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DECONSTRUCTING *TRINKO*

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Introduction

Recent monopolization cases against Google and Facebook brought by the Justice Department and the Federal Trade Commission signal that the United States is at the dawn of a new era of aggressive antitrust enforcement.[1] If those cases are to be harbingers of an antitrust renaissance, then antitrust enforcers must confront and successfully overcome the Supreme Court's 2004 decision in *Trinko*,[2] which has cast a long shadow over antitrust enforcement efforts in monopolization cases. In breathtakingly broad and provocative language that is decidedly unsympathetic to enforcement of §2 of the Sherman Act,[3] particularly in unilateral refusal to deal cases, and extends far beyond the facts of the case, *Trinko* has boldly re-written the antitrust narrative with respect to the monopolist and the offense of monopolization.

The once vilified monopolist has been re-cast as a key player in, and a necessary element of, the free market system,

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1. *See* Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't Just., Antitrust Enforcement: The Road to Recovery, Keynote at the University of Chicago Stigler Center (Apr. 21, 2022) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler) ("the era of lax enforcement is over and the new era of vigorous and effective antitrust law enforcement has begun."); *See* David Lawrence, Policy Director, U.S. Dep't Just. Antitrust Div., Reemerging Areas of Common Ground, Keynote at Brigham Young University Law Conference (Oct. 21, 2022) (transcript available at https://www.justice.gov/opa/speech/antitrust-division-policy-director-david-lawrence-delivers-keynotebrigham-young) ("strong majority supports more aggressive and effective antitrust enforcement.").

2. Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP., 540 U.S. 398 (2004).

3. 15 U.S.C. §2.

whose quest for short-term monopoly profits is what drives innovation and economic prosperity.[4] Accordingly, the monopolist's business decisions about firms with whom it will deal must be treated with deference by the courts, lest an ill-advised judicial intervention would thwart beneficially market behavior and possibly impair consumer welfare.[5] The Court went on to disparage well-accepted antitrust doctrines, such as leveraging,[6] which it had endorsed a decade earlier, and cast doubt on the continuing viability of the essential facilities doctrine.[7] Finally, the Court fashioned a minimalist enforcement agenda for the lower courts, stressing that the risks of false positives, error costs, administrative costs associated with increased antitrust filings, the inherent limitation on the abilities generalist judges to distinguish procompetitive from anticompetitive behavior, and the limitation on judicial tribunals to control certain market behavior, militated against antitrust intervention by the Courts.[8]

However, once you strip away the *Trinko* rhetoric and focus on what the Court actually *did*, as opposed to what it *said*, the opinion is quite narrow. The decision arose out of the unique set of factual circumstances in the technology-rich, ever-evolving telecommunications industry that is highly regulated and involves technologies and services that are not sold to the public. It was not a run-of-the-mill refusal to deal case and the court's application of antitrust principles to the highly regulated telecommunications field tells us little about how antitrust should apply to less regulated areas of the economy, such as digital markets. In addition, although *Trinko* did denigrate certain well-established antitrust doctrines, for all of its bluster, the Court did not overrule any cases, did not specify any legal tests for refusal to deal cases, and, indeed, recognized that under certain circumstances, a monopolist's refusal to deal with a rival can violate §2.[9] Viewed in this light, *Trinko*, while still a formidable hurdle for plaintiffs in monopolization cases, is not insurmountable. In short, *Trinko's* bark is far worse than

4. *Trinko*, 540 U.S. at 407.

5. *Id.* at 407–08 (forced dealing "may lessen the incentive for the monopolist, the rival, or both to invest in…economically beneficial facilities").

6. *Id.* at 415.

7. *Id.* at 410–11 ("we have never recognized such a doctrine").

8. *Id.* at 411–16.

9. *Id.* at 408 ("however, '[t]he high value that we placed on the right to refuse to deal with other firm does not mean that the right is unqualified'").

its bite, and its invocation by defendants in a motion to dismiss does not sound the death knell to a monopolization claim.

This essay seeks to: (1) trace briefly the evolution of monopolization law; (2) delineate the precise holding of *Trinko*, separating holding from dicta and uncovering both what the court said and did not say – about antitrust liability for single firm conduct; (3) demonstrate that *Trinko* is a marked departure from prior case law with sweeping pronouncements about §2 that go far beyond the facts of the case; (4) dispel the myth that *Trinko* strikes that death knell for monopolization claims; and (5) highlight post-*Trinko* case law that provides a potential path to victory for plaintiffs in monopolization cases.

I.
Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it unlawful for a person "to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several states."[10] The statute does *not* condemn the mere status of monopoly; to be liable under §2, the monopolist must engage in anticompetitive *conduct* causing injury to competition.[11] Not surprisingly, the courts have had difficulty locating the line of demarcation separating lawful monopoly from unlawful monopolization.[12] To answer that question, the courts must ascertain precisely what Congress meant in enacting the anti-monopoly provisions of §2. The general wording of the statute provides little assistance. Section 2 appears to target conduct that is "'exclusionary' in nature, impairing rivals' opportunity to compete in a way that is inconsistent with competition on the merits."[13] Monopolization

10. 15 U.S.C. §2.
11. *Trinko*, 540 U.S. at 407.
12. *See* William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 Conn. L. Rev. 1285 (1999) ("Since that late nineteenth century when Canada and the United States began the first experiments with antitrust law courts, government officials and commentators have struggled to define when a firm has achieved or threatened to gain, substantial market power and to specify the difference between legitimate competitive behavior and wrongful methods of exclusion.").
13. Viamedia, Inc. v. Comcast Corp., 951 F. 3d 429, 452-53 (7th Cir. 2020).

may also be described as abuse of dominance[14] or bullying[15] behavior by the dominant firm. Still, given that the "means of illicit exclusion, like the means of legitimate competition, are myriad,"[16] the task of identifying single firm conduct that is anticompetitive has proven challenging for the courts. Indeed, one court has opined that "anticompetitive conduct comes in too many forms and shapes to permit a comprehensive taxonomy."[17] Precisely for that reason, "questions concerning the nature of behavior by a monopolist that violates Section 2 is one of the most uncertain areas of antitrust."[18] The standards have evolved over the time; but, even after some 135 years since the passage of the Sherman Act, those standards remain surprisingly underdeveloped.

A. *Evolution of Section 2 Standards*

1. *Alcoa*

Judge Learned Hand's opinion in *Alcoa*,[19] aptly demonstrates the difficulties that the courts have had in deciding whether to condemn the activities of a monopolist. Alcoa dominated virgin aluminum ingot with a 90% market share. The United States sued, alleging monopolization. Alcoa had some antitrust skeletons in its closet based on, among other things, admitted cartel participation that had terminated some 30 years prior to the government's enforcement action. In the intervening three decades, Alcoa continually expanded to meet the rising demand for aluminum but faced little competition from new entrants.

Hand began his opinion by condemning monopoly. He stated that "Congress did not condone 'good trusts' and

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14. Angelos Vlazakis & Angelik Varela, *Amazon's Antitrust Fair Play, A Transatlantic Evaluation*, 41 N. Ill. U. L. Rev. 64, 68 (2020) ("The rules on monopolization and abuse of dominance function almost identically.").

15. Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. Pa. J. Bus. L. 543, 544 (2012).

16. United States v. Microsoft Corp., 253 F. 3d. 34, 58 (D.C. Cir. 2001) (en banc).

17. Novell, Inc. v. Microsoft Corp., 731 F. 3d 1064, 1072 (10th Cir. 2013).

18. Comment from Robert Pitofsky to the Antitrust Modernization Commission (Sept. 29, 2005) https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Pitofsky.pdf.

