‘copycat’ needles.”); see also *Xerox Corp. v. Media Sci. Int’l, Inc.*, 511 F. Supp. 2d 372, 389 (S.D.N.Y. 2007) (plaintiff stated a claim that Xerox’s redesigned ink sticks for Xerox printers had no consumer benefit and were intended only to prevent customers from using competing sticks); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1002–03 (N.D. Cal. 1979) (“[W]here a monopolist could utilize the design of its own product to maintain market control or to gain a competitive advantage. . . . [I]f those [ ] changes had no purpose and effect other than the preclusion of [competitors], this Court would not hesitate to find that such conduct was predatory [and] . . . that use of monopoly power would be condemned.”).

<sup>26</sup> 3B PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 777a (4th ed. 2016) (noting “[w]hen a defendant’s market share and the underlying market structure make monopolization or attempt plausible, then a tie that contributes significantly to the maintenance or creation of monopoly power violates § 2 even though it is unilaterally imposed. So-called technological ties are best treated as unilateral practices when the defendant decides to bundle two products together and then places the bundle on the market.”).

<sup>27</sup> See *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F. 2d 534, 541–42 (9th Cir. 1983) (dismissing per se tying claim but recognizing possibility of rule of reason Section 1 tying claim); *Systemcare, Inc. v. Wang Labs Corp.*, 117 F.3d 1137, 1142–43 (10th Cir. 1997) (en banc) (holding sale of computer hardware and software support services bundle may “satisf[y] the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer’s acquiescence in a tying arrangement”).

Notwithstanding Kaplow's analysis and these observations, *some* conduct plainly falls outside of Section 1. As Kaplow acknowledges,<sup>28</sup> an unconditional refusal to deal or termination of a prior course of dealing escapes Section 1. Aspen Ski Co.'s termination of the joint lift ticket with Aspen Highland involved no concerted action; on the contrary, the conduct terminated concerted action.<sup>29</sup> Nor did AT&T execute its refusal to provide access to unbundled network elements through any agreements.<sup>30</sup> Product design cases (other than implicit tying) comprise another. It requires no legal fiction to deem a change to a product's features unilateral and not the result of any concerted action.<sup>31</sup> These are areas where courts, mindful of deterring procompetitive conduct, "prohibit[ ] unilateral conduct but only when it rises to the more severe offense of threatening a monopoly."<sup>32</sup>

Kaplow does not rule out continuing to apply less interventionist legal tests, developed by courts under Section 2, to these practices.<sup>33</sup> Indeed, Kaplow suggests, one alternative to present doctrine is to restrict Section 1's application to horizontal agreements and instead police exclusionary practices solely under Section 2.<sup>34</sup> In such circumstances, a single doctrinal approach would govern the conduct, even if formally subject to both Sherman Act provisions. As Kaplow puts it:

All of this can be summarized by stating that the many practices that fall under both the tougher and laxer rules should receive some treatment, that there is a single answer to the question, and that the continuing engagement in simultaneous, parallel, [and] sometimes disconnected discourses cannot be the best way forward.<sup>35</sup>

For some practices, courts have already reached that conclusion. Take setting a price. In principle, Section 1 *might* govern conduct such as price setting.<sup>36</sup> Indeed, some courts have entertained the idea of a purely vertical predatory pricing conspiracy between buyer and seller.<sup>37</sup> However, there is

---

<sup>28</sup> Kaplow, *supra* note 1, at 625.

<sup>29</sup> Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 607–08 (1985).

<sup>30</sup> Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

<sup>31</sup> See, e.g., New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015) (challenging withdrawal of older version of branded drug in favor of new version). Agreements, of course, may be needed to obtain components. But this is not within any reasonable reading of the concerted action requirement.

<sup>32</sup> Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1198 (10th Cir. 2009).

<sup>33</sup> Kaplow, *supra* note 1, at 628.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Mark S. Popofsky, *Charting Antitrust's New Frontier: B2B*, 9 GEO. MASON L. REV. 565, 572 (2001) (explaining that "refusing to subject pricing decision to section 1 on the ground that a sales contract simply implements a 'unilateral' policy choice does not parse").

