EXCLUSIONARY CONDUCT AFTER *TRINKO*

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The Supreme Court's decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP *marks a significant doctrinal shift in the long struggle to develop standards for exclusionary conduct prohibited by Section 2 of the Sherman Act. Yet* Trinko*'s incautious treatment of exclusionary conduct and its uncertain scope threaten to add more confusion to Section 2 jurisprudence. In this Note, Frank X. Schoen examines the manner in which* Trinko *has narrowed the grounds for stating a claim for exclusionary conduct and argues that* Trinko *should be interpreted as signaling a doctrinal departure from traditional frameworks for determining unlawful exclusionary conduct in favor of a short-term profit-sacrifice standard. However, the doctrinal tensions within the decision itself counsel a much narrower reading than might otherwise seem appropriate. This Note concludes that* Trinko *must be read narrowly to apply only to unilateral refusals to deal where prior courses of dealing or dealings with third parties provide the appropriate baseline for evaluating the conduct. Limiting* Trinko *to these circumstances addresses the Court's concerns regarding the identification of and remedy for illegal exclusionary conduct and, moreover, accords with the rationales underlying the Court's deferential treatment of price competition and innovation.*

Introduction

In the first Supreme Court decision in over a decade to consider Section 2 of the Sherman Act, Justice Scalia's majority opinion in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*[1] marks a significant doctrinal shift in the long struggle to develop standards for exclusionary conduct. The Court's decision in *Trinko* resolved a five-circuit split on the issue of whether the Baby Bells' provision of inferior access to their telecommunications infrastructure in violation of the Telecommunications Act of 1996 impaired the opportunities of their competitors in violation of Section 2 of the

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1 540 U.S. 398 (2004).

Sherman Act.[2] While *Trinko* decided the narrow issue firmly in favor of the Baby Bells, *Trinko*'s incautious treatment of exclusionary conduct and its uncertain scope threaten to add more confusion to Section 2 jurisprudence.[3]

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize.[4] Allegations of "mere monopoly," however, fail to state a claim under Section 2 absent some form of anticompetitive conduct.[5] Before *Trinko*, exclusionary conduct was recognized as a type of anticompetitive conduct that "tends to impair the opportunities of rivals."[6] Exclusionary conduct violates Section 2 of the Sherman Act where the conduct "either does not further competition on the merits or does so in an unnecessarily restrictive way."[7] Conduct that merely harms

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2 *Compare* Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176 (4th Cir. 2003) (dismissing antitrust claims), *and* Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (same), *with* MetroNet Servs. Corp. v. U.S. West Commc'ns, 329 F.3d 986 (9th Cir. 2003) (finding allegations stated claims for exclusionary conduct under multiple theories), Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89 (2d Cir. 2002) (same), *and* Covad Commc'ns Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002) (same). The District Court for the District of Columbia also dismissed the antitrust claims. *See* Covad Commc'ns Co. v. Bell Atl. Corp., 201 F. Supp. 2d 123 (D.D.C. 2002); *infra* Part I.A (describing circuit split).

3 *See, e.g.*, Neal R. Stoll & Shepard Goldfein, *Is § 2 of the Sherman Act on Hold?*, N.Y.L.J., Feb. 17, 2004, at 3 ("The [*Trinko*] decision was greeted with a collective 'wow' by the Antitrust Bar . . . because of the potential consequences of Justice Antonin Scalia's sweeping majority opinion."); J. Bruce McDonald, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, The Struggle for Standards, Remarks Presented at the Section 2 Committee "Hot Topics" Discussion during the American Bar Association Section of Antitrust Law Spring Meeting, at 1 (Apr. 1, 2004), http://www.usdoj.gov/atr/public/speeches/203780.pdf (describing *Trinko*'s "contribution to th[e] struggle for standards").

4 15 U.S.C. § 2 (2000) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . . ."). By contrast, Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (2000).

5 *Trinko*, 540 U.S. at 407 ("The 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."). A contrary rule would chill the robust competition antitrust laws are designed to protect. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 6–7 (2000) ("The words [of Section 2] suggest not a condemnation of the mere existence of monopoly, but of the *active behavior* associated with monopolization or attempts to monopolize.").

6 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.2 (1985) (internal quotation omitted).

7 *Id.* at 605 ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1st ed. 1978))); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATIONS ¶ 651 (2d ed. 2002) (defining exclusionary conduct as being "reasonably

competitors, without harming competition itself, is exclusionary conduct that does not constitute an antitrust violation.[8]

Drawing the line between legal and illegal exclusionary conduct is no easy matter, but clear cases of illegal exclusionary conduct help define the core concept: In *Lorain Journal v. United States*, a newspaper with monopoly power over advertising in the relevant geographic market refused to publish the advertisements of any customers who also advertised with a newly formed radio station.[9] The absence of any procompetitive justification for the newspaper's policy indicated an attempt to "destroy threatened competition," and the Supreme Court found this refusal to deal a clear violation of Section 2.[10]

However, conduct that has the effect of excluding competitors may also feature efficiency-enhancing or other consumer-benefiting justifications.[11] Antitrust law has long struggled to develop appropriate standards for determining whether conduct represents competition on the merits or unnecessarily restrictive conduct.[12] Evaluating a firm's *unilateral* conduct is especially difficult:[13] Outperformed rivals typically lose market share and economies of scale to an efficient competitor,[14] but "[t]his is the rule of the marketplace and is precisely the

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capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals" and thereby offsetting proportional consumer benefits); RICHARD A. POSNER, ANTITRUST LAW 40–41 (2d ed. 2001) ("An exclusionary practice is generally a method by which a firm having a monopoly position invests some of its profits in making it unprofitable for other sellers to compete with it, thus perpetuating its monopoly.").

8 *See* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.").

9 Lorain Journal Co. v. United States, 342 U.S. 143, 148 (1951).

10 *Id.* at 154.

11 *See* POSNER, *supra* note 7, at 193 ("A . . . serious problem [for antitrust] . . . is that a practice may be at once exclusionary and efficient.").

12 *See Microsoft*, 253 F.3d at 59 ("[T]he means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147–48 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined. No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance.").

13 With respect to multilateral conduct, antitrust courts can frame their analysis by reference to the agreement, whether express or tacit, between competitors. Any such agreement giving rise to inferences of anticompetitive effects is, by definition, absent in the context of a firm's unilateral conduct, and antitrust courts are consequently left with little from which to infer intent.

14 *See* POSNER, *supra* note 7, at 196–97 (observing that where competitor is "much more efficient than the rival that the latter is unable to reach a level of output at which to

sort of competition that promotes the consumer interests that the Sherman Act aims to foster."[15]

The struggle for standards to distinguish between legal and illegal exclusionary conduct has high stakes: False positives (imposing liability in error) risk chilling robust competition, which is the very conduct modern antitrust law aims to encourage,[16] whereas false negatives (withholding liability in error) pose threats to consumer welfare in the form of supracompetitive pricing, stifled product innovation, and less choice among providers.[17] As the pre-*Trinko* circuit split indicates, the scope of permissible unilateral conduct by the dominant firm in an industry remains one of the most controversial areas of antitrust law.[18]

Trinko has been recognized as a landmark case with significant implications for developing standards for exclusionary conduct prohibited by Section 2 of the Sherman Act.[19] *Trinko*'s contribution to the struggle for Section 2 standards comes at a time when uncertainty in this area of antitrust law has led to the development of a host of frameworks for identifying illegal exclusionary conduct.[20] Yet, as the varied analytical approaches that characterize the pre-*Trinko* circuit

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exploit the available economies of scale in the market and as a result has higher average total costs than he would have if the dominant firm were less efficient"); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 972 (1986) ("Competitive and exclusionary conduct look alike. The dominant firm is an aggressor and expands its market share at the expense of its small rival. The rival yelps and sues.").

15 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

16 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)); *Copperweld*, 467 U.S. at 767–68.

17 SULLIVAN & GRIMES, *supra* note 5, at 10–19 (describing false negative risks associated with exclusionary conduct).

18 *See, e.g.*, Hovenkamp, *supra* note 12, at 147–48 (noting unsettled and highly debated state of law with respect to exclusionary conduct); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 267 (2003) (noting inability of courts and scholars "to devise administrable standards for sorting out desirable from undesirable conduct that tends to exclude rivals"); McDonald, *supra* note 3, at 1 (describing struggle for standards under Section 2).

19 *See supra* note 3 and accompanying text.

20 *See* Hovenkamp, *supra* note 12, at 1 ("About the best antitrust has been able to produce are rules designed for specific classes of cases, such as the cost rules governing predatory pricing, or the simple per se rules applied to naked boycotts."); McDonald, *supra* note 3, at 1 ("There is no shortage of proposed all-purpose, one-sentence, universal tests for Section 2 liability.").

split suggest,[21] the availability of multiple frameworks has arguably made analysis of exclusionary conduct more difficult for courts.[22]

The Supreme Court has overcome similar difficulties with respect to predatory pricing, a specific type of anticompetitive conduct proscribed under antitrust law.[23] In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court adopted a clear standard for predatory pricing claims: Predatory pricing violates Section 2 where (1) the firm sets its prices "below an appropriate measure of... costs" and (2) the firm has "a dangerous probability . . . of recouping its investment in below-cost prices" through long-term supracompetitive prices.[24] Given the relative clarity of the *Brooke Group* rule,[25] commentators have suggested that *Brooke Group*'s short-term profit-sacrifice standard ought to apply more generally for purposes of determining when exclusionary conduct violates Section 2.[26] As indicated by the government's recent briefs and statements, the profit-sacrifice and recoupment standard also "reflect[s] a common and considered government position" with respect to exclusionary conduct.[27]

In *Trinko*, the Supreme Court came no closer to explicitly adopting a general standard for identifying unlawful exclusionary con-

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21 *See infra* notes 41–47 and accompanying text. For a more detailed discussion of the pre-*Trinko* circuit split, see Daniel L. Cendan, Note, *Filling the Gaps: A Principled Approach to Antitrust Enforcement Provides a Necessary Complement to the Telecommunications Act of 1996*, 78 N.Y.U. L. Rev. 1755, 1767–73 (2003).

22 *See* Elhauge, *supra* note 18, at 261–68 (describing lack of guidance under currently formulated standards).

23 A firm engaged in predatory pricing sets the price of its products or services below those of its rivals to punish price-cutting rivals, discourage the entry of new rivals, or drive rivals from the market. Predatory pricing claims pose a dilemma for antitrust courts because consumers typically benefit from ordinary price competition. *See* Eleanor M. Fox et al., Cases and Materials on U.S. Antitrust in Global Context 229–30 (2d ed. 2004) (describing beneficial effects of price competition); Sullivan & Grimes, *supra* note 5, at 147 (same).

24 509 U.S. 209, 222–24 (1993) ("Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.").

25 The clarity of the rule, which by its terms prohibits below-cost pricing, is somewhat diminished by the debate as to which *measure* of cost serves as the appropriate metric. *See, e.g.*, Posner, *supra* note 7, at 218–19 (criticizing as "toothless" Areeda and Turner's use of average variable cost as proxy for marginal cost); W. Dennis Cross, *What's Up with Section 2?*, 18 Antitrust 8, 8–10 (2003) (describing various measures of cost); Elhauge, *supra* note 18, at 268–70 (describing contours of debate).

26 *See* Hovenkamp, *supra* note 12, at 155–58 (canvassing applications of profit-sacrifice test); Elhauge, *supra* note 18, at 269–71 & 270 n.53 (collecting sources supportive of profit-sacrifice standard).

27 Elhauge, *supra* note 18, at 271; *see also* Hovenkamp, *supra* note 12, at 157 ("The government relied heavily on a sacrifice theory in arguing that the alleged refusal to deal in the *Trinko* case did not satisfy any Sherman Act standard of illegality.").

duct.[28] By its terms, *Trinko* does not endorse a new rule for exclusionary conduct nor does it suggest that a categorical limitation on Section 2 liability is necessary. Yet *Trinko* can make a positive contribution to the struggle for standards only if antitrust courts and litigants, left to construct arguments from the tea leaves of *Trinko*'s dicta, can extract a guiding principle or at least come to agreement on how best to interpret the substance of an otherwise open-ended decision.

