The truth about Trinko

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I. INTRODUCTION

To paraphrase Charles Dickens, the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[1] (hereinafter *Trinko*) was the most sweeping of decisions, and it was the least sweeping of decisions. Although some see the *Trinko* case as a watershed event in which U.S. monopolization law as embodied in section 2 of the Sherman Act was significantly rolled back, the truth is that *Trinko* is largely a restatement of the status quo ante of monopolization doctrine. The case is limited to a procedural niche unique to the experimental competition-inducing regulatory statute under which it arose, the Telecommunications Act of 1996 (TCA),[2] and because of this the substantive effect of the decision in a broader antitrust context promises to be quite modest.

A restrained interpretation of *Trinko* is justified on several grounds falling roughly into two categories. The first is the lack of any meaningful direct substantive effect on section 2 jurisprudence. The law

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1. 540 U.S. 398 (2004).

2. Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151 *et seq.* (2000).

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by repudiating existing refusal to deal doctrine (or nearly doing so).[9] But the *Trinko* Court clearly acknowledged that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2."[10] Equally significant is that the Court refused to overrule *Aspen Skiing*,[11] which it characterized as the leading case for section 2 liability based on a refusal to cooperate with a rival, although at the same time it placed *Aspen Skiing* "at or near the outer boundary of § 2 liability."[12]

The general rule, established in the 1919 case of *United States v. Colgate & Co.*,[13] is that absent a purpose to create or maintain a monopoly, firms are free to deal with whomever and on whatever terms they wish.[14] The *Colgate* rule by its own terms is not unqualified; it is unlawful to "create or maintain a monopoly" under section 2 of the Sherman Act. Thus, even dominant firms have the freedom to deal with whomever they wish, although a refusal to deal might sometimes nonetheless violate section 2.[15]

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[9] *See* George A. Hay, Trinko: *Going All the Way*, in this issue of THE ANTITRUST BULLETIN (arguing that the *Trinko* decision has started the process of eliminating unlawful refusals to deal under section 2); *see also* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 UNIV. CHI. L. REV. 73, 88 n.55 (2005) ("The Supreme Court also seems to have moved to a modified per se legality standard for the refusal to share property.").

[10] *Trinko*, 540 U.S. at 408.

[11] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[12] *Trinko*, 540 U.S. at 409.

[13] 250 U.S. 300 (1919).

[14] *See* Glen O. Robinson, *On Refusing to Deal With Rivals*, 87 CORNELL L. REV. 1177, 1190 (2001) (*Colgate's* "freedom formulation" is the "baseline norm" that continues to be cited with "programmed repetition. The norm itself remains unexplained; it is just one of those original principles that is grounded only on itself.").

[15] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992) ("It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.") and Lorain Journal Co. v. United States,

The Supreme Court has circumscribed a monopolist's *Colgate* freedom quite often, while at the same time the Court rarely overturns its antitrust decisions.[16] The *Colgate* qualification to the unfettered freedom of a dominant firm to deal has been fleshed out by the Supreme Court in a line of cases that includes *Standard Oil (New Jersey)*,[17] *Lorain Journal*,[18] *Otter Tail*,[19] *Aspen Skiing*,[20] and *Kodak*.[21] Unilateral refusals to deal occur when a single dominant firm chooses to deal on overly restrictive or exclusionary terms. This can include terms of dealing that are so uneconomical as to constitute a refusal, as well as restrictive terms with counterparties that have the effect of impeding rivals' access to inputs or customers. As a result, there is an enduring body of jurisprudence for adjudging the occurrence of anticompetitive

342 U. S. 143, 155 (1951) (the freedom to deal is "neither absolute nor exempt from regulation"). Indeed, a rule that "a firm that develops a superior product must sometimes share it with its rivals" does not seem to reflect a coherent theory. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 255, 261 (2003). But *any* general rule governing a dominant firm's dealings with other parties will be subject to this same criticism: dominant firms have the right to deal with whomever and on whatever terms they wish, except when done in a manner that constitutes monopolization. This is the rule for single-firm conduct under section 2. Note also that the corresponding rule for concerted action raises the same problem: firms are free to enter into agreements to deal with whomever and on whatever terms they wish, except when doing so constitutes an agreement that unreasonably restrains trade under section 1. There is no reason to require antitrust limits on the "freedom to deal" to be less constraining than antitrust limits on the "freedom to contract."