19. United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d Cir. 1945) [hereinafter *Alcoa*].

condemn 'bad ones'; it forbade all."[20] Further denigrating the monopolist, he describes monopoly as "narcotic" dulling competitive vigor, in contrast to rivalry, a "stimulant" to competition.[21] Later in the opinion, however, Hand switched gears and qualified his condemnation of monopoly *simpliciter*, noting that "the successful competitor, having been urged to compete, must not be turned on when he wins."[22] Hand further observed that a seller may not seek monopoly; rather, monopoly may have been "thrust upon" it as a result of (1) being a natural monopoly; (2) a change in taste or demand; or (3) "superior skill, foresight and business acumen."[23] Ultimately, the court held that Alcoa had violated §2, finding that its hegemony in aluminum had been achieved through repeated expansion that excluded rivals, and that its market dominance had not been thrust upon it.[24]

The *Alcoa* decision, especially with its "thrust upon" language was hardly definitive. Indeed, it raised more questions than it answered. A subsequent Second Circuit decision labeled *Alcoa* the "wishing well" opinion because readers could extract from it almost anything that they wished.[25]

2. *Grinnell*

Twenty years after *Alcoa*, the Supreme Court in *Grinnell*[26] articulated a more definitive test for monopolization. The Court held that the offense of monopolization has two elements: (1) monopoly power, i.e.; the power to control price or to exclude competition; and (2) "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[27] In other words, *Grinnell* requires proof of size plus bad acts. Grinnell had grown dominant in the Central Station Protective Services ("CSPS") market through a series of restrictive agreements with its rivals. The Court concluded

20. *Id.* at 427.
21. *Id.* at 477.
22. *Id.* at 430.
23. *Id.* at 429–30.
24. *Id.* at 430–32.
25. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263, 273 (2d. Cir. 1979).
26. United States v. Grinnell Corp., 384 U.S. 563 (1966).
27. *Id.* at 570–71.

that Grinnell had achieved its monopoly in CSPS, not through superior skill and business acumen, but rather by contracts in restraint of trade in violation of §1 of Sherman Act.[28] The Court held that monopoly power acquired through violations of §1 constituted unlawful monopolization, and upheld the decree below ordering Grinnell's dissolution.[29]

3. *Aspen*

Although *Grinnell* provided some measure of clarity to §2 analysis by specifying a conduct requirement in monopolization cases, it did not address the types of conduct by a lawful monopolist that would run afoul of §2. Some twenty years after *Grinnell*, the Supreme Court in the *Aspen*[30] case faced the question of whether a dominant seller's termination of a long-standing and profitable joint venture with a rival without economic justification constituted a unlawful refusal to deal.[31] *Aspen* involved two ski operators in Aspen, Colorado. Defendant operated three ski facilities and gained the lion's share of revenue from destination skiers; plaintiff operated only one facility. The two ski operators engaged on a joint venture that offered an all-Aspen ski pass, allowing skiers to buy one ticket and ski any mountain.[32] Defendant, over time, made greater and greater revenue demands on the plaintiff, to the point where defendant made plaintiff "an offer that [it] could not accept."[33] Defendant then, without any proffered business justifications, terminated the venture.[34] It thereafter rebuffed all attempts by the plaintiff to revive the venture, including its offer to pay full retail price for lift tickets at defendants mountains.[35]

The Supreme Court upheld the jury verdict for the plaintiff. In so ruling, the Court described the following facts: (1) the ongoing, voluntary and profitable nature of the venture; (2) its popularity with skiers; (3) the defendant's willingness to forsake short-term profits in order reap long-term monopoly profits;

28. *Id.* at 576.
29. *Id.* at 576–77.
30. Aspen Skiing Co. v. Aspen Highlands Ski Corp., 472 U.S. 585 (1985).
31. *Id.* at 587.
32. *Id.* at 589.
33. *Id.* at 592.
34. *Id.* at 593.
35. *Id.* at 593–94.

and (4) lack of any business justifications for the termination.[36] That said, the Court never suggested that any of these facts is a necessary element of a successful claim.

4. *Brooke Group*

In *Brooke Group*,[37] the Supreme Court addressed the question of whether price reductions by a dominant seller, causing a rival to lose sales, were predatory. The Court held that such price reductions did not run afoul of §2 of the Sherman Act unless plaintiff could prove that (a) defendant sold at prices below "an appropriate measure of its costs," and; (b) there was a dangerous probability that defendant would recoup its short-term losses by supra-competitive prices over the long term.[38] This objective, cost-based, standard simplified predatory pricing analysis and made clear that a monopolist could compete aggressively via price reductions, provided its prices were above its costs. *Brooke Group* also made the road to recovery in predatory pricing cases much more difficult for plaintiffs. On the other hand, the *Brooke Group* standard did not address predatory conduct that was not price-based.[39] The Court acknowledged that its legal test for predation was underinclusive but justified its stringent standard, noting that below cost pricing generally inures to the benefit of consumers and that various above-cost predatory schemes may be beyond the courts' practical ability to control.[40] As further justification, the Court observed that "predatory pricing schemes are rarely tried and even more rarely successful."[41]

5. *Kodak*

In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*,[42] the Supreme Court, on defendant's summary judgment motion, upheld Plaintiff's monopolization claim on the theory of monopoly leveraging. Kodak manufactured high end copying machines;

36. *Id.* at 605–10.
37. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
38. *Id.* at 224.
39. *Id.* at 222 (the first element of a predatory pricing claim is proof that a defendant sold at prices that are below an appropriate measure of its costs.).
40. *Id.* at 223.
41. *Id.* at 226.
42. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992).

it also serviced those machines and sold spare parts to users. Kodak faced competition in machine maintenance from independent service organizations ("ISOs"), who generally provided maintenance services at prices lower than Kodak's. To increase its share of the services market, Kodak informed its customers that unless they purchased maintenance services from Kodak, or performed maintenance and repair on their machines themselves, Kodak would no longer supply them with spare parts for their copiers. Kodak customers then knuckled under these demands to the detriment of the ISOs. The ISOs sued Kodak alleging that Kodak was leveraging its market power in spare parts to drive ISOs from the field and thereby gain market power in maintenance services.[43] The Supreme Court agreed and held that "use of monopoly power 'to foreclosure competition, to gain a competitive advantage, or to destroy a competitor" constitutes a violation of §2.[44]

B. *Governing Standards Under §2*

With "time and a gathering body of experience, courts have been able to adapt this general inquiry to particular circumstances, developing considerably more specific rules for common forms of misconduct."[45] Courts have applied various legal tests in determining whether conduct violates §2. One approach is a multistep burden shifting/presumption analysis utilized by the D.C. Circuit in *Microsoft*.[46] Here, the plaintiff bears the initial burden of proving anticompetitive behavior.[47] The burden then shifts to the defendant to justify that behavior by establishing its procompetitive benefits.[48] Failure to do so results in judgment for the plaintiff.[49] If the defendant proves a valid procompetitive justification the burden shifts back to the plaintiff to prove that on balance anticompetitive effects outweigh procompetitive benefits.[50] This test is useful in that it can be applied to all forms of anticompetitive behavior. Its

43. *Id.* at 482–83.
44. *Id.* at 482–83.
45. *Novell*, 731 F. 3d at 1072.
46. *Microsoft*, 253 F. 3d at 64–67.
47. *Id.* at 59.
48. *Id.* at 59.
49. *Id.* at 72.
50. *Id.* at 67.

downside is that it forces that Court to engage in balancing, which by its very nature is inexact and potentially arbitrary.