<sup>37</sup> William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014 (1981); see also Multistate Legal Studies, Inc. v. Harcourt Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d

little doubt today that a challenge to a firm setting prices too low, even if implemented through sales contracts with buyers, would be subject only to the standards set forth in *Brooke Group*,<sup>38</sup> whether or not conduct as a formal matter could be analyzed under Section 1.<sup>39</sup> *Brooke Group* itself supports this position. The case involved a primary-line price discrimination claim brought under the Robinson-Patman Act, which requires completed sales contracts; but the Court recognized that Section 2's below-cost test properly governed.<sup>40</sup>

Applying the same below-cost test to allegations of predatory pricing irrespective of Section 1's (or the Robinson-Patman Act's) applicability makes sense: It would flout sound antitrust policy, for reasons then-Judge Breyer explained in *Barry Wright*,<sup>41</sup> to subject an allegation of predatory pricing to some balancing implementation of the rule of reason. As explained there, rules that "seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."<sup>42</sup> No balancing test could distinguish between a pro-competitive price cut and a potentially anticompetitive, above-cost "disciplinary cut" without "chill[ing] highly desirable procompetitive price cutting."<sup>43</sup>

---

1540, 1548–49 (10th Cir. 1995) (recognizing Section 1 predatory pricing theory); *W. Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013, 1015–18 (9th Cir. 1985) (pre-*Brooke Group* case permitting a Section 1 predatory pricing claim).

<sup>38</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>39</sup> See Popofsky, *supra* note 36, at 571. This principle is settled with respect to horizontal predatory claims brought under Section 1. See *Energy Conversion Devices v. Trina Solar Ltd.*, No. 15-2130, 2016 WL 4394564, at \*5 (6th Cir. Aug. 18, 2016) ("After *Brooke Group*, every circuit to consider the question has required the elements of § 2 predatory-pricing claims in similar claims under § 1 or (like *Matsushita*) has not distinguished between the two provisions." (citing cases)).

<sup>40</sup> *Brooke Group*, 509 U.S. at 222 ("Accordingly, whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same."); see also *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1195 n.3 (3d Cir. 1995) ("While the plaintiff in *Brooke Group* alleged 'primary line' price discrimination under the Clayton Act . . . the Court made clear that such price discrimination was factually identical to predatory pricing and thus that the analysis in the opinion applies as well to predatory pricing suits under section 2 of the Sherman Act." (internal citation omitted)). The *Foremost's* court refusal to apply tying's per se rule to the implicit tie it found from the simultaneous introduction of new camera and film is another example of refusing to mechanically apply a Section 1 legal test to conduct governed by both statutes. See *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 541–42 (9th Cir. 1983).

<sup>41</sup> *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

<sup>42</sup> *Id.* at 234.

<sup>43</sup> *Id.* at 235–36. What evidence satisfies the recoupment requirement might differ depending on whether the claim sounds under Section 2 or a different provision. See *Brooke Group*, 509 U.S. at 230 (recognizing possibility of predatory price discrimination when "recoupment is alleged to take place through supracompetitive oligopoly pricing"). But the key point is that the cost-based safe harbor applies in a predatory pricing case regardless of which statute applies.

The predatory pricing examples support a conclusion that, at least for *some* practices governed both by Section 1 and Section 2, “there [should be] a single answer” to the question of the legal “treatment” they receive.<sup>44</sup> However, cases refusing to oust safe harbors developed under Section 2 merely because the court also theoretically could deploy Section 1 illustrate a separate, key point about current doctrine: Substantive legal tests developed for Section 2 can (and do) play a distinct role even when Section 1’s agreement requirement arguably is met. In the case of predatory pricing, as *Barry Wright* explains, a safe harbor developed in the Section 2 setting provides an error-cost based justification for *not* applying Section 1’s case-specific balancing test, but rather applying a more restrictive doctrine. Even if a properly applied balancing under Section 1 would condemn the conduct, a safe harbor precludes that inquiry.

The case of Section 2 safe harbors limiting Section 1’s operation prompts a related question: Do circumstances exist where, even if Section 1 would exonerate the conduct, Section 2 nonetheless would find liability? As explained next, the answer to this question provides one response to Kaplow’s puzzle “why those challenging firms’ practices often choose the tougher [Section 2] route when an easier path [under Section 1] is available.”<sup>45</sup>

## II. THE RULE OF REASON DIVINING ROD

The answer to this question, and to Kaplow’s puzzle, can be found in the relationship between the substantive analysis called for by Section 1 and by Section 2. Section 1 and Section 2, the Supreme Court explained long ago, both implement the rule of reason.<sup>46</sup> The rule of reason, however, is not one-size fits all; its expression depends on the setting.<sup>47</sup> These propositions provide a basis for Section 2’s continued independent relevance notwithstanding Kaplow’s critique of Section 1’s agreement requirement.