[16] *See* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 GEO. WASH. L. REV. 1103, 1111–12 (2001) ("The Supreme Court has decided over 100 antitrust cases in the past century, and it has overruled only two of those decisions," citing State Oil v. Kahn, 522 U.S. 3 (1997) and Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

[17] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[18] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

[19] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[20] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[21] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

refusals to deal. So even though the *Trinko* opinion in stating the *Colgate* formulation omits the qualification,[22] this can have little substantive effect when considered in light of the great weight of existing authority.

Perhaps because of its excessive dicta, the *Trinko* decision inspires overinterpretation and too much emphasis on its words of limitation. For example, despite the express reiteration in the opinion that under appropriate circumstances a section 2 remedy may be available to compel dealing, the Department of Justice Task Force on Intellectual Property issued a report supporting codification of "the Rights of Intellectual Property Owners to Determine Independently Whether to License Their Technology."[23] In particular, the report refers to "a recent legal ruling that expressed great skepticism about applying the antitrust laws in ways that would force companies to share the source of their competitive advantage with others."[24]

This statement appears to refer to the *Trinko* decision without naming it. If so, it leaves the erroneous impression that the decision pared back the authority of section 2 to compel dealing when in fact the decision leaves antitrust law in this respect entirely intact, both by preserving prior rulings and by expressly reaffirming the refusal to deal doctrine under appropriate circumstances, with no particular limitation on the doctrine as it relates to intellectual property.[25]

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[22] *Trinko*, 540 U.S. at 408 (citing *Colgate* for the *unqualified* proposition that "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'").

[23] U.S. DEPARTMENT OF JUSTICE, REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY (October 2004).

[24] *Id.* at 41–42.

[25] *See also* Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 232 (2005) (stating that "the cost of an exclusionary practice, *especially in intellectual property markets*, need not always exceed the additional monopoly profits that the practice makes possible" and expressing the view that "at present intellectual property rights are too broadly rather than too narrowly defined").

B. *Profit sacrifice, prior dealing, and other formulaic tests of anticompetitive conduct*

Despite some lower court rulings and commentary to this effect, neither the sacrifice of short term profits, nor the discontinuation of a prior course of dealing, nor any other formulaic shibboleth was adopted by the *Trinko* Court as a necessary element of a section 2 claim for unilateral conduct. For example, in *Covad Communications Co. v. Bell Atlantic Corp.*,[26] the court stated that "in order to prevail upon [its] claim Covad will have to prove Bell Atlantic's refusal to deal caused Bell Atlantic short-term economic loss."[27] But the authority cited by the court for this proposition was not *Trinko* but the *Colgate* doctrine; and the court reversed the district court's dismissal of the refusal to deal claim, holding that the allegation that Bell Atlantic's refusal was "predatory" was sufficient to plead the required economic sacrifice element.[28]

Nonetheless, the D.C. Circuit appears to have vastly overstated the role of below-cost pricing in pleading a section 2 case not based on predatory pricing. The *Trinko* Court did not adopt short run profit sacrifice as a necessary element; the Court simply noted that in *Aspen Skiing*,

> [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. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.[29]

By contrast, Verizon's "reluctance to interconnect" at "cost-based rate[s] . . . tells us nothing about dreams of monopoly."[30] At most, then, the sacrifice of short term profits emerges from *Trinko* as an indicium of anticompetitive animus rather than as a sine qua non of a refusal to deal claim. Indeed, any other interpretation would result in

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26 398 F.3d 666 (D.C. Cir. 2005).

27 *Id.* at 675.

28 *Id.* at 676.