A second test is the profit sacrifice test.[51] The question here is whether the defendant sacrificed short-term profits in return for long-term monopoly rents. This test works well in price-based anticompetitive schemes, such as predatory pricing. However, the test is a bad fit for non-price predation schemes.[52]

A third test is the "no economic sense test."[53] The question here is whether the conduct is irrational but for the anticompetitive effects that it achieves.[54] Thus, if the only reason for pursing a course of conduct is to gain monopoly rents, the conduct would be illegal. However, if the conduct creates efficiencies, then it makes economic sense and would be lawful. The problem with this test is that it shifts the Courts' attention away from defendant's *conduct*—the focus of the § 2 inquiry—and onto the efficiencies that conduct has allegedly generated.[55]

Courts have also identified common forms of misconduct, including (1) predatory pricing;[56] (2) exclusive dealing;[57] (3) refusals to deal;[58] (4) tying;[59] (5) monopolistic leveraging;[60] (6) fraud on the Patent Office;[61] (7) predatory innovation;[62] and (8) bundled discounts or rebates.[63] These § 2 violations have no fixed boundaries and, indeed, may be susceptible to more than one category of court-defined anticompetitive conduct. For example, conduct that is "characterized as exclusive dealing could also be described as tying" because "[t]he economic

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51. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 55 (2004).

52. *See* Edward D. Cavanagh, *Trinko: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 ME. L. REV. 111, 122 (2007).

53. *Viamedia*, 951 F.3d at 461; *see* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 422 (2006).

54. *Comcast*, 951 F. 3d at 461.

55. *See* Andrew I. Gavil, *supra* note 51 at 5, 23.

56. *Brooke Grp.*, 509 U.S. at 226.

57. United States v. Dentsply Int'l Inc., 399 F.3d 181, 187 (3d Cir. 2005).

58. *Aspen*, 472 U.S. at 604-05.

59. *Microsoft*, 253 F.3d at 84.

60. *Image Tech. Serv.*, 504 U.S. at 482-83.

61. Walker Process Equip. Corp. v. Food Mach. & Chem. Corp., 382 U.S. 172, 179 (1965).

62. C.R. Bard, Inc. v. M3 Sys., Inc., 157 F. 3d 1340, 1346 (Fed. Cir. 1998).

63. LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003).

distinction between the two is most often slight or nil."[64] The existence of overlap should not deflect the court's attention from the goal of the antitrust inquiry and that is whether the conduct at issue harms the competitive process and thereby harms consumers. As the court in *Comcast* stated: "At bottom, the purpose of identifying these classes of [anticompetitive] conduct is to help determine 'the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove.'"[65]

Courts have, in addition, identified conduct that poses no or minimal antitrust risk to the public. Thus, the monopolist is free to compete aggressively on the merits and need not operate in the marketplace with one hand tied behind its back.[66] A monopolist is free to innovate and to improve or to update the design of its products.[67] A monopolist may lawfully introduce multiple products simultaneously and thereby take advantage of its status as an integrated producer.[68] A monopolist may also offer price reductions on its products in order to increase market share.[69] Nor does monopolist have an obligation to lend a helping hand to rivals by, for example, pre-disclosing new products or technologies[70] or sharing its intellectual property.[71] It need not to deal with customers on terms which the customers deem most favorable,[72] nor is it required to, conduct its operations using the least restrictive alternative.[73] Under *Colgate*, "[i]n the absence of any purpose to create or maintain a monopoly," a monopolist is free to exercise its independent

64. *Viamedia*, 951 F.3d at 453 (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1800b (5th ed. 2022) [hereinafter, "Areeda & Hovenkamp"]).

65. *Comcast*, 951 F. 3d at 453 (citing Areeda & Hovenkamp ¶ 1701d).

66. *Berkey*, 603 F.2d at 275 ("The mere possession of monopoly power does not *ipso facto* condemn a market participant.").

67. *Id.* at 281.

68. *Id.* at 283.

69. Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 374-75 (7th Cir. 1986).

70. *Berkey*, 603 F.2d at 282.

71. *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000).

72. Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 450-51 (2009) ("a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors").

73. *Trinko*, 540 U.S. at 415-16.

judgment regarding the parties with whom it will deal or not deal.[74]

One significant exception to the *Colgate* rule is to so-called essential facilities doctrine under which a monopolist is required to deal with a competitor where: (1) the monopolist controls an essential facility; (2) the competitor cannot reasonably duplicate the essential facility; (3) without access the competitor cannot compete; and (4) it is feasible for the monopolist to provide access.[75] As more fully discussed below,[76] even though the essential facilities doctrine is well-established at the circuit level, the Supreme Court has never endorsed it as a basis for liability under § 2.[77] Indeed, in *Trinko*, the Justice Scalia went out of his way to kick dirt on the doctrine.[78] The essential facilities doctrine, if it does exist, is clearly an exception to the general rule that businesses are free to choose their customers.

Refusal to deal cases raising the essential facilities doctrine are rare. The more common and more difficult question is whether a monopolist's refusal to deal with a rival is pursuant to a purpose to create or maintain a monopoly. The Supreme Court has recognized that a seller's right to refuse to deal with other firms is not unqualified.[79] In *Aspen*, discussed above,[80] the Court held that a dominant firm's withdrawal from an ongoing and profitable joint market arrangement with (smaller) rival ski operator was unlawfully exclusionary in violation of § 2 where the withdrawal effectuated a significant change in the market and where the monopolist failed to offer a valid business justification for its conduct.[81] The Court noted that the defendant terminated the joint marketing arrangement even though that arrangement was popular with its customers and even though

74. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

75. *See* MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983).

76. *See infra*, notes 141-43 and accompanying text.

77. *Cf.* Unites States v. Terminal R.R. Ass'n, 224 U.S. 383, 397, 405 (1912) (upholding liability under §1 as a group boycott where essential facility was jointly owned).

78. *Trinko*, 540 U.S. at 411 ("We have never recognized such a doctrine.")

79. *Id.* at 408 ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.") (citation omitted).

80. *See supra* notes 31-36 and accompanying text.

81. *Aspen*, 472 U.S. at 604, 608-11.

plaintiff is willing to compensate defendant at full retail prices in order to keep the joint marketing arrangement alive.[82] The Court found that "the evidence supports an inference that [defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival."[83]

II.
Trinko

A. *Background*

In 2004, the Court revisited *Aspen* in the *Trinko* case. As a threshold matter, it is important to understand the factual context in which *Trinko* arose. Under the 1984 Consent Decree that resolved the decades-long monopolization action by the United Stated against AT&T, AT&T agreed to exit the local telephone market.[84] The Decree established seven Regional Bell Operating companies that would provide local telephone services.[85] These seven companies, later reduced to four through mergers, were regulated monopolies that had exclusive rights to provide local telephone service in their designated areas.[86] Twelve years later, Congress enacted the Telecommunications Act of 1996 ("TCA") which opened local phone service markets to competition.[87] The TCA required these local service providers, referred to as Incumbent Local Exchange Carriers ("ILECs") by the Court in *Trinko*, to allow newly entering rivals, referred to as Competitive Local Exchange Carriers ("CLECs"), to interconnect with their equipment so that new entrants could effectively compete with the ILECs in local phone service.[88] The TCA provided for regulatory oversight by the Federal Communication Commission ("FCC") which included, inter alia, fines for non-compliance.[89]

82. *Id.* at 593–94, 605.
83. *Id.* at 610–11.
84. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549 (2007).
85. *Id.* at 550 n.1.
86. *Id.* at 549, 550 n.1.
87. *Trinko*, 540 U.S. at 401; 47 U.S.C. § 251(c) (2000).
88. *Trinko*, 540 U.S. at 402; *Twombly*, 550 U.S. at 549.
89. *Id.* at 403–04.