The rule of reason is most familiar as a case-specific, step-wise balancing test. The rule of reason, though, also provides a *principle* for generating set-

---

<sup>44</sup> Kaplow, *supra* note 1, at 628.

<sup>45</sup> *Id.* at 627. Of course, real-world litigants may invoke Section 2 in addition to or in lieu of Section 1 because of the perceived atmospheric benefits of a monopolization charge, as well as uncertainty as to how courts will apply *Copperweld*, among other reasons.

<sup>46</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1, 61–62 (1911) (explaining that “when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason”). The issue here is not Section 2’s additional requirement of monopoly power or a dangerous prospect of its achievement. Rather, the question is how courts apply Section 1 and Section 2 to the same conduct when that prerequisite is met.

<sup>47</sup> See Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 455–56 (2006).



ting-specific tests that govern various categories of conduct.<sup>48</sup> For the setting in question, Section 2's rule of reason directs antitrust tribunals to engage in balancing on a systemic level: to select the legal test for that setting that, over the long run, best promotes competition and consumer welfare.

*Trinko*<sup>49</sup> illustrates Section 2's rule of reason at work. The Court did not stop its analysis after concluding that "[t]he refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*."<sup>50</sup> The Court also asked whether "traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors."<sup>51</sup> Weighing the high costs of antitrust intervention—including intractable problems of enforcement and the significant risk "of false positives" against "the slight benefits of antitrust intervention," the Court came out decisively against recognizing a new duty to deal.<sup>52</sup> The Court's weighing of the benefits and costs to competition and consumers translates to the common-law process of generating antitrust doctrines the case-specific balancing test the rule of reason supplies.<sup>53</sup>

The rule of reason, as a source of Section 2 legal tests as a descriptive matter, explains the range of legal tests courts have created for conduct subject to Section 2. As Kaplow observes, some (indeed, many) of these legal tests are harder to meet than a case-specific balancing expression of Section 1's rule of reason, which Kaplow describes as "call[ing] for an even balancing of pro- and anticompetitive effects."<sup>54</sup> But this is not true for all Section 2 legal tests. Section 2 doctrines range from rules of per se legality (such as charging a monopoly price) to conduct (such as naked exclusion) that, if engaged in by a monopolist, is nearly per se illegal. As depicted in an earlier article<sup>55</sup>:

---

<sup>48</sup> See *id.* at 438–56.

<sup>49</sup> *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 411.

<sup>52</sup> *Id.* at 414.

<sup>53</sup> See Popofsky, *supra* note 47, at 456 ("[C]ourts recognize both expressly in their reasoning and implicitly in their outcomes that (1) the appropriate test for 'reasonableness' under Section 1 or Section 2 can vary depending on the circumstances; and (2) that test is the one that makes consumers in the long run best off or, put equivalently, minimizes error and legal process costs.").

<sup>54</sup> See Kaplow, *supra* note 1, at 621.

<sup>55</sup> See Popofsky, *supra* note 47, at 441.



Thus, Kaplow finds no connection between *Brooke Group*'s test for predatory pricing and the rule of reason.<sup>61</sup> But this is to take a limited view of the rule of reason as only a case-specific balancing test that “calls for an even balancing of pro- and anticompetitive effects.”<sup>62</sup> Recognizing the *Brooke Group* test as an *expression* of the rule of reason's underlying principle for generating antitrust legal tests squares the circle.<sup>63</sup>

Kaplow also views *Copperweld*'s “manifesto” on the different principles applicable to unilateral and concerted action as at odds with *Standard Oil*.<sup>64</sup> This claim of tension is overstated. *Copperweld*'s explication of the implications of how Section 1's coverage differs from Section 2's does not imply ouster of the rule of reason as an underlying principle—or, in some settings, as the governing legal test in its step-wise incarnation—when Section 2 *does* apply; viz. when the conduct threatens actual or threatened monopolization. On the contrary, the Court stated: “It is not *enough* that a single firm appears to ‘restrain trade’ unreasonably”; rather, “[t]he conduct of a single firm” is “unlawful only when it threatens actual monopolization.”<sup>65</sup>

Once it is recognized that the rule of reason is not one-size fits all, Kaplow's suggestion that Section 2 is superfluous in concerted action cases fails to persuade. Section 1's and Section 2's *coverage* of the same conduct does not, perforce, render Section 2 irrelevant. Different implementations of the rule of reason under Section 1 and Section 2 may lead to certain practices' exoneration under the former but condemnation under the latter. Conduct “that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”<sup>66</sup>

To be sure, one could apply Kaplow's “equipoised”<sup>67</sup> Section 1 differently in the presence of monopoly power. The rule of reason, after all, calls for “an enquiry meet for the case.”<sup>68</sup> The competitive harm an exclusionary practice threatens, depending on the setting, may increase with the degree of market power. A greater potential for anticompetitive effects, in turn, may warrant

---

<sup>61</sup> *Id.* at 621 n.163 (“Likewise, courts examining particular practices under Section 2 tend not to mention the rule of reason as such or its equipoised balancing rubric.” (citing *Brooke Group*)).

