

## *Microsoft* and *Trinko*: A Tale of Two Courts

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Two recent opinions have sought to systematize and rationalize the law of monopolization under Section 2 of the Sherman Act. Those cases are *Microsoft*<sup>1</sup> and *Trinko*.<sup>2</sup> They are the most recent word of the D.C. Circuit and the Supreme Court respectively about the core meaning of one of the two basic prohibitions contained in the US antitrust laws. In this brief comment, I will use the debate over the enduring meaning of *Microsoft* to argue that the D.C. Circuit in *Microsoft* has surpassed the United States Supreme Court as the most important and articulate antitrust court and has outshone the highest court in the land in crafting honest and true antitrust doctrine consistent with history, precedent, and policy.

Professors Gavil and First are to be commended for their searching inquiry into the ongoing fight over the meaning and legacy of the antitrust litigation against Microsoft, both here and abroad.<sup>3</sup> They are right in arguing that the combined effect of the appellate decision on the merits of the case, the subsequent consent decree, and the response of the current Administration to foreign enforcement actions has done little to restore competition and done much to protect

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<sup>1</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>2</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>3</sup> Harry First & Andrew I. Gavil, *Re-framing Windows: the Durable Meaning of the Microsoft Antitrust Litigation*, \_\_ UTAH L. REV. \_\_ (2006).

Microsoft's durable market from future challenge.

While Gavil and First are correct in noting the role of the D.C. Circuit in the piecemeal analysis of the various anticompetitive actions by Microsoft,<sup>4</sup> there is still much to admire in the craftsmanship of the opinion. The *Microsoft* decision of the D.C. Circuit should stand as a landmark in the history of antitrust. It is a thoughtful, scholarly opinion by a court that values and respects the antitrust laws that it was interpreting. This opinion largely succeeded at systematizing and rationalizing a body of law under Section 2, which was often the subject of empty slogans and little analytical heft.<sup>5</sup>

In contrast there is *Trinko*. Sometimes there is an opinion that it so profoundly wrong that Mary McCarthy's famous quote about Lillian Hellman comes to mind: "Every word she writes is a lie, including *the* and *a*."<sup>6</sup> *Trinko*, is such an opinion. It is not a lie, of course, because the majority of the Supreme Court presumably believe that it to be true and intend it as a binding statement of the law.

But it is not true in any normal sense either. Justice Scalia's opinion is wrong on the law, wrong on the facts, wrong as a matter of procedure, wrong as a matter of economics, wrong as a matter of institutional competencies, and a poor contrast with the way Section 2 legal standards

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<sup>4</sup> *Id.* at \_\_.

<sup>5</sup> William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 47 SMU L. Rev. 1811, 1823-27 (1995).

<sup>6</sup> Mary McCarthy speaking about Lillian Hellman in a 1980 televised interview on the Dick Cavett show, quoted in Mary McCarthy, <http://www.kirjasto.sci.fi/marymcc.htm>.

have been articulated by courts in antitrust cases since the passage of the Sherman Act.<sup>7</sup> It is also a stunning contrast to the careful thoughtful and systematic way in which the D.C. Circuit analyzed these same principles in *Microsoft*.

In this comment, I compare the *Microsoft* and *Trinko* opinions as to the core questions of Section 2 of the Sherman Act: monopoly power and exclusionary conduct. While Professors Gavil and First focus on *Microsoft*'s faults, I tend to emphasize its strengths as a well-crafted opinion trying to synthesize complicated areas of the law in a creative but straight forward and intellectually honest manner. It compares well to *Trinko*'s recklessness and less straight-forward attempts to move the law in a dramatic fashion without acknowledging what it is seeking to do. I then rely on the insights of the Legal Process School to evaluate the merits of both opinions as opinions and to reach some very tentative conclusions about how and why the *Microsoft* opinion is more likely to be viewed and trusted as the definitive word as to the meaning of monopolization under the Sherman Act. While *Trinko* is profoundly troubling and may be the latest word on this subject, fortunately it is not the final word.

## I. *Microsoft* on Monopoly

The key sections of the 2001 *Microsoft* decision of the D.C. Circuit speak for themselves. As to the existence of monopoly power, a necessary but not sufficient finding for imposing

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<sup>7</sup> The *Trinko* court is, however, certainly correct in noting that the text of Section 2 does not include theories of leveraging which would impose liability if a defendant used power in one market to some advantage falling short of monopolization or attempted monopolization in a related market. 540 U.S. at 415 n.4. Other jurisdictions have done a better job at addressing this issue under their laws dealing with an abuse of a dominant theory which textually can encompass theories of leveraging if adequately proved. See e.g., Article 82, Treaty Establishing the European Economic Community, as amended.

liability under Section 2, the court noted:

While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. The Supreme Court defines monopoly power as “the power to control prices or exclude competition.” More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. “Entry barriers” are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.<sup>8</sup>

As to the type of conduct that a monopolist must engage in to violate Section 2 the court established a series of shifting burdens of proof:

From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an “anticompetitive effect.” That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. “The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”

Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is “of ‘the type that the statute was intended to forestall,’ ” no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.

Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a “procompetitive justification” for its conduct. If the monopolist asserts a procompetitive justification—a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim....

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<sup>8</sup> 253 F. 3d at 51. (Citations omitted).

Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the “rule of reason.” The source of the rule of reason is *Standard Oil Co. v. United States*, in which the Supreme Court used that term to describe the proper inquiry under both sections of the Act....

Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.<sup>9</sup>

Although I have omitted the relevant citations, the *Microsoft* decision is respectful of history and precedent, and attempts to set out enduring standards that one could intelligently apply regardless of what side one represented in a particular dispute. It is making law, but in a way that is hard to tell in advance which side will prevail in its application to any particular fact pattern. Indeed if the reader stopped at this point in the decision there would be no way to tell whether Microsoft or the government would win as to any given point of contention.<sup>10</sup> In the real world, Microsoft lost on most Section 2 issues under this test because the government was able to demonstrate anticompetitive harm for most of the defendant's practices and Microsoft could not offer persuasive non-pretexual procompetitive justifications, thus failing the third prong of

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<sup>9</sup> Microsoft, 253 F. 3d at 58-59 (Citations omitted).

<sup>10</sup> Although beyond the scope of this comment, I would go so far as to argue that the decision can be read as consistent with the theory of justice associated with the philosopher John Rawls who argued that justice requires the selection of rules behind a veil of ignorance in which the decision maker does not know in advance whether the selected rule helps them or hurts them in the real world. JOHN RAWLS, A THEORY OF JUSTICE (1971).

the court's test.<sup>11</sup>

## II. The Trouble with *Trinko*<sup>12</sup>

Whenever I teach *Trinko* in my basic antitrust class, the students invariably view it as a narrow and peculiar case about the intersection between antitrust and a highly technical form of regulation prescribed in the 1996 Telecommunications Act. They wonder what the big deal is or why I make such a big deal out of a short highly fact specific case. The students are half right. *Trinko* should have been that type of an opinion, and perhaps it might be if one ignores all the dicta. However, the problem with *Trinko* is that it offers unfounded and plainly wrong general statements about antitrust law, the operation of markets in the real world, monopoly power, and regulation that supports a political agenda that is being waged in antitrust. This war is being raised in the Administration's treatment of the Microsoft case and the highly political agenda of the Antitrust Modernization Commission.<sup>13</sup> As a result *Trinko* matters. Here are some of the reasons that I tell my students why it matters, how truly radical it appears to be, and how badly it

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<sup>11</sup> See e.g., 253 F. 3d at 63-64 (no justification for certain restrictions in OEM license agreements), 66-67 (no justification for commingling certain computer code and excluding Internet Explorer from Add/Remove utility program), & 71 (no justification for exclusive licenses with Internet Application Programmers). Where Microsoft met that burden, the court did not impose liability unless plaintiff was able to demonstrate that anti-competitive harm outweighed pro-competitive justification. *Id.* at 67 (no liability for overriding user's choice of browser when necessary technically).

<sup>12</sup> With thanks to Eleanor Fox who first coined this alliterative title in a presentation to the American Bar Association. Eleanor M. Fox, *The Trouble with Trinko*, American Bar Association, Antitrust Section, Spring Meeting 2004.

<sup>13</sup> This overall agenda is one of the core insights of Professors Gavil and First. Gavil & First, *supra* note 3, at \_\_\_.

compares to *Microsoft*.

A. Procedural Tone Deafness

The *Trinko* majority failed to give consideration of the procedural context of the case which has been critical to the major antitrust cases of the recent past. This failure is oddly inconsistent with the Court's recent treatment in general of the standards for deciding motions to dismiss for failure to state a cause of action.

The procedural posture of the case has been critical to most of the important antitrust decisions of the past twenty years. In *Aspen*, the case came to the Court following a full trial on the merits.<sup>14</sup> Having conceded the issue of monopoly power and the definition of the relevant market, the defendants nonetheless argued that there was no support for the jury's verdict that they had engaged in unlawful monopolization. The Court rejected these arguments holding the evidence introduced by the plaintiff of harm to consumers and competition, a dramatic change in a long standing course of dealing, the defendant's lack of business justification, and its willingness to sacrifice revenues to injure a rival were more than sufficient to uphold the jury's verdict. Similarly, in *Microsoft*, the D.C. Circuit carefully examined the full record of the bench trial in upholding the vast majority of the trial court's findings of fact as justified by the record generated at trial.

In the seminal *Matsushita*<sup>15</sup> decision, the Court explored when summary judgment was

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<sup>14</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). *See generally* Symposium, *Aspen Skiing 20 Years Later*, 73 ANTITRUST L. J. 59-268 (2005).

<sup>15</sup> *Matsushita Elec. Ind. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

appropriate in a mammoth antitrust case that alleged a long-running conspiracy among the entire Japanese electronics industry to price high in Japan and low in the United States in order to drive US competitors out of business. As part of a trilogy of cases setting forth the meaning of summary judgment generally in civil litigation,<sup>16</sup> *Matsushita* held that in the absence of direct evidence creating a genuine issue of material fact as to the existence of an actionable conspiracy, a plaintiff could not defeat summary judgment in a Section 1 without some theory that made economic sense. The Court would not give every plaintiff her day in court for a trial in the absence of direct evidence of conspiracy or reasonable circumstantial evidence or inference that it was more likely than not that the defendants had acted together rather than unilaterally in setting low prices in the United States.

