A Categorical Rule Limiting Section 2 of the Sherman Act: \textit{Verizon v Trinko}

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The most interesting aspect of the Supreme Court’s opinion in \textit{Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP} is its tacit acceptance that the § 2 question needs a \textit{categorical} resolution, with the choice of the categorical (not to say exceptionless) rule driven by very serious consideration of both the institutional capacities of antitrust courts and the investment incentives created by the chosen categorical rule. It has always been true that “[w]hether specific conduct is anticompetitive is a question of law.” But unlike \textit{Aspen Skiing Co v Aspen Highlands Skiing Corp}, which stands for no general principle and which the Court now has confined to “the outer boundary of § 2 liability,” the Court in \textit{Trinko} decided as a matter of law that an entire \textit{type} of conduct could not meet the “anticompetitive conduct” element required for any § 2 claim and therefore such claims had to be dismissed for failure to state a claim. The Court’s decision thus is quite broad in the familiar sense of establishing a rule (“no duty to share”) applied at the pleadings stage, rather than a mere standard (“no unreasonable refusal to share”) applied at summary judgment or trial.

\textit{Trinko} arose in the specialized context of Congress’s creation of competition for local telephone service in the Telecommunications Act of 1996. Prior to the 1996 Act, there were two barriers to compe-

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  \item 1 540 US 398 (2004).
  \item 2 \textit{SmileCare Dental Group v Delta Dental Plan of California, Inc}, 88 F3d 780, 783 (9th Cir 1996).
  \item 3 472 US 585 (1985).
  \item 4 \textit{Trinko}, 540 US at 409.
  \item 5 Id at 405 (rewriting the question on certiorari as “whether the Court of Appeals erred in reversing the District Court’s dismissal of [Trinko’s] antitrust claims”). See \textit{Goldwasser v Ameritech Corp}, 222 F3d 390, 401 (7th Cir 2000) (deciding on a motion to dismiss that whether a telephone company must share its monopoly network under antitrust law “is not the kind of question that requires further development of a factual record”).
tition in local telephone service: many if not all state telephone franchises were legally exclusive, prohibiting new entry, and the incumbent telephone companies had a hundred year head start constructing connections to homes and offices in their franchise areas, so a new entrant with a newly constructed telephone network could not independently offer the same scope of calling service until it had duplicated all these connections. Given a choice between joining a network that permitted ubiquitous calling versus joining a network that offered only limited calling, consumers would tend to prefer the former so long as the ubiquitous network did not charge too high a premium for its greater calling scope. The 1996 Act addressed both of these problems directly by preempting state laws that prohibited new entry and by requiring incumbents to interconnect their existing ubiquitous telephone networks with the networks of new entrants.

In addition to removing legal barriers to entry into local telephone markets and requiring incumbents to interconnect their networks with rivals’ networks, the 1996 Act imposed an additional and much more controversial requirement that incumbents “unbundle” and “share” their facilities with rivals. This sharing requirement created “something brand new”—“the wholesale market for leasing network elements”—directing the incumbents, for the first time, to assist new intermediaries to displace them, line by line, in providing local service to local customers using pieces of the incumbents’ own networks. The shared facilities, moreover, must be turned over at heavily

7 47 USC § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).
8 47 USC § 251(a)(1) (“Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”). The duty to interconnect separate telephone networks was applied not only to incumbent local telephone providers but to all telecommunications carriers. See 47 USC § 251(c)(2).
9 47 USC § 251(c)(3). Although commonly used to refer to this obligation, “sharing” isn’t the right term to describe the requirement because it suggests the incumbent and the entrant using the shared facility jointly, like allowing a rival’s trains to cross a monopolist’s uncrowded bridge over the Mississippi River. See United States v Terminal Railroad Association of St. Louis, 224 US 383, 411 (1912) (requiring a consortium of railroad terminal companies to admit additional members seeking to use the bridge and associated terminals). In fact, the Federal Communications Commission (FCC) rules require “shared” facilities to be turned over for the rival’s exclusive use, displacing continued use of them by the incumbent. See Richard A. Epstein, Takings, Commons and Associations: Why the Telecommunications Act of 1996 Misfired, 22 Yale J Reg (forthcoming 2005); Michael A. Heller, The UNE Anticommons, 22 Yale J Reg (forthcoming 2005); Eric R. Claeys, The 1996 Telecommunications Act and the Constitutional Law of Eminent Domain, 22 Yale J Reg (forthcoming 2005).
discounted prices designed “to give aspiring competitors every possible incentive to enter local retail telephone markets.” These requirements are “extraordinary” because incumbents must let “competitors come in and try to beat your economic brains out.” The 1996 Act thus marked a rapid evolution from (1) it being illegal for a new entrant to build its own network facilities to (2) an entrant needing to build only limited facilities to (3) an entrant needing to build no facilities whatsoever but instead being permitted to rent them at a discount from the incumbent.

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

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

Rivals thus found it “difficult” to provide service “on the level that [Verizon] is able to provide to its customers.” Trinko alleged that there was no efficiency explanation for Verizon’s failure to treat rivals on par with itself, and sued on behalf of a putative class of all customers of rival firms.

