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Mandatory Access Obligations and Standing

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I. INTRODUCTION

The Supreme Court's January 2004 decision in the *Trinko* case[1] was eagerly awaited by both the antitrust and telecommunications bars. The case focused on the intersection of antitrust law and the Telecommunications Act of 1996.[2] Antitrust law is supremely concerned with competition, and the heart of the 1996 Act was its effort to create meaningful competition in local telecommunications.[3] The Court had already wrestled twice with the 1996 Act's competition structure in *Iowa Utilities*[4] and *Verizon*,[5] but neither of those had required consideration of antitrust law.

Plus, *Trinko* was a twofer. Not only did it pose the intersection questions just described, but it raised interesting substantive and standing issues. The 1996 Act creates a mandatory dealing regime for local telecommunications companies. Antitrust has its own flavors of mandatory dealing obligations, captured most directly by the Supreme Court in *Terminal Railroad*,[6] *Associated Press*,[7] and *Aspen Skiing*.[8] How the Court would

* Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. A prior version of this paper was presented in December 2002 at a conference at the Center for the Digital Economy at the Manhattan Institute under the name *Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act?*. I thank the Paul Leffmann Fund, The Russell J. Parsons Faculty Research Fund and the John M. Olin Program in Law and Economics at The University of Chicago Law School for their generous research support, and through the Olin Program, Microsoft Corporation and Verizon.

1. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
2. *Id.* at 405-07.
3. For skeptical commentary about the utility of the Supreme Court's efforts in those cases, see Douglas Lichtman & Randal C. Picker, *Entry Policy in Local Telecommunications:* Iowa Utilities *and* Verizon, 2002 SUP. CT. REV. 41.
4. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).
5. Verizon Commc'ns v. Fed. Commc'ns Comm'n, 535 U.S. 467 (2002).
6. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
7. Associated Press v. United States, 326 U.S. 1 (1945).
8. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

confront those doctrines was likely to be interesting in and of itself, and the standing issues in *Trinko* might force the Court to revisit its important analysis in *Illinois Brick*[9] of how we should allocate the right to sue between purchasers and indirect purchasers. The lower court case law—in particular, *Goldwasser*,[10] *Covad*,[11] and the Second Circuit opinion in *Trinko*[12]—had provided an interesting range of thoughts on these questions and therefore the Supreme Court had a great deal to work with.

In this Article, I consider the standing question. *Trinko* resolves some core substantive questions about mandatory dealing in antitrust. Well, not really, or perhaps, not really; we will be fighting about what *Trinko* actually said for some time.[13] But *Trinko* certainly addresses quite directly the mandatory dealing issue, at least in the context of the 1996 Act, and we and the lower courts will have to figure out what propositions *Trinko* stands for. But that is not my mission here. Given its substantive resolution of *Trinko*, the majority opinion did not need to resolve the standing issue, and we get few freebies from the Court these days.[14] Justice Stevens, joined by Justices Souter and Thomas, addressed standing in his opinion concurring in the judgment, concluding that the consumer customer should not be found to have standing to address the scope of the mandatory dealing obligation.

That is the question I consider in this Article. Part II briefly describes some of the relevant case law. Part III presents a simple model of the social welfare consequences of an access breach and various approaches to assigning lawsuit rights to entrants and consumers. Part IV matches up the results of the model with how the substantive law of antitrust and the 1996 Act interact together and with standing rules for telecommunications and antitrust. In particular, Part IV matches the model with the antitrust doctrine in *Illinois Brick*, which bars consumers from suing their remote sellers—typically manufacturers, but here possibly the local exchange carrier required by the 1996 Act to give access to unbundled network elements.

II. A QUICK TOUR OF THE CASES

To plunge in and set the scene quickly, consider the three key courts of appeals decisions that set up the Supreme Court's consideration of *Trinko*. In mid-2000, the Seventh Circuit issued its decision in *Goldwasser v. Ameritech Corp.*[15] In *Goldwasser*, consumer plaintiffs brought a class action complaint against their local phone company.[16] The complaint set forth twenty alleged violations of the 1996 Act.[17] These were alleged as violations of the Act itself, and without more, as violations of section 2 of

9. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

10. Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000).

11. Covad Commc'ns v. Bellsouth Corp., 299 F.3d 1272 (11th Cir. 2002).

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

13. *See generally* John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. CHI. L. REV. 289 (2005); Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. (forthcoming 2005), *available at* http://ssrn.com/abstract=814945.

14. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 n.5 (2004).

15. *Goldwasser*, 222 F.3d at 390.