This Note aims to provide such an interpretation by starting with the observation that *Trinko*'s treatment of profit sacrifice is self-contradictory. The Court's analysis in *Trinko* emphasized the elements characteristic of *Brooke Group*'s predatory pricing standard: No firm may "forsake short-term profits to achieve an anticompetitive end."[29] Yet the Court's analysis also noted that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers" and expressed concern about preserving the incentives of firms "to invest in those economically beneficial facilities."[30] A short-term profit-sacrifice standard for exclusionary conduct would prohibit firms from sacrificing short-term profits to invest in such infrastructures.[31] Yet the Court acknowledged that the firms would lack the ex ante incentives to sacrifice profits and develop "economically beneficial" infrastructures absent the ability to *exclude* free-riding rivals and reap supracompetitive returns from its investment.[32]

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28 *See* McDonald, *supra* note 3, at 4 ("*Trinko* certainly does not announce a sweeping new Section 2 standard . . . .").

29 *Trinko*, 540 U.S. at 409; *see also infra* Part II.A (arguing *Trinko* signals doctrinal move in favor of short-term profit-sacrifice framework).

30 *Trinko*, 540 U.S. at 407–08. This infrastructure figured prominently in the Court's analysis of whether Verizon's exclusionary conduct violated Section 2. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 45 (2004) (describing importance of Verizon's infrastructure to Court's "antitrust narrative").

31 *See* Elhauge, *supra* note 18, at 274 ("Investments in innovation that create monopoly power *typically* would be unprofitable but for the prospect of the monopoly returns reaped by excluding rivals."); *id.* at 274–75 ("Some scholars have indeed been willing to walk the logical plank that this test leads them to fall off, concluding that antitrust law should thus condemn as 'predatory' any product innovations whose profitability depends on their ability to drive rivals out of the market." (citing Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8, 22–30 (1981))).

32 *See Trinko*, 540 U.S. at 407–08 ("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 . . . may lessen the incentive for the monopoly, the rival, or both to invest in those socially beneficial facilities."); Elhauge, *supra* note 18, at 275 (describing short-term profit-sacrifice test as having "proper policy priority exactly backwards" because "innovations make consumers and society better

This Note will examine the manner in which *Trinko* has narrowed the grounds for stating a claim for exclusionary conduct. Part I will consider *Trinko*'s treatment of antitrust in a regulated industry and its implications for exclusionary conduct. This Part will discuss unilateral refusals to deal, refusals to provide access to an "essential facility," and monopoly leveraging. This discussion will highlight the underlying concerns that animate *Trinko*'s doctrinal implications.

As a starting point for determining what principle should be extracted from *Trinko*, Part II will evaluate *Trinko* in the context of the existing frameworks for evaluating exclusionary conduct. Part II will argue that *Trinko* should be interpreted as signaling a significant doctrinal departure from traditional frameworks for determining unlawful exclusionary conduct in favor of a short-term profit-sacrifice standard. This Part will provide a reading of *Trinko* that is consistent with the short-term profit-sacrifice standard and will show that key elements of *Trinko*'s analysis are distinctly at odds with several traditional frameworks for exclusionary conduct, such as balancing, excluding an equally efficient competitor, and raising rivals' costs.

Part III will argue that this short-term profit-sacrifice framework would be doctrinally incoherent if applied to Section 2 broadly, or even if limited to typical unilateral refusals to deal, and instead must be read narrowly to apply only to unilateral refusals to deal where there existed a prior course of dealing or dealings with third parties. Only these cases provide the relevant baseline conduct against which a court can compare allegedly illegal exclusionary conduct under the short-term profit-sacrifice model. This reading is consistent with the policies underlying the Supreme Court's deferential treatment of price competition and innovation.

I
Trinko and Exclusionary Conduct

Prefaced by an overview of the telecommunications industry and the doctrinal divide characterizing the pre-*Trinko* circuit split, this Part will review *Trinko*'s analysis regarding whether conduct that vio-

off . . . (because they are cheaper or of higher quality) than the market options they would have had without the innovation"); Hovenkamp, *supra* note 12, at 158 (describing shortcomings of short-term profit-sacrifice standard). It may seem counterintuitive to think of a firm's investment as a "sacrifice" of profits, especially where the "sacrifice" is made with the expectation of maximizing long-term value. Investments constitute sacrifices since capital invested would otherwise be paid out to the firm's shareholders. *Cf.* Elhauge, *supra* note 18, at 278 ("One might be tempted to respond that 'of course, we would not [apply profit-sacrifice test to cases where investments are made for future profits]' . . . . But then one has to ask what precisely are the normative criteria that determine when the profit-sacrifice test would apply . . . .").

lated the Telecommunications Act of 1996 (1996 Act) stated an exclusionary conduct claim under Section 2 of the Sherman Act.

A. *The Telecommunications Industry, the Telecommunications Act of 1996, and the Pre-*Trinko *Circuit Split*

From the AT&T divestiture until 1996,[33] the Baby Bells (also known as incumbent local exchange carriers, or ILECs) enjoyed regional monopolies over the local exchange networks and local loops—the so-called "last mile" of the telecommunications network that connects customers to the telecommunications equipment that routes voice traffic over the national telecommunications network.[34] To introduce competition into the market for local telephone service, Congress passed the 1996 Act,[35] which imposed significant obligations on the ILECs by forcing them to provide competitors (competitive local exchange providers, or CLECs) with access to their local telecommunications network.[36]

While ostensibly a "deregulatory" measure that opened up the markets to competition, the implementation of the Act's sharing obligations required complex and extensive regulatory oversight by the Federal Communications Commission (FCC).[37] The CLECs entered the market to challenge the local incumbents in a highly regulated environment where the FCC, subject to judicial oversight,[38] set the terms by which the ILECs were required to share their networks.[39]

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[33] For an overview of the regulation of the telecommunications industry, see generally Peter W. Huber et al., Federal Telecommunications Law (2d ed. 1999). *See also Trinko*, 540 U.S. at 401–05 (describing regulatory background).

[34] *See* Huber et al., *supra* note 33, at 480–81 (describing duties of incumbent local exchange carriers (ILECs) with monopoly power).

[35] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (stating goal of 1996 Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[36] *See Untangling the Local Loop*, Economist, Oct. 11, 2003, Beyond the Bubble: A Survey of Telecoms (Special Section), at 19 ("The incumbent must, in effect, give its rivals a hand as they try to steal its business. Not surprisingly, most incumbents find procedural, legal and technical reasons for being slow about it.").

[37] *See* Huber et al., *supra* note 33, at 210 (characterizing 1996 Act as "deregulatory in tone" but "regulatory in effect"); Catherine Arnst & Michael Mandel, *The Coming Telescramble*, Bus. Wk., Apr. 8, 1996, at 64 ("The U.S. is embarking on a bold experiment—going further than any other major nation to *deregulate* the communications industries that are building the infrastructure for the 21st century's information economy." (emphasis added)).

[38] *See, e.g.*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (reviewing FCC's provision of open access to ILECs' networks pursuant to 1996 Act and concluding such provision did not reflect 1996 Act's "necessary" and "impair" standards for access).

[39] *See, e.g.*, 47 U.S.C. § 251 (2000) (imposing several duties on ILECs, including interconnection to their network and provision of resale services); 47 U.S.C. § 252 (2000) (pro-

After the collapse of the telecommunications industry,[40] a number of CLECs and their customers sued ILECs, alleging that the ILECs' provision of inferior access violated the 1996 Act's sharing requirements and constituted illegal exclusionary conduct under Section 2 of the Sherman Act.[41] Five circuit courts and the District Court for the District of Columbia considered virtually identical allegations and split on the issue.[42] The Courts of Appeals for the Fourth Circuit and Seventh Circuit affirmed lower court decisions to dismiss for failure to state a claim.[43] The District Court for the District of Columbia also granted a motion to dismiss.[44] By contrast, the Courts of Appeals for the Second Circuit, Ninth Circuit, and Eleventh Circuit reversed dismissals, finding that the alleged facts stated Section 2 claims for exclusionary conduct under *multiple* antitrust theories.[45]

The circuit split signaled a fundamental disagreement over the scope of permissible unilateral conduct by a dominant firm in an industry, evincing the doctrinal tension between a firm's right to refuse to deal with competitors and a firm's obligation to cooperate with competitors for the sake of fostering competition within a market.[46] The divergent outcomes resulting from the application of traditional antitrust principles to virtually identical allegations provide a further indication that lower courts need guidance navigating Section 2's murky waters. The doctrinal confusion regarding the stan-

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viding for negotiation and approval of interconnection agreements and requiring consent to arbitration for dispute resolution); Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176, 186–87 (4th Cir. 2003) (describing FCC's regulatory powers under 1996 Act).

40 Though successful at raising capital during the bubble market of the 1990s, the competitive local exchange providers (CLECs) did not have an easy go of it as the ILECs fought the CLECs to preserve their share in the local market. *See Untangling the Local Loop*, *supra* note 36, at 19. By the late 1990s, CLECs faced decreased availability of high-yield debt and dramatically scaled back their expansion plans. *See* Roger O. Crockett, *Wrong Numbers for Telecom Upstarts*, Bus. Wk., Nov. 2, 1998, at 34 (describing how "the drought is wreaking havoc on business plans of emerging telecom companies").

41 *See* Cendan, *supra* note 21, at 1767–73; Catherine Yang, *The Local-Phone War Heads for Court*, Bus. Wk., Jul. 14, 1997, at 26.

42 *See supra* note 2 and accompanying text.

43 *See* Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176, 190–91 (4th Cir. 2003); Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000).

44 *See* Covad Commc'ns Co. v. Bell Atl. Corp., 201 F. Supp. 2d 123, 126 (D.D.C. 2002).

45 *See* MetroNet Servs. Corp. v. U.S. West Commc'ns, 329 F.3d 986, 1015 (9th Cir. 2003) (finding monopolization and essential facilities claims); Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 107–08, 113 (2d Cir. 2002) (finding essential facilities and monopoly leveraging claims); Covad Commc'ns Co. v. BellSouth Corp., 299 F.3d 1272, 1283–92 (11th Cir. 2002) (finding essential facilities, refusal-to-deal, and price squeeze claims).

46 *See* Cendan, *supra* note 21, at 1767–73 (discussing pre-*Trinko* circuit split); Cross, *supra* note 25, at 14 (voicing hope that *Trinko* "will bring some much needed clarity to the question of a monopolist's affirmative duties to preserve or promote competition").

dards for exclusionary conduct, however, is hardly surprising. For the better part of a century, courts and commentators have struggled to develop an appropriate standard for determining liability for exclusionary conduct under Section 2 of the Sherman Act.[47]

B. The Trinko *Case*

1. The District Court and Second Circuit

As the lead plaintiff in a class action lawsuit, the Law Offices of Curtis V. Trinko, LLP (the Trinko partnership) alleged that Bell Atlantic, an ILEC in the northeastern United States, provided rival CLECs with inferior access to its telecommunications infrastructure in violation of the 1996 Act's regulatory requirements and that this exclusionary conduct violated Section 2 of the Sherman Act.[48] As a customer of AT&T,[49] the Trinko partnership alleged direct harm from poor telephone service and sued the day after the FCC announced a consent decree requiring Verizon (then Bell Atlantic) to pay $3 million in fines and $10 million to compensate its competitors, including AT&T, for its violations of the 1996 Act.[50]

The district court found the Trinko partnership had standing to bring the claim, but followed the Seventh Circuit's approach in

[47] Hovenkamp, *supra* note 12, at 147–48 & n.4.

[48] Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 123 F. Supp. 2d 738, 739–40 (S.D.N.Y. 2000). Bell Atlantic became Verizon after a series of mergers that took place throughout the course of the litigation. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402 n.1 (2004) ("In 1996, NYNEX was the incumbent LEC for the New York State. NYNEX subsequently merged with Bell Atlantic Corporation, and the merged entity retained the Bell Atlantic name; a further merger [with GTE] produced Verizon. We use 'Verizon' to refer to NYNEX and Bell Atlantic as well."). This Note will use the same convention.

