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## TRINKO AND RE-GROUNDING THE REFUSAL TO DEAL DOCTRINE

*Adam Candeb\**

*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (“*Trinko*”),<sup>1</sup> the most important Supreme Court antitrust review of the refusal to deal antitrust doctrine in twenty years, pitted a local incumbent monopolist telephone company (“ILEC”), Verizon,<sup>2</sup> against a class of competitive local exchange companies (“CLECs”), the new entrants to local telephone service spawned by the 1996 Telecommunications Act (“1996 Act” or “Telecom Act”), and their customers.<sup>3</sup> The Supreme Court rejected the CLECs’ claim that Verizon violated the antitrust laws by failing to provide interconnection services as the Act required. The CLECs based their claim upon two antitrust doctrines: “refusal to deal” and “essential facilities,”<sup>4</sup> both of which require monopolists to provide vital vertical inputs to their downstream competitors.<sup>5</sup> Here, the input was interconnection or “access” on a wholesale level to Verizon’s telephone network that its competitors needed in order to provide retail phone service.<sup>6</sup> The Court ruled that if a legal mechanism exists, as with the 1996 Act, to compel access to the putative monopolist’s resource, the refusal to deal doctrine has nothing to remedy and, therefore, plaintiffs did not state an antitrust claim.<sup>7</sup>

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\* Assistant Professor, Michigan State University College of Law. Thanks to Spencer Waller and Steve Wildman for their valuable insights; all errors are my own. Thanks to Julie Taiber and H.W. Candeb for their support and editing.

1. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

2. ILECs include the regional Bell Operating Companies (RBOCs), which were the original seven local telephone services created by the break-up of AT&T in 1983. The original seven—Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell, and US West have combined, through various mergers, into BellSouth, Qwest, SBC, and Verizon. See HARRY NEWTON, *NEWTON’S TELECOM DICTIONARY* 6 (20th ed. 2004). These companies are often referred to as the “Baby Bells.”

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

4. See 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 771b, at 171 (2d ed. 2000); *id.* ¶ 772b, at 176.

5. *Id.* ¶ 771, at 171 (stating “the essential facility claim is about the duty to deal of a monopolist”).

6. *Id.* (“Understanding the ‘vertical’ nature of essential facility claims helps to focus the analysis: the essential facility claim is about the duty to deal of a monopolist who is able to supply an input for itself in a fashion that is so superior to anything else available.”).

7. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (stating no access is required “where a state or federal agency has effective power to compel sharing and to regulate its scope and terms”) (quoting 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 773C, at 150).

How lower courts interpret *Trinko* will have a determinative impact on all network and communications industries. Given the lukewarm success of the Telecommunications Act and the Federal Communications Commission's (FCC) efforts to foster local telephone competition, the antitrust laws may be the only effective method for competitive telephone networks to guarantee access to the Baby Bells' networks.<sup>8</sup> Naturally, *Trinko* will be influential in the CLECs' ongoing suits predicated on different antitrust theories other than refusal to deal.<sup>9</sup> Beyond telephony, the Court's ruling could have a huge impact in the countless simmering disputes in network industries, ranging from Internet broadband access and the open cable system debates to the satellite and electricity industries.<sup>10</sup>

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8. Most industry commentators consider that the Act has failed in its effort to create vibrant local competition. See, e.g., *Don't Blame Telecom Act; Blame Its Enforcement*, TELECOM POL'Y REP., Aug. 4, 2004, at 30 (setting forth the argument of Vincent Cerf, designer of the IP protocol and one of the "fathers of the internet," who blames the "failure" of the Act on its implementation), available at 2004 WL 67005979; David S. Isenberg, *The End of the Middle: Pushing Network Intelligence out to Its Edges Is Causing the Phone Industry To Fail—and That's Okay*, IEEE SPECTRUM, Jan. 1, 2003, at 37, 37 (calling the Act an "utter failure"), available at 2003 WL 13280190. Legal commentators tend to agree. See, e.g., Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act To Blame?*, 81 WASH. U. L.Q. 1, 2 (2003) ("Seven years after the passage of the Act, it is regretfully safe to posit that the telecommunications field is in total disarray."); J. Gregory Sidak, *Remedies and the Institutional Design of Regulation in Network Industries*, 2003 MICH. ST. DCL L. REV. 741, 755 ("European regulators in Brussels and London with whom I have met do not regard the Telecommunications Act of 1996 as a success, and they do not want to emulate it."); Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 962 n.417 (2004) (noting the "general failure of the 'unbundling' requirements of the 1996 Telecommunications Act").

9. See, e.g., *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050-52 (11th Cir. 2004) (allowing an antitrust "price squeeze" suit to continue); *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F. Supp. 2d 513 (E.D. Tex. 2004) (same).

10. The disputes include the "open access" debates in cable systems, which involve whether cable systems must open their networks to programmers, as well as the Bells' continuing obligation to interconnect with competing internet service providers. The FCC's efforts to "close" the cable systems, see *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002) (Declaratory Ruling and Notice of Proposed Rulemaking) [hereinafter *High-Speed Declaratory Ruling*], have been recently upheld by the Court. See *Nat'l Cable & Telecom. Assoc. v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005). The FCC has recently issued final orders on telephone interconnection with DSL-provided broadband concluding that mandatory interconnection is not required. See Press Release, Federal Communications Commission, *FCC Eliminates Sharing Requirement on Incumbents' Wireline Broadband Internet Access Services* (Aug. 5, 2005); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019 (2002) (Notice of Proposed Rulemaking) [hereinafter *Broadband Access NPRM*].

Scholarly debate on the issue has been intense. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001); JOHN B. MORRIS, JR. & JERRY BERMAN, CTR. FOR DEMOCRACY & TECH., *THE BROADBAND INTERNET: THE END OF THE EQUAL VOICE?* (2000), available at <http://www.cdt.org/publications/broadbandandinternet.pdf> (last visited Mar. 1, 2005); ACLU, *NO COMPETITION: HOW MONOPOLY CONTROL OF THE BROADBAND INTERNET THREATENS FREE SPEECH* (2002), available at <http://www.aclu>.

This article argues that the Court's opinion is at times at odds with a large body of widely accepted economic theory—as well as the plain language of the 1996 Act's saving clause. *Trinko's* implication that there can be no antitrust injury from refusing to deal, *i.e.*, provide interconnection, so long as regulation requires access, is probably not true. In other words, the *Trinko* opinion could potentially immunize from antitrust scrutiny whole swathes of anticompetitive behavior.

Beyond *Trinko*, this article examines the refusal to deal doctrine and the antitrust theory on which the Court ruled, and offers a re-interpretation of the doctrine. Rather than view the doctrine as merely protecting competitors and competition, not consumer welfare, this article maintains that the doctrines are meant to prevent vertical foreclosure, which under certain conditions can have negative consumer welfare implications. Vertical foreclosure is, broadly speaking, the strategy of a dominant firm in one market to exclude competitors from another market by refusing to sell them a bottleneck good.<sup>11</sup> Antitrust authorities, particularly prominent figures in the “Chicago School” of antitrust

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org/issues/cyber/NoCompetition.pdf (last visited Mar. 1, 2005); Antonia M. Apps & Thomas M. Dailey, *Non-Regulation of Advanced Internet Services*, 8 GEO. MASON L. REV. 681 (2000); Earl W. Comstock & John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable as Required by the Communications Act*, 8 COMMLAW CONSPECTUS 5 (2000); Harold Feld, *Whose Line Is it Anyway?: The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23 (2000); Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207 (2003); Raymond Shih Ray Ku, *Open Internet Access and Freedom of Speech: A First Amendment Catch-22*, 75 TUL. L. REV. 87 (2000); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) [hereinafter Lemley & Lessig, *End-to-End*]; Mark A. Lemley & Lawrence Lessig, *Open Access to Cable Modems*, 22 WHITTIER L. REV. 3 (2000) [hereinafter Lemley & Lessig, *Open Access*]; Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 631 (2001); James B. Speta, *Unbundling and Open Access Policies: The Vertical Dimension of Cable Open Access*, 71 U. COLO. L. REV. 975 (2000); Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171 (2002); Heather T. Hendrickson, Comment, *Cable Open Access: The FCC Should Establish a National Policy of Staying Out of the Way of Broadband Competition*, 8 GEO. MASON L. REV. 749 (2000); Marcus Maher, Comment, *Cable Internet Unbundling: Local Leadership in the Deployment of High Speed Access*, 52 FED. COMM. L.J. 211 (1999); Christopher K. Ridder, Note, *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146 (D. Ore. 1999), 15 BERKELEY TECH. L.J. 397 (2000); Jason Whiteley, Note & Comment, *AT&T Corp. v. City of Portland: Classifying the “Internet over Cable” in the “Open Access” Fight*, 2000 BYU L. REV. 451, 455-83; David Wolitz, Note, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 YALE SYMP. L. & TECH. 6 (2001). The issue is vital in other network industries like satellite communications. See Kenneth Katkin, *Cable Open Access and Direct Access to INTELSAT*, 53 CASE W. RES. L. REV. 77 (2002).

11. Patrick Rey & Jean Tirole, *A Primer on Foreclosure 1*, in HANDBOOK OF INDUSTRIAL ORGANIZATION III (Mark Armstrong & Rob Porter eds.).

scholarship, have largely disparaged vertical foreclosure as a theory of antitrust harm,<sup>12</sup> and its scope has been dramatically curtailed, largely because the harm it is intended to prevent has seemed unlikely to occur: firms will not accept temporary losses in sale (by refusing to sell to competitors) in order to achieve some long-term market dominance in a vertically related market—or, as Justice Scalia might say, to pursue “dreams of monopoly.”<sup>13</sup>

Recent economic theory suggests, however, that exclusion may allow the bottleneck owner to enhance its monopoly power in its existing market (as opposed to its downstream market).<sup>14</sup> This, in turn, allows the monopolist to enhance its monopoly rents (*i.e.*, raise prices to a supra-competitive level) in its *existing* monopoly by precluding potential competition. Such a strategy might decrease total social welfare—clearly an antitrust injury.<sup>15</sup> This article concludes that in network industries, with incumbent monopolists possessing significant market power on the wholesale and retail level, vertical foreclosure is a serious concern, and *Trinko* must be read to allow antitrust law to adjudicate such claims.

Finally, the *Trinko* Court’s implication that a dominant firm’s refusal to interconnect cannot present an antitrust violation, provided such firm is regulated, is refuted by the most significant telecommunications antitrust decisions of recent history. The *Execunet* decision,<sup>16</sup> which helped to create the competitive long distance industry and, of course, the Modified Final Judgment,<sup>17</sup> which brought about the break-up of AT&T, both found anticompetitive behavior even though the monopolist and its interconnection obligations were regulated.

Section I examines the key critiques of the refusal to deal and essential facilities doctrines. It classifies the critiques according to the three types of efficiencies that economics generally recognize: allocative, productive, and

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12. Fredorick R. Warren-Boulton, *The Contribution of the Merger Guidelines to the Analysis of Non-Horizontal Mergers*, available at <http://www.usdoj.Gov/atr/hmerger/11709.htm> (“The Chicago school has provided theoretical and empirical evidence of how every form of vertical control can be the optimal instrument to achieve efficiencies.”).

13. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

14. See Rey & Tirole, *supra* note 11, at 6.

15. The article accepts the “consensus . . . [that] antitrust should be viewed as ‘a consumer welfare prescription.’ Under this interpretation, a practice restrains trade, monopolizes, is unfair, or tends to lessen competition if it harms consumers by reducing the value or welfare they would have obtained from the market-place absent the practice.” Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 244 (1987).

16. *MCI Telecomm. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir. 1978).

17. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

dynamic. The section concludes that while these critiques are strong, they are, like most economic arguments, limited in their application. The section points out those instances in which they would not hold, suggesting a possible application of the antitrust laws.

Section II examines *Trinko*'s primary antitrust legal holding—that, as a matter of law, neither the refusal to deal nor essential facilities doctrines apply to goods sold pursuant to a regulatory mandate. It discusses the doctrines and their status in both Supreme Court precedent and legal and economic commentary. The section points out that the *Trinko* decision relied upon a bare logical deduction: if access is the remedy that the refusal to deal and essential facilities doctrines provide, and if existing law or regulation already requires access, then the refusal to deal and essential facilities doctrines have no role to play, because there is no injury.<sup>18</sup> Remedies have already been granted. This reasoning, though possessed of certain dogmatic force, begs the question: do refusals to interconnect, whether made pursuant to regulatory mandate or not, constitute an anticompetitive injury, which would seem to be the basic issue presented in *Trinko*.

Section III examines the conditions under which a refusal to deal should constitute an antitrust violation and whether the facts of *Trinko* might satisfy such conditions. Severely criticized by commentators and treated with disdain by the *Trinko* court, the refusal to deal doctrine does rest on uncertain economic and legal grounds. Relying on recent economic research, this section reinterprets the doctrine, suggesting that refusals to interconnect could be part of an anticompetitive strategy of vertically foreclosing competition.<sup>19</sup> While commentators have recognized these doctrines' vertical nature,<sup>20</sup> they have failed to characterize them as foreclosure by a firm with market power in two vertically related markets.

Finally, Section IV returns to the central concern that motivated the *Trinko* Court: that the judiciary would be unable to administer or prescribe effective remedies under the refusal to deal and essential facilities doctrines, tasks presumably more suitable to an administrative agency.<sup>21</sup> Given the

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18. *Trinko*, 540 U.S. at 409 (“The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* [the leading refuse to deal precedent.]”); *id.* at 411 (“[T]he indispensable requirement for invoking the doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.”).

19. As discussed *infra*, a dominant player in a network industry can vertically integrate and refuse to interconnect as one strategy in retaining monopolist rents.