The procedural setting similarly was critical to the *Kodak* case.<sup>17</sup> The Court held that, while the defendants had a plausible theory why they did not, and could not, possess sufficient market power to engage in unlawful tying, there was none the less record evidence that they did exercise such power. This required the denial of summary judgment and a trial on the merits. It is of great interest and considerable importance that Justice Rehnquist, the author of *Matsushita*, joined in the majority opinion in *Kodak* suggesting that procedure does indeed matter.

Most remarkably, *Trinko* is neither a review of a trial record or even a summary judgment case. It is a reversal of the denial of a motion to dismiss for failure to plead a cause of action for which relief can be granted. In this setting, a court may not look beyond the four corners of the

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<sup>16</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>17</sup> *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

complaint, must take all facts in the complaint as true, make all reasonable inferences in favor of the pleader, and dismiss the complaint only if there is no articulable way under which relief can be granted. From *Conley v. Gibson*<sup>18</sup> in the 1950s, to the *Leatherman*<sup>19</sup> decision in 1992, to its most recent pronouncements in *Swierkiewicz v. Sorema, N.A.* in 2002,<sup>20</sup> the Supreme Court has chided lower courts and reversed the dismissal of complaints for misconstruing the concept of notice pleadings and the requirements of Rule 8 and 12(b)(6) governing complaints under the Federal Rules of Civil Procedure.

Although the court was entitled to take judicial notice of the results of the prior regulatory proceedings, *Trinko* reached its result in spite of, not in accordance with, the procedural posture of the case. As Professor Gavil has noted in his own most excellent treatment of *Trinko*, the Court instead engaged in a far reaching factual inquiry of Verizon's operations and the impact of the proposed case on its business freedom without the benefit of any record whatsoever and substantial disregard for the teachings of civil procedure.<sup>21</sup> If the combined result of *Trinko* and *Matsushita* is to suggest that antitrust cases are different from other cases with respect to motions to dismiss but the same with respect to everything else, that is a result for Congress to address and not for the Court to decide in passing.

The *Microsoft* court in contrast seems to take procedure quite seriously, even when it

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<sup>18</sup> 355 U.S. 41 (1957).

<sup>19</sup> *Leatherman v. Tarant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1992).

<sup>20</sup> 534 U.S. 506 (2002).

<sup>21</sup> Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 45 (2004).

appears to limit its discretion as to the outcome on the merits. The appellate court had before it a full record of an extensive bench trial. The appellate court is deferential to findings of fact when supported by the record even when the trial court may have reached conclusions that the appellate court would not have under the same circumstances.<sup>22</sup> As a result, the vast majority of the findings of liability are affirmed.

*Microsoft* is also quite harsh when the court believed that the trial court erred in its procedures for conducting the remedy portion of the trial and in connection with the trial judge's ex parte communications with journalists in the course of the trial itself.<sup>23</sup> Procedure appears to matter deeply to the D.C. Circuit in reviewing this landmark proceeding and its own procedural posture is impeccable and is exacting in insisting that the trial court comply with its procedural obligations.

#### B. Non-Immune Immunity

The net result in *Trinko* is a form of immunity for incumbent local telecommunications operators that is inconsistent with the statutory scheme set forth by Congress. Congress sought to both authorize and promote competition in the local telephone market in the 1996 Telecommunication Act. It created a series of new duties for incumbents and at the same time set forth an antitrust savings clause that nothing in the regulatory scheme would affect the

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<sup>22</sup> 253 F.3d at 66.

<sup>23</sup> *Id.* at 97-117.

application of the antitrust laws.<sup>24</sup> Thus, the Court was precluded from holding that the defendant was immune from the antitrust laws because Congress said it was not.

The Court nevertheless reached the same result by holding that the defendant's foot dragging can *never* constitute unlawful monopolization for violation of its duties under the 1996 Telecommunications Act. This is not merely a matter of lack of standing, which was the theory of the concurrence authored by Justice Stevens.<sup>25</sup> If the wrong plaintiff had sued, then perhaps a competitor or state or federal government antitrust enforcers could bring a case. But if truly no one can challenge these violations under the antitrust laws, then this is immunity by another name. Perhaps there remains some room for the application of Section 1 of the Sherman Act to the collusive actions of incumbent local operators to preclude entry,<sup>26</sup> but then the Court has construed statutory language and Congressional intent as precluding Section 2 liability, but not Section 1, an unprecedented result under either regulatory or antitrust principles. Given that *Trinko* refers to the regulatory scheme repeatedly as an explanation why antitrust will not be added to the mix, the Court can only be read as imposing immunity in the most circuitous manner possible.

### III. Throwing Away Section 2

Once the Court concluded that no antitrust cause of action existed the Court was done.

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<sup>24</sup> The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. The antitrust savings clause is set forth at Section 601(b)(1).

<sup>25</sup> 540 U.S. at 416.

<sup>26</sup> *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005) may be an example of such a reading of *Trinko*. Interestingly, *Trinko* is not even cited in this opinion.

The holding was complete and a court inclined toward judicial restraint would have just signed off. Instead, *Trinko* embarked on a discursive essay on why monopoly power is an essential ingredient to a market power, why the essential facilities doctrine has no application to the situation at hand (and little viability in general), and why courts are likely to do more harm than good in the antitrust area. These are all extraordinary proposition for any court, let alone the Supreme Court, to assert. This section explores the three most important and outrageous assertions in the dicta portion of *Trinko*.