16. *Id.*

17. *Id.* at 394.

the Sherman Act, which bars monopolization and attempted monopolization.[18] The plaintiffs sought treble damages for the Sherman Act violations and declaratory and injunctive relief.[19] The district court dismissed the complaint under the filed rate doctrine, which, under certain circumstances, prohibits inquiry into rates authorized by a regulator,[20] and for lack of antitrust standing.[21]

The Seventh Circuit affirmed the dismissal.[22] The court noted that while antitrust does impose some obligations on an incumbent to deal with other firms—seen most notably in *Terminal Railroad*[23] and *Aspen Skiing*[24]—those duties are relatively limited.[25] In contrast, the 1996 Act creates broad sharing obligations based on status—as a local exchange carrier or an incumbent local exchange carrier—without regard to any showing of monopolization under section 2. Regardless of one's views of the controversial essential facilities doctrine,[26] there is little doubt that the detailed access obligations of the 1996 Act go far beyond whatever access rights exist under the antitrust laws, as the Seventh Circuit quickly found. Therefore, a simple allegation of a violation of the access rules of the 1996 Act, without more, insufficiently alleged a violation of the Sherman Act.

The Seventh Circuit went on to consider whether a properly alleged essential facilities claim could be maintained notwithstanding the 1996 Act.[27] The plaintiffs alleged that they had indeed made out such claims.[28] The court held that access obligations imposed through antitrust litigation could conflict with those imposed under the Act by state commissions or the FCC and that the more specific regulations set forth in the 1996 Act took "precedence over the general antitrust laws."[29] The Seventh Circuit noted that the antitrust savings clause contained in the Act[30] would also operate where less detailed regulation posed less potential for conflict between the antitrust laws and the 1996 Act.[31]

The Second Circuit jumped in mid-2002 in its decision in *Trinko*.[32] AT&T had entered into an interconnection agreement with NYNEX pursuant to section 252 of the 1996 Act.[33] That agreement, which was approved by a New York state commission,[34]

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18. *Id.* at 394-95.
19. *Id.* at 395.
20. *Goldwasser*, 222 F.3d at 395-96; Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) (reaffirming the filed rate doctrine established in *Keogh v. Chicago & Nw. R.R. Co.*, 260 U.S. 156 (1922)).
21. Goldwasser, 222 F.3d at 395-96.
22. *Id.* at 402.
23. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
24. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
25. *Goldwasser*, 222 F.3d at 390.
26. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *are Misguided*, 68 ANTITRUST L.J. 659 (2001).
27. *Goldwasser*, 222 F.3d at 401.
28. *Id.*
29. *Id.*
30. 47 U.S.C. § 152 (2004) (historical and statutory notes).
31. *Goldwasser*, 222 F.3d at 401.
32. Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89 (2d Cir. 2002).
33. *Id.* at 94.

contained a dispute resolutions clause setting forth the "exclusive remedy" for violations of the agreement.[35] AT&T soon alleged breach, and on March 9, 2000, Bell Atlantic—NYNEX's successor after a merger—entered into a consent decree regarding the alleged violations.[36] Additionally, it paid $3 million to the United States and $10 million to AT&T and other competitors for losses.[37]

Soon after that, Trinko filed a class action against Bell Atlantic—now Verizon after a merger with GTE—alleging violations of the 1996 Act and the Sherman Act.[38] The district court dismissed the case based on a conflict between the antitrust laws and the 1996 Act, and on the view that Trinko was seeking to assert rights that belonged to AT&T.[39] On appeal to the Second Circuit, a number of issues were raised, most of which are not the focus of this Article and which I shall therefore ignore.[40] The Second Circuit turned to whether Trinko could satisfy the rules for antitrust standing under the doctrine of *Illinois Brick*, which announced a rule barring indirect purchasers from pursuing antitrust claims against their indirect sellers—for example, a consumer buying from a retailer would not have antitrust standing to sue the manufacturer.[41] I pursue that issue in more detail below. On the antitrust claims themselves, the Second Circuit found that Trinko had alleged independent antitrust claims—that is, claims that did not allege antitrust violations merely because of violations of the interconnection rules of the 1996 Act. That distinguished *Trinko* from *Goldwasser*, where the antitrust claims were purely derivative of the 1996 Act.

This therefore squarely presented a situation where the same conduct might violate both the antitrust laws and the 1996 Act. Under prior Second Circuit case law, the court would not find implicit immunity through the 1996 Act from the antitrust laws absent "plain repugnancy."[42] And for the court to reach that conclusion, it would have to do so in the face of a specific savings clause contained in the 1996 Act: "Nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair or supercede the applicability of any of the antitrust laws."[43] The Second Circuit concluded that the specific savings clause makes the plain repugnancy notion an uphill fight.