After the district court twice dismissed the case, the Second Circuit reinstated it, using broad language to allow proof of a § 2 violation based on a determination that Verizon was not providing “rea-
reasonable access” to its network." By the time of the Supreme Court’s ruling in the case, the federal appellate courts had split sharply on whether antitrust law might impose interconnection and sharing requirements comparable to or even more far reaching than those set out in the FCC’s rules. The Fourth and Seventh Circuits had said no to such claims.17 The Second, Ninth, and Eleventh Circuits had said yes.18

The Supreme Court resolved the conflict, holding without dissent that “alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim.”19 The regulated telecom context was unimportant to that fundamental ruling.20 A regulatory scheme as comprehensive as the 1996 Act’s would ordinarily be “a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency’s regulatory scheme.”21 But Congress had provided otherwise in the antitrust-specific savings clause found in § 601 of the Act.22 Therefore, the Court concluded that the Act neither narrowed nor expanded existing antitrust standards.

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16 Law Offices of Curtis V. Trinko, LLP v Bell Atlantic Corp, 305 F3d 89, 107 (2d Cir 2002) (rejecting the district court’s rationale that “a monopolist has no general duty to cooperate with its competitors,” because in fact “a monopolist has a duty to provide competitors with reasonable access to ‘essential facilities,’ facilities under the monopolist’s control and without which one cannot effectively compete”).

17 Cavalier Telephone, LLC v Verizon Virginia, Inc, 330 F3d 176, 188 (4th Cir 2003) (explaining that “Congress enacted §§ 251 and 252 of the Telecommunications Act to impose entirely new duties, which were in addition to the duties imposed by § 2 of the Sherman Act,” and that the Telecommunications Act “obligations exceed the duties imposed by the antitrust laws”), cert denied, 124 S Ct 1144 (2004); Goldwasser, 222 F3d at 400 (“A complaint like this one, which takes the form ‘X is a monopolist; X didn’t help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high’ does not state a claim under Section 2.”).

18 Trinko, 305 F3d 89; MetroNet Services Corp v US West Communications, 329 F3d 986, 1012 (9th Cir 2003) (permitting the plaintiff to establish a § 2 claim by proving the price of available access was so high it “discourage[d]” the plaintiff “from staying in the business”); Covad Communications Co v BellSouth Corp, 299 F3d 1272, 1283 (11th Cir 2002) (holding that a § 2 claim is established “when a monopolist improperly withholds access to an ‘essential facility’ without which a competitor cannot enter or compete in a market”).

19 Trinko, 540 US at 410.

20 Indeed, lower courts had begun applying the Second Circuit’s decision beyond telecommunications in areas as diverse as parcel insurance and cable TV channel arrangements. See, for example, In re EVIC Class Action Litigation, 2002 WL 1766554, *12–14 (SD NY) (allowing cases to proceed on § 2 “essential facilities” and “monopoly leveraging” theories requiring UPS to provide rival package insurers access to its shipping forms and software); Yankees Entertainment and Sports Network, LLC v Cablevision Systems Corp, 224 F Supp 2d 657, 671–75 (SD NY 2002) (allowing a § 2 case to proceed against a cable TV operator to resolve “reasonable terms” for carrying the Yankees baseball channel).

21 Trinko, 540 US at 406.

22 Telecommunications Act of 1996 § 601(b)(1), 110 Stat at 143 (“[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”).
The decision cannot be viewed as limited to the narrow order-
confirmation glitch\(^\text{23}\) that was the only concrete example Trinko's
complaint gave for its broad allegations. Neither the parties nor the
three courts in the case read the complaint as limited to that instance.
Trinko's complaint was not narrow but general, including allegations
of "improper behavior with respect to providing access to its local
loop."\(^\text{24}\) Liberal notice pleading rules preclude dismissal of a complaint
unless "it is clear that no relief could be granted under any set of facts
that could be proved consistent with the allegations."\(^\text{25}\) Seeking to
apprise the Court of the full scope of what might be proved consistent
with Trinko's general complaint, a large number of amici supporting
Trinko in the Supreme Court described extensive additional alleged
misconduct.\(^\text{26}\) The Supreme Court rejected Trinko's claims, not because
the one detailed allegation was insufficient, but because claims that an
incumbent has denied a rival "interconnection services" do not state a
claim under § 2.\(^\text{27}\)

After deciding Trinko, the Supreme Court confirmed the plain
meaning of the decision by its disparate treatment of three petitions
for certiorari that it had held pending decision in Trinko. The Court
denied certiorari, rather than vacating and remanding for reconsidera-
tion, in \textit{Cavalier Telephone, LLC v Verizon Virginia, Inc.}\(^\text{28}\) a case in
which the Fourth Circuit broadly dismissed rival Cavalier's wide-

\(^{23}\) Amended Complaint at *6 (cited in note 13) (describing the glitches in Verizon's soft-
ware systems for taking orders from rivals that were ostensibly the impetus for the suit).

\(^{24}\) \textit{Trinko}, 540 US at 405 (internal quotation marks omitted). See Amended Complaint at
*2, 9 (cited in note 13).


