Richmond Journal of Law and Technology

Volume 12 | Issue 1 Article 2

2005

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A NEW METHOD FOR REGULATORY ANTITRUST ANALYSIS? VERIZON COMMUNICATIONS INC. v. TRINKO

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Cite as: James E. Scheuermann & Willam D. Semins, *A New Method for Regulatory Antitrust Analysis? Verizon Communications Inc. v. Trinko*, 12 RICH. J.L. & TECH. 1 (2005), *at* http://law.richmond.edu/jolt/v12i1/article1.pdf.

I. INTRODUCTION

[1] It is a commonplace to speak of the application of law to facts. Application is a practical art, and thus involves method. Curiously, there is a paucity of discussion of the various methods by which substantive legal standards are applied to facts. This omission is significant. Method is not outcome-determinative in all cases, but, at a minimum, it guides analysis, opening certain possibilities and foreclosing others.

[2] The latest example of the jurisprudential lack of attention to method is the body of briefing surrounding, and commentary spawned by, the Supreme Court's recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[1] *Trinko*, and three decisions by United

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

States Courts of Appeal,[2] have inspired a host of briefs amicus curiae and substantial commentary on the issue of the standard for liability under section 2 of the Sherman Act.[3] Despite the attention lavished on *Trinko's* discussion of the substantive standard that should govern section 2 cases, and despite the relatively few high court decisions addressing the application of the antitrust laws to regulated markets, the method by which *Trinko* applies section 2 to a deregulating market has received no attention. This omission is noteworthy. In *Trinko*, the Supreme Court adopted a novel method for applying the antitrust laws in regulated and deregulating markets that could have profound implications for participants and litigants in those markets, and not only because it adds a new layer of uncertainty to business conduct and planning by, and antitrust counseling for, participants in these markets.

II. BACKGROUND

[3] The regulatory statute at the heart of *Trinko* is the Telecommunications Act of 1996 (the "Act").[4] The Act opened the retail market for local telephone service to competition by, *inter alia*, compelling incumbent local exchange carriers ("ILECs"), who had previously enjoyed a legally sanctioned monopoly, to interconnect their

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[2] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc), *cert. denied*, 124 S. Ct. 2932 (2004); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

[3] *Trinko* alone generated more than twenty amicus briefs, including a brief filed jointly on behalf of the Federal Trade Commission and the United States Department of Justice, 2003 WL 21269559 (May 23, 2003). The Supreme Court has invited the Solicitor General to file a brief expressing the views of the United States regarding the issues at stake in *3M Co. v. LePage's Inc.*, 540 U.S. 807 (2003), for which at least five amicus briefs had been filed as of July 2003, representing the interests of more than twenty different organizations. Commentary includes numerous articles, *see, e.g.*, Eleanor M. Fox, *The Trouble with Trinko* (Antitrust Section, ABA), Apr. 1, 2004, *available at* http://www.abanet.org/antitrust/committees/communication/ troublewithtrinkodoc; a roundtable discussion in W. Dennis Cross, *What's Up With Section 2?*, 18 ANTITRUST 8 (2003), and an ABA-sponsored teleseminar on the *Trinko* decision, entitled "When You Don't Know What To Do, Walk Fast and Look Worried (Dilbert 2003): Hitting the Section 2 'Refresh' Button for In-House Counsel Following *Trinko*" (Feb. 26, 2004), *reprinted in* THE ANTITRUST SOURCE (July 2004), *available at* http://www.abanet.org/antitrust /source/Jul04-Teleconf7=23.pdf.

[4] 47 U.S.C. §§ 151-161 (2000).

network facilities and equipment, which would include providing access to operations support systems, with those of any requesting rival local exchange carrier ("LEC"), and to do so at wholesale, reasonable, and nondiscriminatory rates.[5]

[4] In *Trinko*, the plaintiff's claim emerged from a dispute between a predecessor of Verizon Communications, Inc. ("Verizon"), an ILEC, and AT&T, a new competitor in the local exchange market.[6] This dispute led the Federal Communications Commission ("FCC") and the New York Public Service Commission ("PSC") to investigate whether Verizon was meeting its interconnection obligations under the Telecommunications Act.[7] The investigations resulted in a $10 million finding of liability by the PSC and a consent decree between Verizon and the FCC.[8] Subsequent to the consent decree, the Law Offices of Curtis V. Trinko, LLP ("Trinko"), which purchased local telephone service from AT&T, brought a consumer class action against Verizon on behalf of all customers of Verizon's competitors since 1996.[9]

[5] Trinko alleged that Verizon, the incumbent carrier, denied AT&T's customers equal access to its local network in violation of the anti-discrimination and interconnection requirements of the Act.[10] In particular, Trinko alleged that Verizon violated the affirmative duties of cooperation imposed by the Act, by failing to fill orders of its competitors' customers, failing to inform its competitors of the status of their customers' orders, and generally failing to provide its competitors with adequate access to its operations support systems.[11] Trinko also alleged direct harm in the form of poor phone service, and that the deficiencies in Verizon's assistance to AT&T amounted to monopolistic conduct in violation of section 2 of the Sherman Act.[12]

[6] The district court dismissed the suit on the grounds that Trinko lacked standing and the complaint did not state a cause of action for which relief

[5] *See id*. §§ 251(a), (b), and (c) (2000).
[6] *Trinko*, 540 U.S. at 403.
[7] *See* 47 U.S.C. §§ 252(c)(2)-(3); *Trinko*, 540 U.S. at 403.
[8] *Trinko*, 540 U.S. at 403-04.
[9] *Id.* at 404.
[10] *Id.*
[11] *Id.* at 404-05.
[12] *Id.* at 405.

could be granted.[13] The district court held, *inter alia*, that Trinko did not have an antitrust claim because Trinko's allegations were inextricably intertwined with the Act and that, even if such allegations were not inextricably intertwined, the Act must take precedence over the general antitrust laws when the two regulate precisely the same area.[14] On appeal, the United States Court of Appeals for the Second Circuit reversed and reinstated the section 2 claim without addressing the merits.[15] The Supreme Court granted Verizon's petition for certiorari and issued a unanimous decision to reverse the judgment, with a six-Justice majority opinion that addressed the antitrust implications of the affirmative duties to cooperate established by the Act.[16]

III. FRAMING THE ISSUE: PRESERVING V. EXPANDING TRADITIONAL SECTION 2 LIABILITY

[7] The Trinko Court's majority opinion frames the issue as "whether the allegations of [Trinko's] complaint fit within existing exceptions" to the doctrine that section 2 does not restrict the right of a monopolist to refuse to deal with a competitor "or provide a basis, under traditional antitrust principles, for recognizing a new one."[17] On no less than ten occasions in its sixteen page slip opinion, the Court further articulates the issue as a choice between "preserving" and applying "traditional antitrust principles," "established antitrust standards," "existing antitrust standards," and "pre-existing antitrust standards," on the one hand, and "an expansion" of section 2 principles, on the other.[18] These pre-existing antitrust standards include a version of the rule enunciated in *United States v. Colgate & Co.*,[19] that 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