The Second Circuit then considered the question of how antitrust remedies might intersect with the 1996 Act. The court saw damages in favor of consumers such as Trinko as unproblematic, as damages create no conflicting requirements. Indeed, the court

34. Order Approving Interconnection Agreement, Petition of AT&T Commc'ns of N.Y. for Arbitration of an Interconnection Agreement with N.Y. Tel. Co., Case 96-C-0723 (N.Y. Pub. Serv. Comm'n June 13, 1997), 1997 WL 410707.

35. *Trinko*, 305 F.3d at 94.

36. *Id.* at 95.

37. *Id.*

38. *Id.*

39. *Id.* at 96.

40. These included whether Trinko had standing under the Communications Act to assert alleged violations of the anti-discrimination provisions of section 202 of that Act—the Second Circuit found that he did—and whether Trinko had standing to assert an alleged violation of section 251, where the court avoided the standing question as it concluded that the defendant had complied with section 251 in entering into an interconnection agreement with AT&T.

41. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

42. *Trinko*, 305 F.3d at 109.

43. 47 U.S.C. § 152 hist. n.5 (2004) (discussing the applicability of consent decrees and other related law).

viewed damages to Trinko as useful "consumer compensation" absent under the 1996 Act.[44] In contrast, the court saw injunctive remedies under the antitrust laws as possibly creating conflicts with the statutory interconnection requirements of the 1996 Act and thus urged "particular judicial restraint."[45] Finally, the court made clear that it was not addressing the power of a potential entrant to pursue antitrust claims.[46] Instead, at the close of *Trinko*, we have consumers positioned to pursue antitrust claims and potential entrants proceeding under the interconnection regime of the 1996 Act.

One week later, in *Covad Communications Co. v. Bellsouth Corp.*,[47] the Eleventh Circuit held that an entrant could sue under both the 1996 Act and antitrust law for alleged breaches of interconnection duties. Covad properly alleged a series of antitrust claims—essential facilities, refusal to deal, and a price squeeze—and the key question was whether those claims were preempted by the 1996 Act. The court followed the analysis in *Trinko*, by requiring plain repugnancy and performing the savings clause analysis, then added a tour of the legislative history and rejected the analysis in *Goldwasser* to the extent that it conflicted with the analysis in *Covad.*

The Supreme Court took the *Trinko* case, and the majority opinion by Justice Scalia focused on the substance of mandatory dealing obligations. These obligations have had a checkered history in the Supreme Court. The 1912 *Terminal Railroad* case[48] is frequently described as the genesis of the essential facilities doctrine, but the Court never used that phrase in the case itself, as Justice Scalia was quick to remind us in *Trinko*.[49] Yet *Terminal Railroad* did indeed order the robber baron Jay Gould to open the St. Louis terminals and bridges to outside railroads or face a break-up order. The 1945 *Associated Press* case effectively forced the AP to deal with newspapers that the association had previously excluded.[50] And, most famously (or infamously), *Aspen Skiing* ordered the dominant ski manager in Aspen to deal with its smaller competitor.[51]

But, at a minimum, the *Trinko* majority shows no taste for moving beyond these cases in crafting a mandatory dealing duty from the bar against monopolization set forth in section 2 of the Sherman Act. The majority made that clear by describing *Aspen* as "at or near the outer boundary of § 2 liability."[52] *Trinko* understood *Aspen* to turn on the history of voluntary dealing between the mountain ski resort competitors in Aspen, and that is certainly a fair reading of the case. In contrast, in *Trinko* itself, the complaint in the case had not alleged prior voluntary dealing by Verizon with AT&T, and indeed, the purpose of the 1996 Act was to force the reluctant local phone companies to open their networks to competitors.

Moreover, as the majority emphasized, the 1996 Act created its own, quite elaborate set of mandatory dealing obligations. Getting those obligations right has turned out to be

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44. *Trinko*, 305 F.3d at 110.

45. *Id.* at 111.

46. *Id.* at 112 n.19.

47. Covad Commc'ns Co. v. Bellsouth Corp., 299 F.3d 1272 (11th Cir. 2002), *vacated in light of* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), *and on remand*, 374 F.3d 1044, 1046 (11th Cir. 2004) (finding antitrust claim foreclosed by *Trinko's* interpretation of *Aspen Skiing*).