\(^{26}\) The additional allegations included cutting off long distance access for customers who
switched to a rival for local service, see Brief for Allegiance Telecom, Inc, et al, as Amici Curiae in
Support of Respondent, \textit{Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP},
No 02-682, *6 (S Ct filed July 25, 2003) (available on Westlaw at 2003 WL 21755935); delaying
interconnection with independently constructed local telephone networks until the rival ob-
tained state certificates, see Brief of AT&T Corp, Cavalier Telephone, and Competitive Tele-
communications Association as Amici Curiae in Support of Respondent, \textit{Verizon Communica-
tions Inc v Law Offices of Curtis V. Trinko, LLP}, No 02-682, *14 (S Ct filed July 25, 2003) (avail-
able on Westlaw 2003 WL 21767975); falsely asserting that there was no space available in Veri-
zon offices to house rival equipment, see id; Brief for Covad Communications Co, Inc as Amicus
Curiae in Support of Respondent, \textit{Verizon Communications Inc v Law Offices of Curtis V.
Trinko, LLP}, No 02-682, *9–10 (S Ct filed July 25, 2003) (available on Westlaw at 2003 WL
21755938); requiring rivals wanting office space to build separate rooms, cages, and entrances, see
id at *11–12; and restricting what services rivals could offer when using a Verizon loop (with the
effect of thwarting new technologies that would have displaced Verizon's monopoly services),
see id at *14–15.

\(^{27}\) \textit{Trinko}, 540 US at 410. See id at 414 (citing the variety of potential allegations—"death
by a thousand cuts"—as a reason to reject the § 2 claim).

ranging network-access-related claims.\textsuperscript{29} By contrast, the Supreme Court vacated, in light of \textit{Trinko}, the Ninth Circuit’s decision in \textit{MetroNet Services Corp v US West Communications}\textsuperscript{30} and the Eleventh Circuit’s decision in \textit{Covad Communications Co v BellSouth Corp},\textsuperscript{31} both of which had allowed rivals to proceed against incumbent telephone companies on claims indistinguishable from Trinko’s. The Court’s differential treatment of the three nearly identical cases—leaving in place only the one decision that held no § 2 violation—is consistent with a broad reading of \textit{Trinko}. On remand, moreover, both the Ninth and Eleventh Circuits sharply curtailed the plaintiffs’ cases in light of \textit{Trinko}.\textsuperscript{32} Most courts faced with complaints like Trinko’s have simply dismissed them.\textsuperscript{33}

Initial reactions from commentators confirm \textit{Trinko}’s breadth. Eleanor Fox wrote (unhappily):

\begin{quote}
The Court tips its hand that it prefers business freedom (even by the owner of an essential facility) to competition and competitive opportunity. It declares, surprisingly, that monopoly is good and to be desired. . . \textit{Trinko} is a child in a china shop of Section 2. It overrules \textit{Berkey v. Kodak} (monopoly leveraging is illegal) in a brief footnote. For those who accept Judge Posner’s interpretation of \textit{Aspen Skiing} (competitor’s right of access to an essential facility), it overrules \textit{Aspen Skiing}. For those who accept the facts of \textit{Otter Tail} (failure to supply wholesale power to municipalities that hoped to serve Otter Tail’s retail customers), it makes clear its preference for Justice Stewart’s dissent.
\end{quote}

Former Department of Justice Antitrust Division chief Thomas E. Kauper, who filed the government’s 1974 complaint that resulted in

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\item \textsuperscript{29} 330 F3d at 180–81 (dismissing a claim in which Verizon allegedly interfered with its rival’s ability to interconnect its local telephone network to Verizon’s and interfered with access to loops, trunks, collocation, directory assistance and directory listings, and pole attachments with the deliberate purpose of excluding a competitor).
\item \textsuperscript{30} 329 F3d 986 (9th Cir 2003), vacd and remd as \textit{Qwest Corp v MetroNet Services Corp}, 124 S Ct 1144 (2004).
\item \textsuperscript{31} 299 F3d 1272 (11th Cir 2002), vacd and remd, 124 S Ct 1143 (2004).
\item \textsuperscript{32} The Ninth Circuit reversed its earlier ruling and affirmed dismissal of MetroNet’s essential facilities claim. \textit{MetroNet Services Corp v Qwest Corp}, 383 F3d 1124 (9th Cir 2004). The Eleventh Circuit reversed its earlier ruling and affirmed dismissal of Covad’s network access claims. \textit{Covad Communications Co v BellSouth Corp}, 374 F3d 1044, 1053 (11th Cir 2004) (allowing Covad to proceed only on a classic predatory pricing theory).
\item \textsuperscript{33} One exception is \textit{Z-Tel Communications, Inc v SBC Communications, Inc}, 331 F Supp 2d 513 (ED Tex 2004), which treats \textit{Trinko} as involving merely a pleading deficiency. See id at 527.
\item \textsuperscript{34} Eleanor M. Fox, \textit{The Trouble with Trinko}, in \textit{2. 52nd Annual Antitrust Spring Meeting: General Session Program Course Materials} 1365, 1369–70 (ABA 2004).
\end{itemize}
the breakup of the AT&T Bell System monopoly, wrote that it is questionable "whether the 1974 complaint in the AT&T case would be sustainable under Trinko."