The Law Firm of Curtis v. Trinko contracted with AT&T (a CLEC newly entering into local phone service in New York per the TCA) to provide local phone service.[90] AT&T sought to interconnect with Verizon, but Verizon was slow in filling AT&T's orders as well as orders from other CLECs.[91] Verizon's obstinacy did not escape the eyes of state and federal regulators; Verizon agreed to pay a fine of $3 million to the FCC and was fined $10 million by the New York Public Service Commission for its failure to comply with the TCA.[92] Thereafter, unable to receive local phone service from AT&T because of Verizon's foot-dragging, the Trinko firm sued Verizon in the Southern District of New York in 2000, alleging that Verizon's failure to comply with the TCA constituted a violation of § 2 of the Sherman Act.[93] The District Court dismissed the complaint, but the Second Circuit reversed and reinstated the claim.[94]

B. *The Decision*

The Supreme Court reversed the Second Circuit's ruling and directed dismissal of the complaint.[95] The Court might have, as three concurring justices urged, reached this outcome on standing grounds alone.[96] AT&T, was in a better position to sue rival Verizon than its customer Trinko.[97] Hence the more efficient plaintiff under *Associated General Contractors*.[98] Nevertheless, the Court, determined to reach the merits, elided over the standing issue and dismissed Trinko's complaint as a matter of law on the ground that it contained no allegations of Verizon's anticompetitive malice nor of Verizon's predatory motivation in its treatment of AT&T orders.[99] In reaching that outcome, the Court posed, and answered, four questions: (1) Does violation of the TCA give rise to an antitrust claim? (2) Did Verizon's conduct violate existing antitrust standards? (3) Did *Aspen* call

90. *Id.* at 404–05.
91. *Id.* at 404.
92. *Id.*
93. *Id.* at 404–405.
94. *Id.* at 405.
95. *Id.* at 416.
96. *Id.* at 416–18 (Stevens, J. concurring).
97. *Id.*
98. Associated Gen. Contractors of Cal. Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-35 (1983).
99. *Trinko*, 540 U.S. at 409.

for antitrust liability? and (4) Should the Court create a new theory of antitrust liability? The Court answered each question in the negative.

1. *Does Violation of the TCA Give Rise to an Antitrust Claim?*

Trinko alleged that Verizon's failure to comply with mandatory facilities-sharing requirements of the TCA created a claim under the antitrust laws.[100] In rejecting that argument, the Court made three points. (1) the TCA imposed mandatory dealing requirements on Verizon that were more extensive than the antitrust laws would require; (2) the TCA also created a detailed regulatory structure to assure compliance with the TCA; and (3) although the existence of such a detailed regulatory structure might ordinarily raise the question of whether Verizon "was shielded from antitrust scrutiny altogether by the doctrine of implied immunity," the Court concluded that any implied immunity argument was foreclosed by the antitrust savings clause in the TCA, which provided that "nothing in this Act or the amendments made by this Act shall be constructed to modify, impair, or supersede the applicability of any of the antitrust laws."[101] Therefore, according to the majority, the TCA preserved application of the antitrust laws but implicitly excluded antitrust liability for conduct that also constituted violations of the TCA.[102] Put another way, the Court declared Verizon's duty to deal under the TCA as irrelevant to any antitrust analysis, on the ground that but for the TCA, Verizon never would have offered to deal with AT&T. The Court thus created an imaginary Verizon with no duty to deal but at the same time free to deal-or not deal-with rivals as it wished. Only by conjuring this imaginary Verizon could the Court hold that although the antitrust laws applied, they did not impose liability on Verizon for ignoring its duty to deal with AT&T under the TCA.

Had the Court stopped there, with the "unremarkable finding"[103] that a violation of the TCA does not create an antitrust

100. *Id.* at 405.
101. *Id.* at. 406.
102. *See Trinko*, 540 U.S. at 406 ("That Congress created these duties [to deal under the TCA], however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim.").
103. Michael Kades, Deputy Assistant Att'y Gen, U.S. Dep't Just. Antitrust Div., Remarks at the University of Virginia Virginia Law and Business Review

claim, *Trinko* would likely not have caused much of a stir. *Trinko* might well have been read as a "decision confined to regulated telecommunications carriers engaged in trading unbundled network elements."[104] Instead, the Court sought to define the outer boundaries of § 2, and in the process created skepticism about every § 2 case.

2. *Did Verizon's Conduct Violate Existing Antitrust Standards?*

The Court then analyzed whether Trinko's complaint had stated an antitrust claim independent of the TCA. The Court rejected Trinko's claim based on existing antitrust principles, reasoning that, under *Grinnell*, an antitrust plaintiff must show unlawful *conduct* by Verizon and re-iterated that mere possession of monopoly power does not suffice to create § 2 liability.[105] Trinko's complaint failed to allege the requisite wrongful conduct by Verizon, and Verizon's mere delay in fulfilling AT&T's orders did not constitute unlawful behavior.[106] The Court treated Verizon's foot dragging as a unilateral refusal to deal and reasoned that under *Colgate* "as a general rule," a seller (whether or not a monopolist) is free to choose those with whom it will deal.[107] Therefore, Verizon had no *antitrust* obligation to deal with AT&T. Forced sharing, according to the Court, would not only undermine the long-recognized *Colgate* right, but it would also pose a threat to the competitive process. First, forced sharing may chill the incentive of the dominant firm to innovate.[108] The Court reasoned that firms may acquire monopoly power by creating an infrastructure that "renders them uniquely suited to serve their customer," suggesting that Verizon had done just that.[109] Any mandate to share its facilities with rivals might discourage investment in new infrastructure. Second, it would thrust courts into the role of central planners, a role for which judges are ill-suited.[110] Third, forced sharing would force rivals

2023 Symposium (Apr. 7, 2023) https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-antitrust-division-delivers-remarks.

104. Jonathan Rubin, Norman Hawkes & D Adam Candeub, *Access Remedies after Trinko, in* NETWORK ACCESS, REGULATION AND ANTITRUST 55, 56 (Diana Moss ed. 2005).

105. *Trinko*, 540 U.S. at 407.

106. *Id.* at 410.

107. *Id.* at 408.

108. *Id.* at 407.

109. *Id.* at 408.

110. *Id.*

to negotiate with each other and thereby create the risk of collusive behavior, the "supreme evil" under the antitrust laws.[111]

3. *Does Aspen or the Essential Facilities Doctrine Call for a Different Result?*

The Court recognized that its ruling that Verizon had no antitrust duty to deal with AT&T did not end the inquiry because "under certain circumstances a refusal to cooperate with rivals, can constitute anticompetitive conduct and violate § 2."[112] Specifically, a refusal to deal may implicate § 2 where that conduct was pursuant to the seller's purpose "to create or maintain a monopoly."[113] In addition, courts have held that a dominant firm operating an essential facility has an obligation to grant rivals access to that facility, where access is essential to competition and where the rival's costs of creating its own facilities would be prohibitive.[114]

a. *Aspen*

In its 1986 decision in *Aspen*, the Court held that the decision of defendant dominant ski slope operator in Aspen to withdraw from a long standing and profitable joint selling arrangement for skiing tickets with the plaintiff, its smaller rival, (a) without economic justification and (b) despite the plaintiff's willingness to compensate defendant at full retail value order to continue the joint arrangement, constituted unlawful exclusionary conduct in violation of § 2.[115]

The Court in *Trinko* described *Aspen* as the "leading case for § 2 liability based on refusal to cooperate with rival" [116] but ruled that *Aspen* did not support the plaintiff's claim against Verizon. Without explanation, *Trinko* suggested that *Aspen* was *sui generis*, describing the decision as "at or near the outer boundary of § 2 liability."[117] The irony of describing *Aspen* as a leading case in the refusal to deal area but at the same time relegating it to the fringes of §2 liability appears to have been lost on the court.

111. *Id.*
112. *Id.*
113. *Colgate*, 250 U.S. at 307.
114. *Trinko.* at 410-11.
115. *Aspen*, 472 U.S. at 610-11.
116. *Trinko*, 540 U.S. at 408.
117. *Id.* at 409.

