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The Role of Antitrust in Regulated Industries

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Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee: Thank you for inviting me to testify. I am a senior vice president and deputy general counsel of Verizon, with responsibility principally for antitrust and intellectual property. In my spare time I have taught classes on telecom law at Columbia University Law School and Georgetown University Law Center, and have written a few books and articles on telecom law and antitrust. My bio is attached to this testimony.

I represented the petitioner in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), where a unanimous Supreme Court dismissed antitrust claims against a regulated company. In my testimony, I will explain that the result in *Trinko* did not depend on the regulatory context. I will then offer some brief thoughts on how antitrust and regulation can work together to protect consumers, even though antitrust and economic regulation are often at odds both in their means and goals. In the course of doing that, I'd like to make clear that *Trinko* would not preclude the bringing of cases like the 1974 government antitrust case that led to the 1982 AT&T Bell System breakup consent decree. Finally, I'd like to point out that large and successful firms (the ones most likely to be the subjects of regulation) should not be subject to special antitrust condemnation when they cut price, invest, or innovate because those actions are good for consumers.

Verizon purchases tens of billions of dollars of products and services from other companies in the U.S. and around the world, and is keenly focused on how competition keeps its own costs low. Verizon and its predecessor companies have been a plaintiff in five major antitrust cases against suppliers and others. Over the past year, we helped to organize a coalition of companies that seeks to improve the detection of antitrust offenses in order to protect and promote competition among our suppliers. Verizon supports sound antitrust enforcement because it is a beneficiary of competition.

Summary of the *Trinko* decision.

The question presented in *Trinko* was whether the extraordinary regulatory requirements imposed by the Federal Communications Commission (FCC) under the 1996 Telecom Act are also mandated by antitrust law. In its complaint, Trinko broadly alleged that Verizon violated § 2 of the Sherman Act by discriminating between itself and rivals in the use of essential "loops"—the copper wires that connect customers to switching centers:

> [Verizon] has not afforded [rivals] access to the local loop on a par with its own access. Among other things, [Verizon] has filled orders of [rival] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [rival] customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform [rivals] of the status of their customers' orders with [Verizon].[1]

[1] Amended Complaint, *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, No. 00-1910, *6 (SDNY filed Jan. 19, 2001).

Trinko alleged that rivals found it "difficult" to provide service "on the level that [Verizon] is able to provide to its customers."[2] Trinko sued on behalf of a putative class of all customers of rival firms.

After the district court twice dismissed the case, the Second Circuit reinstated it, using broad language to allow proof of a Sherman Act § 2 violation based on a determination that Verizon was not providing "reasonable access" to its network.[3] By the time of the Supreme Court's ruling in the case, the federal appellate courts had split sharply on whether antitrust law might impose interconnection and sharing requirements comparable to or even more far reaching than those set out in the FCC's rules. Saying no to such claims were the Fourth and Seventh Circuits—the latter, speaking through Judge Diane Wood, recognizing that these claims were different from the claims found valid in the famous 1983 *MCI v. AT&T* case.[4] Saying yes to these new claims were the Second, Ninth, and Eleventh Circuits.[5]

The Supreme Court resolved the conflict, holding without dissent that "alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim."[6] The Supreme Court also made it clear, however, that the regulated telecom context was unimportant to that fundamental ruling. The bi-partisan Antitrust Modernization Commission explained in one of its major (and unanimous) conclusions: "*Verizon Communications[] Inc. v. Law Offices of Curtis V. Trinko LLP* is best

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[2] *Id*. at *12.

[3] *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 107 (2d Cir. 2002) (rejecting the district court's rationale that "a monopolist has no general duty to cooperate with its competitors," because in fact "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete").

[4] *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 188 (4th Cir. 2003) (explaining that "Congress enacted §§ 251 and 252 of the Telecommunications Act to impose entirely new duties, which were in addition to the duties imposed by § 2 of the Sherman Act," and that the Telecommunications Act "obligations exceed the duties imposed by the antitrust laws"), *cert. denied*, 124 S. Ct. 1144 (2004); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000) ("A complaint like this one, which takes the form 'X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high' does not state a claim under Section 2.").

[5] *Trinko*, 305 F.3d 89; *MetroNet Services Corp. v. US West Communications*, 329 F.3d 986, 1012 (9th Cir. 2003) (permitting the plaintiff to establish a § 2 claim by proving the price of available access was so high it "discourage[d]" the plaintiff "from staying in the business"); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1283 (11th Cir. 2002) (holding that a § 2 claim is established "when a monopolist improperly withholds access to an 'essential facility' without which a competitor cannot enter or compete in a market").