Following the Supreme Court's decision, members of the House Judiciary Committee introduced the Clarification of Antitrust Remedies in Telecommunications Act in order to overturn Trinko. The bill, applicable only to the four incumbent telephone companies descended from the AT&T Bell System, would make it an antitrust offense for the four named companies "to preserve" an otherwise legal network monopoly by "engag[ing] in an anticompetitive practice," one of "which may include a failure to comply" with the 1996 Act sharing rules or agreements entered under those rules. The bill is described by its sponsors as necessary because of Trinko's breadth: "It is doubtful that the Bell system ever would have been broken up had Trinko been the law earlier."

In fact, the Trinko decision is unexceptionable—antitrust has never required the dismantling of lawful monopolies. The 1996 Act does impose such duties through § 251 and § 252 as those provisions have been implemented. But the 1996 Act is a comprehensive regime for making, calibrating, and flexibly adjusting the judgments that are unavoidably needed to implement a duty to share assets at special discounts. Just to contemplate the nature and scope of such judgments is to recognize that they are foreign to the historic tasks of antitrust courts. And the existence of the 1996 Act regime, with all its statutory guarantees of fast regulatory and judicial response to access demands, is one good reason to avoid, not to begin, expanding § 2 into what would unmistakably be new territory.

The claim by Trinko and other plaintiffs would change § 2 into a condemnation of monopoly itself. But § 2, going back at least to the

35 See United States v AT&T, 552 F Supp 131 (D DC 1982) (approving the breakup under a consent decree without adjudication of the antitrust charge).
38 Id.
39 Memorandum entitled Support and Co-Sponsor H.R. 4412, "Clarification of Antitrust Remedies in Telecommunications Act of 2004," Introduced by Chairman Sensenbrenner and Ranking Member Conyers. This Bill Repairs the Damage Caused by the Trinko Decision and Revives Antitrust Law in Telecommunications (May 20, 2004) (on file with author). House Judiciary Committee staff, soliciting co-sponsors for the bill, noted that Trinko and like decisions "have made it virtually impossible to state an antitrust claim for anticompetitive conduct within the regulatory ambit of the Telecom Act." Email from Robert N. Tracci, Majority Counsel, House Committee on the Judiciary, to Judiciary, Rep Leg Staff (May 20, 2004) (on file with author).
40 See note 9 and accompanying text.
1920 case *United States v United States Steel Corp*" (U.S. Steel), has not
done that. *U.S. Steel* declares that § 2 "does not compel competition"
and does not condemn "size."

Other cases have reaffirmed that pos-
session of a monopoly, if obtained without violating the Sherman Act,
is not a § 2 offense. What that means is that § 2 does not compel a
monopolist to give rivals a helping hand in displacing its own sales,
that is, in dispossessing itself of its monopoly. Although the 1996 Act
does impose a duty to create competition, § 2 of the Sherman Act has
been restricted to preventing monopolists from interfering with inde-
pendently arising competition through conduct that can properly be
condemned.

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

There are two core reasons why § 2 has quite properly never been
applied to impose a duty to start sharing assets with rivals at special
discounts: the institutional limits of antitrust courts and the dampen-

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41 251 US 417 (1920).
42 Id at 451.
43 See, for example, *National Biscuit Co v FTC*, 299 F 733 (2d Cir 1924); *United States v
Aluminum Co of America*, 148 F2d 416, 430 (2d Cir 1945) ("The successful competitor, having
been urged to compete, must not be turned upon when he wins.").
44 See, for example, *Laurel Sand & Gravel, Inc v CSX Transportation, Inc*, 924 F2d 539, 545
(4th Cir 1991) (explaining that it is not “feasible” for CSX to change its business of providing rail
transportation service into a business of renting track to other railroads). See also Richard A.

Were vertical integration deemed a suspect practice under the antitrust laws because of its
potential exclusionary effect, all commercial activity would be placed under a cloud as
courts busied themselves redrawing the boundaries of firms, even though the normal moti-
vation for and consequence of vertical integration are merely to reduce the transaction
costs involved in coordinating production by means of contracts with other firms.
ing of proconsumer investment incentives. In short, an antitrust sharing duty presents unmanageable risks of doing more harm than good—of impairing the short-run and long-run investment incentives that the Sherman Act most fundamentally protects, and of generating transaction and administrative costs that offset benefits. The antitrust system is not institutionally suited to reliably counterbalance those risks and costs. The antitrust system therefore has never taken on the challenges that are inherent in implementing duties of sharing—challenges that Justice Breyer recognized in his opinion in *AT&T Corp v Iowa Utilities Board* and that the D.C. Circuit, speaking through Judge Williams, discussed in *United States Telecom Association v FCC* a few years later. These are challenges that historically have been left to regulatory regimes, not the antitrust system. Today, the 1996 Act assumes those challenges in the telecommunications setting.

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

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45 525 US 366, 430 (1999) (Breyer concurring in part and dissenting in part) (explaining the difficulties of an incumbent being forced to share "virtually every aspect if its business" with its competitors, ultimately leading to "a world in which competitors would have little, if anything, to compete about").

46 290 F3d 415, 429 (DC Cir 2002) ("In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."), cert denied as *WorldCom, Inc v United States Telecom Association*, 538 US 940 (2003).