#### A. Learning to Love Monopoly

The *Trinko* decision reframes the standard two-step test for unlawful monopolization in the most extraordinary way. After the standard trope that monopoly power alone is not a violation, *Trinko* states without any support:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.<sup>27</sup>

This is the first time that I am aware that any court, let alone the Supreme Court, has chosen to characterize the possession and exercise of monopoly power as “an important element of the free-market system.” This is rather the instantiation of the unproven and unprovable Schumpeterian hypothesis that we are all better off in a world of monopolists who rise to power

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<sup>27</sup> 540 U.S. at 407.

and then toppled in waves of creative destruction.<sup>28</sup>

Even if true, it is not clear what any of that ringing rhetoric has to do with the facts in *Trinko*. Verizon is the inheritor of a regulated monopoly whose innovation is many decades in the past, long protected by government regulation, and being challenged for allegedly anticompetitive acts in order to cling to its dominant position by impeding new entry authorized by statute.

If the point of antitrust law is to encourage the acquisition and retention of long-term monopoly power then we might as well abandon the entire enterprise of the regulation of competition by law or more broadly the promotion of a democratic market economy. It is one thing to say that we tolerate the existence of monopoly power (if not illegally acquired) but scrutinize its exercise to determine what kind of behavior is exclusionary and what is not. It is quite another to worship at the alter of monopoly power.

We have come a long way from the days of *Alcoa* in which monopoly power, while still necessary but not sufficient for a violation, was described by Judge Hand as deadening initiative, depressing energy, and constituting a narcotic.<sup>29</sup> From the debates that preceded the passage of the Sherman Act until *Trinko*, one can search long and hard before one sees anything close to this love affair with monopoly in either Congress or in the majority, concurring, or dissenting opinions of the Supreme Court in Section 2 cases.

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<sup>28</sup> See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81- 86 (2d ed. 1942).

<sup>29</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945). *Alcoa* was the work of the Second Circuit writing as the court of final appeal because of a lack of quorum at the Supreme Court for the case.

Such a discussion was utterly unnecessary in any event, but is likely to shape the interpretation of Section 2 from the shadows in a way that is impossible to reform through legislation or rebut through legal precedent or policy argument. The *Trinko* court's pronouncements on this score stand merely as a naked assertion of a policy preference that has been rejected since the passage of the antitrust laws themselves.

At one place, the Court appears to put its cards on the table and alludes to certain past precedents that appear to support the plaintiff's refusal to deal and/or essential facilities theory. The Court dismisses these venerable precedents as involving: “*concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.”<sup>30</sup>

Privileging Section 1 over Section 2 of the Sherman Act, or believing concerted action is inherently more anticompetitive than equivalent action by a single entity with similar power, is an equally astonishing assertion with no textual support in the antitrust laws. Both halves of the Sherman Act have equal prohibitions, equal penalties, and equal significance. If one is also inclined to look at legislative history, there is simply no indication that the drafters of the Sherman Act differentiated between these two concepts, or indeed particularly understood that there was a difference.

Even if one were to take an exclusively economic view of antitrust, it is by no means

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<sup>30</sup> Here the Court cited *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912) and *Associated Press v. United States*, 326 U.S. 1 (1945) but not *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) the Supreme Court case most applicable to the merits of the *Trinko* dispute.

clear why the opposite view should not prevail. One can equally persuasively argue from economic theory that antitrust principally fears durable market power unaccompanied by substantial efficiencies which is more likely to arise from a single rent-seeking monopolist than from a fragile agreement of competitors seeking to imperfectly duplicate the behavior of a true monopolist in restricting output and raising price.

#### B. Missing the Essential

Once the court was done praising monopoly power and diminishing the importance of Section 2, it turned to an equally unnecessary, and inherently wrong, discussion of the essential facilities doctrine which the plaintiffs had urged as an alternate theory of liability. Here the court stated in its entirety:

This conclusion would be unchanged even if we considered to be established law the “essential facilities” doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent’s allegations might state a claim. We have never recognized such a doctrine, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purpose. Thus, it is said that “essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.” Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act’s extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent’s “essential facilities” argument is distinct from its general § 2 argument, we reject it.<sup>31</sup>

If anything the court has it backwards. As I will be exploring in future work, the essential facilities doctrine works best as a theory of monopolization when dealing with infrastructure, in

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<sup>31</sup> 540 U.S. at 410-11 (Citations omitted).

the sense that the facility in question is an input which creates such substantial positive externalities downstream that a regime of open access is socially desirable.<sup>32</sup> As my colleague Brett Frischmann has noted, this can include traditional commercial infrastructure such as bridges, roads, ports, etc but also other foundational resources such as lakes, ideas, and the Internet.<sup>33</sup> If the firm controlling the essential infrastructure is not a competitor to those seeking access certain duties to deal has been imposed since common law times under the common carrier doctrine.<sup>34</sup> If the firm controlling the essential infrastructure is a competitor of those seeking access and uses that control to maintain its dominance, then, and only then, has the essential facility doctrine come into play as an antitrust concept.

Most antitrust cases with any merit that have invoked the essential facilities doctrine have dealt with some aspect of infrastructure. These include the cases dismissed by *Trinko* as partaking on Section 1 principles rather than Section 2. But the only bridge across the Mississippi,<sup>35</sup> the network of newspapers comprising the Associated Press around the time of

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<sup>32</sup> For a more complete discussion of infrastructure theory in these terms see Brett Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005) and Lawrence Lessig, *Reply: Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031 (2005).