[13] Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 123 F. Supp. 2d 738, 742 (S.D.N.Y. 2000).
[14] *See generally id.*
[15] Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 305 F.3d 89, 107-10 (2d Cir. 2002).
[16] *See Trinko*, 540 U.S. at 404-16. The three concurring Justices would have reversed the Second Circuit on grounds of lack of standing. *See id.* at 416-18.
[17] *Trinko*, 540 U.S. at 408.
[18] *See, e.g.*, *id*. at 404-11.
[19] 250 U.S. 300 (1919).

parties with whom he will deal,'"[20] and the exception to this rule recognized in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*,[21] which held that in certain circumstances, a monopolist's refusal to cooperate with rivals can constitute anticompetitive conduct and violate section 2.[22]

[8] This seemingly innocent framing of the issue is laden with a host of unarticulated jurisprudential assumptions. These assumptions are foreshadowed in the Trinko Court's discussion of the Act's antitrust savings clause, which provides 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.'"[23] The Trinko Court properly states that this clause precludes a finding of implied antitrust immunity and preserves claims that satisfy "established antitrust standards."[24] The Court goes further, however, and also reads the antitrust savings clause as creating the following limitation: by virtue of the clause, the Act "does not create new claims that go beyond existing antitrust standards."[25] It is one thing to recognize that the Act does not trump the Sherman Act and is not an independent source of antitrust liability. That is unassailable. Yet it requires several logical or interpretive leaps to suggest, as the Court does here, that the antitrust savings clause means that application of traditional antitrust principles to the Act's unique regulatory scheme precludes a finding that conduct that did not violate antitrust law prior to the Act can violate antitrust law after the passage of the Act. In other words, the Court suggests that context does not or may not alter outcomes.[26] Indeed, this reading of the antitrust savings clause is contrary

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[20] *Trinko*, 540 U.S. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). To be precise, the Court quoted *Colgate* only in part. *See id.* The Court omitted the introductory phrase, "In the absence of any purpose to create or maintain a monopoly . . ." *See id.* The Court also failed to note that *Colgate* articulated the rule in the context of a purely vertical distribution relationship. *See id.*
[21] 472 U.S. 585 (1985).
[22] *Id.* at 601.
[23] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (quoting 47 U.S.C. § 152, note (2000)).
[24] *Id.*
[25] *Id.*
[26] For another example of this leap in logic, *see, e.g.,* Covad Communications Co. v. Bell Atlantic Corp., 201 F. Supp. 2d 123, 131 (2002) (interpreting the antitrust savings clause to mean that "conduct that did *not* violate antitrust law prior to the 1996 Act does not now violate antitrust law after the Act.").

to numerous cases that recognize what we shall refer to here as the "Guiding Principle" for analyzing antitrust liability and remedies in regulated industries: the analysis must be context sensitive.

[9] The Court, in its opinion, twice pays homage to the Guiding Principle.[27] First, at the beginning of section 2, the Court recognizes that "[t]o decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles."[28] Again, at the beginning of section 4, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue . . . . 'antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.'"[29] Yet, when the Court considers whether *Trinko* fits into the *Aspen Skiing* exception (in section 3), it almost entirely ignores the "distinctive economic and legal setting" created by the Act.[30] The Court's only real consideration of substantive antitrust implications of the Act occurs in its analysis (in section 4), of whether *Trinko* merits an "expansion" of section 2 liability by the judicial creation of another exception to the *Colgate* rule.[31] For reasons never articulated, but which presumably have their genesis in the Court's "preserving" vs. "expanding" framework and the corollary reading of the antitrust savings clause, the Court applies the "traditional" exception to the *Colgate* rule articulated in *Aspen Skiing* as if the Act did not exist or is irrelevant.

[10] Before considering the details of the *Trinko* Court's methodology and its implications, it is useful to place it in context. Following the Guiding Principle, the typical line of inquiry in a regulatory antitrust case is, what area of voluntary, unregulated decision making or area of competition, if any, exists notwithstanding the regulatory scheme, and has the defendant allegedly or actually committed an antitrust violation in that

[27] *See infra* notes 28-29 and accompanying text.
[28] *Trinko*, 540 U.S. at 405.
[29] *Id.* at 411-12 (quoting Town of Concord v. Boston Edison, Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)); *accord, e.g.,* American Tel. & Tel. Co. v. MCI Communications, 748 F.2d 799, 1105-06 (7th Cir. 1984).
[30] *See Trinko*, 540 U.S. at 407-11.
[31] *See id*. at 411-15.

unregulated, competitive market?[32] The question assumes that, with respect to the regulated conduct, the regulatory scheme implicitly or expressly creates an antitrust immunity, or allows the defendant to avail itself of one or more other antitrust defenses, such as the "state action" or "filed rate" doctrines.[33] Painting with a broad, yet accurate, brush, courts typically have answered this question by following one of two methods: the *Otter Tail* method or the *Town of Concord* method.[34]

[11] The *Otter Tail* method is characterized principally by an analysis of the applicable antitrust standard and the inquiry into whether the plaintiff has alleged or proven the required elements, or whether the defendant has asserted a viable defense, under that standard.[35] Once the regulatory scheme has been analyzed to address the immunity question, the regulatory scheme generally assumes a secondary, but important, role in the antitrust liability and remedies analysis, by causing the courts to "'adjust their usual rules to the existence, extent, and nature of regulation.'"[36]

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[32] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973) (explaining that when "voluntary commercial relationships . . . are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to . . . override the fundamental national policies embodied in the antitrust laws."); *American Tel. & Tel. Co.*, 708 F.2d at 1103 ("The mere pervasiveness of a regulatory scheme does not immunize an industry from antitrust liability for conduct that is voluntarily initiated.") (citing *Otter Tail*, 410 U.S. at 374).

[33] The Court notes in *Trinko* that "a detailed regulatory scheme such as that created by the Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity," but recognizes that the savings clause bars this inquiry in this case. *Trinko*, 540 U.S. at 406. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 200-231 (2d ed. 2000) (discussing the relation between antitrust, federal regulation, and express and implied immunities).

[34] Undoubtedly, the generality of these two methods overlooks many nuances and details. Nonetheless, it is useful for our limited purpose of analyzing the regulatory methodology of the *Trinko* decision.

[35] *See generally Otter Tail*, 410 U.S. at 372-82 (1973).

[36] *American Tel. & Tel. Co.*, 708 F.2d at 1106. With respect to issues of monopoly in particular, "the presence of a substantial degree of regulation, although not sufficient to confer antitrust immunity, may affect both the shape of 'monopoly power' and the precise dimensions of the 'willful acquisition or maintenance' of that power." Id. (citing Keith S. Watson & Thomas W. Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 ANTITRUST BULL. 559, 563 (1977)).