47 Then-Judge Breyer explained this in his opinion in *Town of Concord v Boston Edison Co*, 915 F2d 17, 25 (1st Cir 1990) (explaining that to impose an antitrust duty that monopolists sell inputs to rivals at "fair prices" requires the court to conclude that "the anticompetitive risks [of ignoring the monopolist's conduct] outweigh the possible benefits and the adverse administrative considerations" of intervention) (internal citations omitted).
The only circumstance where § 2 has recognized a single-firm duty to engage in some kinds of dealing with rivals is a narrow one: where the firm has refused to sell to rivals (or rivals' customers) what the firm was already voluntarily selling to others on the desired terms. That particular kind of stark discrimination has been present in every one of the Supreme Court's cases finding liability for a refusal to deal. It was also present in the Seventh Circuit's *MCI Communications Corp v AT&T*, apparently the first and only case of liability for unilateral firm conduct under the "essential facilities doctrine."\(^{49}\)

The discrimination situation—the stark refusal to make available to competitors (or their customers) the very services and terms being voluntarily made available to other customers—has been the precondition to demanding of a monopolist an explanation for a refusal to share: if you are selling this to others at a price that is profitable and lets you recoup your investment, what reason is there for not selling the same thing at the same price to a rival? There might be answers—differential treatment can be justified; it is not by itself illegal—but without that discrimination there has not been liability for refusals to share. There are at least two basic reasons. First, where the defendant is already voluntarily offering the desired terms, there is no antitrust intrusion on the basic competitive choices of (a) what to sell and (b) at what price—the choices through which a firm enjoys the rewards of

\(^{48}\) Such discrimination was present in the cases condemning unilateral refusals to deal. See *Eastman Kodak Co v Image Technical Services, Inc*, 504 US 451, 459, 463 n 8 (1992) (characterizing as not a "unilateral refusal to deal" the refusal by a defendant, while selling parts to customers generally, to sell parts to customers who bought service from competing service providers); *Aspen Skiing*, 472 US at 593–94, 608, 610–11 (observing that the defendant refused to make full retail price ski-lift ticket sales to its competitor, although it was making such sales to customers generally and had previously voluntarily made such sales in collaboration with the competitor itself); *Otter Tail Power Co v United States*, 410 US 366, 371, 378 (1973) (involving a defendant who refused to wheel power for certain local-distribution competitors even though it was in the business of wheeling power for other such customers); *Lorain Journal Co v United States*, 342 US 143, 149–50 (1951) (involving a defendant newspaper publisher's flat refusal to sell advertising space, otherwise generally available to all advertisers, to parties who advertised on a competing radio station); *Eastman Kodak Co v Southern Photo Materials Co*, 273 US 359, 368–69, 375 (1927) (involving a defendant manufacturer that suddenly "refused" to sell to the plaintiff dealer "on the same terms as other dealers"). Such discrimination also was present in the concerted action cases of *Terminal Railroad Association*, 224 US at 394 (involving a multiparty agreement for operating a terminal railroad facility, in which members discriminated against nonmembers), and *Associated Press v United States*, 326 US 1, 10–11 (1945) (involving a multiparty agreement that openly discriminated between those who would compete against existing members and those who would not).

\(^{49}\) 708 F2d 1081, 1144 (7th Cir 1983) (upholding liability based on AT&T's refusal to sell to MCI, as a competitor, the very same connections that AT&T was already in the business of offering to "local customers, independent telephone companies and others").

\(^{50}\) That doctrine, as *Trinko* noted, is not a Supreme Court doctrine. 540 US at 411 ("We have never recognized such a doctrine ... and we find no need either to recognize it or to repudiate it here.").
successful investments. There is, accordingly, much less reason to worry about deterring long-run and short-run investments by requiring the results to be shared. Second, the institutional task for courts is much more manageable in this situation. The voluntary sales to others furnish a standard of conduct—equality—that the courts do not have to define on their own.

The situation is sharply different where a claim is made for sharing on newly forced terms (as opposed to terms already being offered voluntarily)—making sense of why §2 has never recognized such a claim. Any effort to demand sharing of assets on new terms requires definition of those terms and in particular the setting of “fair” prices, something antitrust juries and judges, through a treble damages system, cannot reliably do. 51 Specifically, the problem that has never been undertaken in the antitrust system is to strike a balance so as not to do more harm than good, both in the long run and in the short run.

In the long run, investment incentives would be threatened by a §2 rule that says firms must share the rewards if their investments are successful enough. The essence of the U.S. Steel point about the limited reach of §2 is that antitrust respects that truth. Indeed, this is a fundamental reason for having property rights in the first place. 52

Even in the short run, there are multiple problems with sharing duties—as recognized in the FCC’s orders implementing these duties under the 1996 Act 53 and in the opinions of Justice Breyer and Judge

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

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

We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration.