[6] *Trinko*, 540 U.S. at 410.

understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of antitrust laws in regulated industries."[7]

In fact, the Court began its analysis by noting that a regulatory scheme as comprehensive as the 1996 Telecom Act's would ordinarily be "a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme."[8] But, the Court immediately explained, Congress had provided otherwise in the antitrust-specific savings clause found in § 601 of the 1996 Telecom Act.[9] Therefore, the Court concluded that the Act neither narrowed nor expanded existing antitrust standards.

The basis for the Court's decision in *Trinko* is unexceptionable—antitrust has never required the dismantling of lawful monopolies. The 1996 Act did impose such duties through § 251 and § 252 as those provisions have been implemented. But the 1996 Act is a comprehensive regime for making, calibrating, and flexibly adjusting the judgments that are unavoidably needed to implement a duty to share assets at special discounts. Just to contemplate the nature and scope of such judgments is to recognize that they are foreign to the historic tasks of antitrust courts. As Judge Diane Wood recognized for the Seventh Circuit, distinguishing its own 1983 *MCI* case and other cases, "[t]hese are precisely the kinds of affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws." 222 F.3d at 400.

The claim by Trinko would have changed § 2 into a condemnation of monopoly itself. But § 2, going back at least to the 1920 case *United States v. United States Steel Corp*., 251 U.S. 417 (1920) (*U.S. Steel*), has not done that. *U.S. Steel* declares that § 2 "does not compel competition" and does not condemn "size."[10] Other cases have reaffirmed that possession of a monopoly, if obtained without violating the Sherman Act, is not a § 2 offense.[11] What that means is that § 2 does not compel a monopolist to give rivals a helping hand in displacing its own sales, that is, in dispossessing itself of its monopoly. Although the 1996 Act does impose a duty to create competition, § 2 of the Sherman Act has been restricted to preventing monopolists from interfering with independently arising competition through conduct that can properly be condemned.

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[7] Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS 340 (April 2007).

[8] *Trinko*, 540 U.S. at 406.

[9] Telecommunications Act of 1996 § 601(b)(1), 110 Stat. at 143 ("[N]othing 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.").

[10] *Id*. at 451.

[11] See, for example, *National Biscuit Co. v. FTC*, 299 F. 733 (2d Cir. 1924); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

The distinction between affirmative assistance and negative interference is fundamental.[12] Section 2 has never required a retailer to change itself into a wholesaler, or a service provider to transform itself into a renter of facilities.[13] In common sense and doctrinal terms, it is a legitimate business decision as a matter of law to just continue making one's sales and enjoying the fruits of one's investments, as much for a monopolist as for any other firm. In a system premised on competition, not cooperation, any firm may refuse to turn over its business to rivals, let alone refuse to create an elaborate and burdensome apparatus for entertaining the requests of every would-be intermediary that asks for a piece of the business—an apparatus that, in the context of the 1996 Act, has required billions of dollars in investments to create special ordering systems, has forced involvement of different companies to get to the bottom of service problems, and has engendered constant negotiations and disputes over the prices of individual access elements and the when and how of making them available.

There are two core reasons why § 2 has—independent of any regulatory context—never been applied to impose a duty to start sharing assets with rivals at special discounts: the institutional limits of antitrust courts and the dampening of pro-consumer investment incentives. In short, an antitrust sharing duty presents unmanageable risks of doing more harm than good—of impairing the short-run and long-run investment incentives that the Sherman Act most fundamentally protects, and of generating transaction and administrative costs that offset benefits. The antitrust system is not institutionally suited to reliably counterbalance those risks and costs. The antitrust system therefore has never taken on the challenges that are inherent in implementing duties of sharing—challenges that Justice Breyer recognized in his opinion in *AT&T*

[12] Antitrust properly focuses on *negative* duties (to avoid acts that hinder rivals' independent efforts to attract customers) and not *affirmative* ones. *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) (negative/affirmative line); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co*., 797 F.2d 370, 375-76 (7th Cir. 1986) ("'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.'"); S. Breyer, REGULATION AND ITS REFORM 157 (1982) (antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do."). The distinction between acts negatively interfering with others, on one hand, and a failure to lend affirmative assistance, on the other, is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line to hold that failure to provide assistance is not "deprivation" under Due Process Clause).

[13] See, for example, *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (explaining that it is not "feasible" for CSX to change its business of providing rail transportation service into a business of renting track to other railroads). *See also* Richard A. Posner, ANTITRUST LAW 224 (Chicago 2d ed. 2001): "Were vertical integration deemed a suspect practice under the antitrust laws because of its potential exclusionary effect, all commercial activity would be placed under a cloud as courts busied themselves redrawing the boundaries of firms, even though the normal motivation for and consequence of vertical integration are merely to reduce the transaction costs involved in coordinating production by means of contracts with other firms."