48. United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

49. *Trinko*, 540 U.S. at 411.

50. Associated Press v. United States, 326 U.S. 1 (1945).

51. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

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

nothing short of a Sisyphean task—two trips to the Supreme Court, multiple trips to courts of appeals, sets and sets of complex rules, and ongoing litigation. And yet the question remains: what role, if any, should the thin mandatory dealing obligation of antitrust play on top of the 1996 Act's scheme? It is hardly surprising that a majority already hostile to antitrust's version of mandatory dealing would conclude that enough was enough.[53]

But, for this Article at least, standing is the issue of interest, and as already noted, the *Trinko* majority did not need to confront the standing question, having already resolved the substantive antitrust question in Verizon's favor.[54] But three justices, concurring in the judgment, believed that the case should have been decided in favor of Verizon based on standing. Trinko, after all, was just one of AT&T's customers. The access obligations, whatever their content, ran in favor of AT&T and not Trinko. As a result, said Justice Stevens, "whatever antitrust injury respondent suffered because of Verizon's conduct was purely derivative of the injury that AT&T suffered."[55]

III. ENFORCING ACCESS RIGHTS

Whether Justice Stevens was right is the question. As a matter of first principles, it is hard to understand why we could not apply both the 1996 Telecommunications Act and the Sherman Act. Actually, that formulation is a little crude, though it captures the spirit of the idea. Imagine access regulations consisting of detailed statutory mandates coupled with general fill-in powers. We normally understand fill-in powers to reflect the considerable costs of specifying ex ante rules that will apply to difficult-to-imagine future states of the world. We legislate in specifics for the things that we understand now and build in flexibility to address changes in the future. This is a conventional way of describing incomplete contracts written by private parties. We might also understand general powers to allow legislative deals to be reached when there might not be agreement on more specific language, where each side is betting on how the regulator will interpret the language.[56]

Note that, put this way, we have said nothing about who should make decisions about implementing this mixed scheme of general and specific statutory mandates. One regulator? Two? A mix of federal and state regulators? Courts? Private plaintiffs? These are obviously very broad questions that go far beyond the limited aims of this Article. So, to track the issues in the cases, I focus on private plaintiffs and consider two natural candidates: the blocked competitor and consumers.

The competitor who does not receive access may or may not suffer lost profits.

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53. *Id.* at 412.

> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

Id.

54. *Id.* at 416 n.5.

55. *Id.* at 417.

56. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (describing the pervasiveness of incompletely theorized agreements in Anglo-American law).

Consumers may be harmed as well, as consumer surplus might be higher absent the access breach. Some harmed consumers will be those who actually consume the end product. These inframarginal consumers get as much of the good as they would have absent the breach, but they pay more for the good because of the reduction in competition caused by the access breach. From a social standpoint, we need to have a distributional metric to assess these consumers, as output has not changed for them and we have just transferred value from these consumers to the incumbent. We have a second group of consumers as well. These are consumers who would have purchased the good at the lower prices that would have resulted from competition under the mandated access.

It might help to have a little toy model to play with to talk through these issues. Consider an industry with a demand curve given by $p = z - q$. This obviously is just a very simple linear demand curve. Assume that the incumbent has a fixed marginal cost of c to produce each unit of the good in question. The incumbent has a blocking position, so absent an entrant gaining access to the incumbent's technology, the incumbent will have a monopoly. If the incumbent monopolist maximizes profits, with a little math, we have enough information to calculate profits (Π) and consumer surplus (*CS*). These are given by:

$$\Pi^M = 1/4(z-c)^2,\ CS^M = 1/8(z-c)^2 \qquad (1)$$

Overall social welfare is just the sum of the two.

Now let us make it possible for entry by giving the entrant access to the relevant technology at a per unit cost of p_a. As is standard, we now need to make some assumptions about how the incumbent and the potential entrant will interact: whether the resulting competition will be over price (Bertrand competition) or quantity (Cournot competition), and whether it will be simultaneous or in sequence (Stackelburg competition). These are standard questions for industrial organization models of competition, but for now assume Cournot competition. Note that entry means that the incumbent has two sources of revenue: from consumers through sales in the product market and from the entrant through per unit input sales.

With a little more math, we can come up with more results. Start with the quantities that will be selected by the incumbent and the entrant:

$$q_i = 1/3(z + p_a - 2c),\ q_e = 1/3(z + c - 2p_a) \qquad (2)$$

We know, of course, that the access price will alter the entrant's quantity, but note the way in which it also alters the incumbent's final quantity. The incumbent's output is increasing in the access price. Higher access prices discourage entry, creating greater space for the incumbent to produce.