[49] AT&T is a long-distance carrier that began competing against the ILECs in the market for local phone service pursuant to the terms of the 1996 Act. Within the relevant market (local phone service), AT&T competed as a CLEC against ILECs such as Verizon. In exchange for sharing the local telecommunications infrastructure, ILECs would be allowed into the long-distance market. *See Trinko*, 540 U.S. at 401–07 (describing AT&T's competition with Verizon in market for local telephone service and 1996 Act's regulatory conditions to Verizon's entry into long-distance market); *Trinko*, 305 F.3d at 93–95 (describing AT&T's status as CLEC in market for local phone service and AT&T's interconnection agreement with Verizon); Amy Barrett, *Telecom: The Feds Have Another Tough Call to Make*, Bus. Wk., Aug. 12, 1996, at 40 (explaining 1996 Act's regulatory scheme whereby ILECs could gain access to long-distance market after opening their local networks to competition); Amy Barrett, *Regulators Should Discipline Telecom Brats*, Bus. Wk., Jun. 30, 1997, at 40 (describing ILECs' resistance to 1996 Act's sharing requirements).

[50] *Trinko*, 123 F. Supp. 2d at 739–40 (citing *In re Bell Atlantic–New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 F.C.C.R. 5413 (2000)). The consent decree represented the agreement reached between the FCC and Verizon to settle the FCC's investigation of Verizon's alleged violations of the 1996 Act. *Id.*

Goldwasser v. Ameritech Corp. and dismissed the exclusionary conduct claims for failure to state a claim.[51] The court found the complaint failed to satisfy *United States v. Grinnell Corp.*,[52] which identifies as illegal exclusionary conduct the "willful acquisition or maintenance of [monopoly] power, as distinguished from 'business growth or development as a consequence of superior product, business acumen or historic accident.'"[53] The district court concluded that the obligations of the 1996 Act are "not coterminous" with antitrust duties and "the mere fact that a monopolist has violated another statute does not transform such offense into a violation of the antitrust laws."[54]

The Second Circuit agreed with respect to standing,[55] but its application of *Grinnell*'s elements reached an opposite result, finding that the allegations stated a claim under multiple theories of antitrust liability.[56] First, the Second Circuit found the plaintiffs stated an "essential facilities" claim by alleging that Verizon breached its duty to provide competitors with access to its network.[57] Second, the Second Circuit found allegations that the defendant's use of its

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51 *Id.* at 741 ("*Even though the plaintiff has standing*, however, its antitrust claim must nevertheless be dismissed because the Trinko partnership has not pled facts that would entitle it to relief." (emphasis added)). *But see Trinko*, 540 U.S. at 416–18 (Stevens, J., concurring) (arguing that Trinko partnership lacked standing).

52 384 U.S. 563 (1966).

53 *Trinko*, 123 F. Supp. 2d at 741 (citing Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998)). The Supreme Court has had a number of occasions to consider the standards for exclusionary conduct and discuss such claims under the *Grinnell* framework. *See Trinko*, 540 U.S. at 407 (citing United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) (same); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19 (1985) (same). Under *Grinnell*, there are two elements to claims made under Section 2 of the Sherman Act: "(1) the possession of monopoly power in the relevant market and (2) the 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." *Grinnell*, 384 U.S. at 570–71; *see also infra* notes 59–61 and accompanying text.

54 *Trinko*, 123 F. Supp. 2d at 742 (citing Goldwasser v. Ameritech Corp., 222 F.3d 390, 400 (7th Cir. 2000)).

55 *Trinko*, 305 F.3d at 105–07 ("review[ing] the district court's conclusion that the plaintiff has standing to bring an antitrust suit" and finding plaintiff overcame *Illinois Brick* objection to standing).

56 *Id.* at 107–08.

57 *Id.* at 108. The Second Circuit described the following three elements as sufficient to state an "essential facilities" claim: (1) access to the local loop was necessary to compete; (2) duplicating the local loop was prohibitively expensive; and (3) the defendant violated its duty to provide its rivals with reasonable access. *Id.*; *see also* MetroNet Servs. Corp. v. U.S. West Commc'ns, 329 F.3d 986, 1010–13 (9th Cir. 2003) (finding complaint sufficient for essential facilities claim). Interestingly, Judge Greenberg's dissenting opinion in *Cavalier Telephone, LLC v. Verizon Virginia, Inc.* substantially agreed with the Second Circuit's analysis and found the alleged facts sufficiently stated an essential facilities claim. *See* 330 F.3d 176, 191–92 (4th Cir. 2003) (Greenberg, J., dissenting); *infra* note 94.

monopoly power in the wholesale market to gain a competitive advantage at the retail level stated a monopoly leveraging claim.[58]

As evidenced by the divergent outcomes resulting from the application of the same standard to the same allegations,[59] *Grinnell* fails to provide courts with substantive guidance for purposes of distinguishing the willful acquisition or maintenance of monopoly power from competition on the merits.[60] *Grinnell*'s nebulous standard leaves courts with considerable flexibility in determining whether the conduct in question violated Section 2.[61] The struggle for standards for exclusionary conduct plays out beneath the surface of *Grinnell*'s nonconstraining framework, and the Supreme Court's *Trinko* decision is no exception.[62]

2. *The Supreme Court's* Trinko *Decision*

The Supreme Court granted certiorari on the issue of whether the Second Circuit erred in reversing the District Court's dismissal of the Trinko partnership's antitrust claims.[63] The Supreme Court reversed the Second Circuit and dismissed the Trinko partnership's complaint for failure to state an antitrust claim.[64] While acknowledging that the 1996 Act's saving clause precluded a finding of implied immunity to antitrust liability,[65] the Supreme Court noted that, although the 1996

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58 *Trinko*, 305 F.3d at 107–08. The Second Circuit described three elements for a monopoly leveraging claim: (1) possession of monopoly power in one market; (2) use of that power to gain a competitive advantage in another market; and (3) causation of injury by the anticompetitive conduct. *Id.* at 108 (citing Virgin Atl. Airways v. British Airways, 257 F.3d 256, 272 (2d Cir. 2001)). The Second Circuit found that the Trinko partnership's complaint failed to state an attempted monopolization claim, but suggested the Trinko partnership might make a claim by amending the complaint to include additional allegations of "any additional predatory or anticompetitive conduct" while on remand. *Id.* at 108–09 n.13.

59 The disconnect between the district court and the Second Circuit is characteristic of the pre-*Trinko* circuit split. *See supra* notes 41–47 and accompanying text.

60 *See* Elhauge, *supra* note 18, at 257–68.

61 *See id.*

62 *See supra* note 28 and accompanying text.

63 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 538 U.S. 905 (2003).

64 Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004).

65 *Id.* at 406 ("Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that '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.'" (quoting 1996 Act, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 143, 143 (1996))). The Court expressed its clear reservations by noting that the 1996 Act's regulatory scheme was otherwise a "good candidate" for implied antitrust immunity. *See id.* (noting desire "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme"); *id.* at 411–15 (discussing importance of considering regulatory structure for purposes of antitrust analysis and outlining comparative advantages of agencies vis-à-vis antitrust courts).

Act does not preclude antitrust liability, it "does not create new claims that go beyond existing antitrust standards."[66]

The Supreme Court's extensive discussion of antitrust enforcement in the context of a regulated industry highlighted the concerns regarding the institutional limitations that necessarily shape the Court's approach to antitrust analysis and enforcement.[67] The Supreme Court emphasized the importance of weighing the marginal benefits of judicial antitrust enforcement against its costs where a regulatory scheme exists with the purpose of fostering competition.[68] Comparison to regulatory agencies highlighted the institutional limitations of antitrust courts in two critical aspects: identification and remedy.[69]

First, with respect to identifying anticompetitive conduct that violates Section 2, false positives can chill procompetitive conduct that antitrust laws aim to protect.[70] Detecting violations of the 1996 Act's technical and complex provisions that could be considered exclusionary conduct presented "a daunting task for a generalist antitrust court."[71] Second, the Supreme Court stressed the institutional limitations of antitrust courts in terms of fashioning and implementing the appropriate remedies:

> *Even if the problem of false positives did not exist*, conduct consisting of anticompetitive violations of [the 1996 Act] may be, as we have concluded with respect to above-cost predatory pricing schemes, 'beyond the practical ability of a judicial tribunal to control.' . . . An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.[72]

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[66] *Id.* at 407.

[67] *See* Marie L. Fiala, Verizon v. Trinko: *Limiting Section 2 Liability for Regulated Enterprises*, NAT. RESOURCES & ENV'T, Fall 2004, at 72, 73 ("*Trinko* regards the need for antitrust intervention in such a regulatory context to be very limited based on the fact that regulation dramatically alters the calculus of antitrust harms and benefits.").

[68] *Trinko*, 540 U.S. at 412, 414 ("Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small . . . . Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.").

[69] *See id.* at 414–15 (expressing concern about false positives in identifying violations of Section 2 liability and concern about judicial implementation of effective remedies); Fiala, *supra* note 67, at 73 ("*Trinko* recognizes that it may be wiser to commit resolution of the kinds of disputes that might arise because an incumbent engages in conduct that could be deemed anticompetitive to experts in agencies that oversee the industry . . . .").

[70] The Court observed that "[o]ne false-positive risk is that an [ILEC's] failure to provide a service with sufficient alacrity might have nothing to do with exclusion." *Trinko*, 540 U.S. at 414.

[71] *Id.*

[72] *Id.* at 414–15 (emphasis added) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993)).

Due to the institutional limitations of antitrust courts vis-à-vis regulatory agencies, the Court in *Trinko* prescribed a comparatively limited role for judicial antitrust enforcement.[73] Distinguishing between regulatory aims and antitrust enforcement, the Court cautioned that "[i]t would be a serious mistake to conflate the two goals" since 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."[74]

The institutional limitations of antitrust courts in identifying and remedying illegal exclusionary conduct guided the Court's treatment of the Trinko partnership's various exclusionary conduct claims. These concerns influenced the Court's treatment of three different types of exclusionary conduct claims brought by the Trinko partnership: a stand-alone refusal-to-deal claim, an essential facilities claim, and a monopoly leveraging claim.

a. Refusal to Deal

In general, antitrust law does not impose an affirmative obligation on a market participant to deal with its rivals.[75] In *United States v. Colgate & Co.*, the Supreme Court firmly stated this principle.[76] Indeed, the rule is generally stated as an *affirmative right* to refuse to deal, with doctrinal foundations in the freedom of contract and a free market economy.[77] Although the facts of *Colgate* featured a manufacturer-distributor relationship, the principle announced in *Colgate* is

[73] *Id.* at 415 (noting that 1996 Act seeks to eliminate monopolies whereas Sherman Act "seeks merely to prevent *unlawful monopolization*"). By contrast, when "'[t]here is nothing built into the regulatory scheme which performs the antitrust function,' the benefits of antitrust are worth its sometimes considerable disadvantages." *Id.* at 412 (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)); *see also* Fiala, *supra* note 67, at 73 (arguing that "[*Trinko*] can be read to implicitly endorse a notion of 'soft [antitrust] immunity' by refusing to create an exception to the general rule that there is no duty to aid competitors where regulatory agencies are sufficiently robust").

[74] *Trinko*, 540 U.S. at 415–16.

[75] *See id.* at 407–08 (recognizing freedom of market participant to deal with parties of its choice).

[76] 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.").

[77] *See, e.g.*, BORK, *supra* note 7, at 344 ("Present law leaves the individual firm free to refuse to deal with others, unless the refusal is intended to support another illegal restraint or constitutes an attempt to monopolize. The presumption of freedom seems appropriate to a free market economy."). *Colgate* has been criticized because it contemplates as a remedy an injunction ordering the plaintiff to deal with the defendant, which would require judicial oversight of the terms of the relationship. *See* POSNER, *supra* note 7, at 242 ("The antitrust court becomes charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively.").

equally applicable to dealings between competitors. The Court in *Trinko* invoked *Colgate* to underscore the affirmative right of a single firm to refuse to deal with its rivals, especially where "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."[78] In a signal of the Court's intent to narrow the grounds for Section 2 liability, the *Trinko* opinion's quotation from *Colgate* tellingly omitted the original caveat, which premised the right to refuse to deal on "the absence of any purpose to create or maintain a monopoly."[79]

Antitrust law has long recognized, however, that refusals to deal raise antitrust concerns under certain circumstances.[80] In *United States v. Terminal Railroad Association of St. Louis*, a combination of businesses acquired control over the terminal facilities and consequently the railroad routes to and from St. Louis.[81] The Court determined that as a "result of the geographical and topographical situation . . . it [was], as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis . . . without using the facilities entirely controlled by the Terminal Company."[82] Noting the potential for abuse by the controlling combination, the Supreme Court ordered the combination to provide fair and impartial access to competing railroad lines.[83] While the exclusionary conduct in *Terminal Railroad* featured multilateral conduct, the underlying rationale applies to unilateral conduct as well.[84]

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78 *Trinko*, 540 U.S. at 408; *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) ("The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates.").