[12] Thus, in *Otter Tail Power Co. v. United States*,[37] the Supreme Court considered whether a regulated electric utility violated section 2 by refusing to sell electricity at wholesale and refusing to "wheel" (transmit) power to municipal power companies who competed with it in the retail distribution market.[38] The Court disposed of the immunity defense by finding that the regulatory scheme in question created an area of competition in which commercial relationships are "governed in the first instance by business judgment and not regulatory coercion."[39] The Court then undertook an extended analysis of the application of section 2, and held that "Otter Tail used its monopoly power . . . to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws."[40] The Court considered and rejected the defendant's various defenses.[41] Specifically, the Court accepted both the factual finding that there were no technical factors that prevented Otter Tail from selling power wholesale or wheeling power and the finding that Otter Tail's conduct had no legitimate business purpose, and rejected the defendant's *Noerr-Pennington* defense,[42] along with the defendant's arguments that its willingness to wheel power to other customers relieved it of its duty to wheel or sell power to competing municipalities, and that if Otter Tail assisted its retail competitors, it would "go downhill."[43] The Court also considered the implications of the regulatory scheme in its discussion of the appropriate remedy.[44]

[13] Similarly, in *United States v. Marine Bancorporation*,[45] a government challenge to the merger of two commercial banks under section 7 of the Clayton Act, the Court's legal analysis began by discussing an essential element of a section 7 violation: the determination of the relevant product and geographic markets.[46] Following that discussion, the Court engaged in an extended analysis of the potential

[37] 410 U.S. 366 (1973).
[38] *See id.* at 373.
[39] *Otter Tail*, 410 U.S. at 374.
[40] *Id.* at 377 (citing United States v. Griffith, 334 U.S. 100, 107 (1948)).
[41] *See generally Otter Tail*, 410 U.S. at 372-82.
[42] AREEDA & HOVENKAMP, *supra* note 33, at 201b – 201c.
[43] *Id.* at 378-80.
[44] *Id.* at 381-82.
[45] 418 U.S. 602 (1974).
[46] Apparently no immunity issue was raised on appeal, and thus does not figure in the opinion.

competition doctrine in the context of the "extensive federal and state regulation of banks, particularly the legal restraints on entry unique to this line of commerce."[47] Based on this highly context-sensitive analysis, the Court rejected the government's merger challenge.[48]

[14] Issues of antitrust standing, and specifically, antitrust injury analyses that focus on whether the parties are competitors and whether there has been injury to competition, tend to follow the *Otter Tail* method. Thus, for example, in the seminal case applying the antitrust laws to deregulating electric utility markets, *City of Pittsburgh v. West Penn Power Co.*,[49] the United States Court of Appeals for the Third Circuit considered whether two fully regulated electric utilities conspired to eliminate competition in a geographic area when, after announcing their planned merger, one of the utilities withdrew its application to the regulatory body for a change in its certificate of service which, if granted, would have allowed it to compete with the other defendant-utility in that area.[50] The Court held that because the deregulated, competitive market was merely on the horizon and the market was still subject to a "comprehensive regulatory framework" prohibiting retail competition between the two defendant utilities, the plaintiff suffered no antitrust injury as a result of the utilities' alleged conspiracy and plan to merge.[51] In the absence of competition, plaintiff's injury "did not flow from the defendants' conduct, but, rather, from the realities of the regulated environment in which all three were actors."[52] The Court noted that if the case had come to it after the deregulatory scheme was in place, and if the two utilities were in fact competitors, its antitrust injury analysis would have been "radically different."[53]

[47] *Marine Bancorporation*, 418 U.S. at 606, 641.
[48] *Id.* at 641.
[49] 147 F.3d 256 (3d Cir. 1998).
[50] *Id.* at 261-62.
[51] *Id.* at 263.
[52] *Id.* at 265.
[53] *Id.* at 269. For additional cases adopting the Otter Tail Method, *see, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355-72 (1963) (bank merger challenge under Section 7 of the Clayton Act); Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp., 305 F.3d 89, 107-13 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004); Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002), *vacated by*, 124 S. Ct. 1143 (2004), *and rev'd in part*, 347 F.3d 1044 (11th Cir. 2004) (refusal to deal, essential facilities, and price squeeze claims under Section 2 of the Sherman Act); Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405 (3d Cir.

[15] In contrast, under the *Town of Concord* method, once the regulatory scheme has been analyzed to address the immunity issue, the inquiry proceeds in two steps.[54] First, it asks whether the *type* of claim at issue, considered outside of the regulatory context, is viable under relevant antitrust principles and policies, including what may generally be referred to as administrative or institutional constraints, such as clarity and predictability requirements.T[55] Second, it asks whether the regulatory context of the *type* of claim at issue should lead to an abandonment or modification of the conclusion reached in the first part of the analysis, or whether that context confirms the conclusion. [56]

[16] Thus, in *Town of Concord v. Boston Edison Co.*,T[57] the United States Court of Appeals for the First Circuit, speaking through then-Judge Breyer, examined on appeal, after a full trial and jury verdict in favor of the plaintiff, the question of whether an alleged price squeeze by a fully integrated electric utility violates the antitrust laws when it occurs in a fully regulated industry.[58] The court proceeded by (1) considering the "ordinary price squeeze" in an unregulated industry, (2) comparing the "ordinary price squeeze" to the "regulatory" price squeeze, and then (3) "noting that regulation makes a critical difference in terms of antitrust harms, benefits, and administrative considerations."[59] The court's analysis of the "ordinary price squeeze" in general, and not with specific reference to the facts of this case, concludes that the antitrust harms and pro-competitive benefits of a price squeeze in an unregulated environment are "closely balanced."[60] The court's equally general, non-case specific analysis of price squeezes in regulated industries begins with a statement of the standard to be applied (a balancing test in which the challenged

1997) (finding no antitrust injury); Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427 (9th Cir. 1996) (territorial allocation scheme under Section 1 of the Sherman Act); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1105-53 (1983) (various violations of section 2; "consideration of federal and state regulation may be proper [in the antitrust analysis] even after the issue of antitrust immunity has been resolved." *Id.* at 1105).

[54] *See infra* notes 56-61 and accompanying text.

[55] *See* Town of Concord v. Boston Edison Co., 915 F.2d 17, 21-22 (emphasis added).

[56] *See id.* at 22 (emphasis added).

[57] 915 F.2d 17 (1st Cir. 1990).

[58] *Id.* at 18.

[59] *Id.* at 23.