Corp. v. Iowa Utilities Board[14] and that the D.C. Circuit, speaking through Judge Williams, discussed in *United States Telecom Association v. FCC*[15] a few years later. These are challenges that historically have been left to regulatory regimes, not the antitrust system.[16]

Today, the 1996 Act assumes those challenges in the telecommunications setting. The 1996 Act's sharing duties require decisions about what network elements and services must be shared, at what prices, with what level of care and on what other terms, and for how long. These judgments are technically complex, requiring an understanding of the operation and economics of telecommunications networks and services. They must be based on facts and reasoned economic analysis and must operate within the statutory constraints of the 1996 Act, like any agency decisions. But the judgments are necessarily experimental. They require assessing, on the one hand, when sharing seems likely to produce the kinds of benefits contemplated by the statute—an assessment necessarily dependent on the proposed terms of the sharing—and, on the other hand, when such sharing, by making piggybacking too attractive, is likely to undermine the kind of independent competitive investment the statute seeks to promote. The judgments must be ever-changing. The 1996 Act assigns to both federal and state commissions the comprehensive task of making, and then flexibly adjusting, the necessary judgments. That separate regime highlights why the antitrust system is not suited to the task.

The only circumstance where § 2 has recognized a single-firm duty to engage in some kinds of dealing with rivals is a narrow one: where the firm has refused to sell to rivals (or rivals' customers) what the firm was already voluntarily selling to others on the desired terms. That particular kind of stark discrimination has been present in every one of the Supreme Court's cases finding liability for a refusal to deal.[17] It was also present

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[14] 525 U.S. 366, 430 (1999) (Breyer concurring in part and dissenting in part) (explaining the difficulties of an incumbent being forced to share "virtually every aspect if its business" with its competitors, ultimately leading to "a world in which competitors would have little, if anything, to compete about").

[15] 290 F.3d 415, 429 (D.C. Cir. 2002) ("In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Association*, 538 U.S. 940 (2003).

[16] Then-Judge Breyer explained this in his opinion in *Town of Concord v. Boston Edison Co*., 915 F.2d 17, 25 (1st Cir. 1990) (explaining that to impose an antitrust duty that monopolists sell inputs to rivals at "fair prices" requires the court to conclude that "the anticompetitive risks [of ignoring the monopolist's conduct] outweigh the possible benefits and the adverse administrative considerations" of intervention) (internal citations omitted).

[17] Such discrimination was present in the cases condemning unilateral refusals to deal. *See Eastman Kodak Co. v. Image Technical Services, Inc*., 504 U.S. 451, 459, 463 n.8 (1992) (characterizing as not a lawful "unilateral refusal to deal" the refusal by a defendant, while selling parts to customers generally, to sell parts to customers who bought service from competing service providers); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 593-94, 608, 610-11 (1985) (observing that the defendant refused to make full retail price ski-lift ticket sales to its competitor, although it was making such sales to customers generally and had previously voluntarily made such sales in collaboration with the competitor itself); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371, 378 (1973) (involving a defendant who refused to

in the Seventh Circuit's *MCI Communications Corp. v. AT&T*,[18] apparently the first and only case of liability for unilateral firm conduct under the "essential facilities doctrine."[19]

The discrimination situation—the stark refusal to make available to competitors (or their customers) the very services and terms being voluntarily made available to other customers—has been the precondition to demanding of a monopolist an explanation for a refusal to share: if you are selling this to others at a price that is profitable and lets you recoup your investment, what reason is there for not selling the same thing at the same price to a rival? There might be answers—differential treatment can be justified; it is not by itself illegal—but without that discrimination there has not been liability for refusals to share. In the discrimination situation, the two basic objections to antitrust duties to deal are weakened. First, where the defendant is already voluntarily offering the desired terms, there is no antitrust intrusion on the basic competitive choices of (a) what to sell and (b) at what price—the choices through which a firm enjoys the rewards of successful investments. There is, accordingly, much less reason to worry about deterring long-run and short-run investments by requiring the results to be shared. Second, the institutional task for courts is much more manageable in this situation. The voluntary sales to others furnish a standard of conduct—equality—that the courts do not have to define on their own.

The situation is sharply different where a claim is made for sharing on newly forced terms (as opposed to terms already being offered voluntarily)—making sense of why § 2 has never recognized such a claim. Any effort to demand sharing of assets on new terms requires definition of those terms and in particular the setting of "fair" prices, to strike a balance so as not to do more harm than good, both in the long run and in the short run. This is a task antitrust law has never undertaken because it is something antitrust juries and judges, through a treble damages system, cannot reliably do—as Justice Breyer explained when he was a First Circuit judge.[20]

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wheel power for certain local-distribution competitors even though it was in the business of wheeling power for other such customers); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (involving a defendant newspaper publisher's flat refusal to sell advertising space, otherwise generally available to all advertisers, to parties who advertised on a competing radio station); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-69, 375 (1927) (involving a defendant manufacturer that suddenly "refused" to sell to the plaintiff dealer "on the same terms as other dealers"). Such discrimination also was present in the concerted action cases of *United States v. Terminal Railroad Association*, 224 U.S. 383, 394 (1912) (involving a multiparty agreement for operating a terminal railroad facility, in which members discriminated against nonmembers), and *Associated Press v. United States*, 326 U.S. 1, 10-11 (1945) (involving a multiparty agreement that openly discriminated between those who would compete against existing members and those who would not).