Turn next to profits and consumer surplus. These are fairly complex, so it might help to focus on a special case, namely where the regulator sets the price of access equal to the marginal cost ($p_a = c$). Note that in that case, the incumbent and the entrant produce the same amount, as they face the same costs and the sales to the entrant are neither a source of profit nor of loss for the incumbent. Profits for the incumbent and the entrant and consumer surplus are given by:

$$\Pi^i = 1/9(z - c)^2,\ \Pi^e = 1/9(z - c)^2,\ CS^a = 2/9(z - c)^2 \qquad (3)$$

In some sense, what we most care about are the changes relative to the first situation. Those are given by:

$$\Delta\Pi^i = \text{-}5/36(z - c)^2,\ \Delta\Pi^e = 1/9(z - c)^2,\ \Delta CS = 7/72(z - c)^2 \qquad (4)$$

Together this gives the increase in overall social welfare that results from Cournot entry, resulting in a duopoly when the access price is set at marginal cost:

$$\Delta SWF = 5/72(z - c)^2 \qquad (5)$$

Consumer surplus is up, profits are down, and social welfare rises, though by less than the amount of the increase in consumer surplus. Some of the increase in consumer surplus arises from the additional consumers served with more competition. Another chunk of it is just a transfer away from producers to consumers. If we treat consumers and producers equally in calculating social welfare, the transfer does not add to social welfare; only the additional output actually increases social welfare. Note also that entry transfers profits away from the incumbent to the entrant, but, as just noted, competition reduces overall profits to the benefit of consumers.

What does all of this say about our enforcement questions on access? We need to know what we are trying to accomplish. On these assumptions, we should expect the potential entrant to sue if the incumbent fails to comply with its access obligations, assuming of course that the cost of litigating is less than the lost profits the entrant suffers. Indeed, within the toy model, the potential entrant has a slightly stronger incentive to sue than the consumers (all of 1/72's difference to be sure). If what we want is specific enforcement of the access obligation, we do not necessarily need both the entrant and the consumers to sue. One mechanism of enforcement may suffice, and all parties would benefit from the enforcement.

That, of course, suggests that there could be a free-rider problem associated with enforcement resulting in specific performance. If we start to factor some chance of legal error, consumers might elect not to bring suit on the hopes that the entrant would pursue its remedies and the entrant might do the same. Of course, one way to solve the free-rider problem in that situation is to bar either the entrant or the consumers from bringing suit. If consumers were barred from asserting rights—again, either rights under the 1996 Act or the antitrust laws—we would concentrate the incentive to sue in the potential entrants, though we might need to worry about collective action in that group as well.

In contrast, if the goal of enforcement is at least partially compensatory, then just allowing one suit would be a mistake. The entrant has lost profits from the wrongful denial of access, while the consumers have lost consumer surplus. The wrongful denial of access harms both parties, and, as a general matter, when a single act hurts multiple parties, each person gets to sue for their losses. This situation is particularly relevant here, where the possibility of profits is precisely what induces entry—exactly what the 1996 Act seeks to encourage—and the consumer surplus that flows to consumers from entry is one of the core aims of the Act. The 1996 Act seeks to foster entry to push the benefits of competition to consumers and to minimize the need to regulate prices in the retail market.

Other than getting benefits to consumers, there is little reason to embrace the elaborate access rules of the 1996 Act.

Another possible goal is to deter ex ante breach by incumbents through the threat of ex post damages. To return to Justice Stevens's opinion concurring in the judgment in *Trinko*, would we achieve that if only AT&T could sue in *Trinko* and it could only assert its damages? Quite plausibly not. Look at the formulations in equation (4). The incumbent loses more from competition than the entrant gains (a difference of 1/36 times the squared term). The incumbent could afford to pay the entrant's damages and have money left over. This just reflects the fact that as between the incumbent and the entrant, the incumbent's breach is efficient. The incumbent and the entrant do not want to compete since the benefits only flow to the consumers. In that framework, the interconnection agreement and its breach simply operate as a mechanism for dividing up the monopoly rents. Suits by consumers alone would not suffice either, as the incumbent loses more from competition than the consumers gain (a difference of 3/72 times the squared term). We actually need the threat of both suits to deter the breach (or at least the threat that both harms will be asserted).