[60] *Id.* at 25.

practice's "*likely* anticompetitive effects" are balanced against "its potentially legitimate business justifications"[61]), takes note of the antitrust injury requirement, and then stresses as "particularly important" the administrative considerations of the need for "clear" and "administratively workable" antitrust rules.[62]

[17] Rather than analyze the elements of plaintiff's alleged section 2 violation and the defendant's asserted defenses, or the evidence actually presented at trial, the regulatory price squeeze discussion focuses on "the *likelihood* of major antitrust harm," the "*likelihood* of 'entry barrier' harm" in a regulated context,[63] and whether regulation makes "it less *likely* that a price squeeze" will drive out competitors.[64] The court, in refusing to hold that a regulatory price squeeze violates section 2, relies heavily on "institutional reasons" that may harm consumer welfare and "chill" and "discourage" legitimate price competition and the "administrative difficulties" in having judges and juries embark upon rate regulation.[65] Finally, the court defers to administrative remedies as more efficient and appropriate tools for correcting a poor cost-allocation scheme or rate schedule.[66] Thus, the court concludes that a price squeeze in a fully regulated industry "*will not normally*" violate section 2,[67] but may do so in cases involving "exceptional circumstances."[68] The court states, "in light of the regulatory rules, constraints, and practices, the price squeeze at issue here *is not ordinarily* exclusionary, and for that reason, it does not violate [section 2 of] the Sherman Act."[69] The court does not consider whether the case at bar involves any "exceptional circumstances."[70] Rather, it proceeds in homage to the *Otter Tail* method by analyzing the

[61] *Id.* at 21 (emphasis added).
[62] *Id.* at 21-22.
[63] *Id.* at 25-26 (emphasis added).
[64] *Id.* at 26 (emphasis added).
[65] *Id.* at 26-27.
[66] *Id*. at 28.
[67] *Id*. at 28 (emphasis added).
[68] *Id.* at 29.
[69] *Id.* at 22 (emphasis added).
[70] *See id.* at 29 ("Even so, we have limited our holding by stating that "normally" a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly, thereby leaving cases involving exceptional circumstances for another day.").

relevant market and finding that the defendant did not have market power, and thus did not prove an essential element of a section 2 violation.[71]

[18] *Trinko* distinguishes itself because its analytical method does not follow either the *Otter Tail* or *Town of Concord* methods. The two-part structure of the Court's analysis echoes the *Town of Concord* method, and yet the first part of that analysis -- that is, whether the case fits into existing refusal-to-deal precedents, specifically, *Aspen Skiing* -- is very different from that of the *Town of Concord* method because it abandons the generality of that method. Moreover, its framing of the two-part method as an analysis of "traditional" vs. "expanded" antitrust principles is foreign to the *Town of Concord* method.

IV. ELEVATING THE FACTS OF *ASPEN SKIING* TO SUBSTANTIVE PRINCIPLES

[19] Consistent with the first part of the *Town of Concord* method, in analyzing whether the facts alleged by Trinko fit within the *Aspen Skiing* exception to the general right of a monopolist to refuse to deal, the Court ignores almost entirely the regulatory landscape created by the Act. In addition, the Court assumes that the inquiry addressing whether *Trinko* fits into existing antitrust principles requires that the case be analyzed as if it were a refusal-to-deal case arising in a non-regulated market. Finding that Trinko could not sustain his section 2 claim in the unadorned hypothetical market in which the Act does not exist, the Court holds that "[t]he refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*."[72] *Trinko,* however, cuts a new path in its

[71] *Id.* at 29-32. We are aware of no cases that clearly follow the *Town of Concord* method. Arguably, the United States Court of Appeals for the Seventh Circuit followed this Method in broad outline in *Goldwasser v. Ameritech Corp.,* where the court first considered whether the affirmative duties to assist one's rivals imposed by the Act exist "under the unadorned antitrust laws," and found that they do not, and then analyzed the "elaborate enforcement structure" under the Act and concluded that the antitrust laws "would add nothing to the oversight already available under" the Act. 222 F.3d 390, 400 (7th Cir. 2000). Verizon's brief to the Court in *Trinko* urged the Court to adopt the *Town of Concord* "analytical framework" and cited *Goldwasser* and *Cavalier Telephone LLC v. Verizon Virginia, Inc.*, 330 F.3d 176 (4th Cir. 2003), as examples of this "framework." *See* Brief for Petitioner at 16-17, Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, 2003 WL 21244083 (U.S. 2003) (No. 02-682).

[72] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409 (2004).

"ordinary" or "unregulated" market analysis by abandoning the generality of the first part of the *Town of Concord* method -- that is, the antitrust analysis of this *type* of claim generally in an unregulated market -- and asks instead whether *Trinko* is factually on point with existing refusal-to-deal precedent as embodied in one case, namely, *Aspen Skiing*.[73]

[20] According to the *Trinko* Court, a principal criterion for liability in *Aspen Skiing* was the defendant's unilateral termination of a voluntary cooperative venture.[74] The Court reasons that "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits solely to achieve [the] anticompetitive end" of driving a competitor from the market.[75] By contrast, in *Trinko*, the complaint did not allege that Verizon participated in a voluntary cooperative scheme with its rivals, or would have done so absent statutory compulsion.[76] The *Trinko* Court finds this distinction significant insofar as the lack of a prior cooperative scheme between Trinko's supplier, AT&T, and Verizon "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."[77]

[21] This analysis is cryptic, at best. Presumably, the Court is not attempting to resurrect subjective intent as an element of a section 2 monopolization violation, since it recognizes earlier in the opinion that anticompetitive or exclusionary *conduct* is at the heart of a section 2 monopolization violation, not subjective intent.[78] Moreover, in *Aspen*

[73] *See infra* note 72 and accompanying text.
[74] *Trinko*, 540 U.S. at 409.
[75] *Id.* (emphasis in the original).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 407. Thus, *Aspen Skiing* teaches that, for purposes of a section 2 monopolization cause of action, "[e]vidence of intent is merely relevant [not essential] to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'…." *Aspen Skiing*, 472 U.S. at 602; *accord, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (explaining that monopolization analysis is concerned with "the effect of [the challenged] conduct, not upon the intent behind it" and that the monopolist's subjective intent "is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct"). *But see, e.g., Covad Communications*, 299 F.3d at 1283-84 ("An assessment of intent is critical in determining

Skiing, the Court recognized that evidence of intent need not be direct.[79] Intent may be inferred from conduct because "no monopolist monopolizes unconscious of what he is doing."[80] Thus, in *Aspen Skiing*, because the defendant unilaterally terminated its participation in a profitable cooperative venture and could not explain how its conduct made economic sense apart from harming competition, the Court concluded that the jury reasonably could have inferred that the defendant engaged in "willful" monopolization when the defendant sacrificed short-term profits for long-term monopoly gain.[81] Perhaps, then, the Court's implicit point is that without a prior voluntary cooperative scheme between the parties, the inference to anticompetitive or exclusionary intent from conduct is impossible or impracticable. In other words, without a prior voluntary scheme, there is no baseline for or no standard of economically efficient conduct, which if deviated from by the defendant, allows the inference of anticompetitive intent. Yet this cannot be right, or if it is, it requires argument to show it, and the court offers none.[82] It can very reasonably be argued that the statutory requirements of cooperation under the Act occupy the same analytic role as the voluntary cooperation in *Aspen Skiing*; that is, both set the standard for presumptively economically efficient conduct, deviations from which, without a legitimate business justification, may constitute a section 2 violation.[83]