<sup>62</sup> *Id.* at 621.

<sup>63</sup> See Popofsky, *supra* note 47, at 460–61 (explicating the *Brooke Group* test).

<sup>64</sup> See Kaplow, *supra* note 1, at 623; see also *id.* at 621 n.163 (“The passage quoted in the text to follow from *Copperweld* contrasts with *Standard Oil*'s suggestion that the two sections essentially prohibit the same thing.”).

<sup>65</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984) (emphasis added).

<sup>66</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

<sup>67</sup> Kaplow, *supra* note 1, at 621 n.163.

<sup>68</sup> *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

relaxing other requirements for liability under Section 1 (for example, lower the foreclosure share required to find competition threatened, or increase the efficiencies required for exoneration).<sup>69</sup> If Section 1 *always* operated this way, and *always* condemned concerned action that Section 2 invalidated, the substantive difference between the provisions might indeed be as narrow as the Kaplow-exposed *Copperweld* gap.<sup>70</sup>

But neither holds. For example, in exclusive dealing cases (as discussed next), some courts refuse to find liability under Section 1 absent a 40 percent foreclosure share, even when a lower level of foreclosure may support monopolization.<sup>71</sup> Similarly, some cases suggest that, in certain settings, the “causation” component of the test for exclusionary conduct may be less demanding than Section 1’s rule of reason requires.<sup>72</sup> Thus, even if the same practices are subject to both provisions, Section 2 does *not* always collapse into Section 1. As the Areeda treatise explains: “The point is that §2’s highly general proscription of ‘monopolistic’ practices is not cabined by any specific statutory formulation and thus can be both less than or more than the prohibitions of other antitrust laws.”<sup>73</sup>

---

<sup>69</sup> The application of Section 1 to predatory pricing claims, discussed above, presents a closely related question: whether Section 1 analysis always calls for case-specific balancing (aside from cases calling for “quick look” or *per se* analysis). As that example illustrates, it does not.

<sup>70</sup> Note, however, that an independent role would remain for determining whether different substantive rules should apply to a monopolist’s exclusionary conduct than a non-monopolist’s. This is somewhat different from Kaplow’s suggestion, discussed above, that one possible path forward, in light of the near total overlap of the conduct Section 1 and Section 2 reach, is “to determine the best rules under Section 2 . . . and instead abandon such efforts regarding vertical arrangements under Section 1.” Kaplow, *supra* note 1, at 628.

<sup>71</sup> As one court put it in applying Section 1, “[L]ow numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny based on [many] factors.” *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004). Some commentators criticize requiring a particular foreclosure share as a prerequisite to Section 1 liability. See Jonathan M. Jacobson, *Exclusive Dealing, ‘Foreclosure,’ and Consumer Harm*, 70 ANTITRUST L.J. 311, 361–63 (2002). Nevertheless, as *Microsoft* illustrates, some courts seemingly treat a threshold foreclosure share as a necessary condition (absent, perhaps, hard-to-prove actual anticompetitive effects) for establishing a violation of Section 1, yet permit Section 2 claims to proceed even when that threshold is not met.

<sup>72</sup> Kaplow invokes cases requiring a “significant contribution to maintaining monopoly power” for Section 2 liability (citing Areeda), and contends this demands more than the “evenly balanced” formulation of Section 1’s rule of reason. Kaplow, *supra* note 1, at 621 n.163 (internal quotations and citation omitted). But in *Microsoft*, the court required in a case seeking injunctive relief only that the conduct “‘reasonably appear[ ] capable of making a significant contribution to . . . maintaining monopoly power.’” *United States v. Microsoft Corp.*, 253 F.3d 34, 44 (D.C. Cir. 2001) (en banc) (per curiam) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996)). This “edentulous test for causation,” *id.*, may be read to demand less than Section 1, which requires outside the *per se* setting “the potential for genuine adverse effects on competition.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460 (1986), and in some formulations an “effect actual or probable.” *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (emphasis added).