20. See *supra* note 6.

21. *Trinko*, 540 U.S. at 414 (stating that “conduct consisting of anticompetitive violations of § 251 [of the 1996 Act] may be, as we have concluded with respect to above-cost predatory pricing schemes,

decision's weak, legalistic grounds—which are at tension with the 1996 Act's plain language—the *Trinko* Court's true motivation arguably lies in these policy/prudential concerns which, in fact, constitute a significant bulk of the opinion.<sup>22</sup>

Contrary to the *Trinko* Court's fear of court-mandated interconnection,<sup>23</sup> Section IV points out that judges have been quite competent at creating interconnection regimes, most notably Judge Greene's break-up of AT&T that mandated interconnection between the local telephone companies (the "ILECs" and "Baby Bells"), which produced a vibrant, competitive long-distance industry.<sup>24</sup> This article argues that success in mandating successful interconnection does not depend on the institution (judicial or administrative) that sets the terms for interconnection. Both the judicial and agency decision-making processes have their strengths and weaknesses. Successful mandating of access depends more on the *type* of interconnection mandated. Looking to the Coasian theory of the firm and the field of transaction cost economics, and its elaboration and specification by Oliver Williamson,<sup>25</sup> the article argues that interconnection can be successfully mandated if such interconnection has governance costs that are relatively low—in other words, it is relatively simple and would be efficient to be performed between firms using market mechanisms.

## I. AGAINST THE REFUSAL TO DEAL DOCTRINE

Antitrust law prohibits acts of monopolization or attempts to monopolize.<sup>26</sup> Modern economic understanding of illegal monopolization concludes that merely having a large market share does not make an economic actor an illegal monopolist. As has been pointed out on countless occasions, a corporation's possession of large market share does not necessarily mean

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'beyond the practical ability of a judicial tribunal to control'") (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)).

22. *Id.* at 411-17.

23. The Court feared that the judiciary might be unable to craft remedies, requiring "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Id.* at 408.

24. Gerald Faulhaber, *Policy-Induced Competition: The Telecommunications Experiments*, 15 INFO. ECON. & POL'Y 73 (2003).

25. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 *J. ECON. PERSPECTIVES* 171 (2002).

26. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 3.1a, 72 (2000) (citing 15 U.S.C. § 2 (2000)).

that it is either charging monopolistic rates or behaving in a manner that decreases social welfare, the touchstone of economists' (and most antitrust lawyers') definition of optimal behavior.<sup>27</sup>

The key evidence to determine whether an actor is monopolizing is whether it has market power to raise prices above a competitive level, reduce output, and exclude competition (thus monopolize) and thereby presumably cause consumer welfare loss or decreased net social welfare.<sup>28</sup> Since the *Alcoa* case, at least, antitrust cases have generally involved a definition of the market and an evaluation of whether the putative monopolist behaves as a monopolist within that market.<sup>29</sup> Therefore, under modern approaches, antitrust liability generally requires at least two distinct findings: (i) an actor has market power<sup>30</sup> and (ii) the actor deliberately has followed a course of market conduct by which it has obtained or maintained power to control price or exclude competition.<sup>31</sup>

With origins pre-dating the modern economic justification of antitrust policy,<sup>32</sup> the leading refusal to deal case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,<sup>33</sup> as well as most refusal to deal and/or essential facilities cases,<sup>34</sup> allows plaintiffs to engage in a more straightforward, arguably simplistic analysis of whether the conduct is anticompetitive. According to *Aspen Skiing*, refusal to deal requires a dominant firm to continue to deal with a competitor (i) when doing so would enhance consumer welfare, (ii) this welfare enhancement is known to the monopolist, and (iii) there is no

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27. 1 AREEDA & HOVENKAMP, *supra* note 4, ¶ 110, at 95 (“[E]conomic concerns have generally dominated antitrust policy . . . . The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare.”); *id.* ¶ 112d, at 130 (“We might all agree that economic efficiency and consumer welfare should be dominant or perhaps even exclusive as antitrust policy concerns.”); see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ¶ 2.3c, at 74 (2d ed. 1999).

28. SULLIVAN & GRIMES, *supra* note 26, § 3.3, at 86.

29. *Id.* at 87.

30. A monopolist need not have market power. Consider the local grocery in a small rural town in France in which no one has cars. The grocery has a monopoly on local groceries. Given the ease of entry, however, it lacks market power to raise its prices above a competitive level.

31. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

32. The Supreme Court has never accepted the “essential facilities” doctrine, see *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 (2004), and the case most closely associated with both the essential facilities and refusal to deal doctrines, *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912), was decided nearly a century ago.

33. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

34. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Associated Press v. United States*, 326 U.S. 1 (1945); *Terminal R.R. Ass’n*, 224 U.S. at 383.



efficiency justification for the refusal.<sup>35</sup> As *Trinko* took pains to establish, the refusal to deal doctrine is an exception to the general rule that absent an intention to create or retain a monopoly, firms are free to deal with whomever on whatever conditions.<sup>36</sup>

*Aspen Skiing* involved the ski areas of the famed resort town of Aspen, Colorado. The town had four mountains, three of which were owned by the petitioner/defendant, Aspen Skiing, and the fourth was owned by the respondent/plaintiff, Aspen Highlands. For many years, the two companies offered a joint, multiple-day, all-area ticket. After repeatedly demanding an increased share of the proceeds from the sale of such tickets, the defendant cancelled the joint ticket arrangement. The plaintiff tried to recreate the joint ticket, even, in effect, offering to buy the defendant's tickets at retail price.<sup>37</sup> The Court ruled that Aspen Skiing's refusal was an attempt "to exclude rivals on some basis other than efficiency" and therefore illegal under section 2 of the Sherman Act.<sup>38</sup>

Similarly, the essential facilities doctrine involves refusals to deal in access to some "bottleneck facility," which is generally defined as some input that competitors could not realistically duplicate. The essential facilities doctrine states that, under certain circumstances, a refusal to deal is subject to a monopolization claim under section 2 of the Sherman Act. For instance, in *United States v. Terminal Railroad Ass'n of St. Louis*,<sup>39</sup> the case cited for the origin of the essential facilities doctrine,<sup>40</sup> the Court required a coalition of railroad operators, dominated by "robber baron" Jay Gould, that owned a key bridge across the Mississippi River to allow non-members to use this "essential" bridge.<sup>41</sup>

Under *MCI Communications Corp. v. AT&T*, usually identified as the most significant modern explication of the doctrine, the essential facilities

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35. SULLIVAN & GRIMES, *supra* note 26, § 3.4b, at 116. It was stipulated that Aspen Skiing was a monopolist. *Trinko*, 540 U.S. at 409.

36. *Id.*; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

37. *Aspen Skiing Co.*, 472 U.S. at 594.

38. *Id.* at 605.

39. 224 U.S. 383 (1912).

40. As the *Trinko* opinion pointed out, the Supreme Court has never recognized it, although some of the circuits have. *Trinko*, 540 U.S. at 411; see also JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW, SECTION OF INTELLECTUAL PROPERTY LAW AND SECTION OF INTERNATIONAL LAW AND PRACTICE ON THE REPORT OF THE STUDY GROUP ON THE ANTIMONOPOLY ACT OF JAPAN 3 (2004) ("The United States Supreme Court has made clear that it has never recognized the essential facilities doctrine, and it recently declined the opportunity to endorse or repudiate the doctrine."); *id.* at 5 ("The essential facilities doctrine arguably is derived from [*Terminal Railroad Ass'n*].").

41. *Terminal R.R. Ass'n*, 224 U.S. at 384-85.

four-part test requires a showing of “(1) control of the essential facility by the monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”<sup>42</sup> As mentioned above, the Supreme Court never has recognized this doctrine and declined to rule on it in *Trinko*, but support for the doctrine is generally believed to be found in the *Terminal Railroad* case discussed *supra*.<sup>43</sup>

Commentators generally disapprove of both doctrines.<sup>44</sup> Herbert Hovenkamp states that the essential facilities doctrine is “one of the most troublesome, incoherent and unmanageable of bases for Sherman § 2 liability.”<sup>45</sup> As Areeda and Hovenkamp state, “using § 2 against arbitrary refusal to deal . . . has a superficial appeal . . . . [Y]et we are largely unpersuaded that § 2 should be applied here.”

The judicial and academic hostility stems from the theoretical difficulty of seeing how mandating sales between firms will necessarily decrease prices for consumers or increase consumer or overall social welfare. In other words, remedies under the refusal to deal doctrine may not further economic efficiency but may simply regulate more competitors into existence. The Supreme Court apparently accepted this conventional wisdom, stating, “We have been very cautious in recognizing [refusals to deal as illegal] because of the uncertain virtue of forced sharing.”<sup>46</sup>

One can organize the arguments made against these doctrines into three main categories of efficiency that economists generally deal with: (i) allocative efficiency, meaning the greatest output, given the market’s sum total of willingness to pay; (ii) productive efficiency, meaning using the most cost effective inputs to produce a given product; and (iii) dynamic efficiency,

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42. *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1982); *see also* Glen O. Robinson, *On Refusing To Deal with Rivals*, 87 CORNELL L. REV. 1177, 1207 (2002).

43. Similarly, the essential facilities doctrine is not terribly well grounded and never has been recognized by the Supreme Court. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1989); *see also Trinko*, 540 U.S. at 411 (“We have never recognized [the] doctrine [of essential facilities].”); 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 772b, at 176 (“The Supreme Court has never articulated or approved the modern version of the essential facility doctrine.”) (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring)).

44. *See, e.g.*, 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 770e, at 167 (“[U]sing § 2 against arbitrary refusals to deal . . . has a superficial appeal . . . [y]et we are largely unpersuaded that § 2 should be applied here.”); *id.* ¶ 771c, at 173 (“Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned.”) (citing Areeda, *supra* note 43)).

45. HOVENKAMP, *supra* note 27, § 7.7, at 305.

46. *Trinko*, 540 U.S. at 408.

meaning the rate of introduction of new products and improvements in existing ones.<sup>47</sup>

As shown below, the weight of legal scholarship contends that neither doctrine furthers any of these efficiency goals. But, the arguments typically relied upon are incomplete. The following identifies the arguments used against the refusal to deal doctrine as well as the limits of each argument. In Section III, we will examine arguments that refusals to deal can, in fact, impose social welfare loss and, therefore, can constitute antitrust violations.

#### *A. Allocative Inefficiency of the Refusal to Deal Doctrine*

Forcing firms to deal with each other, even when one of the firms is a monopolist, clearly would improve the welfare of the monopolist's competitors. They would have some input which, without the deal, would be presumably very expensive to reproduce. But, it is less clear whether requiring a firm to deal with competitors would improve consumer welfare, *i.e.*, consumers would not receive lower prices but more firms would simply divide the monopoly rents they received. Consider an example: A court could order the Baby Bells to sell access to competitors, but if the access price were at monopolistic levels, competitors would likely pass on the monopolistic prices to consumers. Therefore, consumers would not benefit. Conversely, the Baby Bells could sell at non-monopolistic rates to the competitive entrants, but the competitive entrants possibly could continue to charge high rates to consumers, essentially splitting monopolistic rents in some sort of duopolistic equilibrium. In other words, if there is a monopoly problem, the problem is with downstream consumer markets, not upstream wholesale markets—which are the concern of the refusal to deal and essential facilities doctrines.

Numerous commentators and judges have made this point in arguments against the economic benefits of the refusal to deal and/or the essential facilities doctrines. Chief Judge Posner, in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*,<sup>48</sup> rejected the claim that a doctor-owned clinic with an affiliated HMO should be forced to accept other HMOs. Posner ruled that even if, in fact, the doctor-owned clinic did constitute a natural monopoly (the clinic served rural Wisconsin and, thus, arguably could be a natural monopoly), forcing it to deal with non-affiliated HMOs would not provide cheaper fees or better service for health care consumers. He states:

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47. LUÍS M.B. CABRAL, INTRODUCTION TO INDUSTRIAL ORGANIZATION 26-27 (2000).

48. *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995).

Consumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors . . . . Similarly, if the practice of medicine in some sparsely populated county of north central Wisconsin is a natural monopoly, consumers will not be helped by our forcing the handful of physicians there to affiliate with multiple HMOs. Those physicians will still charge fees reflecting their monopoly.<sup>49</sup>

In other words, if a natural monopoly exists, it should be regulated as such, with a regulatory agency setting prices. Mandating access does not help consumers.<sup>50</sup> Areeda and Hovenkamp have also made this argument.<sup>51</sup>

In a related argument, Professor Glen Robinson points out that much competition is “rivalrous,” *i.e.*, firms compete for a limited pool of business and take business from each other. A broad duty to deal would threaten to outlaw such competition, clearly a result that seems unacceptable from a common sense viewpoint.<sup>52</sup> In more economic terms, a firm could gain market share at the expense of another firm by withholding some input, but the total output and price level would remain constant, a condition that Robinson calls the “classic illustration of the zero-sum character of rivalrous competition”<sup>53</sup>

Admittedly, the allocative efficiency benefits of the refusal to deal/essential facilities doctrines are not immediately clear. Critics would seem to be correct that if sharing simply results in the splitting of monopoly profits between firms, antitrust enforcement would be a waste. However, what the mainstream criticism does *not* consider is to what degree refusals to deal could constitute *defense* of an existing monopoly. In this sense, refusal to deal is a strategy whereby the monopolist retains its monopoly by vertically integrating into a downstream market. Forced access, therefore, would not have the effect of sharing monopoly rents, but possibly *destroying* monopoly as the new entrants force prices to competitive levels. It is this possibility that Section III will examine in detail.

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49. *Id.* at 1413. Commentators have applied this insight to the deregulatory efforts of the 1996 Act. See John T. Soma et al., *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565, 613 (1998) (“Simply allowing access to copper telephone delivery systems without invocation of the essential facilities doctrine enables a competitor to substitute itself for the incumbent local exchange provider. This substitution has limited pro-competitive effects . . .”).

50. Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1221 (1999) (“It bears emphasis, nonetheless, that the judicial intervention produced no obvious benefit from the standpoint of competition or consumer welfare. If there is a mechanism by which monopoly rents can be extracted by the user-owners of an essential facility . . . it is difficult to see how changing the number of competitors would alter the distortion.”).

51. 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 770e, at 169-71.

52. Robinson, *supra* note 42, at 1198-99.

53. *Id.* at 1198.

### B. *Productive Efficiency*

Productive efficiency refers to using the most cost effective inputs, or combinations and proportions of inputs, to produce a given product.<sup>54</sup> As with allocative efficiency, it would seem that the refusal to deal and essential facilities doctrines do not further productive efficiency and may, in fact, lessen it. In other words, in most circumstances, forcing a firm, particularly a natural monopoly, to share inputs with a competitor does not make for greater efficiency, but rather adds to the total cost of production.