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

30 *Id.*

what one commentator called "a felicitous convergence between the definition of exclusionary or predatory pricing conduct and the definition of exclusionary or predatory non-price conduct."[31] One undesirable effect of this would be to establish short term profitability as a per se justification of otherwise unlawful conduct. Another would be to impose potential liability on procompetitive conduct such as research and development or innovative marketing initiatives. Still another would be to potentially insulate from liability the kind of anticompetitive conduct that occurred in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless Plc*,[32] *Conwood Co. v. United States Tobacco Co.*,[33] or *United States v. Microsoft Corp.*[34] In short, profit sacrifice as precondition of section 2 liability would be both over- and under-inclusive;[35] indeed, "even Justice Scalia would reject any notion that 'one size fits all' for antitrust treatment of unilateral conduct generally."[36]

Similarly, a prior course of dealing can be probative as to whether dealing is efficient and practicable and serve as a guide to reasonable terms,[37] but it was not established by the *Trinko* Court as a necessary

[31] Robert A. Skitol, *Correct Answers to Large Questions about* Verizon v. Trinko, ANTITRUST SOURCE 3, May 2004, http://www.abanet.org/antitrust/source/05-04/skitol.pdf.

[32] 148 F.3d 1080 (D.C. Cir. 1998) (finding a dominant radio station liable under section 2 for misrepresenting the signal coverage of its competitor).

[33] 290 F.3d 768 (6th Cir. 2002) (finding a defendant liable under section 2 for "dirty tricks" such as removing a competitor's products from store shelves).

[34] 253 F.3d 34 (D.C. Cir. 2001) (holding the defendant liable under section 2 for, inter alia, distributing a "polluted" version of a competitor's software to stymie interoperability).

[35] *See* Elhauge, *supra* note 15, at 271 ("Sacrificing profits is neither sufficient nor necessary to show that conduct that excludes rivals is undesirable, nor does it even correlate well with the desirability of such conduct.").

[36] Skitol, *supra* note 31, at 3.

[37] *See* Robinson, *supra* note 14, at 1202 n.109 ("One plausible basis for distinguishing termination cases from initial refusals is that termination cases provide some basis for evaluating the reasonableness of proposed terms of dealing.").

condition to liability for a refusal to deal. As the Court noted, the services required by the TCA to be sold by the incumbent existed "only deep within the bowels of Verizon" and were "brought out on compulsion of the [TCA] and offered not to consumers but to rivals, and at considerable expense and effort."[38] As the Court saw it, Verizon *could not* have had any prior course of dealing with the plaintiff because, in the absence of the TCA, the product market in question did not even exist. Given these particular facts, any supposed requirement of prior dealing cannot be convincingly linked to the language in the *Trinko* opinion.

Trinko, therefore, endorsed no formulaic test for determining whether conduct is anticompetitive. It is far more sensible to regard the Court as having balanced the potential anticompetitive effect of the complained of conduct against its justification on efficiency grounds and against the costs of antitrust intervention. The Court, therefore, proceeded with a case by case analysis in keeping with established section 2 precedent.[39]

C. *Whither essential facilities?*

The Court twice has distanced itself from the essential facilities doctrine, first in Justice Breyer's dissent in *AT&T v. Iowa Utilities Board*[40] and again in *Trinko*.[41] Yet the doctrine remains stubbornly robust. Indeed, one may legitimately question whether the absence of the spe-

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

[39] *See* Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005) (expressing doubt that either a "no business sense" test or a "short-term profit sacrifice" test was adopted by the *Trinko* Court, which relied instead on "a balance of the adverse impact of the conduct at issue against the efficiency effects that may simultaneously arise" as established in *Aspen Skiing* and *Microsoft*).

[40] 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) (noting that essential facilities was "an antitrust doctrine that this Court has never adopted").

[41] *Trinko*, 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.") (citations omitted).

cific words "essential facilities" in decisions such as *Associated Press v. United States*,[42] *Lorain Journal Co. v. United States*,[43] or *Otter Tail Power Co. v. United States*[44] is the appropriate criterion on which to determine whether the doctrine should be considered established law recognized the Court. Virtually every federal judicial circuit has recognized the essential facilities doctrine as a subcategory of section 2 jurisprudence, and all of them require roughly the same prima facie elements.[45]

As in the case of Mark Twain, reports of the death of the essential facilities doctrine may be exaggerated. Even before Professor Areeda advocated limiting principles to constrain the application of the doctrine,[46]

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[42] 326 U.S. 1 (1945) (newswire network in control of essential news source liable for bylaws limiting membership).