<sup>73</sup> 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651i, at 131 (4th ed. 2015). One way to explain this result is not that Section 2 at times condemns procompetitive

### III. SECTION 2'S INDEPENDENT APPLICATION TO VERTICAL AGREEMENTS

An illustration of when, as a descriptive matter, Section 1 and Section 2 produce different results when applied to vertical agreements is *United States v. Microsoft Corp.*<sup>74</sup> There the Department of Justice challenged, among other concerted conduct, Microsoft's contracts with Internet Access Providers (IAPs), such as AOL. IAPs and Original Equipment Manufacturers (OEMs), the government showed, comprised the two most important channels for distributing Internet browsers. To counter the Netscape Navigator Internet browser, the widespread use of which Microsoft viewed as a threat to its long-standing monopoly in PC operating systems, Microsoft secured exclusive deals with the largest IAPs, such as AOL.

The district court exonerated Microsoft's conduct under Sherman Act Section 1 because the DOJ failed to demonstrate that the exclusive IAP agreements foreclosed a substantial share of the browser market—a threshold the court set at 40–50 percent. By contrast, the court held that Microsoft's IAP agreements, in part because they closed off one of the two most important channels for distributing browsers, violated Sherman Act Section 2. The D.C. Circuit concurred. The en banc Court explained:

The basic prudential concerns relevant to §§ 1 and 2 are admittedly the same: exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm. At the same time, however, we agree with plaintiffs that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.<sup>75</sup>

On the facts of the case, the government's theory supported applying a different share threshold for finding an anticompetitive effect depending on

---

conduct, but rather that, for decision-theoretic reasons, Section 1 may not reach anticompetitive conduct Section 2 properly invalidates. Section 1's lower market power threshold leaves more conduct subject to its reach than Section 2. Accordingly, the argument would run: a greater potential exists for costly false positives from erroneously condemning conduct associated with a low foreclosure share under Section 1 than from permitting challenges to the same conduct under Section 2. On the other side of the equation, the argument would similarly run, because the costs of impairing competition to a monopolist are high, the costs associated with false negatives are higher under Section 2 than under Section 1. Applying Section 2 standards in Section 1 cases involving monopolists might provide a rejoinder to this argument, but that would leave an independent role for Section 2's distinct test.

<sup>74</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law) (en banc) (per curiam), *aff'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>75</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc) (per curiam).

the market at issue. To achieve an anticompetitive effect in the browser market, according to the court, required a significantly greater shifting of browser usage than that required to maintain Microsoft's PC Operating System monopoly: Hindering Netscape's usage to a lesser degree sufficed to impede its ability to become disintermediating middleware that would threaten the Windows operating system monopoly.<sup>76</sup> However, that alone cannot explain requiring a lower foreclosure share to establish Section 2 monopoly maintenance than a Section 1 violation involving the same market. Viewing the matter from a policy perspective, *Microsoft* seemingly drew the distinction between the foreclosure share required for Section 2 liability and that required under Section 1 in order to not discourage the procompetitive use of exclusivity in the high-tech industry.<sup>77</sup>

The lesson for the structure of competition law is more general: the monopolization offense, the "heavy artillery of antitrust," need not in every dimension prove "the tougher route" than Section 1.<sup>78</sup> Section 2 surely is harder to satisfy than Section 1's "equipoised balancing rubric"<sup>79</sup> in many cases. But settings such as *Microsoft* exist where, once a court finds a monopolist involved, the facts required to show an anticompetitive effect can differ under Section 2 and Section 1.<sup>80</sup>

Another example is the little examined, but often-litigated, conspiracy-to-monopolize offense. Most conspiracy-to-monopolize cases are horizontal, but some are vertical.<sup>81</sup> These cases, if brought under Section 1, typically would require defining markets and identifying actual anticompetitive effects.<sup>82</sup> But according to some courts, a conspiracy to monopolize requires neither. In-

---

<sup>76</sup> *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 103 (D.D.C. 1999) (findings of fact) (finding Netscape Navigator "could only attract enough developer attention to threaten the applications barrier to entry [protecting Microsoft's Windows monopoly] if Navigator became—or appeared destined to become—the standard software used to browse the Web.").

<sup>77</sup> For a decision-theoretic explanation of this reasoning, see *supra* note 73.

<sup>78</sup> Kaplow, *supra* note 1, at 627.

<sup>79</sup> *Id.* at 621 n.163.