[22] The Court also found a "more fundamental" difference between *Trinko* and *Aspen Skiing*, namely, that[84] in *Aspen Skiing*, the defendant refused to provide its competitor with a product that it already sold at retail, whereas in *Trinko*, the product (i.e., the unbundled elements offered pursuant to section 251(c)(3) of the Act) was offered under statutory compulsion at wholesale to competitors, not consumers.[85] These distinctions may be principled and material, but the Court's opinion does

whether an accused monopolist's actions qualify as anti-competitive conduct."), *vacated by* 540 U.S. 1147, *remanded to* 374 F.3d 1044 (11th Cir. 2004).

[79] *Aspen Skiing*, 472 U.S. at 603 n.28.

[80] *Id.* (quoting United States v. Aluminum Co. of Am., Inc., 148 F.2d 416, 432 (2d Cir. 1945)); *Aspen Skiing*, 472 U.S. at 611 n.44.

[81] *Aspen Skiing*, 472 U.S at 608, 610.

[82] *See generally Aspen Skiing*, 472 U.S. 585.

[83] *See infra* Part VI.

[84] *See infra* note 85 and accompanying text.

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

not explain why.[86] In addition, the retail/wholesale distinction drawn by the Court is arguably not meaningful since the Court recognizes, in the same paragraph, that the market in question in *Otter Tail* was a wholesale market[87] and no one has ever seriously suggested section 2 does not apply to wholesale markets.[88] The fact that in both *Aspen Skiing* and *Otter Tail* the challenged conduct involved the defendant's discrimination between one class of customers (the plaintiff) and another class (purchasers to whom sales of the same product were made) may be relevant to establish lack of a legitimate business justification. The Court, however, does not say this, but simply leaves unspoken the significance of the discrimination present in *Aspen Skiing* and not alleged in *Trinko*.[89]

[23] At the end of its discussion of whether Trinko's complaint falls within the *Aspen Skiing* exception, the Court notes that Trinko argues that "the existence of sharing duties under the 1996 Act supports its case."[90] This suggests that the Court would undertake a regulatory-context-specific antitrust application of *Aspen Skiing* to the facts alleged by Trinko. Instead, the Court declares in conclusory fashion and wholly out of context: "We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access."[91] This conclusion does not rest easily with the Act's antitrust savings clause. If Trinko has a section 2 claim, the savings clause expressly preserves it,[92] and packaging a finding of implied immunity as "judicially imposed forced access" does not change the judicial nullification of the savings clause. Moreover, this peremptory declaration terminates the analysis just where it could instructively begin.[93]

[24] In sum, by the end of section 3, relying only on the factual distinctions between this case and *Aspen Skiing*, the Court concludes that

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[86] *See generally Trinko*, 540 U.S. at 410-16.
[87] *Id.* at 410**.**
[88] See e.g. Burrough of Landsdale v. Philadelphia Electric Co., 517 F. Supp. 218 (E.D. Pa. 1981); Town of Norwood v. New England Power Co., 202F.3d 408 (1st Cir. 2000); *In re* Pacific Gas & Electric 295 BR 635 (N.Dist. Ca 2003).
[89] *See generally Trinko*, 540 U.S. 398.
[90] *Id.* at 411.
[91] *Id.*
[92] *See infra* note 23 and accompanying text.
[93] *See infra* Part VI.

Verizon's alleged refusal to deal does not constitute "a recognized antitrust claim under this Court's existing refusal-to-deal *precedents*."[94] The section 3 analysis does not follow either the *Otter Tail* or *Town of Concord* methods. Although the Court's analysis is facially similar to the *Town of Concord* method because the first part of its analysis considers Trinko's refusal to deal claim in an unregulated context, as an "ordinary" refusal to deal claim, it differs significantly.[95] Specifically, it abandons the generality of the first part of the *Town of Concord* method and instead inquires whether *Trinko* is factually on point with *Aspen Skiing*.[96] This analytic departure from the *Town of Concord* method is significant because, without explanation, it raises the facts of *Aspen Skiing* to the level of principle. The Court does this by apparently declaring that unless the facts of future refusal-to-deal cases in a regulated or deregulating market involve a unilateral termination of a voluntary cooperative scheme in a retail market and a sacrifice of short-term profits without a legitimate business justification, there will be no section 2 monopolization cause of action.[97] In other words, the Court effectively held that a section 2 refusal-to-deal monopolization cause of action will exist only when, as in *Aspen Skiing*, the rivals voluntarily were engaged in a form of joint venture which had demonstrable efficiencies (e.g., making available at retail a product that otherwise would not exist or making available at retail a higher quality product), and one of the parties to that voluntary cooperative venture withdraws without any legitimate business justification. But no section 2 cause of action will lie when, as alleged in *Trinko*, a regulatory statute designed to break up retail monopolies and promote retail competition places the plaintiff and defendant in a compulsory buyer-seller relationship in a wholesale market, and the seller refuses to sell its products or services to the buyer in violation of the statute even when such a refusal to assist one's rival thwarts the pro-competitive ends of the regulatory statute, or when the refusal-to-deal allegedly or demonstrably harms economic efficiency and consumer welfare.

[94] *Id.* at 410 (emphasis added).

[96] *See id.* at 409-10.
[97] *See id.* at 409-11.

[25] While it is indisputably true that the facts alleged in *Trinko* do not fall within the "existing" or "traditional" refusal-to-deal *precedent* of *Aspen Skiing*, it hardly follows that *Trinko* does not fall within or should not be analyzed under "existing" or "traditional" refusal-to-deal section 2 *principles* or that application of these principles to the context created by the Act necessarily requires an "expansion" of the *Colgate* exception. The Court's jurisprudential sleight of hand transforms the facts of *Aspen Skiing* into the sole model and standard for all refusal-to-deal cases under section 2, including regulatory refusal-to-deal cases. Benjamin Disraeli had it right when he stated, "a precedent embalms a principle."[98]

V. THE REGULATORY SCHEME AND THE EXPANSION OF SECTION 2 EXCEPTIONS TO THE *COLGATE* RULE

[26] The Court engages in an extended analysis of the antitrust implications of the Act's regulatory scheme only in section 4 of the majority opinion.[99] The Court, implicitly adopting the second part of the *Town of Concord* method, articulates three reasons against creating another exception to the rule that there is not a general affirmative duty to assist competitors.[100]