[43] 342 U.S. 143 (1951) (newspaper in control of essential advertising medium liable for refusing to accept advertising from advertisers on a competing radio station).

[44] 410 U.S. 366 (1973) (private electric utility in control of unique transmission facility liable for refusing to supply power to municipal utility).

[45] *See* Robert Pitofsky, et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 448 (2002) ("courts have established widely-adopted tests that parties must meet before a court will require a monopolist to grant its competitors access to an essential asset," citing MCI Commc'ns v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983) and collecting cases). In *MCI Communications*, the Seventh Circuit set forth four elements necessary to establish liability using the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Id.* at 1132–33.

[46] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989) (offering six limiting principles: (1) there is no general duty to share and ordering compulsory access should be very rare, (2) a facility is only "essential" when the plaintiff cannot effectively compete without it and duplicate or practical alternatives are not available, (3) compulsory access should be ordered only when doing so will substantially improve competition by lowering price or increasing output or innovation, (4) a per se rule should never be imposed, (5) any evidence of intention is probative only as to the issue of whether the defendant intended to exclude by *improper* means, and (6) courts should not impose a duty to deal that cannot be explained or adequately and reasonably supervised.).

courts were already cautious in applying it.[47] The limitations recommended in the Areeda article now seem to have been fully absorbed into the common law. One commentator considers the present day essential facilities doctrine as "a model of coherence and restraint" compared to general refusal to deal doctrine.[48]

Indeed, the essential facilities doctrine is narrower than the general principles governing refusals to deal. As Professor Elhauge states:

> the concern that the essential facilities doctrine might misguidedly extend *beyond* the Supreme Court's antitrust duty to deal rests on the mistaken premise that this doctrine might require sharing even when the Supreme Court would hold that a refusal to deal was justified. In fact, the lower courts applying the essential facilities doctrine have interpreted its element requiring that sharing be "feasible" to mean the same set of open-ended factors that the Court examines to decide whether a refusal to deal is justified.[49]

There are several reasons why the essential facilities doctrine should continue to contribute to organizing the law on refusals to deal despite the dicta in *Trinko*. First, the doctrine governs only a narrow subset of refusals to deal and is particularly useful as a principle for applying antitrust where access problems plague relationships of fringe competitors with platform monopolists. Second, there is no more specific or useful alternative for the antitrust analysis of dealing involving large infrastructure possessed of an element of a public good, such as stadiums, communications networks, or transmission grids. The only alternatives are the more general "refusal to deal" or "anticompetitive conduct" standards. Finally, the essential facilities concept is likely to grow in importance as networks play a larger role in the economy. As access to networks becomes an ever more crucial

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[47] *See, e.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977) (the doctrine "must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately").

[48] Robinson, *supra* note 14, at 1201 ("The importance of limiting essential facilities pales in comparison to the need for limiting the nebulous refusal to deal 'doctrine' endorsed in *Aspen Skiing*.").

[49] Elhauge, *supra* note 15, at 262 (citations omitted).

antitrust issue, a doctrine expressing a general principle governing when access will be required will attract more rather than less attention in the future.[50] These developments are not likely to be derailed by the decision in *Trinko*.

D. Monopoly leveraging and attempted monopolization

Another section 2 doctrine touched upon by the *Trinko* Court is the doctrine of monopoly leveraging. Again, however, no new ground was covered. The monopoly leveraging doctrine itself continues to be governed by the law of attempted monopolization, the requirements of which were clarified in *Spectrum Sports, Inc. v. McQuillan*.[51] Attempted monopolization requires "anticompetitive ends . . . proof of a dangerous probability that [a defendant] would monopolize a particular market and specific intent to monopolize."[52] As the Court in *Trinko* explained, "leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected."[53] Stated differently, a section 2 claim that lacks the requisite element of anticompetitive conduct cannot be resuscitated by invoking attempted monopolization. Moreover, if the relevant market which Verizon is supposed to have attempted to monopolize through leveraging its wholesale monopoly was the market for retail telephone service, the claim would appear to apply to a market that the defendant had already long ago monopolized. In any case, the Court's holding was simply that the facts did not fit a leveraging or attempt to monopolize claim, not that the nature of such claims deserved any kind of reformulation.