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

53 See notes 58–59 and accompanying text.
Williams mentioned above. First: a duty to share assets risks diminishing the incumbent’s investments in creating those assets in the first place, and in maintaining and upgrading them, for the rewards must be shared but the risks fully borne. Local telephone networks in particular require continuing investment; they do not spring from the ground, but require the constant attention of tens of thousands of employees and billions of dollars of investment. Second: a duty to share risks deterring independent investments by new entrants; sharing may be cheaper, and is certainly less risky, than investing in one’s own facilities. Third: a duty of incumbents to share can harm the best new entrants, those who do build their own facilities; they are faced with competition not just from the incumbent but from all the rivals who can cheaply share the incumbent’s assets. On top of these risks, the costs of implementing and administering any sharing duty can be very substantial, so that any market benefits must be large enough to exceed those costs. And: if the incumbent cannot reliably determine the required sharing terms in advance—if there are vague legal standards requiring years of costly and uncertain litigation—the risk of retrospective treble damages skews choices toward overgenerous sharing.

54 See notes 45–47 and accompanying text.

Even some consumer advocates are concerned that [forced sharing] is getting out of hand in California. The groups had pressed regulators to foster more competition. But now some worry that the resulting price wars have led SBC to invest less in its network. The long-distance companies aren’t investing much either, of course, since they can tap SBC’s network at low cost. “Something is not quite right here,” says Mark Philger, chairman of a group called Americans for Competitive Telecommunications.

There is some evidence that cable TV companies offering high-speed internet access services whose status as subject to sharing requirements is uncertain, see Brand X Internet Services v FCC, 345 F3d 1120 (9th Cir 2003), cert granted No 04-281 (Dec 3, 2004) (available on Lexis at 2004 US LEXIS 7980), are deploying less than the profit-maximizing level of capacity for fear that whatever capacity they deploy may be captured by the sharing duties. See Thomas W. Hazlett and George Bittlingmayer, The Political Economy of Cable “Open Access,” 2003 Stan Tech L Rev 4. The mere threat of compelled sharing has apparently deterred them from fully developing their own networks.
The point is not that, conceptually, there is no situation where these risks and costs could be outweighed by the possible benefits in encouraging investment in unshared assets that compelled sharing of some assets might make possible. The Supreme Court recognized in Verizon that it is "not obviously unreasonable" to conclude that there are such situations where compelled competition has net benefits and that the 1996 Act is Congress's experiment to identify such situations. But that experiment is being conducted through expert agencies and administrative processes that can be flexible—in adopting and revising and abandoning particular sharing duties; in quickly responding to access demands; in knowledgeably evaluating complaints about implementing complex interconnection agreements; in designing performance measures, with accompanying levels of penalties, that reflect the newness and complexity of the tasks they are imposing. The antitrust system, administered by one-time lay juries who are not expert in the facts and economics of the industry and do not reconvene periodically to revisit and readjust their decisions, has never recognized sharing duties on newly forced terms.

The importance of flexibility is illustrated by the FCC's decisions respecting the duty to share part of a copper loop. In its initial order implementing the 1996 Act, the FCC ordered that whole loops and

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56 Verizon, 535 US at 510 (concluding that it was not "obviously unreasonable" for the FCC to prefer to induce potential entrants to compete in "less capital-intensive facilities with lessened incentives to build their own bottleneck facilities" than to risk keeping potential entrants out).

57 Penalties for problems under the 1996 Act have been set (and repeatedly readjusted) by state commissions to motivate proper levels of performance. Each state has adopted a Performance Assurance Plan (PAP) that defines automatic penalties to be paid by incumbent local carriers to rivals for performance deficiencies. The total level of available penalties is quite high. The first PAP, established in New York, was justified as sufficient because it put at risk a sizeable fraction of Verizon's annual profits from the state. In reviewing New York's PAP, the FCC concluded:

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

In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service to the State of New York, 15 FCC Rec 3953, 4168 (1999). The New York PAP subsequently was increased to $293 million, or 39 percent of Verizon's Net Return. The current total of available annual penalties in the major states in which Verizon operates (not counting New Jersey) is $1.24 billion. New Jersey has no annual cap on the penalties that could be incurred. Aside from New Jersey, the total amounts of available penalty levels were set initially as a fraction of profits from the state (usually 39 percent), but because profits have declined while the penalties have stayed the same or increased, the fraction of Verizon's profits that could be forfeited is generally much larger than 39 percent.
nothing less than whole loops were to be provided.\footnote{\textit{In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers}, 11 FCC Rec 15499, 15693 (1996), modified on reconsideration, 11 FCC Rec 13042 (1996), vac'd in part, \textit{Iowa Utilities Board \textit{v} FCC}, 120 F3d 753 (8th Cir 1997), aff'd in part, rev'd in part as \textit{Iowa Utilities Board \textit{v} FCC}, 525 US 366, decision on remand, \textit{Iowa Utilities Board \textit{v} FCC}, 219 F3d 744 (8th Cir 2000), aff'd in part, rev'd in part as \textit{Verizon}, 535 US 467. The FCC specifically rejected the proposal that elements be defined in functional terms allowing use of \textit{less than} the entire facility: Some parties advocate defining a loop element as merely a functional piece of a shared facility. . . . \[W]e conclude that such treatment is inappropriate. Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new services to such end users. \textit{Implementation of the Local Competition Provisions}, 11 FCC Rec at 15693.} A few years later, the FCC required incumbents to share separately the high-frequency part of their loops, so-called line sharing. But after a couple more years’ experience (and a D.C. Circuit reversal), the FCC now has concluded that its judgment ordering line sharing was mistaken, as it actually can discourage independent competition: the firm that rents the whole loop has an incentive to offer, or to partner with others to offer, both data and voice service exploiting the full capacity of that loop to compete with the incumbent—an incentive that is impaired if the data-only rival can rent just the part of the loop used for data services.\footnote{\textit{Review of the Section 251 Unbundling}, 18 FCC Rec at 17135 (rejecting “expressly [ ] the Commission’s earlier finding that ‘line sharing will level the competitive playing field’”).}