The most basic argument that the refusal to deal and/or essential facilities doctrines cannot further productive efficiency is somewhat tautological. A “natural monopoly,” which has a theoretical, mathematical explication, by definition involves a market that is most efficiently served by one firm.<sup>55</sup> For instance, it was widely believed that local telephone service was a natural monopoly.<sup>56</sup> It makes no sense to allow two firms to provide such service because there would have to be two separate networks of telephone poles and copper wire loops into homes—clearly a wasteful result, or so it was often thought. The same service could be better provided by one network.

Modern critics of the refusal to deal and essential facilities doctrines do not concentrate on the productive efficiency of a natural monopoly. This is probably because the concept of a natural monopoly is only clear in economic theory and whether one, in fact, exists is difficult to show.<sup>57</sup> Rather, they point out that any judicial remedy under either doctrine often turns into a bureaucratic, administrative nightmare, requiring judges or agencies to set prices and mandate the terms of access.

If judges and agencies do a poor job of regulating access, their burdensome, bureaucratic, and wasteful schemes of access will inflict additional expense and cost on all firms, both monopolist ones and new entrants. These costs, of course, would be passed on to consumers, thereby creating productive inefficiency, rather than furthering it.<sup>58</sup> For instance, Lipsky and Sidak state that “the essential facilities doctrine . . . requires

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54. CABRAL, *supra* note 47, at 26-27.

55. See generally WILLIAM W. SHARKEY, *THE THEORY OF NATURAL MONOPOLY* (1982) (setting forth the conditions under which a natural monopoly might exist).

56. *Id.* at 23.

57. *Id.*

58. Robinson, *supra* note 42, at 1216 (noting that “one should not assume that placing regulators in charge is always a reliable solution”).

extensive judicial regulation of monopoly conduct . . . . The salient policy question is whether courts . . . are competent to identify natural monopolies and formulate and administer regulatory schemes capable of enhancing welfare.”<sup>59</sup> Indeed, the 1996 Act is, arguably, a good example of the questionable effectiveness of a legally mandated sharing. After eight years, the FCC has failed to produce a legal system of access and has instead furthered a disastrous \$50 billion telecom boom and bust in local telecommunications.<sup>60</sup>

The risk that the refusal to deal doctrine could impose productive inefficiencies is magnified by the particular legal test associated with it—a test adopted in *Aspen* and continued by *Trinko*. Both cases require that the court or agency look to the motivation for whether the refusal to deal is anticompetitive.<sup>61</sup> In other words, courts often mandate access *if they divine an anticompetitive intent* to exclude competition on grounds “other than efficiency”—and, as critics point out, this is hardly a rigorous standard.<sup>62</sup> Indeed, as Robinson notes, the standard, if uniformly and mechanically applied, would virtually outlaw rivalrous competition.<sup>63</sup> Further, it turns on difficult questions of determining business motivations.<sup>64</sup>

Admitting that a poorly planned program of access can impose excessive cost simply to support competitors, there *are* examples of mandated access

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59. Lipsky & Sidak, *supra* note 50, at 1223.

60. This point was recently made by the D.C. Circuit Court of Appeals, which vacated the Commission’s Triennial Order “in light of the Commission’s failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.” *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004). Of course, the failure of the Commission to come up with “lawful . . . rule” is not unrelated to the rulings of the court of appeals.

61. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (“Here, therefore, the defendant’s prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior.”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 385, 610 (1985) (“[T]he evidence supports an inference that Ski Co. was not motivated by efficiency concerns.”).

62. Judge Easterbrook has made this point quite eloquently:

[A]ggressive, competitive conduct by a monopolist is highly beneficial to consumers. Courts should prize and encourage it under the antitrust laws. Aggressive, exclusionary conduct by a monopolist is deleterious to consumers. Courts should condemn it under the antitrust laws. There is only one problem. Competitive and exclusionary conduct look alike.

Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 981 (1986).

63. Robinson, *supra* note 42, at 1209-12 (citing *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995)). Robinson does defend the essential facilities doctrine in cases where there are essential facilities and either a possibility that leveraging might occur or doubt as to whether the essential facility is naturally monopolistic. *Id.* at 1213.

64. See *supra* note 63 and accompanying text.

that have worked in telecommunications. For instance, the FCC's deregulation of customer premise equipment ("CPE" a/k/a phone sets) in the 1970s,<sup>65</sup> the Computer III regulations that allowed for independently owned dial-up ISPs in the 1990s,<sup>66</sup> which played a pivotal role in the widespread deployment of the Internet, or, perhaps more controversially, the introduction of long-distance competition in the 1980s.<sup>67</sup>

This inarguable historical precedent suggests that the typical criticism of the essential facilities/refusal to deal doctrine misses the mark. Sometimes mandated interconnection introduces productive inefficiencies; other times it does not. As will be further examined in Section IV, transaction cost economics may hold the key for distinguishing cases in which productive efficiency would be furthered from those in which it would be diminished. In a nutshell, according to transaction cost economics, market-based transactions—as between two interconnecting firms—feature “high-powered incentives.”<sup>68</sup> Such interconnecting firms are under constant pressure to lower costs and improve output, but such firms face high costs in governing such market-based transactions (*i.e.*, market transactions create risks that investment in asset-specific products may not be fully recovered).<sup>69</sup> On the other hand, integrated firms face lower governance costs, but face lower incentives to cut costs and adopt more efficient ways of doing business.

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65. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (final decision).

66. Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167, 204 (2003) (“The Computer III Final Order was released in 1986. The first commercial ISP was established in 1989. The Commercial Internet eXchange was set up in 1991 as the first exchange point for traffic between commercial Internet backbones (such traffic was not permitted on the NSFNET). . . . The success of the Internet was clearly the result of the confluence of forces [including] . . . [the commission having] deregulated the Customer Premise Equipment market (*i.e.*, modems).”).

67. See generally GERALD W. BROCK, *TELECOMMUNICATION POLICY FOR THE INFORMATION AGE: FROM MONOPOLY TO COMPETITION* (1994) (describing the bureaucratically led development of competition in aspects of the once completely regulated AT&T monopoly); Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration and Open Access: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 130 (2003) (“Of the actions taken in the Computer Inquiries, Computer II's open access rules, which facilitated competition in customer premises equipment, were the most successful and enduring.”).

68. OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 66-67 (1988).

69. According to Williamson, some transactions require one party to invest significantly in transaction-specific resources, for instance, a large IT contractor would invest heavily in developing a specific computer system for a particular customer of little worth to others. Such products require extensive “governance,” *i.e.*, the IT contractor must ensure that the customer will not shirk on its obligation to pay once the investment has been made, and the customer must ensure that the IT contractor does not shirk in doing its job. Such a contract is to be compared with the purchase of commodities in a market in which none of these problems appear. See *id.* at 62-67.

Transaction cost economics suggests that it is far from clear *a priori* in any given situation whether the market-based high incentives and the associated governance costs of market-based transactions will be more efficient than integrated, intra-firm transactions despite such transactions' typically lower costs. Section IV will examine how and why mandated access seems to further productive efficiency in some instances—and hinder it in others.

### C. Dynamic Efficiency

Dynamic efficiency refers to the speed at which innovative technologies are introduced.<sup>70</sup> Commentators criticize both the refusal to deal and essential facilities doctrines for lessening dynamic efficiency in two ways. First, by requiring a firm to deal with or share its facilities with a competitor, the regulator decreases the incentives to create new and/or innovative replacements for the original monopolist's resource.<sup>71</sup> For instance, it could be argued that if the FCC mandates access to the local telephone loop, such a mandate would decrease the incentive to use alternatives for telephone connection, such as the cable system or wireless.<sup>72</sup>

In a similar vein, Glen Robinson points out that an unfettered duty to deal with competitors would outlaw rivalrous competition—in which a firm seeks to maximize its profits at the expense of rivals.<sup>73</sup> As Robinson points out, economists like Joseph Schumpeter see competition as a process of “creative destruction.”<sup>74</sup> Every firm wants to be a monopolist and will seek new and better methods to knock off existing monopolists and take their places. Firms in constant conflict and those not cooperating advance dynamic efficiency. If the antitrust laws do not require cooperation, firms will be able to extract

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70. CABRAL, *supra* note 47, at 21.

71. 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 771b, at 171-72 (“Forcing a firm to share its monopoly . . . [does not make] consumers . . . better off . . . and discourages firms from developing their own alternative inputs.”); *id.* ¶ 771c, at 173-74 (“[S]haring the monopoly does nothing to restore output and price to competitive levels.”); *see also* Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1412-13 (7th Cir. 1995) (noting that the essential facility doctrine has been criticized as having “nothing to do with antitrust principles,” for “[c]onsumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors”).

72. Indeed, this is the typical argument against “unbundling.”

73. Robinson, *supra* note 42, at 1197.

74. *Id.* at 1180-81 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84-92 (3d ed. 1950)).



greater monopoly rents—and thus provide other firms with greater incentives to replace them with more efficient technologies and processes.

Dynamic efficiency arguments are notoriously difficult to assess, and, not surprisingly, neither form of the dynamic efficiency anti-essential facilities/refusal to deal doctrines is a slam-dunk. First, it is indisputable that sharing facilities diminishes the incentive to create alternatives. However, this is only a problem if alternatives, which are similarly priced and/or efficient, exist or are likely to be created given the current state of knowledge and technology. For instance, in *Terminal Railroad*, the essential facilities were the only geographically feasible bridge over the Mississippi River in the St. Louis area. Alternatives to such a resource—say commercial airfreight—were not likely to be created at virtually any cost, certainly not in the early twentieth century. Thus, requiring sharing of the crossing facility was not likely to diminish dynamic efficiency in the short run or the long run.

Other related forms of this Schumpeterian argument—that existing monopolists have the greatest incentive to introduce innovations because they can most easily reap their rewards—also lack universal acceptance. Numerous theoretical models, such as Kenneth Arrow's, suggest the opposite, and the empirical evidence is mixed.<sup>75</sup> In sum, very little can be said definitively about dynamic efficiency. The bald claim that refusal to deal and essential facilities doctrines will decrease dynamic efficiency, therefore, simply cannot be accepted as true in all cases, or even in most cases.

Beyond variations of the Schumpeterian argument, critics also maintain that the refusal to deal/essential facilities doctrine decreases dynamic efficiency in another way: it reduces the incentive of incumbent monopolists to invest in new facilities because the sharing requirement will decrease the return on such facilities. The FCC has adopted this argument with almost zombie-like acquiescence in numerous proceedings,<sup>76</sup> and the D.C. Circuit and

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75. See KENNETH J. ARROW, *Economic Welfare and the Allocation of Resources to Invention*, in *ESSAYS IN THE THEORY OF RISK-BEARING* 144 (1971) (forwarding model in which deconcentrated market produces greatest investment in innovation); see also Yoo, *supra* note 10, at 276-77 (reviewing literature on dynamic efficiency and describing its results as “inconclusive”).

76. The FCC relied on this argument heavily in the Cable Modem Order and Wireline Broadband DSL. See *High-Speed Declaratory Ruling*, *supra* note 10, at 4879 (questioning whether multiple ISP access would decrease investment in high-speed Internet lines); *Broadband Access NPRM*, *supra* note 10, at 3032 (“It appears that broadband facilities support an ever-increasing variety and number of services and applications. As a result, a provider’s decision to invest in redundant transmission facilities may be based on fundamentally different assumptions than those a provider relied upon in the past.”).

the Supreme Court have both relied upon this argument.<sup>77</sup> In a recent article that is discussed further below, Professor Elhauge goes so far as to ask:

[O]nce we admit ex ante efficiencies [those dealing with the incentives to invest], couldn't any monopolist always say it had a "valid" efficiency justification for refusing to share its property rights with its rivals? . . . The monopolist would merely have to observe that its refusal to deal with rivals must increase its overall expected profits in some way . . . [and] confer the efficiency benefit of increasing ex ante incentives to create, enhance, or maintain the valuable property that confers the monopoly power.<sup>78</sup>

Of course, reducing the level of return (due to sharing requirements) reduces the incentives to invest, at least marginally. Yet, the argument is incomplete because it does not tell you *how much* decrease in investment you will see. The magnitude of the decrease depends upon numerous factors, perhaps most significant of which is the opportunity costs of the dominant firm. If those costs were lower than profits under a system of mandatory access, then one would expect *little* decrease in investment and *little* decrease in allocative efficiency.

Finally, numerous scholars, most notably Professors Mark Lemley, Lawrence Lessig, and Brett Frischmann, have argued that open networks foster innovation and dynamic efficiency.<sup>79</sup> They argue that the decentralized nature of open networks facilitates intellectual exchange and fosters creativity on a broad scale. As a powerful example, they point to the "end-to-end" architecture of the Internet, which is an open system, that clearly exhibits numerous positive externalities and public benefits. This would suggest, *contra* Schumpeter, that open, non-integrated firms provide dynamic efficiency benefits.

#### D. Conclusion & Prologue

It must be conceded that the refusal to deal doctrine has an ambiguous effect on efficiency. If remedies based on refusal to deal claims merely split monopoly rents, then one does not improve allocative efficiency but merely divides rents. If, on the other hand, forced sharing counters a strategic

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77. United States Telecom Ass'n v. FCC, 359 F.3d 554, 595 (D.C. Cir. 2004).

78. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 306 (2003).

79. BRETT M. FRISCHMANN, AN ECONOMIC THEORY OF INFRASTRUCTURE AND SUSTAINABLE INFRASTRUCTURE COMMONS (Sept. 8, 2004), available at <http://ssrn.com/abstract=588424>; Lemley & Lessig, *End-to-End*, *supra* note 10, at 957-63 (maintaining that the "end-to-end," decentralized nature of the internet spurs innovation).

behavior like vertical foreclosure, preventing monopolists from gaining full rents, then it could improve allocative efficiency. If the system of access or forced dealing is too burdensome, wasteful, or bureaucratic, it would inflict productive efficiency costs—but not all such systems necessarily do so, as the historical record with telephones would suggest. Finally, little can be said with surety concerning dynamic efficiency.