[18] 708 F.2d 1081, 1144 (7th Cir. 1983) (upholding liability based on AT&T's refusal to sell to MCI, as a competitor, the very same connections that AT&T was already in the business of offering to "local customers, independent telephone companies and others").

[19] That doctrine, as *Trinko* noted, is not a Supreme Court doctrine. 540 U.S. at 411 ("We have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.").

[20] In *Town of Concord*, 915 F.2d at 25, then-Judge Breyer stressed the near impossibility for antitrust courts attempting to set prices of monopoly inputs sold to rivals:

In the long run, investment incentives would be threatened by a § 2 rule that says firms must share the rewards if their investments are successful enough. The essence of the *U.S. Steel* point about the limited reach of § 2 is that antitrust respects that truth.[21]

Even in the short run, there are multiple problems with sharing duties—as recognized in the FCC's orders implementing these duties under the 1996 Act and in the opinions of Justice Breyer, Judge Wood, and Judge Williams mentioned above. First: a duty to share assets risks diminishing the incumbent's investments in creating those assets in the first place, and in maintaining and upgrading them, for the rewards must be shared but not the risks. For example, local telephone networks require continuing investment; they require the constant attention of tens of thousands of employees and billions of dollars of investment. Second: a duty to share risks deterring independent investments by new entrants; sharing may be cheaper, and is certainly less risky, than investing in one's own facilities. Third: a duty of incumbents to share can harm the best new entrants, those who do build their own facilities; they are faced with competition not just from the incumbent but from all the rivals who can cheaply share the incumbent's assets. On top of these risks, the costs of implementing and administering any sharing duty can be very substantial, so that any market benefits must be large enough to exceed those costs. And: if the incumbent cannot reliably determine the required sharing terms in advance—if there are vague legal standards requiring years of costly and uncertain litigation—the risk of retrospective treble damages skews choices toward overgenerous sharing that further deters pro-consumer investments.

For all of these reasons, Section 2 of the Sherman Act has never imposed the kind of affirmative duties to assist rivals that were urged by the plaintiff in *Trinko*. The Supreme Court so concluded entirely independent of the existence of the regulatory regime established in the 1996 Act. And the reasons for not recognizing such Section 2

> Judge Hand's price squeeze test . . . makes it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will? We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration.

[21] *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 278 (2003) ("If there were no right to exclude others from the fruits of investments made in the property, then the property right cannot provide the encouragement to invest that is the main purpose for recognizing property rights to begin with."). *See also U.S. Steel*, 251 U.S. at 452-53 (noting that equitable "discretion" in reviewing an antitrust decree requires respect for investments); *Standard Oil Co. v. United States*, 221 U.S. 1, 78 (1911) ("[O]ne of the fundamental purposes of the statute is to protect, not to destroy, rights of property.").

duties are compelling even apart from the existence of that regulatory regime. The Court then explained that the existence of the 1996 Act regime, a separate, non-antitrust avenue for the assertion of assistance duties, was one additional reason, if one were needed, for the Court to refrain from *adding such new duties* to Section 2.

Observations about regulation:

The general question for today's panel is how antitrust should apply to already-regulated industries. *Trinko*'s limited use of regulation—as a reason not to add a previously unrecognized Section 2 duty—is one quite proper use of regulation. The more challenging situation involves the question of relying on regulation to limit otherwise-established antitrust duties. I was not involved in the *Credit Suisse* case, which found a very context-specific conflict between a securities regulatory regime and a particular antitrust claim, a conflict that the SEC itself (though not the Justice Department's Antitrust Division) thought severe enough to require displacement of the latter in favor of the former. I cannot speak to that narrow result, so my observations here are general. Most important, I believe that the claim that there is some easy harmony to be achieved between antitrust and regulation is false. Regulation and antitrust differ not only in their details. Regulation is often contrary to antitrust either in its ends, in its means, or in both.

1. The goals of regulation and antitrust can be directly adverse.

Economic regulation can choose ends that are actually at odds with antitrust. Instead of promoting free markets, regulation may prohibit competition, whether to ensure subsidization of high-cost services or for other reasons. It may restrict entry, control price, skew investment (causing too much or too little), and limit innovation (delaying innovations by subjecting them to regulatory approval, barring marketing of innovations, or forcing innovations to be shared with rivals on regulated terms). There are many, many examples. Here are two:

<u>Telephones</u>. The early history of the telephone industry was characterized by cradle-to-grave regulation. Entry was forbidden. Prices were regulated. Investment initially was encouraged, some observers claim over-encouraged ("gold-plated"), by the prospect of guaranteed recovery of prudently-incurred costs. Investment later was discouraged by requirements that facilities be shared at super-low prices. Innovations were delayed while regulators scrutinized them. A simple innovation like letting phone lines carry data communications required multiple lengthy FCC proceedings before it could be offered.