To summarize, reading *Trinko* as paring back section 2 is unwarranted. The Court clearly refrained from limiting preexisting refusal to deal doctrine, or imposing short term profit sacrifice, a prior course of dealing, or any other universal indicator of anticompetitive con-

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50 *See generally* NETWORK ACCESS, REGULATION AND ANTITRUST (Diana L. Moss ed., 2005).

51 506 U.S. 447 (1993).

52 *Id.* at 459.

53 *Trinko*, 540 U.S. at 415 n.4.

duct; nor did *Trinko* repudiate the essential facilities doctrine, overrule *Otter Tail*,[54] or make any substantive change in the doctrines of monopoly leveraging or attempted monopolization.

III. THE SIGNIFICANCE OF THE REGULATORY CONTEXT

As suggested in part I, the regulatory context in which *Trinko* arose may be as important to the reasoning and outcome of the decision as the antitrust law under which the case was brought, or perhaps more so. A maximalist interpretation is that under *Trinko*, the FCC's (or other regulatory agency's) stewardship of the antitrust function in circumstances in which the cost of antitrust enforcement may be high categorically displaces antitrust intervention.[55] This view is based on a reading of *Trinko* that relies on a form of regulatory quasi-immunity, in which a fact-specific analysis of the regulation is allowed to lead to a determination that an antitrust violation is unlikely or that the benefits of antitrust intervention would be greatly outweighed by its costs. Both of these determinations find ample support in the *Trinko* opinion, and either one on its own could have supported the result.

A. Regulatory deference under Town of Concord

As the Court pointed out, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[56] The regulatory setting in *Trinko* was such that in the Court's judgment the type of antitrust harm alleged was not sufficiently likely to have occurred. The Court's conclusion was based in no small measure on its confidence that the procompetitive policies of the antitrust laws were adequately protected by the FCC's operating pursuant to a regulatory scheme that functions as an effective substitute for antitrust enforcement.

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[54] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

[55] *See* Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, in this issue of THE ANTITRUST BULLETIN, part V (the dicta in *Trinko* is susceptible "to calls for a limited application of antitrust law").

[56] *Trinko*, 540 U.S. at 411.

This was the same kind of probabilistic reasoning that led a panel of the First Circuit Court of Appeals in an opinion by then-Chief Judge Breyer to conclude that even though wholesale electricity markets were not immune to antitrust enforcement, antitrust intervention nonetheless would be precluded because the regulatory scheme made the "critical difference in terms of antitrust harms, benefits, and administrative considerations."[57] In *Town of Concord*, a municipal electric power distributor sued a vertically integrated power company alleging that it had engaged in an unlawful price squeeze by lowering its retail prices while at the same time raising its wholesale prices. The court of appeals held that due to the active regulation of the prices defendant charged on both the retail and the wholesale levels the probability of anticompetitive harm from the alleged price squeeze was highly unlikely. Thus, although the regulated wholesale electricity industry was not immune from the antitrust laws, the regulatory environment rendered the prospect that the defendant could have caused anticompetitive harm through an alleged price squeeze highly improbable.

Quoting from *Town of Concord*, the *Trinko* Court noted that "[p]art of [the] attention to economic context is an awareness of the significance of regulation. . . . '[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.'"[58] In particular, the Court pointed out that the "regulatory structure designed to deter and remedy anticompetitive harm"[59] included

> statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent [local exchange carrier] must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of § 271's competitive checklist, which as we have noted includes the nondiscriminatory provisions of access to [unbundled network elements of the kind alleged to have been denied or delayed to the plaintiff's competitive local exchange carrier].[60]

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57 Town of Concord v. Boston Edison Co., 915 F.2d 17, 23 (1st Cir. 1990).

58 *Trinko*, 540 U.S. at 411, quoting *Town of Concord*, 915 F.2d at 22.

59 *Trinko*, 540 U.S. at 412.

60 *Id*.