The *Trinko* Court had the problem of ruling on the refusal to deal and essential facilities doctrines, both of which provide remedies of ambiguous economic benefit. Most commentators see little value in either doctrine, yet, at the same time, qualify their arguments with crucial caveats. Given the 1996 Act's saving clause, the Court had to decide whether a refusal to deal constitutes an antitrust violation even in a regulated context. The next section describes and critiques the reasoning the Court used to arrive at its result.

## II. THE *TRINKO* OPINION

### A. *The Facts and the Legal Problems They Presented*

*Trinko* was a customer of a CLEC, the local telephony division of AT&T.<sup>80</sup> *Trinko* claimed that Verizon failed to offer AT&T “access to the local loop on a par with [Verizon’s] own access” and, therefore, injured the CLECs and their customers.<sup>81</sup> *Trinko* argued that, just as it was anticompetitive for the Aspen Highlands Company to refuse to deal with the Aspen Skiing Company for tickets, it was anticompetitive for Verizon to deny access to its facilities to the CLEC.<sup>82</sup> In *Aspen Skiing*, Aspen Skiing had the opportunity to make money with joint tickets and gave up that opportunity to presumably damage Aspen Highlands Company. *Trinko* argued that Verizon similarly had the opportunity to rent portions of its network to its CLEC but failed to do so for anticompetitive motives. In a nutshell, the Court first concluded that nothing in Verizon’s alleged behavior indicated anticompetitive intent and, therefore, Verizon “does not fit within the limited exception recognized in *Aspen Skiing*” to the general rule that parties may “freely exercise [their] own independent discretion as to parties with whom [they] will deal.”<sup>83</sup> Further, because there was an existing regulatory process

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80. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 404 (2004).

81. Brief for Respondent at 16, *Trinko* (No. 02-682), available at 2003 WL 21767982.

82. *Id.* at 5-9.

83. *Trinko*, 540 U.S. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

for obtaining access, the Court could remedy nothing, and the refusal to deal and the essential facilities doctrines did not apply.

The Court in the *Trinko* case was faced with numerous difficulties. First and foremost, it had to deal with a doctrine for which there is no definitive economic rationale and which has the clear potential for providing inefficient remedies. Second, the Court faced the judicially administrative nightmare of the antitrust laws being used to enforce the 1996 Act, a potential “perfect storm” of litigation disaster. The Court has already reviewed the 1996 Act twice, once on jurisdictional grounds<sup>84</sup> and another on statutory (Administrative Procedure Act) grounds, producing two long, difficult, and technical opinions.<sup>85</sup> The Court will perhaps review aspects of the Act yet again, for its most recent opinion left crucial constitutional takings issues unanswered.<sup>86</sup> The rules under which the 1996 Act provides access were still being challenged in the courts at the time of the *Trinko* ruling—and were vacated a few months after *Trinko* was handed down.<sup>87</sup> The notion that on top of all of this legal (and consequently business) uncertainty, the Court would add another litigation possibility of antitrust claims to enforce the Act seems unthinkable. As a final complicating factor, the 1996 Act, as discussed above, contains a saving clause that explicitly states that nothing in it would limit or preclude the application of the antitrust statutes.<sup>88</sup> Thus, the statute itself seems to invite further application of the antitrust laws and explicitly precludes the straightforward legal solution: that the 1996 Act preempts or supersedes the antitrust laws.

In order to successfully navigate this perfect storm, the Court had to find that there was no antitrust injury under the facts pled. This, of course, feeds back to the first problem—no one is quite sure what type of antitrust injury the essential facilities and refusal to deal doctrines are meant to remedy.

### B. *Trinko's Legal Reasoning*

The Court's legal analysis was straightforward. First, the Court stated that although it would have liked to rule that the Act preempted the antitrust

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84. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387-94 (1999).

85. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 496 (2002).

86. *Id.* at 523-24.

87. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004).

88. Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (“Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”).

law, it could not do so because of the saving clause.<sup>89</sup> Second, and most important, it then proceeded to examine whether the facts presented represented a cognizable claim under the refusal to deal doctrine. This analysis took up the bulk of the opinion and concluded that a monopolist that refused to deal in a good mandated by regulation cannot violate section 2 of the Sherman Act.

### 1. *The Saving Clause*

The first part of the opinion dealt with the Act's saving clause, which states "the 1996 Act preserves claims that satisfy existing antitrust standards."<sup>90</sup> Justice Scalia concluded that the saving clause stated that the antitrust laws should apply to telecommunications despite the 1996 Act's regulations and, therefore, they must. The Court, however, commented ruefully that "the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme."<sup>91</sup> The Court noted the Act "does not create new claims that go beyond existing antitrust standards,"<sup>92</sup> and then spent the rest of the opinion showing how the facts as pled in *Trinko* did not constitute an antitrust harm.

It seems worth speculating on how the saving clause affected the Court's analysis. A straightforward interpretation of the Act would allow dual enforcement, a policy result that the *Trinko* Court apparently found repugnant. The refusal to deal doctrine as it existed before *Trinko* arguably would have allowed the suit. Indeed, three of the four courts of appeal, having less authority than the Supreme Court to read new requirements into the refusal to deal doctrine, had read the saving clause to *permit* antitrust suits alleging refusal to deal or essential facilities-type conduct—with only one dissenting circuit.<sup>93</sup> In order to avoid this unfortunate policy result (the "perfect storm"

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89. *Trinko*, 540 U.S. at 406.

90. *Id.* (citation and quotations omitted).

91. *Id.*

92. *Id.*

93. *Compare* Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 305 F.3d 89 (2d Cir. 2002), *rev'd sub nom.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), *MetroNet Servs. Corp. v. U.S. West Communications*, 325 F.3d 1086 (9th Cir. 2003), *vacated sub nom.* Qwest Corp. v. MetroNet Servs. Corp., 540 U.S. 1147 (2004), *superseded and withdrawn sub nom.* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004) (ruling that the saving clause allowed antitrust suits on the essential facilities or refusal to deal grounds), and *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *vacated by* 540 U.S. 1147 (2004), *with* Goldwasser

of litigation described above), the Court *had* to find that the facts as pled did not constitute an antitrust violation—and thus was forced into making several questionable economic claims.<sup>94</sup>

While the Court viewed additional judicial oversight of local telephone interconnection unnecessary and wasteful, Congress's fairly obvious preference for dual enforcement of the FCC and the antitrust laws is not absurd, untenable or "unnecessary." Institutional arrangements, biases, and power relations are central to telecommunications policy, and dual oversight could well have been necessary to ensure a workable access system, at least in Congress's judgment. For instance, during the arduous and fervid debate and lobbying preceding passage of the 1996 Act, AT&T wanted the Act to require Department of Justice approval for the Baby Bells' entrance into long distance, *not* that of the FCC.<sup>95</sup> Congress could quite reasonably have wanted the antitrust laws to enforce its access regime because, for better or worse, the FCC, structurally incapable of Olympian detachment from political influence, could be seen as a poor forum to decide such disputes. Or, at the very least, Congress could have intended the threat of antitrust action to discipline the behavior of the Baby Bells.

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v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (ruling that ILEC's refusal to interconnect did not constitute conduct actionable under refusal to deal/essential facilities). Most commentators also criticized the *Goldwasser* decision and argued that the saving clause permitted Trinko's antitrust claims. See Steven Semeraro, *The Antitrust-Telecom Connection*, 55 SAN DIEGO L. REV. 555 (2003); Philip J. Weiser, Goldwasser, *The Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003). Student-written commentary agreed with the professorial. See, e.g., Megan Delany, *The Dominos of Goldwasser: Only Congress Can Stop the Toppling Effect Before the Game Is Over*, 10 COMMLAW CONSPICUOUS 279 (2002).

94. On the other hand, keeping Congress from making mistakes seems to betray a sort of "Mr. Fix-it Mentality" that views the Court's "mission to Make Everything Come Out Right, rather than merely to decree the consequences" of the law—a mentality Justice Scalia has derided in other situations. See *Hamdi v. Rumsfeld*, 540 U.S. 507, 628 (2004) (Scalia, J., dissenting) (criticizing the plurality opinion for adopting "an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions").

95. In the tremendous legislative duel between the Baby Bells and AT&T, which preceded the passage of the 1996 Act and which, by most accounts, AT&T lost, AT&T proposed that each Baby Bell be allowed into the long-distance competition only upon certification by the Department of Justice that effective competition existed in each Baby Bell's local market. AT&T's preference for the Department of Justice over the FCC shows that institutional arrangements can play an enormous role in determining regulatory outcomes. See *Policy and Regulation*, TELEPHONY, Dec. 18, 1995, 1995 WLNR 4033924; Edward Warner, *In Preparation for Vote, House Telecom Bill's Rules Get "Scrubbed"*, WIRELESS WEEK, July 13, 1995, 1995 WLNR 3992959.

## 2. *Preliminary Points*

Before it reached its analysis that the facts did not present a cognizable antitrust injury, the Court made two “throwaway points” that were really not part of the opinion’s main argument: (i) the Court has always insisted upon the right of businesses to conduct business with whomever they chose and (ii) forced sharing of facilities decreases the incentives for further investment. Neither point added much to the opinion’s logical or economic analysis, but they appeared to signal the Court’s general hostility to the refusal to deal doctrine.

### *a. Refusal to Deal Is a Limited Doctrine*

The Court repeated that, as a rule, the refusal to deal doctrine is only a small exception to the “right of [a] trader or manufacturer . . . [to] freely exercise his own independent discretion as to parties with whom he will deal.”<sup>96</sup> Though sentimentally evocative of eighteenth century capitalism or nineteenth century small town business, this is not really true. On one hand, it is the hallmark of a free economy that individual businesses make their own business decisions and, as the *Colgate* decision made clear, the antitrust laws have nothing to do with politically-motivated or other personal motivations for business practices.<sup>97</sup>

But, the Court forgot the other hand: publicly held corporations have a fiduciary duty to maximize profits within the confines of law, including the antitrust laws. In competitive markets in which businesses lack market power, refusing to deal—turning down an offer to make money—seems odd behavior because it reduces revenue. Or, as Areeda and Turner state, “[s]ubstantial monopolists, run by directors responsible to stockholders, will generally behave rationally and make all profitable sales.”<sup>98</sup> Unlike Seinfeld’s famed Soup Nazi, large, publicly-held corporations cannot turn down business for personal, frivolous reasons—or those that do face their shareholders’ wrath and the market’s ineluctable judgment. It is reasonable at least to suspect that any plan of refusal to deal could be based on some strategic behavior. Such conduct may or may not violate the antitrust laws, but strategic behavior is, at least, a necessary first step to an antitrust violation.

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96. *Trinko*, 540 U.S. at 408.

97. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 770d, at 166.

98. 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 770e, at 169.

*b. Decrease in Investment*

The Court states a significant concern: forcing a monopolist to share its network “may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”<sup>99</sup> This argument is widely made in a variety of regulatory and legal fora in a variety of contexts, as mentioned above.<sup>100</sup> It is, in fact, a claim about dynamic efficiency, the measurement economists use to see whether resources and investments maximize productivity in the long run.<sup>101</sup> The argument claims that if incentives are not sufficiently high over time, producers of essential facilities will not produce them. Or, conversely, if the incentives are greater, essential facilities producers will produce more of such products.

While it is undoubtedly true that a lower return on investment will at least marginally decrease such investment, the argument begs the question and, in fact, makes questionable assumptions about dynamic efficiency, as discussed above.<sup>102</sup> In essential facilities and refusal to deal cases, like *Trinko*, the economic issue is not only the monopolist’s incentives but also those of its interconnecting competitors. If the essential facility monopolist prices its facility in a way that discourages optimum investment, then it may not provide the efficient incentives for competitive entrance. In essential facilities cases, it is at least plausible that, given the large number of potential users of the essential facilities and the great promise of their innovations, *i.e.*, applications on the internet, maximizing *their* incentives would maximize social welfare. The dynamic effects of the *users* of the facility must also be considered—eliminating their ability to market services, products, and use of the PSTN could have negative social welfare consequences.<sup>103</sup>

Further, it is impossible to substantiate the claim that a lower return (due to sharing) will necessarily lower net social welfare, at least under the record

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99. *Trinko*, 540 U.S. at 408; see also 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 771d, at 172 (sharing “removes or reduces the plaintiff’s incentive to develop its own independent capacity for [developing its own facilities]”).

100. Numerous commentators have made this point as well. See, e.g., James B. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW. U. L. REV. 1277 (1999). The FCC has also embraced this concern, citing it as a basis in numerous decisions. See *supra* note 76.

101. CABRAL, *supra* note 47, at 16.

102. See *supra* Part I.C.

103. See Richard N. Langlois, *Technological Standards, Innovation, and Essential Facilities: Toward a Schumpeterian Post-Chicago Approach*, in DYNAMIC COMPETITION AND PUBLIC POLICY 193, 207 (Jerry Ellig ed., 2001).



the court had before it. While, as said above, lowered return will marginally decrease the Baby Bells' incentive to build, it is not clear *how much*. As a basic postulate of microeconomics, if building facilities with sharing obligations provides a return that is greater than costs—including opportunity and fixed costs, even the monopolist will build it.<sup>104</sup> In other words, if building a facility with sharing obligations will provide more return than any use to which Verizon can put its capital, Verizon will build. Sharing will decrease incentive to build on the margins, but it does not follow that this would constitute total social welfare loss once other effects are counted in.

Failing to grasp that basic point, the opinion's claims about the nature of incentives, investment, and dynamic efficiency are overblown if not (from a slightly quibbling perspective) erroneous. It states that

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 opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.<sup>105</sup>

Firms will have incentives to invest if the investment's return will exceed its cost, including its opportunity costs, *i.e.*, the investment's return will be greater than all other available options. The ability to charge monopoly rents is not necessarily determinative.

### 3. *Intent, Anticompetitive Behavior and Trinko's Economic Analysis*

The Court's central legal and economic analysis relied on *Aspen Skiing*, recognizing the case as the definitive statement of the refusal to deal doctrine and distinguishing its facts from *Trinko*. Initially, the Court stated that the refusal to deal doctrine was highly limited and prescribed and reaffirmed the firms' freedom to deal with whomever they choose. Then the Court came closest to stating an *economic test* for when a refusal to deal would be an antitrust violation. It is the economic heart of the opinion.