The 1974 government antitrust case that led to the 1982 AT&T Bell System breakup consent decree was at its core attacking a market structure that had been created by regulation. The Justice Department antitrust case sought to correct market harms that had been not only tolerated but encouraged and imposed by federal and state utility regulators. *Trinko* would not preclude the government bringing a similar case today. In briefing the *Trinko* case to the Supreme Court, Verizon did not argue that the government's case 1974 against the Bell System was incorrect. Instead, we showed how

dismissal of Trinko's complaint was consistent with the parallel result in the Seventh Circuit's approval of a limited refusal-to-deal claim brought by MCI against AT&T—a consistency Judge Wood had likewise found in her opinion for the Seventh Circuit in *Goldwasser*. Notably, the *MCI* case involved AT&T's flat refusal to connect MCI's independent long-distance facilities to AT&T's local network, even though AT&T was selling such connections for the very same services to other "'independent telephone companies.'"[22]

Cable TV. The multichannel video market was long kept non-competitive by regulation. The 1984 Cable Act prohibited telephone companies from competing with cable TV operators. When that ban was struck down as a First Amendment violation in the lower courts and then removed by Congress in the 1996 Telecom Act, incumbent cable TV operators asserted that the telephone rivals must obtain cable franchises, one by one, from thousands of local municipalities before they may compete. This has slowed down entry by Verizon's superior FiOS TV service. At the urging of incumbent cable operators, several states have increased the burdens of obtaining franchises with so-called "level playing field" laws.[23]

Verizon filed an antitrust and First Amendment case against one of the municipalities that was making it difficult to enter in competition against the incumbent cable monopolist. Despite the regulated context, we did not believe our case was precluded by *Trinko*. The case was promptly settled with the result that Verizon is now able to compete in the particular local market, and therefore we did not establish a legal precedent.

2. Even when regulation and antitrust have the same goals, regulators may choose methods that sometimes are substantively contrary to antitrust – indeed, regulatory methods may tend to preserve monopolies.

Ordinary public utility regulation may bear "a strong resemblance" to competition in ultimate objectives: it often is designed to produce the same end result, in particular certain pricing levels, that a competitive process would produce.[24] But the compatibility

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[22] Brief for Petitioner Verizon at 42, *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP*, No. 02-682 (May 23, 2003) (quoting 708 F.2d at 1144 and FCC decision). In fact, Trinko's demand was that Verizon "'fill in the gaps in its competitor's network,'" a duty the Seventh Circuit in *MCI* specifically rejected, and that Verizon do this gap-filling by giving up the opportunity to use the facilities surrendered, which *MCI* specifically did not require.

[23] *See* Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*, 3 Bus. & Politics 21, 43 (2001) (describing the entry inhibitions of the level-playing-field statutes and cable incumbents' "strategic use of administrative processes to thwart entry" and preserve "a monopolistic equilibrium"). One Wall Street analyst observed that "[c]able providers are aware of the protective effects franchise requirements have and regularly tell their investors how the process will prevent near term competitive entry by the Bells." J. Hodulik, UBS, *Franchise Fight Likely To Delay Video Competition* at 3 (May 2, 2005).

[24] Alfred E. Kahn, 1 THE ECONOMICS OF REGULATION 63 (MIT reprint 1988).

of the desired end results does not mean that antitrust can borrow from regulation in defining duties. Even when the goals of antitrust and regulation are the same, their methods are very different. Antitrust fosters a competitive process. Regulation compels specific results. A few examples illustrate the difference:

Acquiring or continuing a monopoly. Antitrust does not require dismantling of a lawful monopoly.[25] Regulation may require dismantling.

Pricing. Antitrust does not require a monopolist to charge less than a monopoly price.[26] Regulation typically restricts price to some measure of costs.

Dealing. Antitrust generally does not require affirmative dealing with others.[27] Regulation often does. Common carriers by definition must deal with all customers.

Mergers. The antitrust agencies evaluate whether a merger will harm competition. If there is no likely harm, the agency doesn't challenge the merger. By contrast, the FCC requires mergers affirmatively to serve the public interest. This leads the FCC to impose conditions well beyond what either DOJ or the FTC thinks is needed to approve a merger.