The Court then proceeded to distinguish *Aspen* on three grounds. First, *Aspen* involved the discontinuation of a long-standing, voluntary, and "presumably profitable" arrangement between the dominant seller and its smaller rival.[118] The decision to terminate the joint selling arrangement reflected a choice by a monopolist to make an important change in the character of the market and "suggested a willingness to forsake short-term profits to achieve and anticompetitive end."[119] In *Trinko*, on the other hand, the Court observed that the "complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals or would have ever done so absent statutory compulsion."[120]

Second, the court reasoned that whereas in *Aspen* the defendant's "unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent," the same cannot be said of Verizon.[121] Because there was no prior voluntary dealing, "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."[122] The *Trinko* Court further observed that unlike in *Aspen*, where the monopolist had sacrificed short-term profits for long-term monopoly rents, Verizon had not sacrificed profits.[123] Rather, payments to Verizon for TCA-mandated dealings were governed by FCC regulations and presumably profitable to Verizon at all times. Thus, Verizon's "reluctance to interconnect" at regulated rates "tells us little about dreams of monopoly."[124] On the other hand, the refusal of the defendants in *Aspen* to sell to the defendant at full retail price "suggest[s] a calculation that its future monopoly retail price would be higher."[125]

Third, *Aspen* involved refusal to sell a product—access to mountain ski-trails—that defendant already sold to retail customers, skiing. By contrast, Verizon had never marketed the interconnect services mandated by the TCA to anyone.[126]

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 410.

Accordingly, Verizon's insufficient assistance to its competitors did not give rise to a cognizable antitrust claim under *Aspen*.[127]

Curiously, the Court ignores perhaps the most consequential distinction between *Aspen* and *Trinko*—Aspen was decided on a full trial record, while *Trinko* was disposed of on a motion to dismiss. On a motion to dismiss, a court has a very narrowly defined task to of determining whether the complaint states a plausible claim for relief.[128] The facts pleaded in the complaint are assumed to be true and cannot be disputed by the defendant on its motion to dismiss.[129] Whether a complaint states a claim for relief is a question of law for the court, and the court may not make factual findings at the motion to dismiss stage.[130] Yet, the Court in *Trinko* went to great lengths to establish Verizon's *bona fides*. Without record support, the Court assumed that Verizon had made sizable monetary investments in infrastructure and that it did not want to share the fruits of that infrastructure with AT&T or any other rivals.[131] The complaint, in the Court's view, had failed to show that its delay in fulfilling AT&T orders was anything more than evidence that Verizon wanted to keep its system to itself.[132] The Court also stated that Verizon's delays in fulfilling orders may not have been motivated by the desire to maintain its monopoly, but, rather, might have been driven by other factors having nothing to do with exclusion.[133] Because the complaint did not refute an illicit competitive motive, the Court dismissed the claim.[134] That is precisely the kind of factual determination that the courts must avoid on a motion to dismiss. Verizon's refusal to deal may well have been motivated by its desire to maintain its monopoly, whether or not that is the case is for the jury to decide after trial and not for the judge.

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127. *Id.*

128. *Twombly*, 550 U.S. at 556.

129. *Id.*

130. Covad Commc'ns Co. v. Bell Atlantic Corp., 398 F. 3d 666, 676 (D.C. Cir. 2008).

131. *Trinko*, 540 U.S at 407-408 ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law. . . . ").

132. *Twombly*, 550 U.S. at 566 (resistance to network sharing was "the natural, unilateral reaction of [Verizon] intent on keeping its regional dominance").

133. *Id.* at 414.

134. *Id.* at 411.

Nor are the Court's efforts to distinguish *Aspen* persuasive. Whether there was a prior course of dealing between AT&T and Verizon should not serve as a benchmark for § 2 liability, a view supported by the Seventh Circuit in *Olympia Equipment Leasing*.[135] In that case, Western Union, a monopolist in telex services planned to exit from the market and offered marketing services to rivals, but later withdrew that offer. Judge Posner, writing for the court, observed that "the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation."[136] Indeed, "requiring a preexisting course or dealing as a precondition to antitrust liability risks the possibility that monopolists might be dissuaded from cooperating even in competitive joint venture arrangements for fear that, once in them, they can never get out."[137]

Furthermore, the absence of "profit sacrifice" does not exculpate Verizon from § 2 liability. The *Trinko* Court underscores profit sacrifice as a key fact supporting liability in Aspen but never embellished *Aspen* to the extent of ensconcing profit sacrifice as a *sine qua non* of a refusal to deal claim. Rather, it is one way to establish monopolization; other legal theories of monopolization have been endorsed and implemented by the courts.[138]

More importantly, nowhere in its opinion does the *Trinko* Court assert that profit sacrifice is a necessary element of a monopolization case. In any event, the profit sacrifice theory is totally inapposite to the *Trinko* record. Nothing that Verizon is alleged to have done involved profit sacrifice. Since Verizon's compensation for making its facilities available for interconnection by rivals was determined by FCC regulations, there were no profits for Verizon to sacrifice. The profit sacrifice theory simply does not fit the facts of *Trinko* and cannot be a basis of the holding therein.

b. *Essential Facilities Doctrine*

After dispatching *Aspen*, the Court turned briefly to the question of whether the essential facilities doctrine, discussed

135. *Olympia Equip.* Leasing, 797 F.2d.
136. *Id.* at 376.
137. *Novell*, 731 F. 2d at 1074.
138. *See e.g., id.* at 1075 (no economic sense test); *LePage's*, 324 F.3d at 151-52 ("exclusionary" conduct).

above, would compel Verizon to deal with AT&T.[139] The Court quickly dismissed that argument, noting that because the TCA already mandated that Verizon provide AT&T access to its infrastructure, the essential facilities doctrine would not apply.[140] The Court, however, did not stop there. Rather, it pointedly asserted that although the doctrine had consensus support at the Circuit level, the Supreme Court had not specifically embraced it, thereby raising some doubt as to whether the essential facilities doctrine in fact existed.[141]

4. *Should the Court Create a New Theory of Section 2 Liability?*

The Court considered, and rejected, "adding [*Trinko*] to the few existing exceptions from the proposition that there is no duty to aid competitors" under traditional antitrust principles.[142] Here, the Court revisited its earlier reasoning that violations of the TCA do not create a claim for relief under the antitrust laws. The Court noted that: (1) the regulatory system in place had effectively addressed Verizon's transgressions, and so the need for antitrust intervention was minimal; (2) the marginal benefits of adding an antitrust remedy were outweighed by their costs; (3) the difficulties that a generalist judge would have in applying § 2 requirements to complex business transactions; (4) significant risk of error; (5) high cost of false positives; and (6) creating a new exception could spawn interminable and costly litigation.[143] Furthermore, the Court suggested that conduct consisting of anticompetitive violation of the TCA, like above-cost predatory pricing schemes, may be "beyond the practical ability of a judicial tribunal to control."[144] It also noted that in order to grant plaintiff the compulsory access relief it sought, a court would have "to assume the day-to-day controls characteristic of a regulatory agency" but concluded that it was unlikely that an antitrust court would be "an effective day-to-day enforcer of these detailed sharing obligations."[145]

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139. *See supra* note 76 and accompanying text. Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
140. *Id.* at 411.
141. *Id.* ("We have never recognized such a doctrine ").
142. *Id.*
143. *Id.* at 411–15.
144. *Id.* at 414 (quoting *Brooke Grp.*, 509 U.S. at 223).
145. *Id.* at 415.

Finally, the Court observed that the goals of the TCA—to eliminate the monopolies enjoyed by the ILECs—were much more ambitious than the goals of the Sherman Act to prevent unlawful monopolization.[146] It cautioned Courts not to conflate those goals, stressing that the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[147]

III.
Impact of *Trinko*

Trinko has always been a controversial decision. The Court might have simply ended its inquiry once it concluded that a violation of the TCA does not give rise to a claim under the antitrust laws but instead it embarked on a broader antitrust journey to the ill-defined outer boundaries of monopolization law and enunciated antitrust principles seemingly applicable to all monopolization cases and not simply to those involving the highly regulated telecommunications industry.[148] The Court spent considerable time and effort making the case for a more tolerant approach to dominant firms, while at the same time eschewing any bright-line rules addressing monopolistic refusals to deal.