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104. CABRAL, *supra* note 47, at 15.

105. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.<sup>106</sup>

The *Trinko* court saw a refusal to deal as part of a strategy to forsake short-term profits as a tool to drive out competitors, the "anticompetitive end."<sup>107</sup> Because Verizon refused to interconnect at cost-based rates, the Court concluded that its behavior could not be anticompetitive. This is, in itself, an odd rule as it is not clear that any firm would sell at pure cost-based rates, *i.e.*, *no profits*.

Applying this rule, nonetheless, the Court found three significant ways *Trinko* could be distinguished from *Aspen Skiing* and concluded that these distinctions failed to demonstrate an "anticompetitive bent" in Verizon's behavior.<sup>108</sup> First, unlike *Aspen Skiing*, in which the two firms at one time offered joint tickets, Verizon had not engaged in a course of dealing in wholesale access until forced to by regulation.<sup>109</sup> Second, in *Aspen Skiing* the putative monopolist turned down the opportunity to deal with its competitor at retail prices. In *Trinko*, Verizon allegedly refused to deal at regulatory set prices that were not retail but were wholesale "cost-based," set pursuant to the FCC's TELRIC methodology.<sup>110</sup> Third, the unbundling elements Verizon "rented" to AT&T were "brand new" and never before marketed to the public.<sup>111</sup>

This position is somewhat bizarre. It would, in effect, immunize from antitrust scrutiny the very greedy monopolist that never deals with competitors but would create the risk of antitrust liability for the moderately greedy monopolist that deals sometimes with some competitors. The Court also created the possibility for strategic behavior, with unhappy allocation efficiency results; namely a firm will be reluctant *even* to deal with companies, because if it ever stops doing so, for whatever reason, the *Trinko* rule would raise the specter of antitrust liability. Even more important, this

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106. *Trinko*, 540 U.S. at 409.

107. See also Simon Genevaz, *Against Immunity for Unilateral Refusals to Deal in Intellectual Property: Why Antitrust Law Should Not Distinguish Between IP and Other Property Rights*, 19 BERKELEY TECH. L.J. 741, 781 (2004) (stating "the *Trinko* Court describes *Aspen* as relying on a sacrifice-of-profit test to prove anticompetitive intent").

108. *Trinko*, 540 U.S. at 409.

109. *Id.*

110. *Id.* It should be noted that TELRIC *does* provide for profit. See *infra* note 112 and accompanying text.

111. *Id.*

position allowed the Court to avoid the central antitrust question *Trinko* presents—whether a refusal to deal, even under regulated conditions, was welfare-enhancing or diminishing. The test it employs for the refusal to deal doctrine—can one divine an anticompetitive motive in refusing to deal and suffering short-term loss in favor of long-term market dominance—misses a possible mode of anticompetitive behavior. As Section III examines, a refusal to deal or exclusionary behavior could be, itself, profit-maximizing by allowing the monopolist to continue to charge higher prices in its existing monopoly.

The *Trinko* Court reasoned, one supposes, that there are a lot *more* profits lost in refusing to deal at retail than at wholesale; therefore, a refusal to take retail profits more likely indicates an anticompetitive motivation. Refusals to deal at “TELRIC” prices do not reveal such motivation. Intuitively, the Court perhaps thought that a refusal to deal at prices that possibly include some type of monopoly rents indicate the existence of monopoly; refusals to deal at TELRIC prices do not.

There is a contradiction in such reasoning. TELRIC prices, at least in theory, provide an incumbent phone company, like Verizon, a competitive return on investment.<sup>112</sup> Similarly, if there is no monopoly, retail prices provide only a competitive return on investment. Thus, if an upstream monopolist refuses to deal in a competitive (or regulated) downstream market, this indicates nothing about monopoly power in the upstream market. Refusals to deal in either a natural retail market or a regulated wholesale market shed the same light (or lack of light) on anticompetitive intent. The Court rushed to the conclusion that the refusals to deal at market-set retail levels reveal much about the existence of antitrust injury—but refusals to deal at regulatory rates (designed to mimic a competitive market) do not.

In other words, the question is not, as the Supreme Court would have it, at what price, wholesale or retail, TELRIC or non-TELRIC, the putative monopolist refuses to deal. The question is what the putative monopolist gains by refusing. If Verizon could obtain more monopoly rents from end-users by refusing to interconnect with competitors—regardless of what competitors paid, its actions would be potentially anticompetitive. Thus, the Court’s proposed “motive” rule for ferreting out anticompetitive, illegal refusals to deal from legal refusals to deal has limited bite. The real question

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112. See DAVID M. MANDY & WILLIAM W. SHARKEY, FED. COMMUNICATIONS COMM’N, DYNAMIC PRICING AND INVESTMENT FROM STATIC PROXY MODELS 38 (Office of Strategic Planning & Policy Analysis, Working Paper Series No. 30, 2003).

is whether refusing to deal permits or facilitates the receipt of monopoly rents, and it is to that question the next section will turn next.

As a final peculiarity, the Court's analysis simply ignores network effects.<sup>113</sup> In network industries, as has been pointed out countless numbers of times, interconnection provides positive externalities.<sup>114</sup> Larger networks are desirable and valuable because they allow end-users to make and receive calls to and from more individuals. *Ceteris paribus*, profit-maximizing networks, like Verizon, would want to interconnect with as many networks as possible because every interconnection provides Verizon with a larger, more valuable calling universe.

Verizon might counter that the cost of interconnection is greater than its benefit—thus it would have no incentive to interconnect. Typically, that is the argument phone companies use for refusing to connect with all possible subscribers, as the marginal network benefit is less than the marginal network cost. However, under the 1996 Act, Verizon is being paid at TELRIC rates for interconnection. Thus, it is hard to see why a rational firm would refuse interconnection, unless TELRIC prices are not adequately compensatory. The Court hints that this might be the case, but its own precedent precludes it from doing any more than hinting. It has already ruled in *Verizon v. FCC* that TELRIC is a reasonable cost-recovery mechanism under the Administrative Procedure Act.<sup>115</sup>

### III. VERTICAL FORECLOSURE, VERTICAL INTEGRATION, AND REFUSALS TO INTERCONNECT

The question the Court never answered in *Trinko* is whether and how a refusal to deal—at either TELRIC rates or wholesale rates—can diminish total social welfare. In other words, is it possible that the Baby Bells are engaging in a strategy of vertical foreclosure by refusing to connect in an effort to enhance monopoly rents? Vertical foreclosure can occur when a firm controls a resource that is necessary, say access to the entire local telephone network, as do the Baby Bells, to a potentially downstream industry, say providing telephone service to consumers. This resource can be denied in order to increase the monopolist's profits—not as the *Trinko* opinion would to reduce

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113. See generally OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES 13-16 (2001) (describing in basic terms the concept of network externalities).

114. *Id.* at 18-24.

115. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 496 (2002).

the monopolist's profit with the hope that lower prices would drive possible competition from the market.

The relationship between vertical foreclosure and the refusal to deal doctrine has long been recognized. Areeda and Turner say that

it is hard to conceive of an *antitrust* rationale for enforcing a duty to deal that does not involve some kind of [vertical] integration as between [for example] the pipeline and the gas shippers with whom it is dealing. If the pipeline refuses the plaintiff for lack of space, there is no antitrust problem at all. If it refuses the plaintiff merely for personal or other noneconomic reasons . . . antitrust law is not apt. If it refuses the plaintiff because it has exclusive contracts with existing customers, antitrust may be apt.<sup>116</sup>

Vertical foreclosure can occur through a variety of mechanisms, including vertical integration—the process by which a monopolist incorporates into its business a vertically related market, *e.g.*, Ford Motors integrating with Goodyear tires. That was the issue involved in *Trinko*. The monopoly at issue was Verizon's access to the entire network. By vertically integrating with its retail services and refusing to interconnect (deal with) competitors, Verizon could—as argued below—reap full monopoly profits for its access. Efforts to stymie interconnection would constitute, therefore, efforts to maintain Verizon's ability to extract monopoly profits.

Most antitrust scholars (along with recent court decisions) tend to see vertical integration benignly, however. Following the influential “Chicago School,” they see few, if any, anticompetitive harms that vertical integration imposes. Rather, vertical integration simply reflects a firm's determination that certain transactions are more efficiently performed internally than through the market.

The following section outlines the view that vertical integration poses no possibility for economic harms. The section then examines more recent economic thinking that takes a different view, seeing vertical integration as a strategy that protects monopoly rents *under certain conditions*. Finally, the section applies this economic thinking to *Trinko* as well as *Aspen Skiing*, which remains the refusal to deal doctrine's most complete explication.

#### A. *Vertical Integration and the Chicago School*

Robert Bork's *The Antitrust Paradox*,<sup>117</sup> a *locus classicus* of the “Chicago School” antitrust doctrine, attacks limits on vertical integration on two

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116. 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 171b.

117. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

grounds. First, vertical integration represents the market decision that certain transactions are more efficiently performed using a corporate command organization while others are more efficiently performed using market mechanisms. Ronald Coase first articulated this insight in *The Theory of the Firm*,<sup>118</sup> which examines why particular transactions are performed within a firm and others outside the firm through market mechanisms. Or, put another way, why do firms have certain tasks performed by employees and “outsource” others to private contractors? Coase’s answer is that there are different costs of inter-firm marketing compared to the costs of intra-firm command and control. Given the peculiarities of different modes of production, firms will integrate (and dis-integrate) in a fashion that maximizes the efficiency of their transactions.<sup>119</sup>

Bork uses the Coasian argument to show that anticompetitive aims do not motivate vertical integration. Commenting on the infamous *Brown Shoe* decision,<sup>120</sup> Bork points out the absurdity of holding illegal a merger between Brown Shoe, primarily a shoe manufacturer with four percent of the national market, and G.R. Kinney, a retailer (that also manufactured some of its product) with 0.5 percent. *Brown Shoe* reasoned that vertical integration operates like a tying clause, forcing Kinney to fill some of its retail needs with Brown’s shoes and thereby foreclosing competition. Bork demolishes this argument against vertical integration by pointing out that while post-acquisition, Kinney filled 7.9 percent of its needs from Brown Shoe, pre-acquisition, Kinney provided twenty percent of its own retail product—thus “foreclosing” competition to a greater degree *before* the merger. Further, forcing Kinney to sell shoes it would have otherwise bought on the market would be Brown Shoe’s gain, but also presumably Kinney’s loss—and, thus, it is unlikely that the merged entity would “force” shoes onto its retail business that it otherwise would not have bought. Rather, the decision to integrate, Bork suggests, is motivated by integration’s added efficiency.

Second, Bork argues that vertical integration generally does not result in changed pricing or output decisions, *i.e.*, social welfare loss. His primary argument is a form of the single monopoly rent theorem—“a monopolist has

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118. Coase, *supra* note 25.

119. Recent scholarship on network access and vertical integration has repeated the claim that the Coasian theory of the firm, as embodied in the “new institutional economics,” supports the notion that the “monopolist has an incentive to be a good steward of the applications sector for its platform and thus better captures the argument for laissez-faire vertical policies.” Farrell & Weiser, *supra* note 67, at 104. While Farrell and Weiser concede the bargaining problems, they do not discuss the Rey and Tirole argument, *see infra* text accompanying notes 129-34.

120. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

no incentive to gain a second monopoly that is vertically related to the first, because there is no additional monopoly profit to be taken.”<sup>121</sup> The argument is intuitive and very powerful. Assume that there is a copper monopolist who sells ingots to a copper pot maker. According to the then-current view of antitrust, the copper ingot monopolist would wish to “extend” or “leverage” its monopoly from the ingot market to the copper pot market. If it vertically integrated into the retail copper pot market, it could use its ingot monopoly to drive out the other copper pot retailers and reign supreme in both markets.

What Bork *et al.* point out, however, is that the demand for copper remains the same whether or not the ingot monopolist is integrated with the copper pot retailers. There is a quantity/price for a particular good that will maximize the monopolist’s profits, and this quantity/price point is identical in both the integrated and non-integrated world. Thus, the integrated monopolist will not further raise prices or capture more rents. There is only one monopoly rent for copper pots, and integration does not affect whether or not it is captured.<sup>122</sup>

It is essential to remember the historical context of Bork and the Chicago school in order to realize the limits to their argument. They wrote against what is known as the “Harvard School” of industrial organization that forwarded the theory that vertical integration does hurt consumers—in ways adumbrated above in the discussion of the *Brown Shoe* case. A monopolist could vertically integrate in an upstream market, limit supplies to the monopolist’s rivals, raise their costs, make them uncompetitive, and thereby allow the leveraging monopolist to expand into the adjacent markets. According to advocates of this theory, firms with remarkably small market shares employ such anticompetitive strategies as the 1968 DOJ Merger Guidelines indicate.<sup>123</sup>

Given the small market shares in adjacent markets that the Harvard School maintained could allow foreclosure, the Chicago critics were no doubt correct in their claims that vertical foreclosure is rarely a realistic strategy for leveraging a monopoly. It seems unlikely that a strategy of limiting supply in an attempt to foreclose competitors would be successful or even attempted. Further, as Bork and the single monopoly rent theorem would point out, it would rarely be desirable, as the putative monopolist could not reap a second monopoly in the adjacent market.

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121. BORK, *supra* note 117, at 229.

122. *Id.* at 229-35.

123. See U.S. DEP’T OF JUSTICE, 1968 MERGER GUIDELINES 8-13, available at <http://www.usdoj.gov/atr/hmerger/11247.htm> (last visited Mar. 1, 2005).

Yet, the Chicago School approach does not necessarily provide knock-down arguments against regulatory interference in communications. Today, the entire debate about communication regulation and open access involves firms with market power in adjacent markets. Unlike the Chicago School—which was addressing limits on mergers—current debates in telecommunications are about opening up *existing* vertically integrated monopolies.<sup>124</sup> The Baby Bells have a *de facto* monopoly in the local exchange and also provide retail service. The cable companies have monopolies on cable service—and significant market power in programming and Internet access.<sup>125</sup> As discussed below, foreclosure strategies may not be motivated by, as Bork believes, “the acquisition by a monopolist of a second vertically-related monopoly.”<sup>126</sup> Rather, the motive may be to *protect* an existing monopoly as discussed more fully in the next section.