<sup>33</sup> Frischmann, *An Economic Theory of Infrastructure*, *supra* note 32, at 960.

<sup>34</sup> RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 279-318 (1998). If the owner of the facility is not a competitor of the entity seeking access no antitrust liability has been imposed for the denial of access regardless of whether the facility is essential. See I AMERICAN BAR ASSOCIATION, *ANTITRUST LAW DEVELOPMENTS (FIFTH)* 278 N. 278 (2002)(collecting cases).

<sup>35</sup> *United States v. Terminal Railroad Ass'n of St Louis*, 224 U.S. 383 (1912).

World War II,<sup>36</sup> the local phone loop controlled by MCI (and Verizon),<sup>37</sup> the transmission lines controlled by Otter Tail Power,<sup>38</sup> and under extraordinary circumstances intellectual property rights,<sup>39</sup> all nicely fall into this notion of infrastructure in both the technical sense used by Professor Frischmann and in the colloquial every day sense of the word. Interestingly enough, it is *Aspen* (not *Trinko*) that is the hardest to justify in these terms.<sup>40</sup>

The vast majority of infrastructural assets for which open access would be societally valuable are neither wholly regulated (presumably immune under the regulatory statute in question) nor fully deregulated (for which *Trinko* may concede some application of the essential facility for discriminatory denials by a competing monopolist). Moreover, it is hard to find any truly unregulated facility which is “essential” in the sense required by *MCI* and its progeny. Even the handful of cases treating sports stadiums as essential facilities may be better explained by virtue of the heavy public subsidization of such facilities making such facilities impossible to

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<sup>36</sup> *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>37</sup> *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7<sup>TH</sup> Cir.), *cert. denied*, 464 U.S. 891 (1983).

<sup>38</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>39</sup> *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG* (C418/01) [2004] E.C.R. I-5039 (ECJ); *Radio Telefis Eireann v. Commission of the European Communities* (C241/91 P) [1995] E.C.R. I-743 (ECJ).

<sup>40</sup> It is also additional support for Professor Fox’s conclusion in a recent article that *Trinko* is much easier and better case to impose Section 2 liability than *Aspen* itself. See Eleanor M. Fox, *If There Life in Aspen after Trinko? The Silent Revolution in Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153 (2005).

duplicate with purely private resources.<sup>41</sup> As a result, the courts have dismissed without much ado most essential facilities cases of the purely unregulated unsubsidized type on the grounds that the plaintiff could create their own alternative facility to the dominant firms.<sup>42</sup>

Most of the good essential facility cases occur in the twilight zone of partial regulation which *Trinko* appears to have cast into the legal abyss. Take *MCI v. AT&T* which is generally credited with as the source of the modern version of the doctrine.<sup>43</sup> In *MCI*, the defendant AT&T continued as the regulated monopolist of local telephone service but now confronted competition in the long distance market. AT&T denied MCI access to the local telephone system which was necessary to complete the long distance calls over MCI's microwave network. MCI was physically, legally, and practically prevented from building its own local telephone system. AT&T claimed it could not interconnect with MCI because of existing regulatory restrictions and also because of technological and system integrity concerns. The courts found all of these purported justifications to be legally or factually insufficient, and frequently pretextual, and imposed Section 2 liability in substantial part on this ground.<sup>44</sup> Most of the verdicts imposing

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<sup>41</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 247 (2005).

<sup>42</sup> *Twin Lab., Inc. v. Weider Health & Fitness*, 900 F. 2d 566 (2d Cir. 1990); *McKenzie v. Mercy Hospital*, 854 F.2d 365 (10<sup>th</sup> Cir. 1988); *Case C-7/97 Oscar Bronner GmbH KG v. Mediaprint* [1998] E.C.R. I-7791; [1999] 4 C.M.L.R. 112.

<sup>43</sup> See generally Spencer Weber Waller, *The "New" Law of Monopolization: An Examination of MCI Communications Corp. v. American Telephone & Telegraph Co.*, 32 DEPAUL. L. REV. 595 (1983).

<sup>44</sup> The court also affirmed liability based on the sham litigation doctrine, but reversed portions of the judgment based on predatory pricing claims, and remanded for a new trial on damages based solely on that conduct found to be unlawful. 708 F.2d at 1166-69. The case subsequently settled for a fraction of the original verdict.

liability under this theory have similarly concerned dominant firms resisting deregulation or misusing partial deregulation in a way that *Microsoft* court would probably characterize as unlawful monopoly maintenance, but *Trinko* appears to consider good clean fun.

The European Union has in fact done a better job than we have in recognizing this fundamental distinction without citing infrastructure theory by name. In the easy cases, the European Commission and the courts have imposed liability (often using the essential facilities doctrine by name) when the operator of a port or harbor uses its control of that facility to discriminate against a competitor for ferry service or shipping services by denying access to needed berths.<sup>45</sup> The European court quite properly refused to require the leading newspaper in Austria to make its delivery network available to smaller competitor that was legally and practically speaking free to create its own network.<sup>46</sup> In the harder cases involving overly broad intellectual property rights, the court left open the possibility of liability in extraordinary circumstances.<sup>47</sup> Here too, all the cases with any merit appear to fall into the zone of partial regulation where *Trinko*, if translated into holding and precedent, would eliminate.