79 *Colgate*, 250 U.S. at 307; *see also* Gavil, *supra* note 30, at 46 (discussing significance of *Trinko*'s omission of *Colgate*'s proviso). *Compare Trinko*, 540 U.S. at 408 (omitting caveat regarding absence of purpose to create or maintain monopoly), *with Colgate*, 250 U.S. at 307 (including caveat).

80 *See Trinko*, 540 U.S. at 408 ("However, '[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'" (alterations in original) (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985))).

81 224 U.S. 383 (1912).

82 *Id.* at 397.

83 *Id.* at 409–13. For criticism of *Terminal Railroad*, see POSNER, *supra* note 7, at 239. "It is difficult to understand how such a decree protects the public; its purpose and effect are, rather, to let the defendants' competitors share in the monopoly position enjoyed by the defendants. Again we see a duty to divide monopoly profits equitably derived mysteriously from antitrust principles." *Id.*

84 *See* POSNER, *supra* note 7, at 243 (explaining that "for remedial purposes [the *Terminal Railroad* Court] had to treat the case as if it involved a unilateral refusal to deal, and thus had to order the association to deal with the competing railroads on nondiscriminatory terms"); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1189–91 (1999) (describing how *Terminal Railroad* has come to stand for prin-

The Supreme Court reached a similar outcome with respect to unilateral conduct in *Aspen Skiing*, a decision which the Court has identified as "[t]he leading case for § 2 liability based on refusal to cooperate with a rival . . . ."[85] The Supreme Court examined the refusal of a company owning three of the four ski areas in Aspen, Colorado to cooperate with the smaller owner of the fourth ski area in providing customers with a four-area ski ticket.[86] The defendant's refusal to provide its competitor with tickets even at the retail price it charged skiers figured prominently in the Court's finding of a Section 2 violation. The Court suggested that the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[87]

In rejecting *Trinko*'s refusal-to-deal claim, the Supreme Court distinguished it from *Aspen Skiing*.[88] The Court in *Trinko* found that the refusal to deal at issue in *Aspen Skiing* created an inference of anticompetitive conduct because the *Aspen Skiing* defendant's prior and voluntary course of dealing with the plaintiff was presumably profitable.[89] The unilateral termination of this course of dealing, even where the defendant was offered compensation at the same retail prices it charged skiers, "suggest[ed] a calculation that [the defendant's] future monopoly retail price would be higher."[90]

In *Trinko*, the Trinko partnership could not rely on *Aspen Skiing* for the proposition that Verizon's conduct was anticompetitive: Prior to the 1996 Act, Verizon did not provide its competitors with access to its network facilities, and the provision of access required by the 1996 Act was costly, involuntary, and not profitable.[91] Verizon's conduct provided no evidence of profit-sacrifice whereas, by contrast, *Aspen Skiing* featured evidence of profit-sacrificing since the defendant had refused to offer services that it willingly offered to its retail cus-

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ciple that "[a] monopolist in control of a facility essential to other competitors must provide reasonable access to that facility if it is feasible to do so").

85 *Trinko*, 540 U.S. at 408. *Aspen Skiing* played a key role in the *Trinko* decision. *See id.* at 408–11; *see infra* notes 88–93, 137–40 and accompanying text (discussing *Trinko* and *Aspen Skiing*).

86 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985).

87 *Id.*

88 *Trinko*, 540 U.S. at 409–11.

89 *Id.* at 409. Ironically, the *Aspen Skiing* defendant's prior conduct triggered a claim from the Colorado Attorney General alleging a price-fixing scheme in violation of Section 1 of the Sherman Act, *see supra* note 4, thereby whipsawing the defendant between antitrust liability for a refusal to deal and for dealing too collusively. *See Aspen Skiing*, 473 U.S. at 591 n.9.

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

91 *See id.*

tomers.[92] The Court concluded that "Verizon's reluctance to interconnect at the cost-based rate of compensation available under [the 1996 Act] tells us nothing about dreams of monopoly."[93]

b. Essential Facilities Claim

The Second Circuit found that the Trinko partnership's allegations stated a claim under the essential facilities doctrine,[94] the substantive content of which resembles a refusal to deal. With pre–Sherman Act roots in the common law,[95] the essential facilities doctrine provides a narrow exception to a firm's right to refuse to deal with its competitors.[96] Although the Supreme Court has never endorsed the doctrine, commentators and lower courts have looked to the Supreme Court's duty-to-deal cases for doctrinal legitimacy.[97] The doctrine states simply that a firm with control over a facility which is essential for competing in the market should, under certain circumstances, be required to provide its competitors with access to the facility.[98]

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92 *See id.*

93 *Id.* The Supreme Court noted that the sharing obligations imposed by the 1996 Act are "more ambitious" than the duties enforceable under antitrust laws. *Id.* at 415.

94 Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 107–08 (2d Cir. 2002). The pre-*Trinko* cases also split on the application of the "essential facilities" doctrine to virtually identical facts and allegations. *Compare* MetroNet Servs. Corp. v. U.S. West Commc'ns, 329 F.3d 986, 1010–13 (9th Cir. 2003) (finding "essential facilities" claim on denial of summary judgment motion), *and* Covad Commc'ns Co. v. BellSouth Corp., 299 F.3d 1272, 1285–88 (11th Cir. 2002) (same on denial of motion to dismiss), *with* Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176, 187 (4th Cir. 2003) ("Even under the essential facilities doctrine applied in *Otter Tail*, a legal monopoly cannot be forced to get into a business it was not traditionally in simply to respond favorably to a new competitor's demand for use of its facilities." (citation omitted)), *and* Covad Commc'ns Co. v. Bell Atl. Corp., 201 F. Supp. 2d 123, 131–33 (D.D.C. 2002) (rejecting "essential facilities" claim). The Seventh Circuit's *Goldwasser* opinion did not consider the question. *See* Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000).

95 *See* Sullivan & Grimes, *supra* note 5, at 110 (tracing origin of essential facilities doctrine to common law duty to share scarce resource well established prior to Sherman Act); Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 445 (2002) (noting "long and respected history" of essential facilities doctrine in U.S. antitrust law).

96 *See* Elhauge, *supra* note 18, at 262 (describing "essential facilities" doctrine as narrower than Supreme Court's duty-to-deal doctrine).

97 *See MetroNet Servs. Corp.*, 329 F.3d at 1010 (tracing doctrinal origin of "essential facilities" doctrine to Supreme Court's *Terminal Railroad* decision). See *supra* notes 81–84 and accompanying text for a discussion of *Terminal Railroad*.

98 *See* Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988) ("The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors . . . ."). The doctrine is animated by intuitive notions of fairness and applies where rivals cannot duplicate the facility or where investment in a duplicate facility would be irrational and, consequently, the firm would

Given the Supreme Court's silence, the doctrine had taken on a life of its own in the lower courts, serving as a plaintiff's wishing well and offering some measure of doctrinal legitimacy to otherwise thin allegations.[99] The doctrine has faced significant criticism for its chilling effects on investments in essential facilities.[100] Further, the doctrine raises remedy concerns as it turns antitrust courts into regulators, requiring judicial determination and oversight of the terms of access.[101] Finally, the doctrine provides no guidance as to whether the dominant firm must provide equal and nondiscriminatory access or whether it may charge above some measure of cost for providing access.[102]

Whatever its popularity among the lower courts, very little of the essential facilities doctrine remains after *Trinko*.[103] First, the Court rejected the essential facilities claim on the grounds that the Trinko partnership had alleged only *inferior* access to the telecommunications network, and *actual denial* of access is an "indispensable requirement" for application of the doctrine. This suggests that a firm can make access "available" to its competitors and thus escape essential

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otherwise enjoy a stranglehold on the market. *See MetroNet Servs. Corp.*, 329 F.3d at 1010 (noting that "denial of access to an essential facility violates Section 2 because control of an essential facility can 'extend monopoly power from one stage of production to another'" (quoting MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1132 (7th Cir. 1983))).

99 *See* Lipsky & Sidak, *supra* note 84, at 1190–93 (cataloguing numerous applications of supposedly narrow exception to firm's right to refuse to deal). The doctrine's limiting principles have apparently done little to stem the tide. Traditionally, "the essential facilities doctrine does not apply where it is necessary to expand the capacity of the facility to include a new user." *Id.* at 1222.

100 *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (expressing concern that "[j]udicial oversight" over terms of access to facilities will "distort investment and lead to a new layer of interminable litigation"); Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1990) ("No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation. Such an improvement is unlikely . . . when it would chill desirable activity . . . .").

101 *See* Lipsky & Sidak, *supra* note 84, at 1222–23.

102 *See* Areeda, *supra* note 100, at 841 (arguing that, in absence of principles to determine its scope and application, "it is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are").

103 *See Trinko*, 540 U.S. at 411 (noting that essential facilities doctrine, at minimum, would require flat denial of access); Stoll & Goldfein, *supra* note 3, at 3 ("[*Trinko*] call[s] into question the parameters, if not the existence of the essential facilities doctrine under § 2 of the Sherman Act."). The Supreme Court noted it has never recognized the doctrine and that the case provided no reason to recognize or repudiate it. *Trinko*, 540 U.S. at 411.

facilities analysis regardless of whether or not the terms of such access are fair, reasonable, or nondiscriminatory.[104]

Second, *Trinko* limits what may constitute an essential facility for purposes of the doctrine. More specifically, *Trinko* introduced its antitrust analysis with the declaration that "[f]irms may acquire monopoly power by establishing an *infrastructure* that renders them *uniquely* suited to serve their customers."[105] The difference between an "infrastructure" and a "facility" is not specified, but the language indicates that such an infrastructure may be used to the exclusion of rivals, even if the result is monopoly power.[106] This broad construction of a firm's right to refuse to deal signals the Supreme Court's strong reservations about the administrability of the essential facilities doctrine and its concern that application of the doctrine may facilitate collusion.[107]

Third, *Trinko* signals a narrowing of Section 2's prohibition of exclusionary conduct that is motivated by the Court's awareness of the institutional limitations of antitrust courts vis-à-vis regulatory agencies.[108] The existence of a regulatory agency with the authority to compel and regulate access to a so-called essential facility precludes application of the doctrine because the agency in fact compels and regulates access.[109] The Court expressed reservations about substituting its own judgment on the scope and terms of regulation for that established by an agency.[110] The Court also expressed its reluctance to adopt, even absent a regulatory agency, the regulatory role implied by the doctrine.[111] This treatment seems at odds with *Otter Tail Power*

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[104] *See Trinko*, 540 U.S. at 411 ("[W]here access exists, the doctrine serves no purpose."). In *Trinko*, the Trinko partnership's complaint focused on the *adequacy* of the access Verizon provided the CLECs. The Court disagreed with this approach, concluding that "[t]he 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." *Id.*

[105] *Id.* at 407 (emphasis added).

[106] *See* Gavil, *supra* note 30, at 45.

[107] *See Trinko*, 540 U.S. at 408 ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.").

[108] *See* Fiala, *supra* note 67, at 72–73.

[109] At least three post-*Trinko* opinions have acknowledged this implication. *See* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128–30 (9th Cir. 2004) (citing *Trinko* for proposition that existence of regulatory agency precludes doctrine's application); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1050 (11th Cir. 2004) (same); N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559, 568–70 (S.D.N.Y. 2004) (same).

[110] *See Trinko*, 540 U.S. at 411 ("Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite . . . .").

[111] *See id.* at 414–15 (recognizing that antitrust courts are ill-suited for administrative tasks requiring "continuing supervision" and "day-to-day control[ ]" (citation omitted)).