Ironically, regulation that imposes a "competitive" *result* can have the effect of preventing competition itself. For example, the swiftest and surest way to end a monopoly is to let it charge a high price; high prices attract entry. Conversely, forcing a monopolist to share its productive facilities with rivals at low prices results in shared monopoly, and will deter rivals' independent investments in competing facilities.[28] Treating the symptoms of monopoly thus may keep it intact longer.

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[25] *Trinko*, 540 U.S. 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.*"); *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (Section 2 "does not compel competition"); *Eastman Kodak Co. Image Tech. Servs., Inc.*, 504 U.S. 451, 480 (1992) (power plus *conduct*); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985); *United States v. Microsoft Corp.*, 253 F.3d 34, 51, 58 (D.C. Cir. 2001) (*en banc*) ("merely possessing monopoly power is not itself an antitrust violation"; "having a monopoly does not by itself violate § 2"; "'the successful competitor, having been urged to compete, must not be turned on when he wins,'" quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.)).

[26] *Trinko*, 540 U.S. at 407 ("charging of monopoly prices, is not … unlawful").

[27] *Trinko*, 540 U.S. at 408 ("as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,'" quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

[28] For example, a prominent former FCC economist has shown that the European model for broadband infrastructure sharing depresses investment. Scott J. Wallsten and Stephanie Hausladen, *Net Neutrality, Unbundling, and their Effects on International Investment in Next-Generation Networks* 107 (March 2009).

3. Regulation more readily admits of fine-tuning.

As discussed above, regulation operates procedurally very differently than antitrust. Regulation can be experimental, trying one approach, then another, changing course as the results are seen. Regulatory enforcement mechanisms can be calibrated to provide incentives that motivate desired conduct, making adjustments with experience. Enforcement penalties can be closely tied to the substance of the regulatory duties, with care taken that beneficial conduct such as price-cutting, investment, and innovation is not deterred by excessive or imprecisely administered penalties (which would cause the regulated firm to avoid entire areas out of caution). The administrative agency gains experience over time, and the same agency will be there to revisit specific requirements that prove ineffective or counterproductive.

Antitrust is substantively less fine-tuned and procedurally less fine-tunable. It forbids "monopolization" and restraints that are "unreasonable." Its enforcement, involving juries, class actions, and treble damages, is a potent but imprecise deterrent, making it important not to point this weapon in the direction of normally pro-competitive behaviors. The administration of antitrust by single-case lay juries means there is usually no opportunity to gain industry-specific expertise or to make adjustments in light of experience. In particular, a common-law antitrust process is not able reliably to make the right judgments about how much sharing and on what terms will do more good than harm.[29]

Consider the regulatory regime at issue in the *Trinko* case. Trinko alleged that Verizon failed to send prompt acknowledgements of rivals' orders for unbundled telephone lines. A precise specification of what Verizon was supposed to do was contained in three documents: (1) an interconnection agreement between Verizon and Trinko's carrier, AT&T; (2) Carrier-to-Carrier Guidelines established jointly by Verizon, its rivals (known in industry jargon as "CLECs"), and the New York Public Service Commission; and (3) a state-commission administered Performance Assurance Plan that defines automatic penalties to be paid to the CLECs for performance deficiencies. For example, performance measure "OR-8" requires Verizon to check each CLEC order to ensure it is "valid and complete" and then to return an acknowledgement to the CLEC within two hours, 95% of the time. The penalty for missing this performance measure was set with regard to the size of the performance shortfall, its effect on the CLEC business, and whether Verizon had missed this measure in the past. The state commission retained discretion to adjust the weights of penalties up or down as experience was gained.

The regulatory enforcement regime in New York, where Trinko's office is located, put at risk a sizeable fraction of Verizon's annual profits. The FCC approved the New York enforcement regime as potent: "We believe it is useful to compare the

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[29] The common law reluctance to define and enforce terms on which mandated sharing of monopolist facilities with aspiring competitors is to be afforded, based only on general standards, is over a century old. *Express Cases*, 117 U.S. 1, 28-29 (1886).

maximum liability level to Bell Atlantic's net revenues derived from local exchange service – after all, it is primarily its local service profits that Bell Atlantic would have a theoretical incentive to 'protect' by discriminating against competing local carriers. * * * In 1998, Bell Atlantic reported a Net Return of $743 million in New York: $269 million [the amount then at risk under the Performance Assurance Plan] would represent 36% of this amount."[30]

There are profound problems accompanying calibration of any sharing duties. Excessive sharing (a) undermines the incentive of the regulated firm to invest in creating or maintaining or upgrading facilities (the entire risk is borne by the regulated firm, but rewards must be shared); (b) undermines the incentive of rivals to build or buy when renting at low prices from the regulated firm is cheaper and less risky (the regulated firm is stuck with the facility if demand is disappointing); and (c) harms *facilities-building* rivals, whose investments (*e.g.*, more efficient than the regulated firm but perhaps not as efficient as possible) must compete against rivals renting from the regulated firm at super-low prices. One of the strongest amicus briefs in the Supreme Court in *Trinko* came from the equipment manufacturers, who just want the market to grow so they can sell more equipment. The manufacturers argued that excessive sharing requirements were depressing investments by both the incumbents and new rivals.[31]

The above observations lead me to two conclusions:

Conclusion #1: Antitrust should not be rewritten or interpreted to encompass specific regulatory requirements.