Even if taken on its terms *Trinko's* own discussion of the essential facilities doctrine does not lead to the result it claims. *Trinko* states that “essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope

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<sup>45</sup> See generally II JAMES ATWOOD, KINGMAN BREWSTER, & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD §16.4 (1997 & annual supp.).

<sup>46</sup> Case C-7/97 Oscar Bronner GmbH KG v. Mediaprint [1998] E.C.R. I-7791; [1999] 4 C.M.L.R. 112.

<sup>47</sup> IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (C418/01) [2004] E.C.R. I-5039 (ECJ).

and terms.”<sup>48</sup> The discussion that follows hardly suggests that there was “effective regulation” in this particular case. For its actions, Verizon was subject to fines totaling \$13 million and various reporting obligations. There was (and could not be at this early procedural stage of the case) no discussion of whether this was “effective” in forcing Verizon to live up to its obligations under state and federal telecommunications law. There is every indication that it was not and that Verizon was prepared to incur litigation expenses far in excess of this fine to avoid the one set of penalties that actually would be effective in mandating non-discriminatory access.

Let’s turn the question on its head for a moment. Putting aside antitrust, does Justice Scalia and the rest of the *Trinko* majority actually think that FCC regulation implementing the 1996 Telecommunications Act is “effective” in any normal sense of the word? Neither Congress nor most commentators think that it is. There is certainly nothing in the numerous past opinions of the Supreme Court on recent telecommunications issues that shows a great deal of faith in the 1996 Telecom Act, FCC regulation, or even regulation in general.

### C. Fear and Loathing of Antitrust and Courts

*Trinko* is replete with a contempt for the judicial process adding any value in the area of the regulation of competition by law. We are cautioned about the possibilities of false positives and urged to be reluctant to bring out the antitrust battering ram unless one is confident that the benefits exceed the costs. This is certainly debatable in principle but also curious because it appears to have little to do with *Trinko*. The possibility of a false positive is quite low, since no

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<sup>48</sup> 540 U.S. at 411, *citing* P. AREEDA & H. HOVENKAMP, ANTITRUST LAW p. 150 ¶ 773e (2003 Supp.).

one can seem to find any procompetitive upside in *Trinko*'s foot dragging and interference with competitor access to its local exchange facilities.<sup>49</sup>

Moreover there is no reason to think that deciding *Trinko* on the merits is beyond the capacity of the average federal judge. The basic question of whether Verizon was, or wasn't providing access to its competitors on terms less favorable than it did its own local customers is a straight forward question of discrimination amounting to roughly: Is X being treated less favorably than Y? This is a basic binary type of verdict that federal and state courts decide on a daily basis in both statutory and common law cases of civil rights, employment discrimination, common carrier duties, licensing decisions, school segregation, prison conditions, access to health care, and numerous other areas of the law. These are a dime-a-dozen type of decisions that are a far cry of the polycentric multi-variate balancing type of cases that legal theory predict that courts are comparatively poorer at deciding.<sup>50</sup> If one concludes the courts cannot handle this kind of dispute then most of the federal docket should be discarded in favor of some other institutional dispute resolution mechanism.

The courts have proved themselves quite adept at making these sorts of decisions in right to access antitrust cases, whether called essential facilities cases or not. The *Trinko* court acknowledged that the courts have adequately handled such disputes under the rubric of Section 1 of the Sherman Act.<sup>51</sup> When the essential facilities doctrine has been explicitly used by the

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<sup>49</sup> See Fox, *Is There Life in Aspen*, *supra* note 40, at 165-66.

<sup>50</sup> These type of cases may actually be easier to adjudicate than the full rule of reason type analysis adopted in *Microsoft*, particularly those cases which reach the final stage requiring an actual balancing of pro- and anti-competitive effects.

<sup>51</sup> 540 U.S. at 410 n.3.

lower courts, they have been equally adept at sorting out the meritorious cases from the frivolous cases where a competitor could reasonably duplicate the facility in question but simply preferred not to go to the trouble and expense.<sup>52</sup> What *Trinko* did is hold that, in most circumstances, federal courts will never even get the chance to do what they have doing quite well for decades because of a theoretical concern for false positives in the context of a case that did not even raise a credible fear of such an outcome.

*Trinko* further instructs us to be wary of adjudicating liability where no adequate remedy can be implemented by the courts. This is a fair concern, but again one for which the courts have proved up to the challenge. It is also not clear whether *Trinko* itself raised any serious concern in this regard, certainly not in its request for damages.

Right to access cases and essential facility cases come in all shapes and sizes as do the possible remedies when a violation has been shown. Many of the cases involve nothing more than the award (or the affirmance on appeal) of treble damages. That was the case in *Aspen* and *MCI* where the court affirmed on liability, but reversed and remanded for a new trial on damages.

Even the *Trinko* court appears to have no problem with a straight forward injunction (at least in the Section 1 context) of “Thou shall not discriminate.”<sup>53</sup> It is not clear why a similar remedy in a Section 2 case is any more problematic. The complaint in *Trinko* requested both treble damages and injunctive relief to restore equal access. This is the bread and butter of the

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<sup>52</sup> See *infra* notes 35-42 and accompanying text. For example *MCI* distinguished between access to intra-city networks and inter-city networks in which MCI was free to build its own facilities and was not given access to AT&T’s existing competitive facilities. 708 F.2d at 1147-50.