Co. v. United States, where the Supreme Court found a duty to deal despite an overlapping regulatory structure and an agency that had the power to order interconnection.[112] While declining to repudiate the essential facilities doctrine, *Trinko*'s severe limitations on the doctrine make it unclear what facts, if any, could support an essential facilities claim after *Trinko*.[113]

c. Monopoly Leveraging

The Second Circuit also found that the Trinko partnership's allegations stated a monopoly leveraging claim.[114] Monopoly leveraging describes "the use of power in one market to affect competition in a second, related market."[115] Monopoly leveraging claims have been heavily criticized on the grounds that "[t]he power a monopoly confers can be exploited only once,"[116] in which case a dominant firm's allocation of monopoly profits over two markets leaves consumers as a group no worse off.[117]

Early Supreme Court decisions in this area expressed concern over the use of monopoly power as an evil in itself. In *United States v.*

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112 410 U.S. 366, 372 (1973). In *Otter Tail*, municipalities wishing to provide retail distribution of electricity to residents sued after Otter Tail, a power company regulated by the Federal Power Commission (FPC), refused to provide the municipality with electricity on a wholesale basis or from another power company. *Id.* at 370–72. A slim four-to-three majority found that, while the FPC had the authority to order Otter Tail to comply with the municipalities' request, such regulatory oversight did not immunize Otter Tail from antitrust inquiry. *Id.* at 374–75. Three Justices dissented, arguing that the authority vested by Congress in the FPC exempted Otter Tail's actions from antitrust scrutiny. *Id.* at 395 (Stewart, J., dissenting in part).

113 A survey of post-*Trinko* cases shows some reluctance to part with the essential facilities doctrine. *See, e.g.*, Applera Corp. v. MJ Research, Inc., 349 F. Supp. 2d 338, 347 n.6 (D. Conn. 2004) (noting with respect to essential facilities claim that "[t]he Supreme Court has neither recognized nor repudiated the essential facilities doctrine" (citing *Trinko*, 540 U.S. at 411)). However, some post-*Trinko* cases have bid farewell to the essential facilities doctrine. *See N.Y. Mercantile Exch.*, 323 F. Supp. 2d at 568–70 (citing *Trinko*, 540 U.S. at 407–11) (dismissing essential facilities claim given existence of regulatory structure "in a better position than a general antitrust court to determine the scope and terms of any forced sharing"); Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 539–41 (E.D. Tex. 2004) (citing *Trinko*, 540 U.S. at 411) (dismissing essential facilities claim based on *Trinko*'s treatment of doctrine).

114 Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 108 (2d Cir. 2002). For a discussion of the Second Circuit's description of the monopoly leveraging claim, see *supra* note 58.

115 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 25, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682); *see also* SULLIVAN & GRIMES, *supra* note 5, at 106 (describing monopoly leveraging).

116 SULLIVAN & GRIMES, *supra* note 5, at 107; *see also* BORK, *supra* note 7, at 299–309.

117 By exploiting the collective action problems of dispersed customers, however, a monopolist may be able to extract more than one monopoly profit. *See* Elhauge, *supra* note 18, at 282–88.

Griffith, the defendant leveraged his monopoly of movie theaters in one town "to acquire exclusive privileges in a city where he [had] competitors," even though the Court acknowledged the defendant made no threat to withhold business.[118] Similarly, the Second Circuit's *Trinko* decision found a monopoly leveraging claim where Verizon leveraged its power in the wholesale market[119] "to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers."[120]

In its *Trinko* brief for the Supreme Court, the government criticized the Second Circuit's account of monopoly leveraging. The government argued that "Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[121] Mere use of monopoly power in the form of monopoly leveraging, absent "exclusionary techniques," fails to state a violation of the Sherman Act.[122] The need to allege exclusionary techniques indicates that, in the government's view, monopoly leveraging cannot serve as a stand-alone claim.[123]

The Supreme Court found that the Second Circuit improperly "dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market."[124] The Court noted the monopoly leveraging claim also required allegations of anticompeti-

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118 334 U.S. 100, 106–08 (1948). More recently, the Supreme Court's heavily criticized decision in *Eastman Kodak* found a possible violation of the Sherman Act where the defendant leveraged its power over its own brand of equipment to gain a competitive advantage in the market for the equipment's repair service and parts market. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479, 483–86 (1992). For a discussion and criticism of *Eastman Kodak*, see Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 283–99 (2001). "Nearly a decade of post-*Kodak* antitrust litigation indicates that the lock-in rule as formulated in that case was improperly conceived. For several reasons of administrability and principle, *Kodak* should be overruled." *Id.* at 288; *see also Eastman Kodak*, 504 U.S. at 503–04 (Scalia, J., dissenting) (expressing concern that majority opinion "transforms § 2 from a specialized mechanism for responding to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts").

119 The sale of local loop access to CLECs for resale to residential and business customers shows involvement in both the wholesale and retail markets. By definition, monopoly leveraging requires two markets.

120 Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 108 (2d Cir. 2002).

121 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *supra* note 115, at 26 (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993)).

122 *See id.* at 27 (observing that, with respect to monopoly leveraging, "[w]hat offends the Sherman Act is not the use of monopoly power as such, but exclusionary techniques"). By "exclusionary techniques," we can understand the government as referring to those practices which constitute illegal exclusionary conduct that enhances market power.

123 *Id.* at 25–27; *see also* Cross, *supra* note 25, at 13–14.

124 *Trinko*, 540 U.S. at 415 n.4 (citing *Spectrum Sports*, 506 U.S. at 459).

tive conduct, "which in this case could only be the refusal-to-deal claim [the Court] rejected."[125] The Court's dismissive treatment of the monopoly leveraging claim, coupled with its statement that a firm may lawfully exercise monopoly power "at least for a short period,"[126] indicates strong disapproval of an earlier Second Circuit opinion, *Berkey Photo, Inc. v. Eastman Kodak Company*, which premised Section 2 liability on the abuse of "inherently evil" monopoly power even in the absence of extraction of supracompetitive profits.[127] After *Trinko*, monopoly leveraging cannot function as a stand-alone claim.[128]

II
Trinko and Frameworks for Identifying Exclusionary Conduct

This Part evaluates the implications of *Trinko*'s treatment of exclusionary conduct claims for established approaches to identifying anticompetitive exclusionary conduct that violates Section 2 of the Sherman Act. This Part will argue that the short-term profit-sacrifice approach endorsed by the government and other commentators is compatible with *Trinko*'s analysis and, further, that *Trinko*'s emphasis on the risks of false positives and the institutional limitations of antitrust courts is distinctly at odds with other established approaches.[129]

A. Trinko *and the Short-Term Profit-Sacrifice Standard*

The *Brooke Group* rule for predatory pricing has provided an economically savvy approach to that particular form of anticompetitive conduct. Framing its analysis in terms of economic rationality,[130]

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125 *Id.*

126 *Id.* at 407.

127 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273–74 (2d Cir. 1979).

128 *See, e.g.*, Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294–95 & n.11 (11th Cir. 2004) ("Morris challenges the district court's resolution of its refusal to deal and monopoly leveraging claims. For purposes of this case, the elements of the two claims are sufficiently similar to warrant only one discussion."); N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559, 572–73 (S.D.N.Y. 2004) (recounting party's admission that its monopoly leveraging counterclaim was "dead in the water after *Trinko*" (internal quotations omitted)); A.I.B. Express, Inc. v. FedEx Corp., 358 F. Supp. 2d 239, 246–47 (S.D.N.Y. 2004) (noting strict limits *Trinko* puts on monopoly leveraging claims).

129 *See supra* notes 23–27 and accompanying text (describing Court's approach to predatory pricing).

130 The focus on whether the conduct in question is economically rational reflects the Court's approach in *Brooke Group*'s predecessor, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Matsushita*, a slim majority of the court rejected allegations of a predatory pricing conspiracy in violation of the Sherman Act. The Court treated the defendants as economically rational actors and would not infer the existence of an agreement to eliminate rivals from circumstantial evidence where it appeared highly

the Court held that reductions in price by a competitor do not run afoul of Section 2 unless (i) the competitor is pricing its products below some measure of cost and (ii) there is a reasonable probability that the competitor can recoup its losses by later charging supracompetitive prices.[131] In practice, *Brooke Group* heavily favors defendants, as courts rarely find instances of price predation under this standard.[132] For that reason, the rule has been criticized as extreme and underinclusive.[133] The Supreme Court appears to acknowledge that the standard is underinclusive, but it has justified the rule's scope by reference to the institutional limitations of antitrust courts, finding that the administrability benefits of the rule outweigh the harms of the rule's underinclusive scope.[134]

The relative clarity of *Brooke Group* as an analytical approach and its sensitivity to the institutional strengths (and weaknesses) of judicial enforcement of antitrust invite its application in the context of non-pricing-based exclusionary conduct.[135] Indeed, both the defendant's brief and the government's amicus brief in *Trinko* urged application of a profit-sacrifice standard.[136] While the Supreme Court did not endorse or explicitly address this (or any other) particular analyt-

implausible that the alleged conspirators could ever recoup their investment in predation. *Id.* at 590–93; *see also infra* note 143.

131 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

132 *See* Sullivan & Grimes, *supra* note 5, at 161. The second prong of the test has been particularly hard for plaintiffs to meet. *Id.* at 163.

133 Sullivan & Grimes, *supra* note 5, at 141–42 ("An encompassing definition [of price predation] . . . is that price predation occurs when a market participant with market power uses low prices in a manner that creates allocation injuries or undermines the dynamic component of competition (by discouraging entry or innovation)."). The *Brooke Group* rule is narrower, "limit[ing] price predation to the use of low prices that are below some measure of the seller's cost and that may reasonably be recouped by the seller." *Id.* at 142; *see also* Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L.J. 941, 945 (2002) ("The Supreme Court endorsed a more extreme version of this view in *Brooke Group* in which today's profit sacrifice must entail *actually suffering losses*, rather than simply failing to maximize profits." (emphasis added)).

134 *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004); *cf. Brooke Group*, 509 U.S. at 223 ("[T]he exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is *beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting*." (emphasis added)).

135 *See supra* notes 23–27 and accompanying text.

136 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *supra* note 115, at 15–20; Brief for the Petitioner at 22, *Trinko*, 540 U.S. 398 (No. 02-682); *see also* Elhauge, *supra* note 18, at 270–71 & n.56 (observing that Department of Justice and Federal Trade Commission emphasized profit-sacrifice test in their joint *Trinko* brief); Hovenkamp, *supra* note 12, at 157 ("The government relied heavily on a sacrifice theory in arguing that the alleged refusal to deal in the *Trinko* case did not satisfy any Sherman Act standard of illegality.").

ical approach, the Court framed several key features of its analysis in terms of a short-term profit-sacrifice standard for exclusionary conduct.

The Supreme Court distinguished *Trinko* from its earlier *Aspen Skiing* decision, which dealt with seemingly similar exclusionary conduct. The *Trinko* Court described *Aspen Skiing* as a case where "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[137] Forgoing these short-term profits created an inference that such conduct would have anticompetitive effects, whereas, by contrast, Verizon's past conduct did not support a similar inference.[138] The sharing obligations imposed by the 1996 Act did not exist prior to the Act, and "Verizon's reluctance to interconnect at the *cost-based rate* of compensation available under the [Act told the Court] nothing about dreams of monopoly."[139]

This distinction between *Aspen Skiing* and *Trinko* emphasizes the importance of prior conduct in evaluating the allegedly illegal exclusionary conduct, treating the former as a baseline against which to evaluate the latter. Where there is evidence that prior dealings pursued short-term profits (which the Court inferred since the conduct was voluntary), a refusal to deal that sacrificed short-term profit "suggest[s] a calculation that [the] future monopoly retail price would be higher."[140] The Court's analysis distinguishes *Aspen Skiing* by identifying conduct that is below some measure of profit-maximization (instead of *Brooke Group*'s cost-based baseline), where prior conduct establishes the applicable baseline for the calculation of the difference. The failure to pursue these profits in the short term supports by inference *Brooke Group*'s second prong: recoupment of forgone short-term profits through long-term monopoly profits.

It is true, however, that these passages in *Trinko* appear to place a weight on anticompetitive intent that is not at all consistent with a profit-sacrifice standard. Under a profit-sacrifice standard, the relevant inquiry is not, as *Trinko* may suggest, whether the conduct was

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137 *Trinko*, 540 U.S. at 409. The Court placed special emphasis on "the [*Aspen Skiing*] defendant's unwillingness to renew the ticket *even if compensated at retail price*," finding that it "revealed a distinctly anticompetitive bent." *Id.* For a discussion of the facts of *Aspen Skiing*, see *supra* notes 86–87 and accompanying text.

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

139 *Id.* (emphasis added). The Court's ambiguous reference to "dreams of monopoly" appears to refer to the subjective intent to establish a monopoly. This reading is problematic. *See infra* note 144 and accompanying text.

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

motivated by "competitive zeal" or "anticompetitive malice,"[141] but rather whether the exclusionary conduct would harm competition and yield supracompetitive profits in the long run.