[27] As in the prior discussion of whether Trinko's claims fit into the *Aspen Skiing* framework, the Court never addresses the issue of what substantive section 2 standard applies to determine whether there is section 2 liability for the alleged violations of the Act.[101] The Court does not consider, for example, whether the "sacrifice test" apparently adopted by *Aspen Skiing*[102] should apply to the regulatory scheme created by the Act and the facts alleged by Trinko.[103] The Court also does not find that

[98] Benjamin Disraeli, Speech on the Expenditures of the Country (Feb. 22, 1848), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 502 (Emily M. Beck ed., 1980).
[99] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411-16 (2004).
[100] *Id.*
[101] *Id.* at 409.
[102] *Id.* at 411-16. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 610-11 (1985) (providing that section 2 is violated when the monopolist sacrifices, with no legitimate business purpose, short term profits or other business advantage solely to obtain a long-term monopoly profit by driving a competitor from the market or creating a barrier to entry).
[103] *See generally Trinko,* 540 U.S. at 408-16.

Trinko's complaint fails to allege one or more elements of a section 2 violation, or that Trinko lacks antitrust standing.[104] Instead, adopting the generality of the *Town of Concord* method, the Court considers, (a) whether the regulatory framework created by the Act "'[d]iminishes the *likelihood* of major antitrust harm;'"[105] (b) whether the "slight benefits" of antitrust intervention outweigh its costs; [106] and (c) the administrative difficulties in judicial supervision of the requirement of compulsory access under the Act, especially when, as here, the plaintiff seeks injunctive relief.[107]

[28] Thus, the Court finds no section 2 cause of action because the perceived small "likelihood" of "major" antitrust injury, the judicial limitations on finding actual antitrust violations and avoiding false positives, and the judicial limitations on administering remedies militate against an "expansion" of section 2 liability.[108] While one might argue that it would have been more judicious for the Court to allow discovery to proceed to determine whether there was *in fact* "major" antitrust injury and, if so, whether viable remedies could be fashioned, this part of the opinion at least takes seriously the regulatory context in which section 2 would be applied and follows a recognized regulatory antitrust methodology.

VI. CONTEXT-SPECIFIC REGULATORY ANTITRUST ANALYSIS APPLIED TO TRINKO'S COMPLAINT

[29] Following the Guiding Principle of regulatory antitrust analysis, the affirmative duties of cooperation created by the Act and its purpose of creating a competitive retail market should have led the Court to undertake an inquiry that is the converse of the typical regulatory antitrust inquiry. That is, rather than asking what area of competition exists notwithstanding the regulatory scheme, the Court should have asked two questions: (1)

[104] *See generally Trinko*, 540 U.S. at 408-16.
[105] *Trinko*, 540 U.S. at 412 (quoting Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)) (emphasis added) (finding that the Act's regulatory framework does "diminish[ ] the likelihood of major antitrust harm" in certain circumstances).
[106] *Id.* at 414 (finding that the cost and likelihood of false positives outweigh any benefits from "an undue expansion of § 2 liability").
[107] *Id.* at 415.
[108] *Id.* at 412-15

what area of competition exists by virtue of the Act, and (2) does Verizon's alleged conduct in or related to that market constitute a violation of section 2? In other words, a context-sensitive antitrust inquiry would be informed by the recognition that the antitrust violation in *Trinko*, if any, occurred not because an area of actual competition exists notwithstanding the regulatory scheme, as in the typical regulatory antitrust analysis, but rather because the Act requires incumbent local exchange carriers ("ILECs") to undertake "cooperative" actions -- namely, the compelled participation in a "wholesale market for leasing network elements"-- that create necessary conditions for a competitive retail market. [109] Significantly, this inquiry does not dictate method; thus, it could proceed through either the *Otter Tail* or *Town of Concord* method. If the Court had adopted the *Town of Concord* method, the first part of its analysis would have focused on issues created by refusal-to-deal claims *generally* in an unregulated market; part two of the analysis may have focused on the types of considerations that are raised in section 4 of *Trinko*.[110] It is instructive to examine where the analysis may have led had the Court adopted the *Otter Tail* method to address this question.

[30] Had the Court engaged in a context-sensitive *Otter Tail* analysis, its antitrust analysis may have proceeded in accordance with the following sequential steps. First, the Court would consider that the defendant allegedly violated its affirmative duties of cooperation under the Act.[111] Second, the Court would acknowledge that Congress imposed the affirmative duties under the Act in order to facilitate retail market entry by competitors, to breakup entrenched monopolies by ILECs, and to promote retail competition.[112] Third, the Court would determine that these goals are, at least, not inconsistent with the goals of section 2. Fourth, under the applicable standard for section 2 liability (whatever the Court may have determined that to be, either the sacrifice test or some other), [113] the Court

[109] *Id.* at 409-10.
[110] Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990).
[111] *Trinko*, 540 U.S. at 403.
[112] *Id.* at 401, 415.
[113] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 610 (1985). Alternatively, it may have selected one of the following standards: whether the challenged conduct excludes an equally or more efficient competitor, *see* RICHARD A. POSNER, ANTITRUST LAW 194-95 (2d ed. 2001); "whether the challenged practice places rival competitors at a cost disadvantage sufficient to allow the [monopolist] to exercise

would determine whether the alleged violation of affirmative duties of cooperation under the Act (a) states a per se (or ipso facto) monopolization cause of action under the applicable section 2 standard, (b) creates a rebuttable presumption of a violation of the applicable section 2 standard, (c) stands as merely probative evidence of a section 2 violation, or (d) none of the above.[114] Fifth, and finally, depending on the answers to the fourth step, the Court would conclude with a statement of the holding of the case.

[31] Had the Court undertaken this type of *Otter Tail* analysis, it may have concluded, as did the concurring Justices, that Trinko had no standing to assert his section 2 claims.[115] Trinko alleged that Verizon's antitrust violations occurred in the "wholesale market for leasing network elements," that is, that Verizon was not satisfying its statutory affirmative obligations of providing complete and timely access to its network.[116] In this compulsory wholesale market, however, Verizon and AT&T stood in the relationship of a seller and buyer, respectively. Generally, a purchaser has no section 2 cause of action against its seller in the market in which the sale occurs, since the buyer and seller are not competitors in that market, and the injury suffered by the buyer and caused by the seller is not injury to the competitive process in that market.[117] This hornbook rule has limits, however, and the Court has found standing when the plaintiff is the customer of the defendant's competitor and the customer's injuries are "[t]he very means by which . . . [the defendant seeks] to achieve its illegal

monopoly power by raising its price," *see* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 214 (1986); whether (1) "the monopolist['s] [alleged exclusionary conduct] has improved its own efficiency or (2) by impairing rival efficiency whether or not it enhances monopolist efficiency," *see* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 256 (2003); or whether the pro-competitive effects outweigh the anticompetitive harms in a section 2 rule of reason balancing test, *see* United States v. Microsoft Corp., 253 F.3d 44, 76-77 (2001).