Further, Bork’s Coasian/transaction cost economics argument—that the market will dictate the efficient degree of vertical integration—does not necessarily apply to cable systems and the incumbent telephone monopolists. A free market—one that decides which transactions are best performed within a firm and those best performed without—has not created *their* vertical structure. Rather, decades of intrusive government regulation—some of the most intrusive ever imposed in peacetime United States—have determined their structure.<sup>127</sup> The deregulatory solution is not necessarily to loosen the bonds of these unnatural corporate creatures and let them roam the earth free—rather deregulation might require, as discussed in Section IV, the policy maker to decide how and on what terms competitors must have access to the incumbent monopolists’ networks.

Yet, before one decides how best (if at all) to mandate access, the question of whether there is an economic case for mandating access must be answered first. Under what conditions is it likely that a cable operator will foreclose access to a competing, non-affiliated programmer or internet service provider? Or, under what conditions is it likely that an incumbent telephone monopolist will foreclose against a competitor telephone service? Or, under

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124. The debates in telecommunications center around the incumbent monopolist’s duty to interconnect with local competitors, the CLECs, and competitors in vertically adjacent markets, like ISPs.

125. Industrial Analysis Division, Wireless Competition Bureau, *Local Telephone Competition: Status as of December 31, 2003* (June 2004); see also UBS Investment Research, *Wireline Postgame Analysis* (June 2004) (on file with author).

126. BORK, *supra* note 117, at 256.

127. See generally BROCK, *supra* note 67; see also STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW & POLICY 137-221 (2001) (describing federal regulatory authority and local franchising regulation of cable systems).



what conditions would a cable broadband service or telephone DSL service foreclose against a competitor ISP service?

*B. Rey and Tirole on Vertical Foreclosure*

Economists have long recognized conditions under which the single monopoly rent theorem will not hold, for instance, Krattenmaker, Scheffman, and Salop's famous "raising rivals costs" argument.<sup>128</sup> If, through control of a vital input (also known as an "essential facility"), a firm can raise its rivals' costs above the firm's own, rivals will have to raise their prices to consumers. This gives the monopolist firm the ability to raise its prices to supra-competitive levels—at least to levels near its rivals' inflated prices. Thus, efforts to resist interconnection could be part of an effort by the Baby Bells to raise their CLECs' costs. This would raise prices to CLEC customers, protecting the Baby Bells' ability to charge its customers monopoly prices.

Beyond shirking their regulatory mandates to interconnect, incumbents' flat refusals to interconnect also could be seen as part of an effort to raise rivals' costs. Plain refusal is a type of vertical foreclosure that can be seen as a sort of extreme example of raising rivals' costs. By refusing interconnection, the only way rivals could compete would be by completely replicating the ILECs' networks, an effort of prohibitive cost. Of course, it is impossible to identify a network monopolist's precise motivation for refusing interconnection, but it is true that for decades AT&T fought interconnection of *any* kind. It is at least conceivable that its behavior was an effort to maintain its monopoly.<sup>129</sup>

In recent work, Rey and Tirole provide an excellent summary of the current thinking about vertical foreclosure and make their own important contributions.<sup>130</sup> Rather than seeing vertical integration as an effort to expand a monopoly, they conceive of it as a strategy to protect an existing monopoly. A monopolist will engage in exclusionary behavior not in an effort to expand

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128. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 234-62 (1986); see also Krattenmaker et al., *supra* note 15, at 234 (citing *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)). Economists have pointed out numerous other situations in which the single monopoly rent theorem does not hold. Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981).

129. As an historical fact, telephone monopolists have fought interconnection in numerous instances. For instance, AT&T fought long-distance interconnection, radiophone interconnection, and even customer premise equipment interconnection. See BROCK, *supra* note 67, at 92-93, 112, 149.

130. Rey & Tirole, *supra* note 11.

its monopoly but in an effort to continue receiving rents in an existing monopoly or, as Rey and Tirole say, “[t]he reconciliation of the foreclosure doctrine and the Chicago School critique is based on the observation that an upstream monopolist in general cannot fully exert its monopoly power without engaging in exclusionary practices.”<sup>131</sup>

Rey and Tirole analogize the incumbent monopolist to an “essential facility” or “bottleneck” to the owner of a patent. The patent holder can only profitably license its patent if it can credibly promise that it will *not* “flood the market with licenses” thereby allowing the competitive market to dissipate all monopoly rents the patent confers. Thus, the purchaser of the patent license desires a commitment from the patent holder to *limit* the number of licenses granted. On the other hand, once the patent-holder has sold licenses, it has the incentive to sell more. The issue is timing. While it may not have a motive to license to numerous parties before it sells to any licensee (because the value of the license would be less), once the license is sold, the patent holder does have an incentive to license again, particularly in secret.<sup>132</sup>

One way to eliminate this bargaining problem is, therefore, to integrate vertically. A phone company’s desire to continue to reap monopoly profits from access to its network could possibly compel it to integrate with retail service—and then foreclose competitors by refusing to sell them access. Similarly, a cable company with a monopoly in the provision of video programming and broadband access would foreclose a video-programming provider seeking to distribute via the Internet.

Rey and Tirole develop numerous results using a sophisticated mathematical model to expand this initial insight. First, the *more* competitive the downstream market, the lower the bottleneck owner’s ability to receive monopolist rents.<sup>133</sup> The *more* buyers of the essential facility that exist, the greater the credibility problem, the greater the buyers’ reluctance to pay full monopoly price, and the greater the downward pressure on price.<sup>134</sup>

Second, Rey and Tirole observe that if there is a vertically integrated monopolist and an inefficient substitute, the monopolist would want to limit the supply to its competitors so as not to undermine its monopoly—but it would be at a price and quantity that would make it more attractive than the price of the inefficient substitute. This implication also argues for placing the

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131. *Id.* at 3.

132. *Id.* at 3-6.

133. *Id.* at 15, 38.

134. *Id.* at 25.

monopolist upstream as it creates a downstream stage of competition that “eliminates inferior substitutes.”<sup>135</sup>

These considerations lead Rey and Tirole to support common carrier policy—requiring the bottleneck holder to interconnect with and/or accept the traffic of other networks. They have numerous caveats to this prescription—including a rule that non-discrimination in access price will “have the perverse effect of restoring the monopoly power that they are supposed to fight.”<sup>136</sup> Yet, at the very least, their analysis suggests that (i) foreclosure is not, as the Chicago School would have it, an inconsequential problem and, consequently, (ii) vertical integration may be a strategy that bottleneck owners, *e.g.* telephone and cable companies, use to maintain or enhance monopoly rents, and (iii) some type of common carrier policy may be warranted.

### C. *Application to Trinko*

Applying theory to practice, it seems at least possible that Verizon’s refusal to interconnect, or its resistance to interconnection both in the business and legal context, could be an effort to maintain its monopoly rents. The following section examines the test the Supreme Court applies and shows why it is lacking. Then, assuming that, in theory, refusals to interconnect could constitute anticompetitive behavior, this section looks for whether there is a workable test to put the theory into practice.

#### 1. *The Trinko Test for Refusal to Deal*

The Court’s test essentially states that a refusal to deal constitutes anticompetitive behavior if the putative monopolist *intends* to drive out competitors by enduring the profit loss from not dealing with competitors in the hope that the competitors will desist in their efforts to enter the monopolist’s market. As “proxies” for this intent, the Court asks whether the putative monopolist ever sold the good in question, whether the rates are natural retail rates or regulatory cost-based rates, and whether the monopolist had not engaged in a course of dealing in wholesale access until forced to by regulation.<sup>137</sup>

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135. *Id.*

136. *Id.* at 12.

137. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

The Court would appear to assume that a good sold pursuant to regulation is somehow unnatural or, at least, not profitable. Refusals to sell such a good are not indicia of anticompetitive intention. Instead, anticompetitive intent is only revealed from a refusal to sell goods that were at one time sold under market conditions and, therefore, presumed to be profitable. The Court implies, therefore, that a good sold pursuant to regulation is not sold for profit, and, therefore, a firm is justified in its refusal (at least from an economic perspective).

Indeed, it is not clear that *any* firm would sell goods at a pure cost-based rate. Of course, as a factual matter, whether the FCC's cost-based rates (formed under the rubric, total element long range incremental costing or "TELRIC") constitute adequate compensation is a debatable question. According to its supporters, TELRIC mimics the price a competitive market would bring about—as a general principle, competitive markets force prices to incremental cost. Its detractors maintain that TELRIC produces unrealistically low rates because it does not allow firms to recover their fixed and sunk costs through some sort of average cost methodology. Scholars and partisans, economists and lawyers take both sides.<sup>138</sup> The adequacy of TELRIC, however, is something to which the Court has already spoken, ruling that it is a reasonable costing methodology.<sup>139</sup>

Assuming that TELRIC allows for some profit, the Court's argument against applying the refusal to deal doctrines to goods provided pursuant to regulation lacks bite. Presumably, the Baby Bells could make *some* profit from selling under TELRIC rates, but chose not to do so. Whether this might constitute an antitrust violation is a question to which we now turn.

## 2. Antitrust Violations: From Theory to Test

Typically, the accrual of monopoly rents of and by themselves does not make an antitrust violation. The "harm" of monopoly rents that industry concentration can sometimes cause must be balanced against the benefits of more efficient production. An often-used schemata for horizontal mergers

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138. The "TELRIC debate" is a long battle with economist and lawyer partisans on both sides. Compare Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417 (1999), with David Gable & David I. Rosenbaum, *Who's Taking Whom: Some Comments and Evidence on the Constitutionality of TELRIC*, 52 FED. COMM. L.J. 239 (2000).

139. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 539 (2002).

invites the judge to balance the harms and benefits of horizontal integration to determine whether consumers might benefit from a given merger.<sup>140</sup>

Similarly, the refusal to deal doctrine presents the judge with competing interests: on one hand, as elaborated above, refusals to deal can enable firms to reap monopoly rents. By denying a needed input to competitors, a firm can raise its rivals' costs and allow it the "room" to charge supra-competitive prices, which raises consumer prices and potentially lowers net social welfare. Thus, once a firm has invested in some resource of infrastructure, the efficient result would be to share such resource at marginal costs with all consumers and rivals. Or, as Professor Einar Elhauge would say, "failing to share with rivals the property that confers monopoly power will almost always look inefficient from this purely *ex post* perspective."<sup>141</sup> On the other hand, permitting firms to retain monopoly rents encourages greater investment. If firms expect a greater return, they will invest more. Or, as Elhauge says, "it is precisely the prospect of being able to exclude rivals from one's property and charge a price above the marginal cost of using it that is necessary to encourage the prior investments that created the property."<sup>142</sup>

A test that requires a firm to deal in all of its valuable goods would severely limit innovation; on the other hand, absent a Schumpeterian faith in markets, allowing monopolists to foreclose in all instances could have deleterious allocative effects and, at least according to Lemley, Lessig, and Frischmann, deleterious dynamic effects as well.<sup>143</sup>

Elhauge suggests an interesting test for distinguishing between "good" and "bad" refusals to deal. He argues that if a firm has already set a price for a good, it can be assumed that such price adequately compensates—the price is (by definition) adequate to provide sufficient incentive to the firm (or the firm would not have produced the good). If a firm, therefore, refuses to sell such a good to rivals in a discriminatory fashion, such a refusal could have allocative effects—but not dynamic. Thus, one could state as a rule that discriminatory refusals to deal to rivals can be condemned as anti-competitive and in violation of the antitrust statutes. Elhauge claims that virtually every Supreme Court case dealing with refusals to deal involve such discriminatory refusals.<sup>144</sup>

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140. BORK, *supra* note 117, at 102-29.

141. Elhauge, *supra* note 78, at 289.

142. *Id.*

143. See Lemley & Lessig, *End-to-End*, *supra* note 10, at 945.

144. Elhauge, *supra* note 78, at 309.

Elhaug's test, however, is quite static and perhaps fails to account for dynamic pricing decisions. A firm may view its investment as an option to experiment with different pricing schemes—sometimes dealing, sometimes refusing to deal to recover investment, or other times, refusing to deal with the anticompetitive motivation. A firm—by changing its policy/deal strategy—may simply be experimenting, not engaging in discriminatory pricing. Elhaug's test fails to account for this possibility.

Elhaug bases his claim on the notion that “ex post [allocative] efficiencies of excluding rivals [cannot] suffice to require dealing with rivals as a matter of antitrust law, [for if] it did, then social desirable investments necessary to make or maintain monopoly power would never be made.”<sup>145</sup> In other words, it is the siren allure of monopoly profits that provides adequate incentives to invest. But, is that really true? As suggested above, a firm will invest if the expected return is greater than its opportunity costs. In other words, a firm will invest in a project if the expected return is better than any other possible return available to it. Notice, this does not mean that the firm will only invest if it receives monopoly profits or will invest if it simply receives a competitive rate. Rather, determinations of whether a firm would invest must be particularized. This would suggest that an alternate test for distinguishing between “good” and “bad” refusals to deal is whether, given a monopolist's opportunity costs, monopoly profits are necessary to encourage investment.

Applying this test to vertical foreclosure in the *Aspen Skiing* case produces interesting results. Recall that the case involved two companies that dominated the ski areas in Aspen, Colorado, Aspen Skiing and Aspen Highlands, the former controlling three mountains and the latter one mountain. Aspen Skiing at one time sold joint passes with Aspen Highlands, but then backed out of the arrangement. Under this analysis, the retail product at issue was a multi-mountain pass in Aspen, Colorado. Aspen Skiing, as owner of three of the four mountains, possessed the “essential facility” or “monopoly resource” for such a product, *i.e.*, as Aspen Highlands only owned one mountain, it could hardly sell multi-mountain passes without cooperation with Aspen Highlands. Under the Rey and Tirole model, the question is what strategies Aspen Skiing would adopt to allow it to reap monopoly rent from its resources.