A short-term profit-sacrifice standard requires showing something other than "dreams of monopoly"[142] and subjective anticompetitive intent. Courts will infer intent to monopolize based on objective evidence of prior conduct and profit sacrifice. The anticompetitive result must be economically rational from the perspective of the allegedly predatory competitor.[143] A reading that takes from *Trinko* an increased emphasis on anticompetitive intent, however, would be mistaken given the Supreme Court's firm (and very clear) statements elsewhere against giving subjective intent weighty consideration.[144]

B. Trinko *and the Departure from Prominent Frameworks for Identifying Illegal Exclusionary Conduct*

While *Trinko* is consistent with the short-term profit-sacrifice framework, the decision is markedly inconsistent with traditional frameworks for identifying illegal exclusionary conduct. *Trinko*'s skepticism regarding the ability of antitrust courts to implement effective remedies also has implications for these frameworks: Identifying illegal exclusionary conduct has little value where remedying the identified exclusionary conduct would require courts to assume responsibilities and oversee day-to-day activities that are "beyond the practical

141 *See id.* ("Here, therefore, [Verizon'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.").

142 *Id.*

143 *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–89 (1986) (explaining that alleged predators "must have a reasonable expectation of recovering [the forgone profits] in the form of later monopoly profits [in excess of] the losses suffered").

144 *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("*Even an act of pure malice* by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ." (emphasis added)); *Matushita*, 475 U.S. at 595–97 (disregarding subjective intent and focusing only on economically "rational" aspects of conduct); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."); McDonald, *supra* note 3, at 4 ("One could read Justice Scalia's language [in *Trinko*], peppered as it is with colorful references . . . , as suggesting a standard for Section 2 liability that is based on the defendant's subjective motivation. Such a reading of the opinion probably is misguided.").

In post-*Trinko* cases, some lower courts have nevertheless given weight to the opinion's colorful language. *See, e.g.*, Nobody in Particular Represents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1113 (D. Colo. 2004) ("The Supreme Court, in analyzing an essential facilities case [in *Trinko*] . . . focused on the monopolistic intent of the defendant.").

ability of a judicial tribunal to control."[145] This Part will consider the established frameworks for identifying illegal exclusionary conduct—balancing, raising rivals' costs, and excluding an equally efficient competitor—in light of *Trinko*'s narrowly prescribed vision of judicial enforcement of antitrust law.[146] *Trinko*'s pervasive concern with the institutional limitations of antitrust courts implies a rejection of each framework.

1. Balancing

Conduct criticized as exclusionary may in some circumstances have procompetitive aspects, such as providing consumers with a superior product design.[147] Condemning such conduct would yield a net decrease in consumer welfare where the benefits of the conduct outweigh the harm to competition.[148] In recognition that some conduct may have both pro- and anticompetitive effects, courts have applied a burden-shifting balancing test to identify the net effects of such conduct, ultimately imposing antitrust liability only when the procompetitive effects are outweighed by the anticompetitive harms.

In *Microsoft*, the Court of Appeals for the D.C. Circuit applied a series of shifting burdens to determine whether any of the many allegations of exclusionary conduct stemming from Microsoft's practices violated Section 2 of the Sherman Act.[149] The court adopted a three-step process for evaluating such claims, asking (1) whether the plaintiff satisfied its burden to "demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect," (2) whether the defendant-monopolist could "proffer a 'procompetitive justification' for its conduct" to rebut the plaintiff's prima facie case, and (3) "if the monopolist's procompetitive justification stands unrebutted, then [whether the plaintiff could show] that the anticompetitive harm of

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145 *Trinko*, 540 U.S. at 414 (quoting *Brooke Group*, 509 U.S. at 233).

146 This is not an exhaustive list of frameworks—prominent or otherwise—for evaluating exclusionary conduct. *See supra* note 20 and accompanying text. However, this Part makes the other half of the case that *Trinko*'s analytical approach favors short-term profit sacrifice over other established frameworks for identifying illegal exclusionary conduct.

147 *See supra* notes 11–15 and accompanying text.

148 *Id.*

149 United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001). For a more detailed discussion of *Microsoft*, see Eleanor M. Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 384–91 (2002); Hovenkamp, *supra* note 118, at 299–304; Kara E. Harchuck, Note, *Microsoft IV: The Dangers to Innovation Posed by the Irresponsible Application of a Rule of Reason Analysis to Product Design Claims*, 97 NW. U. L. REV. 395, 395–99 (2002). The Ninth Circuit employed the balancing approach in its contribution to the pre-*Trinko* circuit split. *See* MetroNet Servs. Corp. v. U.S. West Commc'ns., 329 F.3d 986, 1007–08 (9th Cir. 2003).

the conduct outweighs the procompetitive benefit."[150] By placing the initial burden of proof on the plaintiff and, in the event of rebuttal, by requiring the plaintiff to show net anticompetitive effects, *Microsoft* generally accords with *Trinko*'s disapproval of standards that unreasonably risk false positives.[151] This approach also accords with *Trinko*'s statement that the harmful characteristics of monopoly in the short term are often necessary and even beneficial over the longer term.[152]

However, predicating antitrust liability on the outcome of net effects analysis exceeds the circumscribed role of antitrust courts contemplated by *Trinko*. While *Trinko* spoke approvingly of a regulatory scheme designed to promote competition (such as the elimination of monopolies),[153] it viewed the role of antitrust courts as limited to sanctioning only conduct made unlawful by antitrust laws.[154] *Trinko*'s distinction between the pursuit of a procompetitive goal and the prevention of unlawful monopolization disfavors a balancing approach, since Section 2 "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."[155] While the analytical approach of balancing conforms to the structural elements of Section 2, it requires courts to provide nuanced remedies, a requirement at odds with Section 2's "sledgehammer" remedies.[156]

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150 *Microsoft*, 253 F.3d at 58–59. For example, in applying the balancing approach, the court found that Microsoft successfully rebutted one of the three claims against it and, in response to the rebuttal, the plaintiff failed to meet its "burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it." *Id.* at 64–67.

151 *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004); *supra* note 16 and accompanying text.

152 *Trinko*, 540 U.S. at 407 ("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.").

153 *Id.* at 412–13.

154 *Id.* at 415 ("[The 1996 Act] attempts *to eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises. Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization*. It would be a serious mistake to conflate the two goals." (citation omitted) (internal quotation marks omitted)).

155 *Id.* at 415–16.

156 *Id.* at 414–15; *see also* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 489 (1992) (Scalia, J., dissenting) (expressing concern over "bring[ing] the sledgehammer of [Section 2 liability] into play"); Fiala, *supra* note 67, at 73 ("Achieving competitive conditions requires detailed prescriptions for remediation and close and continuing supervision of industry practices. . . . [T]he preferred course is the codification of remedial schemes by legislation and regulation, rather than reliance on judicial enforcement of antitrust laws.").

2. *Raising Rivals' Costs*

The raising rivals' costs framework identifies exclusionary conduct by assessing the effects of the dominant firm's conduct on rivals' costs. Conduct that solely raises rivals' costs serves no good market end. A dominant firm with sufficient monopoly power may exercise its monopoly power in ways that increase its rivals' costs and enable the dominant firm to extract supracompetitive prices.[157] A dominant firm may, for example, enter exclusive contracts with the market's input suppliers, reducing overall levels of input supply and thereby increasing rivals' costs of obtaining inputs.[158] From the dominant firm's perspective, a strategy of raising rivals' costs can exclude competition more effectively than predatory pricing: Conduct that raises rivals' costs need not involve a sacrifice of profits and may actually yield immediate profits.[159] Given these advantages, conduct that raises rivals' costs is generally less risky, and therefore more plausible, than predatory pricing schemes.[160]

Unlike courts applying a short-term profit-sacrifice analysis, those applying the raising rivals' costs standard need not speculatively compare the short-term benefits of price reduction against the long-term risks of supracompetitive prices.[161] However, the comparative simplicity of implementation fails to address the two primary concerns raised by *Trinko*: namely, identifying illegal exclusionary conduct while avoiding false positives and remedying illegal exclusionary conduct in a judicially administrable manner.[162] Especially since conduct that raises rivals' costs may be profitable, courts evaluating conduct by reference to this standard face a high risk of false positives.

Trinko's statement that a dominant firm can lawfully establish an "infrastructure" to serve the market better suggests that the raising rivals' costs standard is overinclusive.[163] The raising rivals' costs approach to evaluating exclusionary conduct provides no guidance as to how courts should identify the appropriate baseline level of costs. That is, if a firm establishes an infrastructure that serves the market at a lower cost, the firm's refusal to provide rivals with access could be

157 Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986).

158 *Id.* at 223–24.

159 *Id.* at 224; *see also* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 267 (1983).

160 *See* Krattenmaker & Salop, *supra* note 157, at 224; Salop & Scheffman, *supra* note 159, at 267.

161 *See* Salop & Scheffman, *supra* note 159, at 267.

162 *See supra* Part I.B.2.

163 *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Gavil, *supra* note 30, at 45–46.

characterized as raising rivals' costs.[164] The illegality of the exclusionary conduct would then turn on whether the proper baseline for the rivals' costs includes or excludes access to the infrastructure, a question the raising rivals' cost framework fails to answer.

3. *Excluding an Equally Efficient Competitor*

Inefficient competitors may be harmed by a dominant firm's conduct whether or not such conduct is anticompetitive. If an efficient, innovative firm rapidly gains market share as dissatisfied customers switch over, then its rivals' consequently decreased market share will adversely affect their economies of scale, putting them at a pricing disadvantage vis-à-vis the growing competitor.[165] Alternatively, a dominant firm's exclusionary conduct, such as exclusive dealing or a refusal to deal on terms offered to other parties, similarly may harm competitors.[166] The results look the same in terms of the harmful effects on rivals,[167] reflecting the difficulties associated with *Grinnell*'s approach to exclusionary conduct.[168]

To determine whether the results were made possible by the superior business acumen of the dominant firm or by unlawful exclusionary conduct, courts may look to determine the effects of such conduct on a hypothetical equally efficient competitor.[169] If the conduct in question would not harm an equally efficient competitor, then courts can attribute the actual harm suffered by competitors to their inefficiencies relative to the dominant firm.[170] A contrary finding indicates that the conduct produced anticompetitive exclusionary effects. Upon such a finding, courts can impose antitrust liability if the defendant fails to demonstrate that "although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient."[171]

By evaluating the challenged conduct by reference to how it would affect a hypothetical equally efficient competitor, this approach introduces baseline problems, insofar as it is not clear what attributes

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[164] *See* POSNER, *supra* note 7, at 196–97 (concluding that raising rivals' costs "is not a happy formula" and "neither a necessary nor a sufficient condition of predation").

[165] *See id.*

[166] *See supra* Part I.B.2.a (discussing refusals to deal).

[167] *See supra* note 14 and accompanying text.

[168] *See* Elhauge, *supra* note 18, at 257–68. For a discussion of *Grinnell*, see *supra* notes 53, 59–62 and accompanying text.

[169] *See* POSNER, *supra* note 7, at 196 ("Only when monopoly power is used to discourage equally or more efficient firms and thus perpetuate a monopoly not supported by superior efficiency should the law step in.").

[170] *See id.* at 196–97.

[171] *Id.* at 195.

the equally efficient competitor should have. Imagining a hypothetical equally efficient competitor is especially difficult where, as in *LePage's v. 3M*, the plaintiff offered a single-product line in competition with the defendant's multi-product line and the defendant offered percentage discounts, or loyalty rebates, based on whether the customers reached purchasing targets in its other product lines.[172] The equally efficient competitor standard provides no guidance as to whether the baseline should be measured by reference to an equally efficient single- or multi-product-line competitor.

Similarly, under the facts of *Trinko*, it is unclear whether, had the Court applied the equally efficient competitor standard, such a competitor would have had its own local loop and telecommunications infrastructure. The 1996 Act provides CLECs with access to the ILECs' networks precisely because CLECs would not otherwise have such access, but importing this presumption into the analysis of whether antitrust requires ILECs to provide access takes for granted the disputed issue. In short, the conceptual task of imagining an equally efficient competitor begs the question as to whether the challenged conduct would constitute illegal exclusionary conduct.

Moreover, *Trinko*'s skepticism about the ability of antitrust courts to identify anticompetitive conduct applies with equal (if not greater) force to this analytical approach, which requires courts to evaluate the effects of conduct within a counterfactual inquiry. By contrast, the Court in *Trinko* evaluated the challenged conduct by reference to actual prior dealings,[173] an approach that obviates the need to engage in a complex and contentious counterfactual hypothesizing and that addresses the baseline problems discussed above.