As discussed above, there are two kinds of reasons that courts cannot soundly borrow violations of regulatory duties to define antitrust violations.[32]

First, the substantive policies are fundamentally different in what they do about the ideal of "competition." For example, in telephones, the 1996 Act seeks to "jumpstart" competition and "uproot" monopolies; antitrust does neither. The choices made under the 1996 Act about terms of sharing (including the all-but-confiscatorily low

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[30] Application of Verizon New York, 15 FCCR 3953 (1999), ¶ 436. The available annual penalty under the New York plan subsequently was increased to $293 million although Verizon's profits from the state had declined. At the time of the *Trinko* decision, the total of available annual penalties in Verizon's states (not counting New Jersey) was $1.24 billion. New Jersey had no annual cap on the penalties that could be incurred.

[31] Amicus Brief of Telecommunications Industry Ass'n, 16 & n.6 (U.S. May 23, 2003) (citing Telecom. Industry Ass'n., 2003 Telecommunications Market Review and Forecast at 55, 60 (2003)).

[32] As the Supreme Court explained in *Trinko*, under the 1996 Telecommunications Act, there is also a textual reason for not incorporating regulatory duties into antitrust: The savings clause precludes using the new regulatory duties to "modify" (add to) pre-existing antitrust duties. It declares that Congress was *not* treating the new 1996 Act duties as if they defined a new standard for "restraint of trade" or "monopolizing" conduct under the Sherman Act. *Compare Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439-40 (1992) (law deeming certain conduct to come within prior statute "modified" prior statute).

prices) are *not* the choices antitrust makes. Most notably, antitrust does *not* require below-monopoly pricing for any sharing. The Supreme Court has specifically cautioned against confusing antitrust wrongs with other wrongs, including even the evasion of regulatory controls on exploitation of a monopoly.[33]

Second, enforcement systems differ. Agency decision-makers are able to act flexibly and prospectively and use calibrated penalties (*e.g.*, the 1996 Act regime), whereas juries act retrospectively through severe treble-damages penalties and judges adopt injunctions that typically are difficult to modify. Thus the Supreme Court has recognized that substantive policy choices now go hand in glove with particular enforcement regimes.[34] Respect for differences in implementation and remedial choices is most important when a regulatory regime "comes as close to the line of overregulation as possible–that is, to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits."[35] The remedial choices of specific statutes thus trigger the principle that the "specific governs the general."[36] And antitrust litigation would inevitably operate as an "extraneous pull" on agency processes themselves (*Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 353 (2001)), distorting the choices of participants and decision-makers alike.

Accordingly, because regulatory determinations are deeply experimental and uncertain, and price regulation in particular "inevitably distorts the incentive to reduce costs or engage in further innovation" and tends to chill new entry that higher prices

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[33] *NYNEX v. Discon*, 525 U.S. 128, 136, 137 (1998). That violations of other standards overlap *as a matter of fact* with violations of antitrust standards (*see* ABA, Antitrust Law Developments 249 (5th ed. 2002)) does not mean that wrongfulness under the former is the reason, or even a reason, for finding the conduct wrongful under antitrust. An examination of the ABA statement and its footnote support confirms that it is, at best, a description of *de facto* overlap.

[34] *See* R. Fallon, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 841-42 (4th ed. 1996). In many contexts since the 1970s, the Court has rejected the notion that it is better, or even permissible, to add remedies to those Congress chose for particular statutory violations, recognizing the importance of congressional *remedial* choices, such as whether agencies (or numerous individual judges or juries) resolve disputes under potentially open-ended standards, and what remedies attach to violations. *See*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Karahalios v. Nat'l Fed. of Federal Employees*, 489 U.S. 527, 533 (1989); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 146-147 (1985); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn.*, 453 U.S. 1, 19-20 (1981); *Northwest Airlines, Inc. v. Transport Wkrs.*, 451 U.S. 77, 93-94 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

[35] Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 541 (1983).

[36] *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (refusing "'to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute'").

might attract, "[a]ntitrust courts have rightly resisted undertaking the heavy, continuous, and unguided burden of supervising the economic performance of business firms."[37]

Conclusion #2: Antitrust should not condemn large, successful firms for pro-competitive behaviors.

I want to emphasize a final point. Regulation sometimes inhibits large and successful firms from engaging in pro-competitive behaviors such as cutting prices, innovating, and investing. There is a popular view that antitrust, too, should specially scrutinize these behaviors by large firms because cutting prices, etc., can injure rivals.