There are numerous strategies firms can adopt to maintain their monopolies in the face of the Coasian conjecture. One strategy would be to

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145. *Id.* at 305.

require Aspen Highlands to fork over a larger sale of the joint ticket returns in some type of exclusive contract. (Given that Aspen Skiing was the only multi-mountain operator in Aspen and Aspen Highlands the only competitor, any such contract would be exclusive.) It could receive its monopoly profits from the price that Aspen Highlands paid for the privilege to market multi-mountain passes. Yet, Aspen Skiing did not choose this approach. This seems odd because, presumably, it could have commanded monopoly profits from tough negotiation with Aspen Highlands over the terms of the joint ticket. On the other hand, Aspen Highlands was apparently motivated by the desire to control all the mountains in Aspen.<sup>146</sup>

Instead, therefore, it chose to garner its rents directly from consumers by “vertically integrating” in a sense. Aspen Skiing *refused* to sell Aspen Highlands such tickets *even at retail price* and provided all marketing of multi-mountain passes itself. The *Trinko* Court found this issue to be highly probative of anticompetitive intent.<sup>147</sup> Under the Elhauge discriminatory refusals against rivals test, such refusals would clearly be antitrust violations because retail prices obviously allow for a sufficient return on investment. A refusal to sell at retail would indicate, therefore, a strategy to foreclose competitors and possibly protect monopoly rents.

Under the test advocated here, a similar result would occur. The test would be whether the tickets sold to Aspen Highlands covered Aspen Skiing’s opportunity costs. Given that Aspen Skiing refused to sell the tickets at retail, and presumably retail prices covered Aspen Skiing’s opportunity costs, then the refusal could have permitted Aspen Skiing to charge supra-competitive prices for its multi-mountain tickets.<sup>148</sup>

This test advocated here is admittedly much more difficult to administer than Elhauge’s discriminatory refusals test. Indeed, given the difficulties and vagaries of calculating opportunity costs, it may be impossible to use. On the other hand, for vertically integrated industries in which certain goods are sold to *no one*, the test may be the only one available. In other words, if a firm retains its monopoly profits for a particular good by vertically integrating and never sells the monopoly good as a retail product, then one could never

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146. Lipsky & Sidak, *supra* note 50, at 1210.

147. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

148. Of course, Aspen Skiing’s opportunity costs would include foregone revenue generated from refusing to deal and thereby increasing market share. The test advocated would exclude these costs—indeed, that is arguably the purpose of the antitrust laws—to exclude certain market size-based opportunities.

determine whether it was being discriminatory in its refusing to deal. Elhaug's test would not be helpful.

#### IV. JUDICIAL REMEDIES: INSTITUTIONS AND INTERCONNECTION

Even if one were to establish a coherent justification for the refusal to deal doctrine, one is still left with the question of what remedy courts should and can effectively provide. The *Trinko* Court began its analysis with this concern, stating, "We have been very cautious in recognizing such exceptions [to the general rule that businesses may deal or refuse to deal with whomever they wish], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."<sup>149</sup> This concern took up much of the *Trinko* opinion as the Court dilated on the difficulties of administering a remedial program of access and its uselessness in light of the FCC's existing scheme of access.<sup>150</sup> The court expressed doubts about the efficacy of judicial intervention, stating, "Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs," and it feared that "[a]llegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous . . . ."<sup>151</sup> Commentators overwhelmingly agree the inability or difficulty in crafting a judicial remedy, *i.e.*, a regime of access or terms and conditions for dealing in the refused good, renders the refusal to deal doctrine generally an undesirable tool for antitrust policy.<sup>152</sup>

A quick and easy response to this problem is that, as the United States Court of Appeals for the Second Circuit recognized in *Law Offices of Curtis V. Trinko v. Bell Atlantic Co.*,<sup>153</sup> there is a difference between damages and

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149. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

150. *Id.* at 411-16.

151. *Id.*

152. See 3A AREEDA & HOVENKAMP, *supra* note 4, ¶ 774e, at 224 (criticizing the doctrine because it forces courts to deal with pricing issues that "courts are not well equipped to deal with" and courts cannot function as "price control agencies"); Areeda, *supra* note 43, at 853 ("No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."); Lipsky & Sidak, *supra* note 50, at 1232 ("The mandating of access to network only begins the regulator's task."); Robinson, *supra* note 42, at 1216 ("Antitrust commentators are alert to the difficulty of determining the appropriate terms of access and for that reason have chastised courts for capriciously imposing the duty in the first place.").

153. *Law Offices of Curtis V. Trinko v. Bell Atlantic Co.*, 305 F.3d 89, 111-13 (2d Cir. 2002).



injunctive relief. While “injunctive relief in this area may have ramifications that require particular judicial restraint,”<sup>154</sup> the Second Circuit realized that damages would not require courts to oversee interconnection.<sup>155</sup> Rather, given the Federal Communication Commission’s and state utility commission’s less than stellar record on enforcement and given that the *Trinko* complaint arose out of Verizon’s alleged failure to observe its interconnection obligations in a good-faith manner, monetary damages could simply act as a spur to encourage good regulatory behavior by the incumbents. Further, as the Second Circuit points out, courts are quite capable of calculating damages so that the “antitrust laws [would] supplement the regulatory scheme.”<sup>156</sup>

A further, more cynical argument can be offered. The 1996 Telecommunications Act, which created competitive local telephony, was the result of a struggle between the Baby Bells and AT&T over the terms and conditions under which the local markets would open to competition and the long-distance market would open to the Baby Bells. Most observers believe AT&T lost this struggle, at least on the congressional level.<sup>157</sup> In any case, institutional issues were a significant feature in this struggle in which Congress had to compromise between the claims of AT&T and the Baby Bells. For instance, the Baby Bells sought Federal Communications Commission oversight for their entry into long distance on the presumption that the Commission would be relatively lax while AT&T sought Department of Justice oversight on the presumption that it would be more stringent. Thus, allowing the FCC and antitrust dual oversight represents a congressional decision (or deal) that AT&T should have a particular arrow in its quiver to fight the continuing regulatory battles with the Baby Bells. The *Trinko* decision disrupted this deal.

Beyond whether monetary damages are possible or whether courts should respect congressional deals is a more basic question: was the *Trinko* Court (as well as most commentators) correct in the claim that courts are incapable of administering a program of access? Or, to put the question slightly more accurately, are agencies an eminently preferable forum to create and

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154. *Id.* at 111.

155. *Id.* at 111-12.

156. *Id.* at 112-13.

157. Stephanie N. Mehta, *How to Get Broadband Moving Again Tech Companies Want Washington to Break the Broadband Traffic Jam by Helping Old-World, Old-Geezer Telcos. Good Luck*, FORTUNE 144, at 3 (2001) (“According to Scott Cleland, principal at the Precursor Group, a leading telecommunications consulting firm, the Bells won the Act in Congress; the long-distance companies won its implementation at the FCC.”); David Alstrom, *Passing the 1996 Telecom Act*, CONGRESSIONAL RECORD REVIEW (Jan. 1, 1997).

adjudicate forced access regimes? Conventional wisdom holds this to be the case, but there does not seem to be any immediately apparent justification for this belief.

On the other hand, the Coasian-Williamsonian theory of the firm (and transaction cost economics which is the theory's modern standard bearer)<sup>158</sup> would predict that if a transaction is simple enough, *i.e.*, involves no long term relationships with sunk costs, complicated coordination, or specialized knowledge and expertise, such transactions have low governance costs. They can be most efficiently performed in the market *between* firms.<sup>159</sup> Applying this insight to networks, interconnection can be mandated between different firms if its terms are sufficiently simple—regardless of whether courts or agencies do the mandating. Judge Greene succeeded because the engineering, economics, and law of long-distance/local interconnection were (relatively) simple.<sup>160</sup> Regulatory interconnection between the CLECs and Baby Bells has failed because the 1996 Act and the FCC could not create a simple interconnection regime suitable for a competitive market.

Transaction cost economics has been used in the past as a shield to *support* vertical integration. Scholars and advocates used it to show “that previously suspect vertical arrangements [like certain tying claims and foreclosure claims based on small market shares] often could be explained as contractual and organizational responses motivated by a desire to reduce the cost of transacting.”<sup>161</sup> Yet, transaction cost economics can also be used as a regulatory sword to guide mandated *open access*. Where monopoly power is present in network industries, transaction cost economics can help policymakers decide the best ways to mandate interconnection and/or access.

Both judges and agencies have strengths and weaknesses in setting interconnection policy. Judges have limited time and information to deal with complex issues but are more immune to political pressure and their orders are more final, providing greater business certainty and more stable property rights. On the other hand, agencies can devote more resources to technical

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158. See WILLIAMSON, *supra* note 68, at 118-230.

159. See Coase, *supra* note 25, at 37-52.

160. Of course, local-long distance interconnection intercarrier payments were, in fact, complicated by the complex scheme by which long distance service subsidized local. See BROCK, *supra* note 67, 135-80. However, this scheme was only necessary to maintain the existing program of local service subsidization. Such schemes have little role to play necessarily in any regime of competitive access.

161. Paul L. Joskow, *The Role of Transaction Cost Economics in Antitrust and Public Utility Regulatory Policies*, 7 J.L. ECON. & ORG. 53 (1991); see also Christopher Weare, *Interconnections: A Contractual Analysis of the Regulation of Bottleneck Telephone Monopolies*, in INDUSTRIAL AND CORPORATE CHANGE 5, at 985 (Oxford Univ. Press 1996).

analysis but are susceptible to political capture, *i.e.*, the interests of the regulated firms and/or political expedience often guide their decisions—and, as evidenced by the 1996 Act regulation, they cannot provide finality, clouding business certainty.<sup>162</sup>

*A. An Historical Perspective to Judicially Mandated Interconnection*

As argued above, *Trinko*'s motivating factor was pragmatic, the concern that courts cannot create workable interconnection regimes, and, therefore, this job should be left to regulators. This concern has a remarkable and unacknowledged historical parallel to the last time there was vibrant competition in local telephony in the United States—in the early part of the twentieth century after the expiration of the original Bell patent and before the establishment of the second AT&T monopoly and its concomitant regulation starting with the Kingsbury Agreement of 1916.<sup>163</sup> During this competitive period, courts refused to judicially mandate interconnection between carriers under claims that the common law duties of common carriers (which telephone companies are) require interconnection. The competitors argued that common carriers, like trains, ferryboats, toll roads, and bailers, have an obligation to provide service, *i.e.*, interconnection, to all, including competitors.<sup>164</sup>

Courts agreed with this principle to the extent that all parties, whether business, private persons, or competitors, had a right to receive *retail* service from common carriers.<sup>165</sup> Thus, the Bell companies had to transmit messages

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162. The D.C. Circuit in its vacating of the Triennial Order expressed, in uncharacteristically frank terms, exasperation at the FCC's inability to write legal rules after three attempts over an eight year period. *See supra* note 60.

163. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); HARRY MACMEAL, *THE STORY OF INDEPENDENT TELEPHONY* 206 (1934). The Kingsbury Commitment required independent phone companies to pay "tariffs" to interconnect with Bell-affiliated long-distance services and thus constituted the first (of many) federally mandated interconnection regimes. For the definitive historical description of this period, see MILTON MUELLER, *UNIVERSAL SERVICE* (1999). The analysis in this section draws upon previous work. *See* Adam Candeub, *Network Interconnection and Takings*, 54 SYRACUSE L. REV. 369 (2004).

164. *See, e.g.*, Richard Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 LAW & CONTEMP. PROBS. 340, 343 (1969); *id.* at 350. "Refusal to connect with independent telephone systems for long-distance telephone service afforded Bell a stronger means of curbing the independent movement. Since Bell was the pioneer in this field, its refusal to connect confined independent companies within the limits of the particular territories they served." *Id.*

165. *See, e.g.*, James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 258 (2002) ("[T]he common law imposed no obligation on railroads (or other carriers) to interconnect with the lines of other carriers or to establish joint or through rates for services. . . . There

to competitors if competitors purchased telephone service from a Bell company. Indeed, it was often the legal duty—given telephone companies' status as common carriers—for one telephone company to call the central office of the other telephone company in order to inform its subscriber of the call and tell her to go to a public phone belonging to the first telephone company.<sup>166</sup> The Supreme Court of Wisconsin described the process:

Where there was a call over the Bell toll line for a resident of La Crosse who was a subscriber to the exchange of the local company, but not to that of the plaintiff, an operator in the local company's office was notified of such call by telephone. The operator then notified its subscriber of the call, and such subscriber could respond only to a Bell station or to a place where a Bell phone was in use . . . the average waiting was half an hour.<sup>167</sup>

The court continued:

The business of a telephone company is to transmit oral messages from one point to another, and for that purpose every patron, whether he is a subscriber or not, has the use of its line for the time being. That is the public use to which they are dedicated. Without the physical connection each subscriber to a Citizen's telephone is entitled to the same use of the complainant's lines that he would have with the physical connection; the difference being that with the lines connected he can talk from his own telephone, while without the connection he would be obliged to go to a public station of complainant company.<sup>168</sup>

The problem is (and was) that while a court can order that a regulated, established rate be charged to everyone—including competitors (like telegraph

was no obligation to establish either a physical connection or a joint business operation.”).

166. *Mich. State Tel. Co. v. Mich. R.R. Comm'n*, 161 N.W. 240, 243 (Mich. 1916); *Home Tel. Co. v. Sarcoux Light & Tel. Co.*, 139 S.W. 108, 112 (Mo. 1911); *Home Tel. Co. v. People's Tel. & Tel. Co.*, 141 S.W. 845, 848 (Tenn. 1911) (“[U]nder the common law [each telephone company] is independent of all other telephone companies, save for the duty to receive and forward to any point on its line messages received from such other company or companies . . .”).

167. *Wis. Tel. Co. v. R.R. Comm'n*, 156 N.W. 614, 616 (Wis. 1916); *see also Pac. Tel. & Tel. Co. v. Anderson*, 196 Fed. 699, 703 (E.D. Wash. 1912) (“[A]t common law each telephone company is independent of all other telephone companies, save for the duty to receive and forward to any point on its lines messages received from such other company or companies . . .”); *Mich. State Tel. Co.*, 161 N.W. at 243.