An alternative approach would be to focus on the extra profits obtained by the incumbent from the access breach and require disgorgement. If we were merely seeking to deter the access breach and were not focusing on compensation to those harmed by the breach, we could assign the right to enforce that remedy to almost anyone. In reality, we would naturally look to entrants, consumers, or regulators. Entrants may have the best information about whether a breach has taken place. After all, they are squarely in the middle of trying to make the access right work, and also have an insider's knowledge of the business. Regulators might see multiple alleged breaches across many cases, and thus would have a large numbers advantage in assessing access breakdowns. Consumers would seem to be the least well situated to enforce a disgorgement remedy. They lack direct knowledge of the interaction between the incumbent and the entrant, are not particularly knowledgeable about the operation of the industry, and may see only one case ever.

Whether we would require a multiplier á la antitrust treble damages depends on what we are trying to accomplish. It would be foolish to take on in this Article the large question of the merits of punitive damages.[57] Consider the under-detection rationale for punitive damages, namely, that imperfect detection of violations creates an incentive to breach even in the face of a disgorgement remedy, since some of the time the breacher will get away with it. Damage multiplying—treble damages or punitive damages generally—might adjust for that under-detection to restore a sufficient ex ante penalty to deter breach.[58]

We should think the under-detection rationale has little role to play here, suggesting little reason for damage multipliers. Entrants should naturally detect breaches. They are calling the incumbent day by day to gain access to lines and other unbundled network elements. To be sure, the entrants may face some uncertainty, but this could just as easily

57. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Cass R. Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071 (1998).

58. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 646 (2d ed. 1999) (discussing along these same lines for antitrust treble damages).

result in too many claims for breach as in too few.

Here is what all of this suggests. If we are only looking for an injunction ordering performance of the access right, we can assign the right to sue to either the entrant or the consumers. It may make sense to assign it to one or the other to avoid free-riding issues, as the entrant is almost certainly better situated to know whether an access breach has taken place. If we are looking to deter breach through disgorgement, and if we believe that avoiding multiple liability is important—as we often do[59]—we should again assign the right to sue to the entrant because it has better information. In the alternative, we could deter breach and compensate those harmed by the access breach by allowing the entrant to sue for lost profits and the consumers to sue for lost consumer surplus. At least within the confines of the model, these amounts are quite distinct and readily separable. Nothing in the analysis suggests a role for damage multipliers based on the need to gross up damages to adjust for undetected breaches, as we should expect entrants to catch breaches in ordinary course.

IV. MATCHING THE MODEL AND THE LAW

The discussion so far has been fairly abstract. The model in Part III traces the consequences of an "access breach," which results in less competition than would otherwise take place, and assesses ways of (1) calculating damages or penalties, depending in part on whether we are seeking to compensate those harmed or seeking to deter breaches from occurring in the first place; and (2) assigning enforcement rights depending on which policy goals we are trying to accomplish. Both the incumbent and the entrant can set price to consumers, though I did treat the access price by the entrant as being set by regulators. We next consider how this abstract setup matches with the substantive law of access and standing doctrine.

A. Integrating Antitrust Substantive Law and the 1996 Act

Goldwasser, *Trinko*, and *Covad* consist of the standard antitrust claim soup, a mix of ingredients thrown together in the hopes that something good will result. Goldwasser seemingly stated no independent antitrust claims, apparently in the hope that he could make the possibly easier showing of a breach of the 1996 Act's access rules and then morph that into an antitrust violation. The Seventh Circuit appropriately saw through that: access "rights" under the antitrust laws are notoriously difficult to pin down, require a substantial showing of market power, and typically depend on the existence of an essential facility. The 1996 Act merely imposes access rights on an assortment of local exchange carriers, so there is a large difference between the substantive antitrust doctrine of access and that under the 1996 Act.

Of course, Goldwasser only pled poorly, or more likely, strategically. Trinko did better, or at least the Second Circuit thought he did. The court saw in the complaint a possible essential facilities claim and a possible monopoly leveraging claim. Certainly, a careful complaint could allege an essential facilities claim, as such claims have succeeded

59. See William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979), and the cases cited therein.

before when telecommunications entrants have sought access to an incumbent's facilities.[60] The monopoly leveraging claim turns on the idea that Bell Atlantic had monopoly power in the wholesale market for local loop access and that it was seeking to leverage that power into a competitive advantage in the retail market.

Finally, Covad adds to the essential facilities claims a distinct refusal to deal claim based upon alleged denied access and a price squeeze claim based on wholesale prices that were alleged to be impermissibly high. The refusal to deal claim emerges from the fact that in *Aspen Skiing* the Supreme Court specifically disclaimed reliance on the essential facilities doctrine in finding that Aspen Skiing had a duty to deal with its competitor.[61] As if one uncertain antitrust access doctrine was not enough!