That is just one illustration of the judgments that regulators at both the federal and state levels must make. The many massive FCC orders, and the numerous state-level orders that have been issued over the years, display the magnitude and complexity of the task and the range of subjects that must be addressed, and reevaluated, in light of changing circumstances. They address access to different kinds of switch-to-customer connections (different kinds of “loops”), different kinds of interoffice trunks and switches, different forms of access to central offices, and varieties of computerized ordering, billing, and other operation-support systems. With respect to all these matters, the agencies must determine the terms on which they think that there will be greater benefit than harm in forcing the incumbents to share, rather than forcing new entrants to take the risks of investing on their own. Yet the cases brought by Trinko and other plaintiffs would have all these judgments made under § 2 of the Sherman Act before juries and judges.

The problem is magnified because the prospect of obtaining access to valuable resources at cheap prices, like other regulatory
schemes offering valuable benefits, coupled with a potential treble damages "gold mine" inevitably attracts false claims. Fraud problems bear on the relative institutional capacities of antitrust courts and regulatory agencies, because any regime of forced access must sift wholly illegitimate (even fraudulent) complaints from legitimate ones. Agencies gain experience hearing complaints over time and are more likely to identify false claims successfully.

The reluctance to having courts define and enforce terms for mandated sharing of monopolist facilities, based only on general common law standards, is over a century old. In the *Express Cases*, the Supreme Court rejected the proposition that the defendant railroads had an affirmative common law duty to share their operational facilities with express company competitors, precisely because such a duty then entails the court defining extensive terms of dealing:

Having found that the railroad company should furnish the express company with facilities for business, [the lower court] had

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61 See *Son of Frankentobacco*, Wall St J A12 (Aug 23, 2002) (describing the proposed expansion of antitrust as a Frankenstein monster created by plaintiffs' lawyers who "see a gold mine here").

62 For example, after rival Covad filed its antitrust case against Verizon, Verizon obtained sworn declarations from three dozen former Covad employees stating that Covad had put them up to making tens of thousands of false reports about Verizon problems in providing lines ordered by Covad. See *Verizon Delaware, Inc v Covad Communications Co*, 377 F3d 1081, 1085 (9th Cir 2004) ("In the first quarter of 2000, Covad shirked its initial trouble-shooting responsibilities and issued numerous false trouble tickets leading Verizon to dispatch its technicians to solve problems arising from Covad's service and equipment."). As one former Covad employee stated in her declaration: "[A] Covad manager[] explained to me that Covad needed lots of 'undelivered' lines in order to bring its lawsuit." Declaration of Margo Nitis ¶ 7, attached to First Amended Complaint, *Verizon Delaware, Inc v Covad Communications Co*, No 01-20524-JF (ND Cal filed Dec 18, 2001). Many of the antitrust claims brought by rivals have involved efforts to avoid paying for services provided. Rival Cavalier's antitrust claim against Verizon originated in a dispute where Cavalier allegedly had not paid $17 million for use of Verizon's facilities, $9 million of which amount was "undisputed." *Cavalier*, 330 F3d at 179-80. Rival Ntegrity's antitrust claim against Verizon was filed as a counterclaim in response to Verizon's collection action for unpaid bills. *Verizon New Jersey, Inc v Ntegrity Telecontent Services, Inc*, 219 F Supp 2d 616, 621-22 (D NJ 2002).

63 See, for example, *In Touch Communications, Inc and Inflexion California Communications Corp, for the Sale and Purchase, Respectively of the Customer Base, Operating Authorities and Other Assets; Inflexion California Communications Corp, for a Certificate of Public Convenience and Necessity to Provide Resold and Limited Facilities-Based Competitive Local Exchange Service Throughout the Service Territories of SBC California, Inc, Verizon California Inc, Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc; and Resold and Facilities-Based Interexchange Service*, Cal Pub Utilities Commission Dec 04-05-033, *2 (May 27, 2004) (denying operating authority to the principals of antitrust plaintiff Ntegrity on the ground that they had not paid fines for misconduct in other states).

64 117 US 1 (1886).
to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation.

Such definition by a court of the parties' business arrangements is improper: "The regulation of matters of this kind is legislative in its character, not judicial." The sharing duties alleged by Trinko and the other plaintiffs would not only be novel as a matter of antitrust law but unjustifiable for the substantive and institutional reasons discussed above. And the 1996 Act is itself a good reason for not expanding § 2 newly to recognize such duties. Doctrinally, the comprehensive regime of the 1996 Act furnishes one reason not to expand § 2 under the often recognized principle that a general statute, especially a common-law-like one such as the Sherman Act, should not be newly expanded to cover what more specific federal regimes already are addressing.