Finally, the equally efficient competitor standard appears overbroad in light of *Trinko*. Just as *Grinnell* allows the acquisition of monopoly by either business acumen or chance, *Trinko* states that a competitor may create an infrastructure that lets it uniquely serve the market.[174] That is, even *Grinnell* permits the chance acquisition of monopoly power at the expense of an equally efficient, albeit less lucky competitor; likewise, *Trinko* expressly condones the establish-

[172] *See* LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003). For more detailed discussions of *LePage's*, see generally Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi. L. Rev. 243 (2005), and Joanna Warren, Comment, LePage's v. 3M: *An Antitrust Analysis of Loyalty Rebates*, 79 N.Y.U. L. Rev. 1605 (2004).

[173] *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–10 (2004).

[174] *Id.* at 407; *see also* Gavil, *supra* note 30, at 45 (discussing *Trinko* Court's acceptance of "Verizon's characterization of its 'infrastructure' as an 'economically beneficial' facility").

ment of an infrastructure that excludes rivals, without regard to their efficiency, as necessary to protect the incentive to innovate.[175]

III
IMPLICATIONS OF *TRINKO*

This Part describes the implications of the *Trinko* decision in light of its consistency with the short-term profit-sacrifice standard. Given the compelling criticism of the short-term profit-sacrifice standard as applied to non-pricing conduct, this Part will aim to resolve the difficulties of the short-term profit-sacrifice standard and *Trinko*'s apparent contradictory position with respect to profit sacrifice by articulating a coherent post-*Trinko* standard for exclusionary conduct.

A. Adopting Short-Term Profit-Sacrifice as a General Section 2 Standard

By their own terms, the key passages of *Trinko* do not expressly limit the decision to either a particular form of anticompetitive conduct (such as refusals to deal) or a particular context (such as a regulatory environment). Furthermore, much of the language in *Trinko* appears to narrow the entire scope of Section 2's grounds for liability.[176] Consequently, a plausible reading of *Trinko* invites application of profit-sacrifice analysis as a general Section 2 standard for illegal exclusionary conduct. This reading is consistent with the government's *Trinko* amicus briefs and enjoys considerable academic support.[177]

Yet the application of a short-term profit-sacrifice standard to non-pricing conduct is both under- and overinclusive. While conventional accounts of exclusionary conduct insist that such conduct entails some cost,[178] paradigmatic violations of Section 2 can be virtually

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175 *Trinko*, 540 U.S. at 407–08.

176 *See, e.g.*, *id.* at 407 ("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*.").

177 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *supra* note 115, at 8 (naming as defect in complaint that "it nowhere asserts that, by refusing to sell to competitors as a wholesaler at regulated rates . . . [Verizon] undertook a sacrifice of short-term profits that would make sense only if it had the effect of impairing competition"); *id.* at 16 ("[I]n the context of asserted duties to assist rivals, this Court and the courts of appeals have recognized that conduct is exclusionary where it involves a *sacrifice of short-term profits* or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power." (emphasis added) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 610–11 (1985))); *see also supra* notes 23–27 and accompanying text; *supra* Part II.A.

178 *See, e.g.*, BORK, *supra* note 7, at 345 (arguing conduct in *Lorain Journal* "must have" entailed costs); POSNER, *supra* note 7, at 40–41 ("An exclusionary practice is generally a

costless,[179] even considering the loss of goodwill. Consider *Lorain Journal*, where a newspaper with monopoly power over advertising in the relevant geographic market refused to publish the advertisements of any customers who also advertised with a newly formed radio station:[180] To the extent that such conduct successfully achieves its purpose, it will cause customers to reduce radio advertisements in favor of newspaper advertisements, thereby increasing both short-term and long-term profits of the defendant. The rule is thus more likely to catch less successful conduct because, under some circumstances, the more successful the exclusionary conduct, the less its short-term costs.

Further, applying this standard to non-pricing conduct also presents baseline problems. Conduct that sacrifices profits does so only by comparison to the profits available under some other course of action. Accordingly, what appears to be a short-term sacrifice of profits by reference to some other, more profitable course of conduct may have resulted from either anticompetitive designs or an exercise of business judgment, whether poor (missing a short-term opportunity) or expert (forgoing a specific short-term profit opportunity to pursue an opportunity that yields higher long-term profits).[181]

The *Brooke Group* rule for predatory pricing resolves this baseline problem by positioning cost as the relevant baseline and prohibiting only below-cost pricing where there is a reasonable chance of recouping short-term losses through long-term monopoly profits.[182] But the cost of production fails to serve as a meaningful baseline for non-pricing conduct, such as a unilateral refusal to deal, and the Court has not offered any other adequate means to determine this baseline. Whatever the breadth of *Trinko*'s language, *Trinko*'s doctrinal push toward the short-term profit-sacrifice standard for exclusionary con-

method by which a firm having a monopoly position *invests some of its monopoly profits* in making it unprofitable for other sellers to compete with it, thus perpetuating its monopoly." (emphasis added)).

179 *See* Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951) (finding clear violation of Section 2 where defendant newspaper refused to print advertisements for customers who placed advertisements with newly formed radio station); *supra* notes 9–15 and accompanying text.

180 Lorain Journal Co., 342 U.S. at 154.

181 *See* Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J.L. & PUB. POL'Y 5, 9–10 (1999) [hereinafter Easterbrook, *Comparative Advantage*] (arguing that markets may have comparative advantage over antitrust courts where antitrust "[c]ourts can see the wounded plaintiffs but not the beneficiaries"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5–6, 24–25 (1984) ("At first hearing, the failure or lost opportunity is bound to seem a reduction in competition. Fewer competitors remain, and fewness is the definition of monopoly (or at least oligopoly).").

182 *See supra* note 143 and accompanying text.

duct discussed in Part II cannot be taken to apply to exclusionary conduct generally. A coherent reading requires limiting *Trinko*'s scope.

B. Limiting Trinko *to Unilateral Refusals to Deal*

While *Trinko* can be limited to antitrust cases brought in a regulatory environment,[183] narrowing *Trinko* in this fashion would be a mistake.[184] Instead, restricting *Trinko* by reference to the challenged anticompetitive conduct, namely a refusal to deal, offers a more promising approach insofar as it identifies the doctrinal tensions within *Trinko* itself. While the case speaks to unique facts of a notoriously complicated and regulated industry, *Trinko*'s analysis emphasizes the institutional strengths (and weaknesses) of the antitrust courts vis-à-vis regulatory agencies generally, and these institutional considerations continue to play a key role in developing sound and administrable antitrust policy in any market.[185]

Trinko primarily analyzed the exclusionary conduct as a refusal-to-deal claim, dismissively addressing the Trinko partnership's essential facilities and monopoly leveraging claims.[186] Applying a profit-sacrifice standard to refusals to deal may condemn conduct that is normally socially desirable, namely the short-term sacrifice of profits to invest in economically beneficial assets.[187] Crucially, the promise of

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183 *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004) ("In this case we consider whether a complaint alleging breach of [an ILEC's] duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act." (citations omitted)); *id.* at 412 (arguing that "existence of a regulatory structure designed to deter and remedy anticompetitive harm [indicates] the additional benefit to competition provided by antitrust enforcement will tend to be small").

184 *See* McDonald, *supra* note 3, at 2 (observing that Court "said a lot more" about antitrust in addressing narrow question of whether Baby Bells' provision of inferior access to their telecommunications infrastructure in violation of 1996 Act constituted illegal exclusionary conduct).

185 *Cf.* Areeda, *supra* note 100, 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 [sic] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.").

186 The Court reserved a single paragraph for the essential facilities claim, *see Trinko*, 540 U.S. at 410–11, and dispatched the monopoly leveraging claim with a footnote. *Id.* at 415 n.4; *see also* Parts I.B.2–3 (discussing Court's treatment of "essential facilities" and monopoly leveraging claims, respectively).

187 *See* Elhauge, *supra* note 18, at 274–79 (arguing that problem with profit-sacrifice test is "that what this test identifies as the signature of evil—sacrificing short-run profits in order to drive out rivals and reap long-run monopoly profits—is normally the stamp of virtue"); Hovenkamp, *supra* note 12, at 158 ("Product innovations are always costly to the defendant, and their success may very well depend on their ability to exclude rivals from the market, but neither of these factors is or should be decisive in subsequent antitrust litigation."); *supra* notes 31–32 and accompanying text (further discussing critiques of profit-sacrifice test).

long-term monopoly profits informs the firm's ex ante incentives to sacrifice short-term profits for such an investment, and the anticipated long-term profits only materialize if the firm can successfully exclude any rivals who attempt to free-ride on the firm's investment.[188] The analysis in *Trinko* appears to acknowledge as much: "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."[189] Further, *Trinko* acknowledges the need to protect the incentives of firms—even dominant firms and monopolists—to innovate.[190]

Trinko's concerns regarding the substantial problems of administering a remedy and preserving incentives to innovate indicate that profit sacrifice is a necessary but not sufficient condition for imposing antitrust liability for unilateral refusals to deal.[191] Again, *Trinko* seems to acknowledge as much by noting that "[w]e have been very cautious in recognizing such exceptions [to the right to refuse to deal], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[192] In this sense, *Trinko*'s descriptions of the institutional limitations of antitrust courts in terms of identification and remedy are related. Antitrust courts cannot remedy unidentifiable problems, but there is also a sense in which some problems are irremediable by antitrust because they are unidentifiable or insufficiently identifiable. Absent a reliable baseline against which to evaluate the exclusionary conduct, antitrust courts cannot identify the scope, extent, and degree of the exclusionary conduct's illegality with sufficient precision to devise and administer workable remedies.

188 *See Trinko*, 540 U.S. at 407–08, 414 (describing undesirable effects of forced sharing as decreasing ex ante incentives to invest and increasing ex post incentives to collude); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 300 (1981) (expressing concern that "prevent[ing] an innovator from growing at the expense of its rival" will preclude "full social gains of the innovation").

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

190 *See id.* at 407–08 ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); *id.* at 414 (expressing concern that "[j]udicial oversight" that compels forced sharing would "distort investment"); Gavil, *supra* note 30, at 45 (discussing rivals' incentive to free ride if dominant firm is forced to share economically beneficial facilities).

191 *See* Hovenkamp, *supra* note 12, at 157.

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

C. *Limiting* Trinko *to Refusals to Deal Where Prior Courses of Dealing or Dealings with Third Parties Provides the Relevant Baseline*

Restricting *Trinko* to refusals to deal where prior courses of dealing or dealings with third parties provides the relevant baseline addresses the concerns raised in Parts III.A and III.B. Antitrust courts have good reason to be suspicious where a firm refuses to deal with a rival on the same terms as it is willing to deal with others (such as its retail customers).[193] As applied to unilateral refusals to deal, the short-term profit-sacrifice standard establishes a standard that is coterminous with a rule that scrutinizes discriminatory dealings.[194] Where a firm is willing to deal with its retail customers on certain terms (such as a certain price), its refusal to deal with a rival on those terms constitutes anticompetitive conduct captured by both discriminatory terms analysis and the sacrifice of profits approach endorsed by the *Trinko* decision and government briefs.

The firm's dealings with third parties and its prior dealings with rivals provide a baseline for evaluating its challenged conduct that alleviates the baseline problems associated with the traditional standards for exclusionary conduct such as balancing, excluding an equally efficient competitor, and raising rivals' costs.[195] It also obviates the need for the counterfactual inquiries required by equally efficient competitor analysis.

Further, limiting *Trinko*'s holding to such refusals to deal addresses concerns of judicial implementation of antitrust remedies. Where prior dealings and dealings with third parties establish the baseline for evaluating the firm's conduct with respect to its rivals, the appropriate remedy does not require courts to function as ongoing regulators of the terms and conditions of cooperation.[196] Instead, courts must merely enforce dealing with rivals on terms similar to those offered other parties. Here, the Court's distinction between *Trinko* and *Terminal Railroad* is especially meaningful: The Court

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[193] *See* Elhauge, *supra* note 18, at 309–10 & n.165 (citing Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 377 (7th Cir. 1986)) (arguing such behavior is defining characteristic of illegal refusals to deal).