<sup>80</sup> See, e.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191–97 (3d Cir. 2005) (reasoning that "a finding in favor of the defendant under Section 1 of the Sherman Act and Section 3 of the Clayton Act[ ] did not preclude the application of evidence of . . . exclusive dealing to support the [Section] 2 claim" (internal quotations omitted)); *LePage's Inc. v. 3M*, 324 F.3d 141, 158 n.10 (3d Cir. 2003) (en banc) (same).

<sup>81</sup> See *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (alleging conspiracy between franchisor and its distributor subsidiary to monopolize market for frozen food, paper products, and promotional items used by franchisee); *Vermiculite I*, 156 F.3d 535 (4th Cir. 1998) (alleging dominant producer conspired with nonprofit organization to monopolize market through donation of land on the understanding that nonprofit would refrain from engaging in mining activity).

<sup>82</sup> At least when the conduct does not fall within a category of per se illegality.

stead, the conspiracy, a specific intent to acquire or maintain monopoly power, and overt acts may suffice.<sup>83</sup>

To be sure, the ultimate policy question is whether liability standards *should* differ based on whether the actor is (or is not) a monopolist. In many settings (including when a conspiracy to monopolize might be alleged), sound antitrust policy may not support distinguishing between the facts required to make out a Section 1 or Section 2 violation. Candidates include structural transactions, where courts already have largely unified the standard applied under Sherman Act Section 1 and Clayton Act Section 7.<sup>84</sup> And, as noted, certain conduct, such as product design and pricing, should be subject to the tests developed in the Section 2 context regardless of whether Section 1 in theory could be applied to the conduct because of some background vertical relationship necessary to carrying out the conduct.

There doubtless are many others where, as a policy matter, Section 2 and Section 1 standards should converge. The central points remain undiminished: Section 2 principles can supply the operative rule of decision even when Section 1 formally applies; and Section 2 may, depending on the setting, condemn conduct that Section 1 might exonerate.

#### IV. CONCLUSION

Professor Kaplow correctly observes that *Colgate's* distinction between unilateral and concerted action finds slippery footing when applied in many settings. Nonetheless, it does not follow, as Kaplow can be read to suggest, that independently developing Section 2 jurisprudence under the current structure of competition law is an empty enterprise. As *Microsoft* illustrates, even if the same conduct can be analyzed under both Section 1 and Section 2, circumstances exist where the Sherman Act condemns the conduct only when practiced by a monopolist. In other settings (such as alleged predatory pric-

---

<sup>83</sup> See, e.g., *Monument Builders v. Am. Cemetery Ass'n*, 891 F.2d 1473, 1484 (10th Cir. 1989) ("Conspiring to monopolize . . . requir[es] less in the way of proof than the other section 2 offenses. For example, the market power in a relevant market need not be proved. A plaintiff must show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." (internal quotations and citations omitted)). Thus, it is not necessarily the case that the conspiracy to monopolize provision is "moot because any such conspiracy would be reached by Section 1 in any event." Kaplow, *supra* note 1, at 619 n.155. That conclusion might apply in other courts that require, as in attempt to monopolize cases, a dangerous probability of achieving monopoly. See *Levitch v. CBS Inc.*, 495 F. Supp. 649, 668 (S.D.N.Y. 1980) ("[P]laintiffs' charges of . . . conspiracy to monopolize are defective for another reason: . . . For example, nowhere . . . are [the defendants] charged with possessing sufficient market share to create a dangerous probability that they would be successful.").

<sup>84</sup> *United States v. Rockford Mem. Corp.*, 898 F.2d 1278, 1282 (7th Cir. 1990) ("[B]oth statutory formulas require, and have received, judicial interpretation; and the interpretations have, after three quarters of a century, converged.").

ing), applications of the rule of reason developed under Section 2 provide the rule of decision irrespective of whether Section 1 formally can apply.

The rule of reason's role as a principle for generating applicable antitrust legal tests, rather than merely as a case-specific rule of decision, provides the answer for unraveling this particular "myster[y]" of *Copperweld* illuminated by Professor Kaplow.<sup>85</sup> The question for antitrust policy remains: In what settings *should* the rules for putative monopolists differ from those that apply to other firms, and why? When does Justice Scalia's dictum that, conduct "that might not otherwise be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist," properly apply?<sup>86</sup> Identifying these settings based on sound antitrust principles remains a vital task.

---

<sup>85</sup> Popofsky, *supra* note 18, at 1265.

<sup>86</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).