Expanding § 2 in this context is distinctly unnecessary in this area, given the 1996 Act. The 1996 Act gives statutory rights to quick decisions for regulators on access demands, subject to judicial review. That

65 Id at 28-29.
66 Id at 29 (internal citations omitted).
67 The familiar "specific governs the general" principle has been recognized by the Supreme Court in diverse contexts ranging from ERISA, see Black & Decker Disability Plan v Nord, 538 US 822, 831 (2003) ("Although Congress 'expected' courts would develop 'a federal common law of rights and obligations under ERISA-regulated plans,' the scope of permissible judicial innovation is narrower in areas where other federal actors are engaged.") (internal citations omitted), to water pollution, see City of Milwaukee v Illinois, 451 US 304, 325 (1981) (holding that a previously recognized federal common law nuisance claim was displaced by a later, more specific, federal statute because the technical difficulty of the problems were "doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise," and that the claim was "particularly unsuited to the approach inevitable under a regime of federal common law"), and by the lower courts in this telecommunications antitrust context particularly. Goldwasser, 222 F3d at 401 ("The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.").
system, including the reviewing courts, cannot be expected to fail unless the antitrust system, including the same courts, would fail as well.68

To a large extent, expanding §2 would reintroduce the very kind of judicial regulatory regime that Congress repudiated in the 1996 Act when it ended fourteen years of judicial control of telephone matters under the AT&T breakup consent decree, returning the task of fine-tuned telecommunications regulation to administrative agencies.69 That is just one reason expanding §2 in this context is particularly unwise. Such expansion would raise serious problems of disruption of and interference with the regulatory processes for implementing the 1996 Act.

Expanding §2 would reduce the agencies’ flexibility in performing their delicate balancing, especially their ability to enforce ceilings on sharing duties. The ceilings on sharing obligations are as important as floors in that regime, for it is the refusal to allow sharing that induces the independent investments by new entrants that constitutes genuine competition. The process of weaning entrants off no-longer-justified sharing, or excessively favorable terms of sharing, can only be impaired by adding antitrust—the threats of treble damages, class actions, hard-to-change injunctions, and, even, the sheer expense of defending complex antitrust suits, even while participating in the two-level regulatory proceedings superintending the very same matters.

There are hundreds, maybe thousands, of agreements between incumbents and competitors. They are lengthy, complex, and detailed, all doing something new and involuntary. Disputes are inevitable under many of the open-ended and technical terms of the agreements, which is why there are built-in performance standards and penalties and expeditious dispute-resolution mechanisms. Recognizing the claims of Trinko and others would allow all these disputes to be made into antitrust cases simply by adding the allegation of a pattern of violations intended to slow overall marketwide entry. Those suits threaten years of costly, uncertain, and risky litigation before diverse juries deciding whether the incumbents dismantled themselves rapidly or helpfully enough. That prospect tilts the agency-adjusted 1996 Act balance—too little versus too much sharing—in only one direction.

In particular, it impairs the expeditious resolutions of problems under the 1996 Act. In Trinko itself, for example, AT&T and Verizon

68 Then-Judge Breyer relied on a similar point in a decision broadly rejecting recognition of certain “price squeeze” claims. See Town of Concord, 915 F.2d at 25–28.
had a state-approved agreement saying, in effect, “don’t go to court to redress grievances,” but instead use fast nonjudicial processes to resolve problems. They used those processes: the underlying problem was fully resolved, with compensation paid, in a few short months. The prospect of treble damages antitrust class actions can only impair the ability of the 1996 Act regulatory regime to achieve such efficient resolutions.

The history of network-to-network interconnection, even in areas where the 1996 Act’s universal duty to interconnect has not been applied, provides reason for optimism that interconnecting parties will tend to work out proper terms without intervention from antitrust courts. Diverse email networks, which started as separate closed systems unable to communicate with each other, developed common standards for exchanging messages and then interconnected so that their customers can send emails between networks. Diverse internet backbones interconnected through arrangements known as “peering” so that the users connected directly or indirectly to one backbone can access websites on other backbones. Diverse wireless telephone systems interconnected through arrangements known as “roaming” so that a subscriber to one network can make calls when outside the area his or her network covers. In each instance, the interconnecting networks worked out for themselves problems of pricing, dividing revenues, metering usage, billing, offering compatible features, deterring fraud, and a host of other issues. “The beauty of the free market is that it achieves collaborations of this kind by private contracts freely entered on, wherever they are economically beneficial.”

Even a look at some of the failures of different networks to interconnect does not suggest that an antitrust court or jury applying general standards could reliably improve matters. For example, the FCC unsuccessfully sought to force AOL’s Instant Messenger system to interconnect with other systems. Presumably AOL believed that it

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70 47 USC § 251(a)(1).
71 Alfred E. Kahn, 2 The Economics of Regulation: Principles and Institutions 65 (MIT 1988).
could serve the entire demand for instant messenger services at a lower cost alone than in collaboration with other providers, especially when collaboration could increase the volume of unwanted spam and commercial pop-up messages that would degrade the service. Despite the lack of interconnection with other instant messenger services, AOL's market power is abating while MSN's and Yahoo's services are gaining market share. Where even expert agencies falter, antitrust courts should be reluctant to follow.