We should consider the ways in which these antitrust claims might conflict with the 1996 Act. For our purposes, the independent antitrust status of these claims probably should not matter too much. So, for example, whether monopoly leveraging is or is not a good antitrust doctrine is separate and apart from how it should intersect with the 1996 Act. Our concern should be the way in which enforcing otherwise applicable antitrust doctrines might undercut the operation of the section 251 access rules.

As suggested above, I find no conceptual conflict between the detailed access rules of section 251 and the contingent, general access rules of antitrust law. In the law, we often set forth a series of particular rules and confer on an authority—be it court or regulator—the ability to fill in gaps. When we do that, we routinely face the issue of how to police the regulators to ensure that they are honestly filling in the terms of the intentionally incomplete scheme set forth by Congress and not overturning that scheme.

But *Trinko* has clearly limited the role that antitrust access doctrines will play in telecommunications: "The 1996 Act's extensive provision for access makes it unnecessary to impose a doctrine of forced access."[62] That should resolve this issue under the 1996 Act, and the fighting issues are the next steps. Does the analysis carry over to other areas in which there are extensive statutory or regulatory obligations to deal, say, in electricity? Does *Trinko* draw a line in the sand—perhaps, more appropriately, a line in the snow—on *Aspen*'s analysis? For this Article, these are issues for another day.

B. Standing

Let us turn instead to standing. Part III of this Article focused on the consequences of an access breach. Quite intentionally, nothing in that analysis turns on the source of the duty, that is, whether the access obligation flows from antitrust law or from the 1996 Act. The lost profits and consumer surplus follow from the denial of access that allows the monopoly to continue.

We have two standing questions to consider. The first is purely internal to telecommunications law. Namely, who has standing to assert claims for violations of the interconnection rules set forth in section 251? The analysis in Part III suggests that standing rules should follow quickly once we figure out our general approach to remedies for access breaches. There is little reason to think that that analysis should not carry over as well to telecommunications law proper. That is not my focus here, so I will not pursue

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

61. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n.44 (1985).

62. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

it, especially since the appellate court opinion in *Trinko* made clear that the statutory and doctrinal issues are not simple.

So let us turn instead to the antitrust standing rule set forth in *Illinois Brick.* That case bars indirect purchasers from pursuing antitrust actions "up the chain," so that a consumer buying from a retailer who in turn had purchased from a manufacturer could not sue the manufacturer. *Illinois Brick* meshes with *Hanover Shoe*[63] in which the Supreme Court held that a defendant in an antitrust action could not bar a claim on the basis that the overcharged plaintiff had been able to "pass on" the overcharges to its customers and hence had suffered no damages from the antitrust violation.

The rule in *Illinois Brick* is typically defended as avoiding the risk of multiple liability.[64] At least within the stark confines of the model here, we do not face that problem. We can cleanly separate out the lost profits that a potential entrant will suffer from the reduction in consumer surplus inflicted on consumers who lose the benefit of competition between the incumbent and the entrant.

In *Trinko,* the Second Circuit noted that the interconnection cases present a different setting than that usually addressed by *Illinois Brick.* AT&T did purchase inputs from Bell Atlantic, but it was not "solely" a customer of Bell Atlantic. Instead, local loop access in hand, AT&T immediately competed with Bell Atlantic.[65] This sufficed, in the Second Circuit's view, to take *Trinko* outside of *Illinois Brick* so as to permit Trinko to satisfy the standard for antitrust standing. Again, in the Supreme Court, the majority opinion pushed the standing issue to one side to take on the direct question of substantive antitrust law. Justice Stevens, joined by Justices Souter and Thomas, addressed the standing question and concluded that Trinko lacked standing.

The conventional defense of *Illinois Brick* focuses on the expected behavior of the firm purchasing the input, which is then resold to consumers. The purchasing firm realizes that it is being overcharged—that each purchase brings with it treble damages which therefore effectively lowers the price of the input—and that competition among input purchasers pushes the benefits of the damages claim to consumers.[66] The success of this mechanism obviously depends on a fine sense of how antitrust works—"oh good, we have noticed that they are overcharging us, so go buy more and announce a sale price for our customers"—but there is a more basic point as we try to carry this analysis to the interconnection access rules.