That view is wrong. As a general rule, when non-dominant firms are observed commonly engaging in a particular form of conduct in the marketplace, such conduct should be presumptively permissible for a large firm also:

> If the practice is one employed widely in industries that resemble the monopolist's but are competitive, there should be a presumption that the monopolist is entitled to use it as well. For its widespread use implies that it has significant economizing properties, which implies in turn that to forbid the monopolist to use it will drive up his costs and so his optimum monopoly price.[38]

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[37] 3 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 720b at 256 (2d ed. 2000) (footnote omitted, noting rare exceptions embodied in judicial decrees); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (recognizing problems with antitrust price administration); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (to examine reasonableness of price is to "set sail on a sea of doubt"); *see Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1225 (9th Cir. 1997) (rejecting even a remedial "reasonable price" order, restricting order to "nondiscriminatory pricing"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) ("Not only are the technical problems difficult–doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise–but the general area is particularly unsuited to the approach inevitable under a regime of federal common law."). *See also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990).

[38] Richard A. Posner, ANTITRUST LAW 253 (2d ed. 2001); *see* Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 60 (2005) ("[T]he appropriate assumption is that these practices offer some efficiencies that improve the gains from trade, even if a reviewing court cannot quite understand exactly why these practices survive or how they work."); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 81 (2005) ("[N]ondominant firms regularly engage in unilateral practices challenged under the antitrust laws. These include tying; vertical restraints such as exclusive contracts and exclusive territories; nonlinear pricing, including loyalty discounts; and aggressive price cutting. Practices that generate efficiencies where firms lack market power logically should generate those same efficiencies where firms possess market power. There is no economic reason to believe that these efficiencies become less important as firms acquire market power. We therefore presume these practices are procompetitive, even if practiced by firms with monopoly power, unless shown otherwise."); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-26 (1993) (adopting predatory pricing test for measuring the legality of single-product discounts by dominant firms); U.S. Br. in *3M v. LePage's*, 10 n.6, 14 n.11 (U.S. filed May 2004) (*Brooke Group* "plainly" applies to dominant firm pricing).

Monopolists, of all firms, should be *encouraged* to lower prices (to still-above-cost levels), invest, and innovate because by definition full market pressure to do so is missing, and there are more customers who stand to benefit.

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Mr. Thorne won clearance for the mergers that created Verizon including Bell Atlantic-NYNEX, Bell Atlantic-GTE-AirTouch, Verizon-MCI, and Verizon Wireless-Alltel.

Mr. Thorne won three antitrust cases in the Supreme Court, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Verizon v. Trinko*, 540 U.S. 398 (2004); and *NYNEX v. Discon*, 525 U.S. 128 (1998), and assisted obtaining Supreme Court review in *Pacific Bell Tel. Co. v. linkLine Comm., Inc.*, 555 U.S. ___ (2009). He defeated all other antitrust cases against Verizon, including five dozen consumer class actions and a half dozen competitor antitrust cases. On December 7, 2009, he won a Second Circuit appeal that he briefed and argued regarding state action immunity for payphones in New York City.

Mr. Thorne brought offensive antitrust cases in 1994 and 1997 against AT&T and Lucent, respectively. He brought an offensive antitrust case in 1999 against AirTouch. He brought an offensive antitrust case in 2001 against Sumitomo for copper price fixing. He brought an offensive antitrust and First Amendment case in 2006 against Montgomery County, Maryland for restricting Verizon's entry into the video business.

Mr. Thorne testified before the Antitrust Modernization Commission in 2005 and before joint hearings of the Antitrust Division and Federal Trade Commission in 2007 and 2010.

Global Counsel Awards named Mr. Thorne the world's best corporate competition lawyer in 2009. Global Counsel Awards named his Intellectual Property group one of the world's five best in 2008 and again in 2010. Washington Metropolitan Area Corporate Counsel Association named him the "outstanding in-house counsel" in 2009. Global Competition Review, March 2005, named him one of the top 40 worldwide "stars of the in house competition bar."

Mr. Thorne coauthored several treatises: Federal Telecommunications Law (Little Brown & Co. 1992, Aspen 2d ed. 1999 & Supps. 2004-2010) and Federal Broadband Law (Little Brown & Co. 1995). His remarks to the New York Bar Association on the 20th anniversary of the AT&T breakup were reprinted in Vital Speeches of the Day, May 15, 2004. His keynote address to the Madrid meeting of the International Bar Association, "Five Freedoms," was reprinted in Vital Speeches of the Day, June 1, 2005.

Mr. Thorne was a summa cum laude mathematics major at Kenyon College, was Order of the Coif and law review articles editor at Northwestern University Law School, and clerked for Chief Judge Cummings of the U.S. Court of Appeals for the Seventh Circuit.

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