[114] *See generally* Otter Tail Power Co. v. United States, 410 U.S. 366, 372-77 (1973).

[115] *Trinko*, 540 U.S. at 416-18 (Stevens, J., Souter, J., Thomas, J. concurring).

[116] *Trinko*, 540 U.S. at 410 (quoting Verizon Communications Inc. v. FCC, 535 U.S. 528, 574 (2002)).

[117] *See, e.g.*, Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 539 (1983); Schuylkill Energy Res. Inc. v. Pa. Power & Light Co., 113 F.3d 405, 415-17 (3rd Cir. 1997); *see also* Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995).

ends."[118] The Court could have considered whether Verizon's alleged injury to AT&T in the wholesale market was "the very means by which" Verizon injured competition between itself and AT&T in the retail market, where the two companies were competitors, and hence actionably injured Trinko. That analysis, whatever its conclusion, would at least have applied section 2 in a context-sensitive manner.[119]

[32] More substantively, had the Court undertaken the *Otter Tail* analysis outlined above or some variant thereon, it would have articulated the applicable section 2 standard and discussed how this standard applies to the facts alleged and the competitive conditions and retail market created by the Act. Had the Court considered the sacrifice test independent of the specific facts of *Aspen Skiing*, for example, it would have been compelled to analyze whether the compulsory cooperation at issue affected Verizon's economic incentives such that the sacrifice test is or is not an appropriate standard by which to determine whether its alleged conduct injured economic efficiency or consumer welfare.[120] The economic presumption underlying the sacrifice test is that profit-maximizing conduct, in most market circumstances, is economically efficient and promotes consumer welfare, such that when a monopolist sacrifices profits in the short-term without a legitimate business justification—with no purpose other than to drive rivals from the market—then that conduct harms economic efficiency and consumer welfare and is exclusionary under section 2.[121] A regulatory scheme, however, can render inappropriate this presumption that profit-maximizing conduct is economically efficient.[122] When, as in *Trinko*, compliance with the regulatory scheme involves the sacrifice of short-term profits, and when Congress has enacted the scheme to eliminate existing monopolies and to promote competition, then violation of the

[118] Blue Shield of Va. v. McCready, 457 U.S. 465, 479 (1982).
[119] *Compare* this context-sensitive analysis to the three-Justice concurring opinion, which finds that Trinko lacked standing, *to* Goldwasser v. Ameritech Corp., 222 F.3d 390, 398-99 (7th Cir. 2000) (finding through a context-sensitive standing analysis that customers of an ILEC's competitors have standing).
[120] *See infra* note 125 and accompanying text; Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608, 610-11 (1985) (discussing the "sacrifice" test).
[121] *See infra* note 125 and accompanying text.
[122] *See infra* note 125 and accompanying text.

statute may be profit-maximizing and contrary to economic efficiency and consumer welfare.[123]

[33] This point has been made powerfully by four leading economists in their amici brief:

> Strict application of the sacrifice test would gauge the profitability of the examined conduct against the benchmark of existing price and industry structures: interpreted in this way, the local telephone monopolist does not incur a "sacrifice" by refusing to grant a competitor wholesale access to its network if the price offered by the rival generates less profits to the monopolist than selling to the rival's prospective customers at retail (and excluding the rival). The sacrifice test's illuminative power rests legitimately on the presumption that in ordinary market conditions, profit-driven conduct that merely preserves existing market pricing structures is unobjectionable. In contrast, where, as in the local telephone context, the base-level pricing structures and refusals to deal have been explicitly repudiated as anticompetitive by legislation designed to foster competition, such a presumption is plainly inappropriate.
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> . . . .
>
> Where Congress explicitly forbids conduct on the grounds that it would prevent the very competition that Congress is affirmatively seeking to foster, there is no rational basis to presume (as the sacrifice test properly does in other contexts) that the current level of profit constitutes the appropriate benchmark with which to evaluate the incumbent's strategy for granting access. In other words, in regulated industries, inflexible utilization of a "sacrifice" test -- at least as measured against a benchmark of monopoly profits resulting from flouting regulations designed to foster competition -- is invalid as a matter of

[123] *See infra* note 125 and accompanying text.

> economics, because there can be no legitimate presumption that such unimpeded pursuit of profits is not anticompetitive and serves the public interest. Conversely, conduct that does not seem to entail a voluntary sacrifice may nevertheless constitute willful monopolization because the firm's conduct choices are inconsistent with regulations that have been expressly found necessary for protection of the public interest. [124]

On this view, the Act's provisions mandating cooperation occupy the same analytic role as the voluntary cooperative scheme in *Aspen Skiing*, that is, they establish the baseline for presumptively economically efficient conduct, departures from which, when challenged, must have a legitimate, i.e., not solely exclusionary, business purpose.[125]

[34] Had the Court undertaken an *Otter Tail* analysis, and as part of this analysis, considered this view of the analytic role of the compulsory affirmative duties of cooperation under the Act, it could then have addressed what evidentiary significance, if any, the lower court should afford to Verizon's alleged violation of these duties. Trinko argued that "[c]onduct by an incumbent that violates the Act or obstructs its core objectives [of promoting competition] cannot be said to have a 'legitimate business purpose' -- even when the monopolist might be maximizing its short-term profits by sabotaging the competitive entry the 1996 Act seeks to enable."[126] Such an approach may be read as urging a per se rule for monopolization in this context: an incumbent monopolist that violates the Act is thwarting the pro-competitive goals of the Act and cannot have a legitimate business purpose, and hence its violations of the Act are per se violations of section 2.[127] Most significantly, in view of the Court's

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[124] Brief of Amici Curiae Economics Professors in Support of Respondent, Verizon Communications Inc. v. Law Office of Curtis V. Trinko, 2003 WL 21767976, at *17, *20-21 (No. 02-682) [hereinafter Brief of Economics Professors].
[125] The discussion in this and the prior paragraph rely heavily on the arguments of the Amici Brief of Economics Professors, *supra* note 124.
[126] Respondent's Brief, 2003 WL 21767982 at *32.
[127] *Compare* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 2003 WL 21269559 at *7 (No. 02-682) [hereinafter DOJ/FTC Brief] ("But conduct that violates the obligations imposed by the 1996 Act does not ipso facto violate

framing of the case as a choice between "preserving" or "expanding" "traditional antitrust principles," the Court was not compelled to create this new category of antitrust violations. It might simply have concluded that violations of the cooperative duties under the Act create a rebuttable presumption or are merely probative of a section 2 violation.[128] The Court may even have concluded that the violation had no probative value at all, on the ground that (a) Trinko did not allege that Verizon's conduct entailed financial sacrifice, and absent a sacrifice of short-term profits that makes sense only if it eliminates or impairs competition, section 2 does not impose a general duty on a firm to injure itself to benefit a rival,[129] or (b) the Act imposes affirmative duties that go well beyond what section 2 requires on its own such that allegations of a violation of the Act tell us nothing about whether section 2 was violated. The Court's concluding remarks strongly suggest that it would favor this latter alternative.[130]

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the antitrust laws."), *with Goldwasser,* 222 F.3d at 400 (a violation of the Act does not automatically count as exclusionary behavior under section 2).