This vision of *Illinois Brick* assumes ready access to the input. The whole point of the 1996 Act's interconnection rules is that entrants have a hard time obtaining access. In the extreme case, the denial of access is total and no damages are passed to consumers who buy from the entrant because there is no entrant and there are no sales by the entrant. In the less extreme case, the denial of access is at least partial. Moreover, in the situation addressed by the 1996 Act, competition is minimal, so there may be no pressure to pass on damages to customers, plus it is uncertain whether the entrant can actually assert antitrust damages at all. Put slightly differently, this is not an overcharge situation. To the extent that the entrant is able to get access, the price of access will be set pursuant to the

63. Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

64. *See* Landes & Posner, *supra* note 59.

65. Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp., 305 F.3d 89, 106 (2d Cir. 2002).

66. *See* Landes & Posner, *supra* note 59, at 605-06.

pricing rules of section 252 as implemented by state public utility commissions. And that price may very well be protected from inquiry under the filed-rate doctrine.

We should step back to see how well this analysis meshes with Supreme Court doctrine, especially as seen in the Court's last extended look at *Illinois Brick*, which came in *Kansas v. Utilicorp United, Inc.*[67] In that case, the Court declined to carve out an exception to the general rule in *Illinois Brick* for regulated industries. Kansas and Missouri sought to assert *parens patriae* claims on behalf of residential consumers who bought natural gas from regulated public utilities. The states argued that the utilities passed through one hundred percent of their costs, and hence, if natural gas producers had overcharged the utilities, consumers should recover.

The states also argued that the harms to the utilities and the consumers were separable, and therefore there was no risk of multiple recoveries. The Court declined to consider that point, believing that the additional litigation burdens of allowing more parties dwarfed any possible benefit of doing so.[68] That was especially true, in the Court's view, as the new litigants who would be added under the proposed exception—consumers—lacked expertise and experience.[69]

Finally, the Court saw a substantial burden in embracing a case-by-case, industry-by-industry inquiry into whether *Illinois Brick* would apply. The core point of *Illinois Brick* was to simplify already complex antitrust litigation. Any exception to the rule would require a substantial inquiry as to whether the exception had been met or not, and that would increase the burden on the courts and on litigants.

I am not sure that there is a particularly good response to that. There might be much to be said in favor of a "balanced budget" approach to doctrinal wrinkles: So you want to add an exception to *Illinois Brick*? That will increase burdens on courts and litigants, so what other doctrine are you willing to give up to pay for the new wrinkle? It is folly to think that we can continually add doctrinal refinements and not suffer any cost—either direct litigation costs or error costs—from the increased complexity. That is the Court's essential message in *Utilicorp United*, and I am hard-pressed to believe that the Court is wrong.

It may be too slick a response to say that we can avoid that here by treating the issue in *Trinko* as being about telecommunications standing. The idea would be to leave *Illinois Brick* alone in antitrust, but when we approach the question of standing proper in telecommunications, ignore the underlying message of the *Illinois Brick* cases and allow both entrant and consumers to sue. It is perhaps fair to say that the Court's concern in *Utilicorp United* was the classification burden of a case-by-case *Illinois Brick*. If Congress chooses to create that classification for the courts—as it could through clear standing rules in telecommunications regarding entrants and consumers—the case-by-case burden would be avoided.[70]

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67. Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990).

68. *Id.* at 213.

69. *Id.* at 215.

70. Again, I have not considered here whether Congress has actually done this in the 1996 Act itself on the question of standing to assert breach of the access duties of the Act.

V. CONCLUSION

Trinko and the recent courts of appeals decisions that preceded it raise interesting questions about the intersection of antitrust law and the 1996 Telecommunications Act. There are some nice questions about how to interweave the substance of the two regimes, but I have not considered those issues here. Instead, I have focused on the standing issues posed by a breach of an access obligation. As just a matter of analytics, I think there is much to be said in favor of calling off the standard *Illinois Brick* rule in the breach of access situation. In the extreme case of a full breach of the access duty, there is no way in which the pass-through idea that supports *Illinois Brick* can function. Instead, consumers are harmed through any incremental market power that the incumbent can exercise because of the competition avoided though the denial of access. Whether we would want to confer standing on consumers would then depend on making precise what we were seeking to accomplish through our antitrust remedies—for example, deterrence of breach versus compensation for those breaches.

That said, the Supreme Court has expressed an understandable reluctance to add wrinkles to the *Illinois Brick* doctrine. I do not know exactly how many refinements to antitrust doctrine we can afford, but I do think that the Supreme Court is well situated to gauge when enough is enough. That we have already reached that point seems to be the central message of *Utilicorp United*, one that comes across sufficiently loudly that even a relatively tone-deaf academic can hear it.