[194] By "discriminatory dealings," I mean instances where a firm refuses to deal with its rivals or certain customers (or both) on the same terms by which it is willing to deal with other parties. I do not mean to suggest that a firm that grants superior terms to a favored customer has necessarily discriminated against its rivals or customers. Such a firm has only "discriminated" if the rivals and customers were as eligible for the superior terms (by, say, purchasing a certain volume to receive a volume discount) but were nevertheless denied the benefits conferred on the favored customer.

[195] *See supra* Parts II.B.1–3.

[196] This is one of *Trinko*'s key concerns. *See Trinko*, 540 U.S. at 414–15.

observed that the latter "involved *concerted* action" and "simply requir[ed] that the outsider be granted nondiscriminatory admission to the club."[197] A firm's dealings with other parties, whether rivals or customers, or its prior dealings with the plaintiff-rival, inform the scope, terms, and nature of the firm's dealings in a manner that alleviates the institutional limitations of antitrust courts.[198]

In addition to problems of distorting the incentives to invest in infrastructures and positioning antitrust courts as "central planners," *Trinko* also expressed concern that forced dealings or "compel[led] negotiations between competitors may facilitate the supreme evil of antitrust: collusion."[199] But compelling a firm to deal with rivals on the same terms it willingly deals with third parties (such as its own retail customers) does not implicate conventional worries about collusion. Where rivals collude, we typically worry that they will cooperate to extract supracompetitive returns from the market by restricting output and raising prices. Where the terms enforced are those set by the market as between a firm and its customers, enforcing a duty to deal between rival firms provides them with little opportunity to restrict output, since the terms by which they are compelled to deal are the same as those openly available in the market.

This approach, characterized as it is by a relatively clear baseline and remedy, represents a welcome departure from previous approaches to refusals to deal, where liability turned on whether the refusal was based on "legitimate business reasons."[200] In *Eastman*

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197 *See id.* at 410 n.3. At least one post-*Trinko* decision has acknowledged this point. *See* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1133 (9th Cir. 2004) ("If the defendant already sells the product in an existing market to certain customers but merely refuses to sell to its competitors, the court can impose a judicial remedy that does not require the court to 'assume the day-to-day controls characteristic of a regulatory agency.'" (quoting *Trinko*, 540 U.S. at 415)).

198 A survey of post-*Trinko* cases shows a few courts have adopted this view and applied *Trinko* to discriminatory refusals to deal. *See Qwest Corp.*, 383 F.3d at 1131–32 (citing *Trinko*, 540 U.S. at 409–10) (treating both prior course of conduct and conduct with respect to customers as relevant baselines); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004) (citing *Trinko*, 540 U.S. at 409) (using prior voluntary conduct as baseline); A.I.B. Express, Inc. v. FedEx Corp., 358 F. Supp. 2d 239, 250–51 (S.D.N.Y. 2004) (citing *Trinko*, 540 U.S. at 409) (finding refusal-to-deal claim where prior course of dealing was voluntary and profitable); N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559, 571 (S.D.N.Y. 2004) (citing *Trinko*, 540 U.S. at 409) (rejecting refusal-to-deal claim where "[t]here [was] no history of cooperation"); Levine v. BellSouth Corp., 302 F. Supp. 2d 1358, 1371 (S.D. Fla. 2004) (citing *Trinko*, 540 U.S. at 409) (same).

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

200 At least one post-*Trinko* decision appears to have acknowledged that *Trinko* departs from a strict "legitimate business reasons" analysis. *See* Am. Cent. E. Tex. Gas Co. v. Union Pac. Res. Group Inc., 93 F. App'x 1, 9 (5th Cir. 2004) (citing *Trinko*, 540 U.S. at 407–08).

Kodak, the Supreme Court's most recent pre-*Trinko* opinion dealing with exclusionary conduct, the majority opinion (from which Justice Scalia dissented) examined whether the defendant with monopoly power over its own brand of equipment "took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the [defendant's] service market."[201] The Court explained that "[l]iability turns . . . on whether 'valid business reasons' can explain [the defendant's] actions."[202]

Eastman Kodak is conspicuously absent from Justice Scalia's majority opinion in *Trinko*, but, if *Trinko* is interpreted as employing a short-term profit-sacrifice framework for evaluating refusals to deal,[203] then *Trinko* effectively steers exclusionary analysis out of the woods of "valid business reasons" analysis. The "valid business reasons" defense for refusals to deal represents a vacuous approach that offers courts no substantive guidance as to what might constitute either valid or invalid business reasons for the conduct in question.[204] By shifting the inquiry to an objective and facts-based one, the short-term profit-sacrifice standard helps prevent antitrust analysis from positing liability on the basis of harm to competitors as distinguished from harm to competition itself.[205]

Yet prior dealings with a rival raise some issues that are quite distinct from discriminatory dealings where a competitor refuses to deal with a rival on the same terms as it deals with third parties. *Trinko*'s description of the illegal aspects of the refusal to deal in *Aspen Skiing* offers support for both baselines,[206] but there are a number of compelling reasons that urge caution in applying *Trinko*'s short-term profit-sacrifice standard to refusals to deal where a prior

201 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 (1992) (citations omitted).

202 *Id.* (citations omitted).

203 *See supra* Part II.A.

204 *See* Elhauge, *supra* note 18, at 265–66 (arguing that "valid business reasons" approach is vacuous because liability "turns on what content one gives to the key placeholder term—'valid,' 'normal,' or 'legitimate'").

205 *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); *cf.* Easterbrook, *Comparative Advantage*, *supra* note 181, at 9.

206 *See Trinko*, 540 U.S. at 409 ("The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." (citation omitted)).

course of dealing with a rival (as opposed to dealings with third parties) provides the relevant baseline.

Even where the prior course of dealing with a rival was both voluntary and profitable, enforcing prior courses of dealing presents a twofold problem: First, it may chill the ex ante incentives of firms to enter into dealings with their rivals (for fear that, after the firm's unilateral termination of the dealing, an antitrust court may renew the relationship on the same terms). More importantly, prior courses of dealing do not provide as reliable a baseline for determining whether the firm sacrificed profits in the short term: Even where the prior course of dealing was both voluntary and profitable, a firm may nevertheless have *profit-increasing* reasons for ceasing its dealings with a rival. That is, incautious application of the profit-sacrifice standard in this context may enforce a duty to deal that is less efficient than the refusal to deal.

D. Trinko *and the Incentives to Innovate*

The Supreme Court has expressed clearly its commitment to the position that the risk of chilling aggressive price competition[207] and the importance of product innovation warrant the deferential treatment of potentially exclusionary conduct.[208] With *Trinko*, the Supreme Court extended this same deference to a firm's unilateral refusal to deal with its rivals.[209] This deference is necessary to preserve both the ex ante incentives of firms to invest in "socially benefi-

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207 Reductions in price provide immediate, short-term benefits to consumers directly in proportion to the degree of price reduction. Against this clear short-term benefit, *Brooke Group* provides a deferential standard for predatory pricing, finding a violation of Section 2 only where prices are below (some measure of) cost and there is a reasonable opportunity for the dominant firm to recoup its short-term losses via long-term, supracompetitive profits. *See Brooke Group*, 509 U.S. at 226–27 ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."); *supra* notes 130–34, and 143 and accompanying text.

208 *See, e.g.*, *Brooke Group*, 509 U.S. at 222–24. Market participants are encouraged to improve existing products and develop new products in response to consumer demand. However, "[w]hen [design change] is used by a dominant firm, it can often leave rivals feeling like victims and this sometimes generates a monopolization complaint." SULLIVAN & GRIMES, *supra* note 5, at 121. Often, the dominant firm that implemented the design change can respond to antitrust complaints by pointing to the consumer benefits of the new design. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 75 (D.C. Cir. 2001) ("In order to violate the antitrust laws, the incompatible product must have an anticompetitive effect that outweighs any procompetitive justification for the design."). Where such improvements exist, courts are highly reluctant to impose antitrust sanctions for fear of chilling product innovation, especially where it is difficult if not impossible to weigh the benefits of innovation against the harms to competition. *See id.*; Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121, 1141–42 (1983) (discussing difficulty of calculating social costs and benefits of innovation).

209 *See supra* Part III.C.

cial" infrastructures and the ability of firms that have invested in such infrastructures to exclude rivals seeking to free-ride on the investment.[210]

Whereas *Brooke Group* supplements its short-term profit-sacrifice test with the reasonable risk of recouping short-term losses via long-term monopoly profits, *Trinko* gives no hint of an analogous recoupment prong for assessing refusals to deal. At the same time, however, *Trinko* indicates that incentives will be sufficiently preserved to attract "business acumen" and "induce[ ] risk taking" where a firm has "[t]he opportunity to charge monopoly prices—*at least for a short period*."[211] Under *Brooke Group*, a reasonable risk of recoupment of the short-term sacrifice is unlikely because, absent high barriers to entry, other competitors will enter the market to compete with the predatory firm once it raises its prices to a supracompetitive level. We may well wonder what long-term market forces can check the ambitions of an innovator who is allowed under post-*Trinko* antitrust law to build an infrastructure to the exclusion of rivals. To the extent that a firm commits its short-term profits to the investment in an infrastructure and excludes rivals to reap monopoly profits, the firm has tied its future to the infrastructure: Excluded rivals, unable to free-ride, will have incentives to invest in innovations to replace the dominant firm's infrastructure.[212]

In the end, *Trinko*'s treatment of refusals to deal preserves the incentives of the dominant firm *and its excluded rivals* to innovate. Absent discriminatory dealing or departures from prior courses of dealing, enforced sharing by either antitrust courts or regulatory agencies distorts the incentives to innovate.[213] In fact, an antitrust court's

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210 *See Trinko*, 540 U.S. at 407–08 ("Compelling such firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."); N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559, 571 (S.D.N.Y. 2004) (citing *Trinko*, 540 U.S. at 409) (describing importance of firm's right to refuse to allow rivals to free-ride).

211 *Trinko*, 540 U.S. at 407 (emphasis added).

212 *See The Blood of Incumbents*, ECONOMIST, Oct. 30, 2004, Make It Simple: A Survey of Information Technology (Special Section), at 23 ("[F]irms that succeed in one generation of innovation almost inevitably become hamstrung by their own success and thus doomed to lose out in the next wave of innovation. Just as they 'disrupted' the previous era's leaders, they are in turn disrupted by the pioneers of the next era."); *Great-Grandma Bell*, ECONOMIST, Oct. 30, 2004, at 68 ("For over 125 years, [the telecommunications infrastructure] was the source of the telecoms company's power and its most prized asset. Yet as telecoms capacity has become a commodity, the value of owning a network has diminished dramatically."). *See generally* CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997) (describing inability of dominant companies to adapt to new innovations).

213 This was a compelling criticism of the 1996 Act's sharing obligations. Critics argued that it deterred the investment incentives of both CLECs and ILECs: CLECs had little

concerns about facilitating collusion and chilling investment incentives should be *heightened* when a firm voluntarily provides rivals with access to its infrastructure or essential facility. The dominant firm and its rivals would have an opportunity to act collusively in setting prices and output. Further, the dominant firm's decision not to exclude rivals distorts rivals' incentives to invest in innovations designed to replace the dominant firm's infrastructure. This may represent a calculation that doing so will extend the useful life—and supracompetitive profits—associated with the dominant firm's original investment in its infrastructure.

CONCLUSION

Trinko has been recognized as a landmark case with significant implications for determining the conditions under which exclusionary conduct violates Section 2 of the Sherman Act. The Court's analysis in *Trinko* suggests a shift towards a short-term profit-sacrifice standard and away from several established frameworks for exclusionary conduct. A closer look at the doctrinal tensions within the decision itself counsels a much narrower reading than might otherwise seem appropriate. Whatever the breadth of *Trinko*'s language, this Note has argued that its scope cannot reasonably be interpreted to reach exclusionary conduct in general or unilateral refusals to deal in particular. Limiting *Trinko* to unilateral refusals to deal where prior courses of dealing or dealings with third parties provide the relevant baseline addresses the Court's concerns regarding identification and remedy and accords with the rationales underlying the Court's deferential treatment of price competition and innovation.

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incentive to purchase their own facilities when the 1996 Act imposed forced sharing on ILECs; and ILECs' incentive to invest in existing equipment was reduced by compulsory sharing of the benefits any such investment would reap. *See Untangling the Local Loop*, *supra* note 36, at 21 (describing how local loop unbundling deters both CLEC and ILEC investment in new technology).