[128] *See* Brief of Economics Professors, *supra* note 124, at *24-*25 (rejecting the suggestion that a violation of a competition-enhancing law automatically establishes a section 2 violation); Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 305 F.3d 89, 112 (2d Cir. 2002) (the ILEC's breach of an interconnection agreement "[*m*]*ay in some cases* be a means by which the ILEC improperly excludes competition from the market.") (emphasis added), *rev'd and remanded by* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); IIIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 249 (2d ed. 2002) ("[W]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws.") (citing as examples, false advertising, product disparagement, the filing of baseless legal proceedings, and the violation of regulatory requirements).

[129] This, of course, is the position championed by Verizon and the FTC and DOJ. *See, e.g.,* Petitioner's Brief, 2003 WL 21244083, at * 21, *26-*27 (treating the sacrifice test as an instance of the more general rule that conduct constitutes monopolization only if it makes no business sense except for its enabling of monopoly returns from lessened competition); DOJ/FTC Brief, *supra* note 75, at *7, *15-*16, *20; *see also* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS ¶ 773, at 211 (5th ed. 2002) ("no firm has a general duty to injure itself in order to benefit a rival").

[130] Section 2 tolerates the existence of monopolies and only condemns monopolization and attempted monopolization. The Act goes further and is intended "to uproo[t] the incumbent LEC's monopoly and to introduce competition in its place." *Trinko*, 540 U.S. at 402 (quoting Verizon Communications Inc. v. FCC, 535 U.S. 467, 488 (2002)). The Act is "much more ambitious than the antitrust laws [in that it attempts] 'to *eliminate the monopolies* enjoyed by' [ILECs, whereas section 2, by contrast,] seeks merely to prevent

[35] In short, the context-sensitive application of "traditional," "pre-existing," or "existing" antitrust principles to the regulatory scheme created by the Act does not lead necessarily to an "expansion" of exceptions to the *Colgate* rule, because that application is not sufficient to determine an answer to the standing issue, the issue of the evidentiary significance, if any, of a monopolist's violations of the Act, or the issue of what substantive section 2 standard is to be applied to determine the legality of Verizon's alleged conduct. In addition to the standing hurdle raised by the facts alleged, the Court might have concluded—after analysis of the different goals of the Act and section 2, through adoption of the sacrifice test or some other substantive section 2 standard, through a rejection of the essential facilities doctrine or the monopoly leveraging theory, or for other reasons—that the complaint's allegations of violations of duties of cooperation under the Act did not create antitrust liability under section 2. Yet locked in the grip of its "preserving-versus-expanding" framework and its elevation of the petrified facts of *Aspen Skiing* to the level of antitrust principles—in a sharp and novel departure from the generality of the first part of the *Town of Concord* method—the majority opinion fails to address the challenging questions raised by an application of either of the two principal "traditional" and "pre-existing" context-specific regulatory antitrust methodologies.

VII. IMPLICATIONS

[36] It is too early to predict whether *Trinko's* abandonment of the generality of the first part of the *Town of Concord* method and its counterfactual fealty to the facts of one prior refusal-to-deal case represent a new method for regulatory antitrust analysis or a case-specific detour. If *Trinko's* cementing the facts of *Aspen Skiing* into antitrust principles is not modified in future decisions, then whenever a regulatory scheme places rivals in the roles of compulsory seller and purchaser in a wholesale market, a viable section 2 refusal-to-deal cause of action is unlikely, either

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unlawful monopolization." *Id.* at 415 (quoting *Verizon*, 535 U.S. at 476) (emphasis in original). Accordingly, the Sherman Act does not give the judiciary a license to insist that monopolists alter their way of doing business "whenever some other approach might yield greater competition." *Id.* at 415-16. In *Goldwasser*, the Seventh Circuit adopted this view after extended analysis. *See* 222 F.3d at 400-01. In contrast, in *Trinko*, these remarks are found in the conclusion of the majority opinion, entirely out of context, and without the benefit of any prior supporting argument. *See* 540 U.S. at 415-16.

for lack of standing or because a requisite section 2 element will be deemed to be lacking. In these circumstances, an incumbent that refuses to deal with its competitors apparently will have no antitrust liability even when such a refusal to deal contravenes the procompetitive goals of the regulatory scheme and even when the regulatory statute contains an antitrust savings clause. If, however, the regulatory scheme requires that rivals exchange like goods (e.g. a mandatory patent pool or mandatory cross-licensing of intellectual property) or participate in some form of joint venture so that the rivals individually or jointly can provide a higher quality product or a product that would not otherwise be available to the consumer, under *Trinko* a finding of a viable section 2 cause of action is more likely, since this generally describes the facts of *Aspen Skiing*. Moreover, if *Aspen Skiing* is now the standard for section 2 liability for all regulatory refusal-to-deal cases, then it appears that the sacrifice test governs all such cases, even when the regulatory scheme may so alter the normal economic interests of the monopolist that the application of the test may bless conduct that is economically inefficient and harms consumer welfare.

[37] If *Trinko's* fealty to the facts of prior antitrust precedent as constituting the proper antitrust standard in the ordinary, nonregulatory context does represent a new, viable modification of the *Town of Concord* method, that raises a host of unanswered questions, including:

> 1) what is the justification for this departure from prior regulatory antitrust methodology as found in *Otter Tail*;
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> 2) what are the limitations, if any, of this type of modified *Town of Concord*, or *Town of Concord/Trinko*, method for future regulatory antitrust cases; does it, for example, apply only to refusal-to-deal claims, or does it also apply to all other types of regulatory antitrust claims, such as price squeezes and mergers; and
>
> 3) what are the implications of this modified *Town of Concord* method for the application of the *Otter Tail* and *Town of Concord* methods in future regulatory antitrust cases; does *Trinko* implicitly overrule these methods for all, some, or no future cases; if there are now two regulatory

> antitrust methods recognized by the Court—the *Otter Tail* and the modified *Town of Concord* methods—then what are the principles by which it is determined that one or the other should apply—especially critical if in some cases the selection of a method may tend to be outcome-determinative.

[38] In short, *Trinko* has introduced additional uncertainty into an area of law that is not burdened by an excess of clear and sharp rules. Business conduct and planning, and antitrust counseling, have thus taken on an additional layer of uncertainty and complexity.