<sup>53</sup> 540 U.S. at 410 n.3.

federal courts. Imagine the outcry if *Trinko's* logic was imported to justify abstention by the federal courts from adjudicating racial or employment discrimination cases because of a fear of false positives and a need to defer to other enforcement regimes.

One can imagine where problems at the remedy stage in antitrust or other kinds of cases are so massive that a court might be reluctant to adjudicate liability, but it is by no means clear that it has a right to refrain from doing so. In such a worse case scenario, the court could issue a declaratory judgment or a decision on liability and leave the decision as to remedy for another day.<sup>54</sup>

Creative solutions are also available. Professor Phillip Weiser has been a pioneer in suggesting a role for state and federal regulators as special masters when implementation of a judicial decree involves day-to-day supervision, complicated pricing decisions, and technical skill beyond the capacities of a generalist federal court.<sup>55</sup> If regulatory agencies are so good at promoting the competitive aims of the Telecommunications Act, as is the view in *Trinko*, why not enlist them at the back end of the process as well? The Court obviously prefers to walk away from such situations entirely, but in doing so could have benefitted from the more creative approach in the final settlement of Microsoft which created a private monitoring structure to implement a settlement far more regulatory in nature than the relief sought by the *Trinko* plaintiffs.

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<sup>54</sup> This is precisely what the Second Circuit did in *Alcoa*. 148 F.2d at 445-48.

<sup>55</sup> Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. xx (2005); Philip J. Weiser, *Goldwasser, The Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003).

D. Legal Process Lessons from *Trinko* and *Microsoft*

A variety of important lessons can be drawn from comparing *Microsoft* and *Trinko*. First, Judge Posner indeed may be correct that there is little or no difference between the Chicago school and the so-called Harvard school of antitrust.<sup>56</sup> *Trinko* has many of the hallmarks of a strong case Chicago school opinion: strong use of theory, dislike of collusion, embrace of market power as a sign of efficient success in the best interests of society, and overall fear of false antitrust positives that would stifle market outcomes allegedly favorable to consumer welfare.

The only scholarly support cited in the opinion is the work of Philip Areeda and Herbert Hovenkamp.<sup>57</sup> Professor Areeda is considered by most the founding father of the Harvard school and Professor Hovenkamp is the current editor and author of the monumental antitrust treatise begun by Areeda and his colleague Don Turner at Harvard. Part of the *Trinko* majority on the court included Justice Breyer, who is a former antitrust and regulated industries professor at Harvard Law School itself before his appointment to the federal bench. Justice Breyer is not known as a shy or easily intimidated jurist and presumably would not have joined the opinion if he wished to approach the matter some other way. Indeed, it would have been surprising if he had done so, since *Trinko* is virtually the living embodiment of Justice Breyer's own opinion on

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<sup>56</sup> Richard, A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). See generally RICHARD A. POSNER, *ANTITRUST LAW* ix (2d ed. 2001)(discussing degree of consensus in antitrust analysis). Cf. HOVENKAMP, *THE ANTITRUST ENTERPRISE*, *supra* note 41, at 2, 35-38 (2005)(citing agreement on general principles but not specific rules for antitrust enforcement).

<sup>57</sup> See PHILIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* p. 150 ¶773e (2003 supp.); Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *ANTITRUST L.J.* 841 (1989).

the 1<sup>st</sup> Circuit in *Town of Concord*.<sup>58</sup>

Nor does there appear to be a strong competing voice on the Supreme Court for Section 2 issues. In *Trinko*, the concurrence was couched in terms of standing rather than liability so we do not know whether Justices Stevens, Thomas, and Souter would have had anything substantially different to say if they had reached the issues discussed in the main opinion.

The key differences between *Microsoft* and *Trinko* do not appear to stem from basic political or philosophical differences. There are no substantial political or philosophical differences between the makeup of the current DC Circuit and the Supreme Court. The chief judge of the Circuit (and probable author or main contributor to the opinion) Douglas Ginsburg may be a product of the Harvard Law School faculty, but graduated from the University of Chicago law School, was head of the Antitrust Division during the Reagan administration, and serves on the board of the law and economics center at George Mason University Law School, a school with strong philosophical ties to the Chicago school.

Nor do the two opinions differ much in philosophy. Both are anxious to avoid false positives. Both provide defendants with safe harbors of different sorts in defending against Section 2 litigation. *Trinko*'s safety zone for defendants is grounded in the presence of effective regulation that limits the additional utility of antitrust remedies. This could well be right as a philosophical construct, but does not seem to have much to do with the factual setting for *Trinko* or its procedural posture.

*Microsoft*'s safety zone for defendants lies in a burden of proof for plaintiffs to show some likely harm to competition as well as the opportunity for the defendant to show that

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<sup>58</sup> *Town of Concord v. Boston Edison Co*, 915 F.2d 17 (1<sup>st</sup> Cir. 1990).

there is a competing efficiency justification that has some basis in both law and fact. Then the plaintiff has the further hill to climb of showing that the harm to competition outweighs the asserted justifications. With all but a few exceptions, Microsoft flunked the second step and was unable to articulate at trial any cognizable pro-competitive justifications for most of its conduct. This is hardly a radical pro-plaintiff approach, although the plaintiffs ultimately prevailed on most aspects of liability.