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*Id.*

168. *See supra* note 167 and accompanying text.

offices)—courts cannot see how to set the rates for interconnection between competitors.<sup>169</sup> Thus, the legal-technical problems faced by both the *Trinko* case and the early common carriage cases are identical—a competitor cannot economically interconnect with a Bell using only a retail line. It needs a bigger pipe. Judges in the early twentieth century and now justices in the early twenty-first century trembled at the thought of trying to answer this question; they simply could not imagine courts formulating rules for connection.

But, is the notion of judicially mandated and supervised interconnection between carriers so utterly horrific? Telecommunication history suggests that courts can mandate interconnection effectively without bureaucratic oversight—perhaps *more* effectively than the FCC. For instance, competitive long distance started out with such a judicial order, Judge Greene’s famed MFJ that broke up the AT&T telephone monopoly into the local monopolists (the original seven “Baby Bells” now grown up into SBC, BellSouth, Verizon, and Qwest) and the competitive long-distance companies, AT&T, MCI, and Sprint.<sup>170</sup> While the price paid for interconnection between the competitive long-distance companies, like MCI and AT&T, was a matter of regulatory oversight,<sup>171</sup> and endless regulatory and judicial wrangling persists to this day,<sup>172</sup> the physical question of interconnection was relatively straightforward. MCI and the other competitive long-distance companies were afforded points of presence (POPs of places at which the networks would physically connect) to which the Baby Bells had to provide connection.

Further, while interconnection pricing tends to be a chronic regulatory headache, recent theories of interconnection suggest that regulators should *not* set prices. Under certain conditions, carriers should exchange traffic for free.<sup>173</sup> Such approaches to inter-carrier compensation could end the incessant

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169. See *supra* note 21 and accompanying text.

170. See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982). Of course, the details of long distance competition and, most particularly, access charges were delegated to regulatory authority. On the other hand, the actual physical interconnection was not so difficult to achieve.

171. That is putting it mildly. The access charge regime was (and remains to this day) a cause of endless regulatory wrangling. See BROCK, *supra* note 67, at 173-94.

172. See Access Charge Reform, 15 F.C.C.R. 12962 (2000) (setting forth the most recent reform of the access charge regime).

173. While hardly accepted universally, some economists are calling for interconnection without intercarrier payments. See JAY M. ATKINSON & CHRISTOPHER C. BARNEKOV, FED. COMMUNICATIONS COMM’N, A COMPETITIVELY NEUTRAL APPROACH TO NETWORK INTERCONNECTION (Office of Plans & Policy, Working Paper Series No. 34, 2000); Patrick DeGraba, *Central Office Bill and Keep as a Unified Inter-Carrier Compensation Regime*, 19 YALE J. ON REG. 37 (2002).

wrangling in Washington and the state utility commissions and would simplify the challenge to any judicially mandated scheme of interconnection.

Finally, there are numerous network markets in which competitors routinely interconnect, such as the Internet backbone, wireless-to-wireless, and wireless-to-wireline (for roaming charges).<sup>174</sup> Indeed, as the leading telecommunications historian Milton Mueller has shown, even AT&T, during the early days of competitive telephony, voluntarily interconnected, at times, with the independents, as did most independent telephone companies with the AT&T monopoly.<sup>175</sup> The existence of non-regulated interconnection on a large scale suggests that interconnection can be possible on simple terms susceptible to court order.

*B. Transaction Cost Economics and Interconnection, or If Judge Greene Can Mandate Interconnection Successfully, Can't Other Judges?*

As a historical matter (and contrary to the *Trinko* Court), some types of mandated interconnection work and others do not—regardless of whether courts or agencies do the mandating. The remaining question is, therefore, how courts can separate instances in which judicially mandated interconnection will be an administrative disaster from those in which it will bring competition's sweet fruits to monopoly's desiccated plains. It has been suggested by numerous prominent economists that transaction cost economics can offer insight.

The basic insight of transaction cost economics derives from Coase's seminal article, *The Theory of the Firm*.<sup>176</sup> Coase asked a very basic question—why are firms shaped the way they are? In other words, why do firms perform some transactions internally through the hierarchical, command and control typical of most employment relationships while they perform others through the market? His answer was straightforward—some transactions are more cheaply done through the market, others are more cheaply done internally through hierarchical control.

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174. MICHAEL KENDE, FED. COMMUNICATIONS COMM'N, THE DIGITAL HANDSHAKE: CONNECTING INTERNET BACKBONES 5 (Office of Plans & Policy, Working Paper Series No. 32, 2000) (noting that "peering partners exchange traffic on a settlements-free basis"); Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885 (2003).

175. MILTON L. MUELLER, JR., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM 46-47 (1997). *See also* HUBER ET AL., FEDERAL TELECOM LAW § 2.4.1 (2d ed. 1999).

176. *See* Coase, *supra* note 25, at 45-68.

Williamson has brought greater analytic precision to Coase's central insight.<sup>177</sup> He re-formulated Coase's insight as a problem of agency and contract. Due to the fact that *no* contract can possibly anticipate every contingency, Williamson points out that some types of deals or purchases, due to their complexity, create problems of agency for their contracting parties. Contractual incompleteness permits situations in which actors can be put in vulnerable situations.

For instance, consider a computer contractor working on a major project for a corporate customer. The contractor agrees to produce a large, complicated product: a computer and programming system. Because of the complexity of the product, there is significant *ex ante* cost in writing the contract. Because of the specialized nature of the product, there is significant *ex post* cost because the contractor will make significant investments to create the product but has limited ability to sell its product to anyone but that customer. The contractor, thus, is vulnerable to the corporate customer's opportunistic behavior. This behavior might include, for instance, the customer refusing to pay what was agreed upon—or, that the product will cost a lot more to create than expected—refusing to compensate the extra cost. Conversely, if the corporate customer pays up front to eliminate some of these risks, the customer will create a situation with a moral hazard for the contractor: the contractor has an incentive to shirk and not deliver the quality or quantity promised. Thus, the customer must expend the cost to monitor the contractor.<sup>178</sup>

In contrast, consider the purchase of gold ingots. From an *ex ante* perspective, the contract is simple and largely costless as the purchase is for a simple commodity with easily defined and verified attributes. From an *ex post* perspective, the seller, unlike the computer contractor, possesses a good that it can sell to anyone. Thus, if it has a contract to sell an ingot with a particular purchaser, the seller is not susceptible to any opportunistic behavior. If the purchaser refuses to pay the agreed upon amount, the seller can sell to someone else. Conversely, the purchaser knows what it is getting; gold is marked and easily tested. There is little need to worry about opportunism.

Transaction cost economics predicts that the sale of gold ingots occurs in open markets, because the purchase of gold has low governance costs and few

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177. See G.P. Pisano, *The R&D Boundaries of the Firm: An Empirical Analysis*, 35 ADMIN. SCIENCE Q. 153 (1990) (discussing monitoring costs that result from joint research and development between and among pharmaceutical companies).

178. See Y.J. Bakos & E. Brynjolfsson, *From Vendors to Partners: Information Technology and Incomplete Contracts*, 3 J. ORG. COMPUTING 301-28 (1993).

agency problems. Each party entering into a contract to sell does not face large risks that one party will take advantage of the other. On the other hand, computer contracting is often performed in-house or often involves incredibly complex contracting with specific governance provisions. Transaction cost economics would suggest that the added administrative cost of running a hierarchical, in-house operation is outweighed by the governance costs and risks such contracting would impose if performed on the open market.

Numerous prominent scholars have applied this insight to telecommunications. For instance, Christopher Weare argues that higher levels of transaction cost complexity and uncertainty leads to increased regulatory cost. Thus, successful regulatory regimes will involve “low technology complexity and uncertainty.”<sup>179</sup> Weare argues that CPE and long-distance represent prime examples of deregulation that mandated interconnection with relatively stable, low-complexity technologies.

Gerald Faulhauber, former FCC Chief Economist, also argues that transaction cost economics hold the key.<sup>180</sup> Faulhauber compares the 1996 Act’s effort to introduce competition to the Baby Bells with Judge Greene’s court-ordered divestiture of AT&T into competitive long-distance companies and the still-monopolized Baby Bells pursuant to the Department of Justice’s antitrust suit.<sup>181</sup> He argues the latter was a success in bringing about competitive long-distance because it created a clear boundary between the local and long-distance markets. The court required equal access for all long-distance companies and prescribed a relatively simple procedure with a relatively simple physical architecture by which long-distance companies could interconnect. This created a “low transaction cost” boundary through which the Baby Bells could interconnect with the competitive long-distance companies with minimal cooperation between the two. Finally, Judge Greene excluded the Baby Bells from competing in long-distance and thus denied them any possible motive to stymie interconnection with the long-distance companies.<sup>182</sup>

In marked contrast, the 1996 Act created a very fuzzy boundary between the Baby Bells and their competitors. The physical features of interconnection are incredibly complex and continue to be controversial.<sup>183</sup> Unlike the relative

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179. Weare, *supra* note 161, at 985.

180. Faulhauber, *supra* note 24.

181. See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

182. Faulhauber, *supra* note 24, at 10.

183. Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-03-36A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-36A1.pdf) (Aug. 21, 2003).



simplicity of long-distance interconnection, administering the UNEs involves close cooperation between Baby Bells and their competitors, and their precise physical (and virtual) contours continue to be debated as well as their pricing. In other words, the Act failed to provide a low transaction cost boundary. Further, the Act allows the entrants to compete with the incumbent monopolists in the same markets and (perhaps) the Baby Bells do have a motive to refuse or stymie interconnection.<sup>184</sup>

Thus, it seems plausible that the fears of the *Trinko* Court are simply misplaced. The question is not whether courts or administrative agencies are better “qualified” to mandate interconnection. The question is the type of interconnection they mandate—whether it creates a low transaction cost boundary and whether it has the appropriate industrial structure to foster competition. It would seem the legitimate job of courts to determine, given the industry and particular circumstances, whether such access and what kinds of access would be effective.

#### CONCLUSION: HOW TO READ *TRINKO*

In the myriad disputes involving interconnection, not simply in telephony but in network access disputes ranging from the cable systems to the electricity grids, advocates will claim that *Trinko* stands for the proposition that a refusal to interconnect—where there exists some regulatory regime governing interconnection—does not constitute an antitrust violation under any theory. The language of the opinion is ambiguous. At times, it states that Verizon refused to offer those network elements required under the Act, *i.e.*, UNEs, suggesting a narrower reading. At other times, it states that Verizon refused to offer *interconnection* of any kind, *i.e.*, refused to allow competitors or other parties to connect with it under any regimes—regulatory or contractual.

If *Trinko* is read to hold that the antitrust laws cannot be used to require interconnection of any kind—that all interconnection issues start and end with the 1996 Act or other communications law and regulation—then *Trinko* arguably would insulate an incumbent monopolist from anticompetitive abuses that have a very real possibility of inflicting antitrust injury. Further, this reading potentially permits the incumbents to engage in foreclosure of a huge

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184. Faulhauber, in fact, marshals empirical support for this claim, comparing long-distance, intrastate interlata calls with long-distance, intrastate *intralata* calls. See Faulhauber, *supra* note 24, at 83-85.

number of technologies that rely upon their networks—from wireless telephony to the Internet and WiFi. While *under current regulation*, Title II of the 1934 Communications Act’s common carriage mandate would require interconnection,<sup>185</sup> recent regulatory efforts may move newer technologies, like broadband, out of common carriage protections, thus making the likelihood of foreclosure greater.<sup>186</sup>

Despite the importance of specifying what types of interconnection are involved, *Trinko* is maddeningly vague. On one hand, the narrower interpretation—that only interconnection under the 1996 Act is involved—has support from the opinion’s first paragraph which states, “[i]n this case we consider whether a complaint alleging breach of the incumbent’s duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.”<sup>187</sup> The opinion quotes from the complaint stating that “Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs.”<sup>188</sup> *Trinko* later describes its purpose as to decide whether “the activity of which respondent complains [presumably discriminatory order filling under the 1996 Act] violates preexisting antitrust standards.”<sup>189</sup> Further, “Verizon’s reluctance to interconnect at cost-based rate of compensation available under § 251(c)(3) [a portion of the Act] tells us nothing about dreams about monopoly.”<sup>190</sup>

On the other hand, the opinion’s language also supports a broad reading—that all antitrust claims involving refusals to interconnect are barred. The opinion states that the alleged antitrust injury consists of “Verizon[’s] deni[al of] interconnection services to rivals in order to limit entry.”<sup>191</sup> In dismissing the court of appeal’s argument that the *Trinko* complaint may also state a leveraging theory, the Court stated that “leveraging presupposes anticompetitive conduct, which in this case could only be the refusal to deal

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185. See 47 U.S.C. § 201 (2000).

186. See High-Speed Declaratory Ruling, *supra* note 10, at 4812 (declining to impose an obligation of open access onto cable systems); Broadband Access NPRM, *supra* note 10, at 3019 (tentatively concluding to eliminate the Computer III obligations on the Baby Bells to provide interconnection with advanced service providers, such as internet service providers); Nat’l Cable & Telecomm. Assoc. v. Brand X Internet Servs., 125 S. Ct. 2688 (2005) (affirming the conclusions of the Broadband Access NPRM).

187. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004).

188. *Id.* at 404.

189. *Id.* at 407.

190. *Id.* at 409.

191. *Id.* at 407.

claim we have rejected.” This suggests that the interconnection *Trinko* is talking about is broader than that required by the Act. Further, the complaint itself speaks in broad terms alleging that Bell Atlantic (Verizon’s predecessor) used its control over its physical wires to discriminate against the plaintiffs and does not allege a violation of the 1996 Act but rather alleges an injury under the Sherman Act and Communication Act of 1934—and the Court states that it responds “to whether the activity of which respondent complains violates pre-existing antitrust standards.”<sup>192</sup>

This article has argued that refusal to interconnect, whether or not under a regulatory regime, can result in anticompetitive harm. The *Trinko* opinion relied on a wooden doctrinal analysis and fears of judicially mandated interconnection to arrive at its conclusion. Its analysis simply ignored the possible economic impact of refusals to interconnect under *either* a market or regulatory regime. Further, its fears concerning judicially mandated interconnection were not based on historical experience or a large body of economic analysis. *Trinko* must be read narrowly.

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192. *Id.* at 409.