The Court then reasons that having approved incumbent local exchange carrier (ILEC) entry into long distance markets in 47 states and the District of Columbia, the FCC must have found Verizon and the other ILECs to have been on "good behavior." The defendant in *Trinko*, therefore, was permitted to escape liability based on the Court's pre-evaluation of the (low) probability that the claimed anticompetitive effect could be proven in light of the FCC's regulation under the TCA. This type of antitrust preclusion does not depend on the pervasiveness of the regulatory scheme or a plain repugnance between the approach of a regulatory statute and the policies of the antitrust laws, as would be required for a finding of implied antitrust immunity.[61] Instead, it depends on the likely effect of particular features of the regulatory system on the specific factual allegations that give rise to the antitrust claim.

Whether the factual presumption indulged in at the pleading stage about the likelihood of the alleged anticompetitive harm (a procedure that has also justified limiting treble damage recovery in otherwise well-pled antitrust claims[62]) was appropriate in *Trinko* is an important but tangential issue.[63] What is crucial is how this reasoning undermines the significance of the decision for substantive antitrust law. The independent grounds for the decision based on the reasoning of *Town of Concord* are more than sufficient on their own to drive the outcome. In light of this, the Court's section 2 discussion in *Trinko* seems gratuitous and suggests a much more limited impact on monopolization jurisprudence than may first appear from the volume of section 2 dicta in the opinion.

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[61] *See* United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 734–35 (1975) (SEC's regulatory authority was "sufficiently pervasive" to confer an implied immunity that was necessary for agency to discharge its responsibility "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws").

[62] *See, e.g.*, Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 414 (1986) (affirming dismissal of an antitrust action seeking treble damages under the "filed rate doctrine" even though "[u]nder the plain language of the relevant statutes, it would appear that petitioners have alleged a valid antitrust action").

[63] *See* Weiser, *supra* note 55 (criticizing the *Trinko* Court's confidence in the FCC's discharge of its antitrust function).

B. *Judicial efficiency and the marginal benefits of antitrust intervention*

In yet another procedurally oriented line of reasoning, the *Trinko* Court invoked the antitrust function of the FCC, and in particular its enforcement and remedial authority, to conclude that the additional benefits of antitrust intervention would be "slight."[64] Included in the costs against which such slight benefits must be balanced is the cost of mistaken inferences, i.e., falsely condemning procompetitive conduct:

> One false-positive risk is that an [ILEC's] failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of [TCA interconnection] duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent [local exchange carriers] implementing the sharing and interconnection obligations.[65]

This line of reasoning is unrelated to existing section 2 jurisprudence and highlights just how narrow the scope is for future application of the decision rule in *Trinko*. With each itemization of the particularities of the nature and context of the anticompetitive effects alleged, and the difficulties that might confront a generalist antitrust court called upon to deal with them, the Court imposes yet another limitation and distinguishing characteristic of the *Trinko* decision in the broader landscape of section 2 doctrine.

The merits of the Court's cost-benefit analysis aside,[66] such reasoning succeeds in equipping parties in litigation with a wealth of ways to distinguish *Trinko*. The decision emerges from this discussion as narrowly tailored to the unique circumstances of the interconnec-

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64 *Trinko*, 540 U.S. at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs.").

65 *Id.*

66 *See* Jonathan L. Rubin, et al., *Access Remedies After* Trinko, *in* NETWORK ACCESS, REGULATION AND ANTITRUST (Diana L. Moss ed., 2005) (criticizing the decision on the grounds, inter alia, that the risk of false positives in the context of the duties of the TCA seems remote).

tion provisions of the legislation governing local exchange telecommunications markets.

IV. CONCLUSION

The notion that the *Trinko* decision represents a substantial shift in section 2 jurisprudence is belied by several factors. No substantive change in section 2 doctrine was announced by the Court, and no particular universal approach to adjudging the anticompetitive conduct element of a monopolization claim was adopted. Moreover, the multiple procedural grounds invoked by the Court to support its decision[67] rendered much if not all of the Court's treatment of section 2 doctrine superfluous. In any case, the *Trinko* Court's expansive discussion of substantive antitrust law can fairly be characterized as dicta. The truth about *Trinko* is that there is much less than meets the eye.

[67] A concurring opinion would have affirmed dismissal on the sole ground that the plaintiff, a customer of the allegedly injured competitive local exchange carrier, lacked antitrust standing. *See Trinko*, 540 U.S. at 416 (Stevens, J., concurring).