The legal process school from the middle of the twentieth century taught us that how an opinion is written is important. While infrequently applied to antitrust matters,<sup>59</sup> this school of judging, pioneered by Professor Hart and Sacks, contended that the most important thing about a judicial decision was the process of reasoned elaboration so that the basic tenets of the decision were honestly and thoughtfully laid out for public display and available for application in future cases which would almost never be identical.<sup>60</sup> Successful opinions earn the respect of the parties, commentators, future litigants, and the lower courts which have to apply the utterances of the Supreme Court in messy factual and legal situations that were not fully adjudicated in the prior case. Unsuccessful opinions become subject to debate and criticism among commentators

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<sup>59</sup> See Reynolds & Waller, *Legal Process*, *supra* note 5.

<sup>60</sup> See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (tent. ed. 1958); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 33-43 (1995); Anthony J. Sebok, *Reading the Legal Process*, 94 MICH. L. REV. 1571 (1996) (book review). Interestingly enough, Hart and Sacks used as one of their primary examples an antitrust opinion by the Federal Trade Commission in which they reprinted the actual opinion followed by a version they regarded from a legal process view as a more successful version of the same opinion. HART & SACKS, *THE LEGAL PROCESS*, *supra* at 1084-95.

and a process of guerilla warfare in the lower courts which undermines their legitimacy until they are eventually repudiated in an “Emperor has no clothes” moment.<sup>61</sup>

Section 2 has never been a shining example of success from a legal process point of view. Most of the old chestnuts are empty verbal formulations that do not help courts decide hard cases or parties plan their conduct in the real world.<sup>62</sup> Now compare *Microsoft* and *Trinko* from this perspective. Which will stand the test of time? Which will garner respect and support from both antitrust enforcers and defenders and the institutions that apply the law? Which will grow in influence until it comes to represent a settled and accepted approach to the law? Which will be undermined by hostile commentators and rebellious lower courts until discarded?

The fact that *Trinko* is the product of the US Supreme Court and that *Microsoft* is the product of an intermediate appellate court gives *Trinko* an early lead, but is hardly determinative. Antitrust is replete with federal appellate decisions that have come to reflect settled doctrine far more than the Supreme Court decisions of similar vintage addressing the same topics. *Addyston Pipe*,<sup>63</sup> *Alcoa*,<sup>64</sup> and *MCI*<sup>65</sup> are all decisions have eclipsed their Supreme Court competition for

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<sup>61</sup> In the antitrust area arguably the line of cases dealing with the standards for judging the legality of vertical restraints from *White Motors Co. v. United States*, 372 U.S. 253 (1963) through *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and then *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) can be characterized as an illustration of this aspect of the legal process argument.

<sup>62</sup> Reynolds and Waller, *Legal Process*, *supra* note 5, at 1823-27.

<sup>63</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6<sup>th</sup> Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

<sup>64</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>65</sup> *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F. 2d 1081 (7<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 891 (1983).

coherent statements of the antitrust doctrine of their time.

*Trinko* obviously will have its greatest impact on the group of cases involving claims against incumbent local exchange companies and has had its intended effect of virtually eliminating such claims.<sup>66</sup> Whatever happens beyond that specific factual setting will depend on how the case is read and applied to the general body of monopolization law. *Microsoft* has the prestige of the D.C. Circuit, the nearly unique situation of being a unanimous en banc per curiam opinion synthesizing an entire area of law in a massive and complex case, and a three year head start as its assets in the horse race with *Trinko*.<sup>67</sup> A quick check of citations and how the two cases are being used in subsequent litigation shows that for the moment it is just too close to call.

#### E. Conclusion

One can gather that I do not think very much of the Supreme Court's opinion in *Trinko*. While this is certainly true, it is not as a result of any strong disagreement on the merits. The interplay between federal and state telecommunications regulation and the antitrust laws is a complex one about which reasonable people may differ.

However, there is much at stake when the Supreme Court or any court opines on a subject. What the opinion chooses to address (or not) beyond the holding and result tends to have great real world consequences. Antitrust opinions matter because they represent the legal

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<sup>66</sup> See, e.g., *Covad Comm. Co. v. Bell Atlantic Corp.*, 407 F.3d 1220 (D.C. Cir. 2005)(denying petition for rehearing).

<sup>67</sup> Compare *Brown v. Board of Education*, 347 U.S. 483 (1954)(per curiam) in which the Supreme Court labored mightily to craft a unanimous opinion that would have the greatest weight and prestige in the real world.

philosophy of capitalism. They tend to stick around for a while and are almost impossible to reverse by legislation. Section 2 opinions tend to matter more than most because they are so infrequent and so much turns on them.

*Trinko's* main defect is its attempt to radically redefine the law of monopolization while purporting to uphold established doctrine. It did far more than it had to and did it badly. Justice Stevens's opinion on standing would have sufficed and in the alternative the first few pages of the majority opinion sufficed, once it found greater certainty in the regulatory provisions of the Telecommunications Act. What follows is an ode to laissez faire that is in stark contrast to everything antitrust has stood for since its inception, regardless of one's opinions about the validity of any particular theory or case. In contrast, *Microsoft* did its job and it pretty well, even if one believes, as Gavil and First do, that it should have done more.