The threshold question is whether the *Trinko* holding has implications for monopolization cases generally, or should be limited to cases involving the telecommunications industry. One view is that *Trinko* merely reaffirms the status quo ante in refusal to deal cases and that anything the Court said beyond that a violation of the TCA does not create an antitrust claim is dicta.[149] A second view suggests that *Trinko* has profoundly reshaped the § 2 landscape.[150] It is perilous, if not reckless, to

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146. *Id.*
147. *Id.* at 415–16.
148. Rubin et al., *supra* note 104, at 56, 67.
149. *See, e.g.*, Jonathan L. Rubin, *The Truth About Trinko*, 50 Antitrust Bull. 725, 725-26 (2005) ("the truth is that *Trinko* is largely a restatement of the *status quo ante* of monopolization doctrine," and .viewed in the light of the regulatory context of *Trinko* "the antitrust discussion in the opinion emerges as mere dicta."); *see also* Kades, *supra* note 103 ("The refusals to deal of the kind at issue in *Trinko* are highly context-specific and driven by the unique facts and circumstances at issue in that case.").
150. *See, e.g.*, New York v. Facebook, Inc., 549 F. Supp. 3d 6, 25 (D.D.C. 2021) (refusals to deal are "essentially per se lawful" or "presumptively legal"),

dismiss a large portions of the *Trinko* decision as dicta especially since the lower courts do not necessarily distinguish between dicta and holding when Supreme Court speaks and, as in the case of *Facebook*, have given wide berth to the *Trinko* decision.[151] Moreover, the Court still stands solidly behind *Trinko*, having recently re-affirmed that decision in *LinkLine* and *Alston* on claims not involving TCA issues.[152]

A. *Courts Post-Trinko*

Despite the analytical and theoretical shortcomings of *Trinko*, the Supreme Court is not likely to overrule it any time soon. Two recent decisions underscore *Trinko's* continuing viability in the Supreme Court. First, in *LinkLine*,[153] the Court reaffirmed the *Trinko* holding and extended its reasoning to preclude recovery in price-squeeze cases, ruling that "a firm with no antitrust duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors."[154] The Court there also re-iterated the institutional concerns expressed in *Trinko* that the "[c]ourts are ill-suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'"[155] More recently, in *Alston*,[156] a § 1 case involving NCAA rules restricting payments to college athletes, the Court echoed the broader themes of *Trinko* that antitrust courts must (1) "have a healthy respect for the practical limits of judicial administration;" (2) avoid "continuing supervision of a highly detailed decree" that could wind up suppressing rather than enhancing competition; and (3) be aware that costs of compliance with judicial decrees may exceed any efficiencies gained.[157]

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aff'd sub nom. New York v. Meta Platforms, Inc., 66 F. 4th 288, (D.C. Cir. 2023); *but see* Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 311 F. Supp. 3d 468, 483 (D.R.I. 2018) (*Trinko* should not be viewed as "pulling back the reins on refusal-to-deal claims.").

151. *Facebook*, 549 F. Supp. 3d at 25.

152. *Pac. Bell Tel.*, 555 U.S. at 449 (holding that Trinko forecloses any challenges to AT&T's wholesale prices); NCAA v. Alston, 141 S. Ct. 2141, 2161 (2021) (underscoring the view expressed in *Trinko* that courts need to avoid "mistaken condemnations of legitimate business arrangements").

153. *LinkLine*, 555 U.S. 438.

154. *Id.* at 440.

155. *Id.* at 452 (quoting *Trinko*, 540 U.S. at 408).

156. *Alston*, 141 S. Ct. 2141.

157. *Id.* at 2763.

Some lower Courts have also replayed *Trinko's* broader themes and even taken the *Trinko* holding one step further. For example, in *Novell*, the Tenth Circuit per then-Judge Gorsuch, after underscoring concerns expressed in *Trinko* that forced sharing might lead to collusion and prove difficult for courts to administer, suggested that refusals to deal by a dominant firm should be viewed as presumptively lawful, describing refusals to deal as a "narrow-eyed needle" of antitrust liability.[158] He further suggested that courts should respect the general rule of "firm independence" and that in close cases "perhaps it is better that it should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face the risk of inducing collusion and inviting judicial central planning."[159] The appellate court also extracted from *Aspen* a two-pronged bright-line rule in refusal to deal cases requiring (1) prior course of dealing; and (2) defendant's profit sacrifice.[160] At the same time the court appeared to ignore that there was a course of dealing in that case, at least at the critical development stage.[161]

More recently, the D.C. District Court in *Facebook* followed the reasoning in *Novell*. The Court in *Facebook* opined that unilateral refusals to deal were essentially per se lawful or presumptively legal, subject to the narrow exception of *Aspen*.[162] The *Facebook* court re-iterated concerns expressed in *Trinko* that forced sharing could (1) chill innovation; (2) force judges to be central planners; and (3) foster collusion.[163] *Facebook* also prescribed its own three step rule in analyzing unilateral refusals to deal, even though the Court in *Trinko* chose not to adopt any rigid test in refusal to deal cases.[164] The D.C. Circuit

158. *Novell*, 731 F.3d at 1073–74.
159. *Id.* at 1076.
160. *Id.* at 1074–75.
161. *See id.* at 1068-69 (Microsoft allowed Novell access to its namespace extensions ("NSEs") in beta form as Novell was developing applications for its PerfectOffice but subsequently withdrew access to Microsoft's NSEs, forcing Novell to develop workarounds that left it at a competitive disadvantage).
162. New York v. Facebook, Inc., 549 F. Supp. 3d 6, 25 (D.D.C. 2021).
163. *Id.*
164. *Id.* at 27 (the three prongs of the test are: (1) preexisting, voluntary and profitable course of conduct, (2) sale of products that defendant already sells to other similarly situated customers; and (3) willingness to forsake short-term profits in order to achieve an anticompetitive goal).

subsequently affirmed the lower court without extensive discussion of *Trinko*.[165]

On the other hand, some courts have taken a narrower view of *Trinko*. For example, in *Covad*,[166] a telecommunications case decided shortly after *Trinko*, the D.C. Circuit upheld Covad's claim against rival DSL provider Bell Atlantic that Bell Atlantic's refusal to sell its DSL services to would-be customers who had orders for DSL services pending with Covad constituted an unlawful refusal to deal.[167] The court ruled that Covad's allegations that Bell Atlantic's actions were predatory were sufficient to withstand a motion to dismiss.[168] The court went on to reject Bell Atlantic's defense that its conduct was economically justified because that defense raised fact issues not properly before the court on a motion to dismiss.[169]

The more recent Seventh Circuit decision in *Viamedia, Inc. v. Comcast Corp.*[170] merits detailed discussion not only because its facts are complex, but also because it "maps" onto *Aspen*.[171] In that case, Viamedia alleged that Comcast engaged in unlawful exclusionary behavior in the sale of cable television advertising services. The case involved two distinct markets: the market for interconnect services and the market for advertising representative services. Interconnect services "are cooperative selling arrangements for advertising through an 'Interconnect' that enables providers of retail cable television services to sell advertising targeted efficiently at regional audiences."[172] It is essentially a clearinghouse for sales of cable television advertising. The clearinghouse is operated by the largest cable television provider in the region; small cable television providers pay the clearinghouse operator a fee to participate.[173] Comcast was

165. New York v. Meta Platforms, Inc., 66 F. 4th 288, 305 (D.C. Cir. 2023) ("To fit itself within [the *Aspen*] exception, a plaintiff must allege that, among other things, before the defendant refused its competitors access the defendant 'voluntarily engaged in a course of dealing with its rivals, or would…have done so, absent statutory compulsion.'").

166. Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666 (D.C. Cir. 2005).

167. *Id.* at 675–76.

168. *Id.* at 676.

169. *Id.*

170. *Viamedia*, 951 F.3d.

171. *Id.* at 454.

172. *Id.* at 434.

173. *Id.* at 434, 443.

concededly a monopolist in the interconnect market for the three regions at issue in the case.[174]

In the second market—the market for advertising representative services—ad reps assist cable television providers with the sales and delivering of national regional and local advertising slots.[175] Viamedia and Comcast competed in this space for several years. Then, Comcast, allegedly in furtherance of its plans to monopolize ad rep services, presented its rival cable television operators with an ultimatum: either cease dealing with Viamedia—its only competitor in ad rep services—or be cut off from access to the Interconnect services needed to compete effectively.[176] Comcast pursued this course fully aware that it would cost the company millions of dollars in the short run but achieve monopoly power in ad rep services in the longer term.[177] Viamedia saw its customers for ad rep services disappear, not because Comcast offered better services at lower prices but rather because otherwise, those customers would be locked out of interconnect services.[178]

Revisiting the trial Court's dismissal of the complaint, the Seventh Circuit pointedly rejected Comcast's argument that after *Trinko*, the notion that a monopolist had a duty to deal with rivals "bit the dust."[179] Rather, "*Trinko* itself said just the opposite" that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2."[180] The Circuit Court further found that "*Aspen Skiing* . . . maps onto Comcast's conduct"[181] and that even though *Trinko* described *Aspen* as "at or even near the outer boundary of §2 liability,"[182] "Viamedia has presented a case that is well within those bounds and appears even stronger than *Aspen Skiing*."[183] Moreover, *Viamedia* contains elements present in *Aspen* and missing in *Trinko*—"a prior course of voluntary

174. *Id.* at 434.
175. *Id.*
176. *Id* at 434–35.
177. *Id.* at 435.
178. *Id.*
179. *Id.* at 455.
180. *Id.*, (quoting *Trinko*, 540 U.S. at 408).
181. *Id.* at 409.
182. *Trinko*, 540 U.S. at 409.
183. *Comcast*, 951 F. 3d at 458.

conduct, sacrifice of short-term profits, and refusal to sell to rivals on the same terms as other potential buyers."[184]

The court stressed that *Aspen* calls for a case-by-case analysis to determine whether the refusal to deal runs afoul of § 2,[185] and refrained firm any "precise delineation of the requirements of a refusal-to-deal pleading."[186] Rather the court found that "it is enough to allege plausibly that the refusal to deal has some of the key anticompetitive characteristics identified in *Aspen Skiing*."[187] The court specifically left open the question of whether profit sacrifice is a necessary element of a refusal to deal claim.[188] It further noted that other factors, including "a prior course of conduct, exploitation of power over a cooperative network, refusal to sell at retail price, and discriminatory treatment of rivals" could suggest that "a refusal to deal is prompted by anticompetitive malice."[189]

Nor is a refusal to deal the only way to run afoul of § 2. Courts have recognized a variety of market behaviors by dominant firms that may meet the conduct element of a § 2 violation, including among others, refusal to deal, tying and exclusive dealing.[190] Moreover, as the *Comcast* court noted, "[c]onduct that can harm competition may fit into more than one of these court-devised categories."[191] The fact that there may be an overlap in these categories of conduct should not shift the court's focus from its task of determining the basic question of whether the conduct in question—however denominated—causes harm to the competitive process.[192] The purpose of identifying these categories of conduct is to assist in ascertaining "the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove."[193] At the end of the day, the process of bucketizing various categories of alleged misconduct can prove more of a

184. *Id.* at 463.
185. *Id.* at 457 ("the *Aspen* factors help case by case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself.").
186. *Id.* at 463.
187. *Id.* at 462.
188. *Id.* at 463.
189. *Id.*
190. *Id.* at 453.
191. *Id.*
192. *Id.*
193. *Id.*

hindrance than a help to a court assessing whether the conduct at issue is anticompetitive.

Comcast concluded that neither *Trinko* nor *Aspen* established a bright-line rule for § 2 violations generally, nor for unilateral refusals to deal in particular. Rather, the question in both cases was whether the refusal to deal was predatory, *i.e.*, whether the monopolist was "attempting to exclude rivals on some basis other than efficiency."[194] This inquiry is context-specific and fact-intensive. The factors considered in *Aspen*, such as termination of prior course of dealing, can be helpful, but not necessarily decisive.[195] For example, whether there was a course of prior dealing is less significant where predatory purpose is obvious from other facts.[196] Courts may also look to other factors, such as whether defendant's conduct was rational but for its anticompetitive effect[197] or whether the refusal to deal was driven by a valid business decision.[198] In analyzing § 2 cases, "the challenge for an antitrust court lies in stating a general rule distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."[199] In short, *Comcast* provides antitrust plaintiff's a valuable roadmap as to how to neutralize and overcome *Trinko*.

IV.
The Case for Viewing *Trinko* Narrowly

A. *Trinko Itself*

The *Trinko* decision itself provides a strong reason for taking a narrow view of the case. The Court stated that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[200] Subsequently, in *Alston*, the Court echoed these words from *Trinko* regarding specific nature of the antitrust inquiry, stating that "whether an

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194. *Aspen*, 472 U.S. at 605.
195. *Comcast*, 951 F. 3d at 457 ("the *Aspen Skiing* factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself.").
196. *See, e.g.*, Otter Tail Power Co. v. United States 410 U.S. 366, 378 (1973) (defendant's refusal to wheel power to municipalities was motivated by its goal to monopolize the retail energy market).
197. *See, e.g.*, *Novell*, 731 F. 3d at 1075.
198. *See, e.g.*, *Aspen*, 472 U.S. at 608.
199. *Microsoft*, 253 F. 3d at 58.
200. *Trinko*, 540 U.S. at 411.

antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis."[201] The *Trinko* holding is inextricably bound to its particular facts involving Verizon's conduct in the highly regulated telecommunications field, where the regulators actively monitored the marketplace and had done so effectively, having already imposed monetary penalties on Verizon for the very conduct that plaintiff alleged in its antitrust suit. On these facts, the Court reasoned that further antitrust intervention would not be necessary and indeed could be counterproductive.[202] The highly specific facts in *Trinko* do not lend themselves well to generalization, and hence *Trinko* is not a good vehicle for re-writing the law of refusals to deal in particular or the law of monopolization generally indeed. The facts of *Trinko* are even more specific than the facts of *Aspen*, described by the court in *Trinko*, as "the leading case for § 2 liability based on refusal to cooperate with a rival."[203] If we are to take seriously the Court's dicta that antitrust analysis is attuned to the structure of the particular industry at issue, it would seem that *Aspen* stands for the general rule and *Trinko* is the exception, sitting just beyond "the outer boundary of §2 liability."[204]

B. *Refusals to deal*

The Court in *Trinko* recognized that a seller's right to choose its own customers was not unqualified and that in certain instances, refusal to deal with a rival could give rise to liability under § 2.[205] The Court said nothing of a rule per se legality as presumptive legality for refusals to deal. Nor did it overrule *Aspen* or *Otter Tail*, two leading refusals to deal precedents, although it did distinguish both cases on the facts.[206]

In addition, the Court did not articulate any bright line rule specifying the elements of a refusal to deal case. The Court did emphasize certain facts in *Aspen*, including the existence of an ongoing consensual business relationship between the

201. *Alston*, 141 S. Ct. at 2158.
202. *Trinko*, 540 U.S. at 414.
203. *Id.* at 408.
204. *Cf. Trinko*, 540 U.S. at 409; (*Aspen Skiing* is "at or near the outer boundary of §2 liability.").
205. *Id.* at 408.
206. *Id.* at 409–10.

parties and defendant's profit sacrifice but did rule that either of these was a necessary element of a refusal to deal claim.[207] Rather they are factors that a court may consider in assessing the legality of the conduct. In line with *Alston*, courts can make decisions in refusal to deal cases on a case-by-case bases.

C. *Nature of Conduct Violative of §2*

Trinko recognized that the "means of illicit exclusion, like the means of legitimate competition, are myriad."[208] There is no requirement that antitrust claims come before a court with a pre-fixed label, such as refusal to deal, tying, exclusive dealing, or predatory pricing. The goal is to identify conduct that is unreasonably exclusionary and inconsistent with competition or the merits.

D. *Trinko's Broad Statements Regarding §2 Liability Are Not Essential to the Holding and Are Suspect Both Legally and Factually*

In deciding the *Trinko* case, the Court ventured beyond refusals to deal and opined broadly about the parameters of § 2 liability. These sweeping statements were not essential to the holding and are at odds with both prior case law and economic theory. It is unclear whether Justice Scalia is writing as provocateur or as decision-maker. Most troubling is his attempt to re-write the antitrust narrative and recast the monopolist as "an important element of the free market system."[209] Historically, courts have viewed the monopolist with suspicion and certainly not as a positive force in the marketplace.[210] Scalia viewed the monopolist as a key player in the free market system because: [t]he opportunity to charge monopoly profits—at least for a short period—is what attracts business acumen in the first place."[211] The notion that the lure of monopoly profits is what drives innovation is contrary to the Court's earlier decision in *Northern Pacific*[212] wherein the Court per Justice Black stated:

207. *Id.* at 409.
208. *Id.* at 414.
209. *Id.* at 407.
210. *See Alcoa*, 148 F. 2d at 427 ("immunity from competition is a narcotic").
211. *Trinko,* 540 U.S. at 407.
212. N. Pac. Ry. Co. v. U.S., 356 U.S. 1 (1958).

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[213]

In short, rivalry—not monopoly—is what drives economic prosperity.

Equally important, the argument that the lure of monopoly rents fosters innovation and risk-taking is out of step with economic theory.[214] The bump in revenue that results from successful innovation, known as quasi rents, "are surplus returns that reward innovation"[215] and "it is a mistake to enter into antitrust law the notion that innovation and risk-taking require temporary monopoly rents as an incentive."[216] Scalia's reasoning on this point is especially inapt because Verizon did not earn its monopoly through innovation or by superior performance in the marketplace; rather, the monopoly was bestowed on it by government decree.[217]

The Court's willingness to cede monopoly profits to the monopolist/innovator in the short-term is also puzzling. What would stop the monopolist/innovator from reaping *long-term* monopoly profits? Presumably, the Court is of the view that market forces would intervene to thwart the monopolist's attempt to achieve long-term monopoly rents. That view is naïve and out of touch with economic reality. In fact, market power can prove durable, as experiences with Alcoa, AT&T and Microsoft, among other durable monopolies, amply demonstrate.[218]

Furthermore, the Court's view that forced sharing of assets would chill Verizon's, as well as any rival's incentive to innovate is also questionable. It may be that access to Verizon

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213. *Id.* at 4.
214. *See* Rubin et al., *supra* note104, at 64.
215. *Id.*
216. *Id.* at 64.
217. *Id.*
218. *See* Jonathan Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 10 n. 39 (2015).

infrastructure would lessen AT&T's incentives to duplicate Verizon's infrastructure, but the interconnect duties reflect the legislative judgment made in the TCA that sharing would, on balance enhance competition in local phone services. Moreover, mandated interconnection could very well incentivize AT&T and similarly situated companies to offer new products not offered by Verizon.

In addition, the Court's concern that forced sharing would require parties to negotiate and thereby possibly lead to collusion—"the supreme evil of antitrust"[219]—is speculative in nature. It may well be that forced sharing does create a risk of collusion; but again Congress, in enacting the TCA, appears to have decided that the risk of any collusion could be effectively addressed by vigorous antitrust enforcement. In any event, there is simply no legal basis for concluding that violation of § 1 necessarily more insidious that violations of § 2. Certainly, cartel behavior is pernicious and warrants the attention of antitrust enforcers; but the notion that collusion is the supreme evil of antitrust seems pure *ipse dixit.*[220] It is also at odds with the *Microsoft*[221] decision, which used the same burden-shifting technique that is used in § 1 cases in deciding § 2 issues and thus treated violation of § 1 and § 2 as equivalent harms.[222] Also, the legislative history of the Sherman Act offers no support for the "supreme evil" concept.[223]

Finally, *Trinko* should not be read as a call for minimalist antitrust enforcement. The Court did indeed decline to recognize a new exception to the general rule that a monopolist has no duty to deal that would sustain the plaintiff's complaint. Although that portion of the opinion checks all the boxes of a Chicago School minimalist antitrust agenda, the Court was clearly speaking in the context of a complex and ever-changing

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

220. Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 750 (2006) ("Privileging Section 1 of the Sherman Act... over section 2, or believing that concerted action is inherently more anticompetitive than equivalent action by a single entity with similar power, is an equally astonishing assertion with no textual support in the antitrust laws.").

221. *Microsoft*, 253 F. 3d at 64-67.

222. Spencer Weber Waller, *The Role of Monopolization and Abuse of Dominance in Competition Law*, 20 LOY. CONS. L. REV. 123, 125 (2008).

223. Waller, *supra* note 222, at 750 ("there is simply no indication that the drafters of the Sherman Act differentiated between [monopolization and collusion], or indeed particularly understood that there was a difference.").

telecommunications field that is heavily regulated wherein Verizon had already been assessed significant fines for its foot-dragging in complying with AT&T's orders. Given that situation, the Court concluded that the marginal benefits of additional antitrust enforcement in this space was outweighed by its cost. The Court was not addressing antitrust enforcement generally.

E. Trinko *is Shaky Authority*

Finally, *Trinko* is shaky authority and ought not to be extended beyond its facts. First, the Court's sweeping statements about § 2 liability were made on a truncated record. Only the complaint was before the court in *Trinko* on Verizon's motion to dismiss. Faced with a motion to dismiss, a trial court must (a) assume the truth of all properly pleaded allegations of fact; and (b) avoid making factual determinations. The Court simply disregarded these legal standards and proceeded to piece together from appellate briefs and prior administrative proceedings a factual record supporting Verizon's position.

> Not only did the Court fail to assume the truth of the allegations of the complaint, it went further, prying out and piecing together from the appellate briefs and prior administrative hearings—there was no answer to reference—a "factual record" supporting Verizon's motion to dismiss. Among the Court's "findings" were: (1) Verizon had created a valuable infrastructure, (2) the unbundled elements to which access is mandated by the telecommunications Act of 1996 "exist only deep within the bowels of Verizon."[224]

It then concluded that Verizon had no antitrust obligation to deal with AT&T, even though one could easily infer from the complaint that Verizon was seeking to maintain its monopoly in providing local exchange services.

Second, given the sparseness of the record properly before the court, its dismissal of the plaintiff's claim was clearly premature. It would have been preferable for the Court to make its sweeping pronouncements on § 2 liability on a fully developed trial record.

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224. *See* Cavanagh, *supra* note 52, at 118-19.

Third, Trinko clearly lacked standing to assert its antitrust claim. For that reason alone, the Court's extensive statements on § 2 liability were unnecessary and hence suspect.

Fourth, the two unstated shadows cast over this opinion are that (a) *Trinko* was an unappealing plaintiff that could viewed as opportunistically piling on to deliver even more punishment to Verizon; and (b) few jurists are willing to second-guess Justice Scalia on an issue of antitrust jurisprudence.

Conclusion

For the last two decades, *Trinko* has stood as a formidable obstacle to all varieties of claims under § 2 of the Sherman Act. Yet, it is not insurmountable. The key to unravelling *Trinko* is cutting the case down to size by persuading the courts to separate its rhetoric from its holding; the *Trinko* Court talked quite broadly but actually ruled very narrowly. A head-on assault of *Trinko* is unlikely to succeed. A multi-front guerilla attack is necessary. Ben Franklin once said that "[a] great Empire, like a great Cake, is most easily diminished at the edges."[225] The same is true in the law. *Trinko* is best overcome by attacking it at the edges.

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225. *See* Nick Bunker, An Empire on the Edge 11 (2015) (quoting Benjamin Franklin).