

The Old New (Or is it the New Old) Antitrust: “I’m Not Dead Yet!!”

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There was a time, long before many of the people at this Colloquium were real grown-ups, when antitrust enforcers saw themselves as Jack and Joan, the Giant-Killers. They went after huge business entities, called whatever you like—Trusts, Corporations, Associations, Common Selling Agencies—and cut them down to size. They claimed that they did so for the good not only of consumers, but also of aspiring competitors, and ultimately our political system as a whole. But then the Giant got smart. Rather than fighting Jack and Joan, it persuaded them that they were on the wrong track. Big isn’t necessarily bad, the Giant urged, quoting the famous line from Judge Learned Hand’s *Alcoa* opinion, in which he wrote:

A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.¹

At the same time, the Giant brushed under the rug Judge Hand’s earlier summary of the purpose of antitrust law. That, too, is worth repeating:

[Congress] did not condone “good trusts” and condemn “bad” ones; it forbade all. Moreover, in so doing, *it was not necessarily actuated by economic motives alone*. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These

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1. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.²

Roll that around in your mind for a moment. The antitrust laws are “not necessarily actuated by economic motives alone.”³ Heresy, or the truth at last? Is Sansa going to prevail in the end, or Cersei?⁴ Or someone else altogether?

I would not claim that there is a definitive answer to the antitrust part of that question. In recent years, the Supreme Court has frequently ordered courts to look at the language of a statute (and *only* the language of the statute, maybe with the help of contemporaneous dictionaries) in order to discern its meaning.⁵ Most, though not all, of the Justices scorn the use of legislative history; they regard a purposivist approach to interpretation as inherently squishy; and they insist that judges cannot “make up” laws.⁶

That doesn’t take one very far in antitrust. All we get from Section 1 of the Sherman Act is a ban on contracts, combinations, and conspiracies in restraint of trade;⁷ Section 2 forbids monopolization, as well as attempts and conspiracies to monopolize (the last of those being a dead letter).⁸ The Clayton Act and a few special industry statutes add a bit of clarity, but not much.⁹ Who knows which mergers or acquisitions are those for which “the effect . . . may be substantially to lessen competition, or to tend to create monopoly”?¹⁰ More fundamentally, what do we mean when we say “antitrust law”? Staring at the statutory words will not answer that question, no matter how much patience you have.

That is why, as recently as 2007, the Supreme Court conceded that the

2. Aluminum Co. of Am., 148 F.2d at 427 (emphasis added).

3. *Id.*

4. Two characters who, among others, compete for a kingdom in the cultural phenomenon *A Game of Thrones*. See generally GEORGE R.R. MARTIN, *A GAME OF THRONES* (Bantam Books 2011) (1996).

5. See, e.g., *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 175 (2009) (stating that statutory construction must adhere to the idea that the ordinary meaning of words properly reflects legislative intent); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (quoting *Gross* and repeating that the ordinary meaning of words reflects the legislative intent of Congress).

6. For instance, Justice Thomas joined the late Justice Scalia in characterizing legislative history as dangerous “swamps” in contrast to the “terra firma” of statutory language. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (Scalia, J., concurring). See also *Wyeth v. Levine*, 555 U.S. 555, 601 (2009) (explaining that the statute as written is often the result of compromise, and thus fails to reflect the true intent of any legislator).

7. 15 U.S.C. § 1.

8. 15 U.S.C. § 2; see also EARL W. KINTNER, ET. AL., 2 FEDERAL ANTITRUST LAW § 16.39 (3d ed. 2018) (explaining that the conspiracy to monopolize offense is indistinct from a conspiracy in restraint of trade and thus has received little attention from the courts).

9. 15 U.S.C. § 12 et seq.

10. 15 U.S.C. § 18.

rules of statutory interpretation are different for antitrust.¹¹ *Stare decisis* also, the Court confirmed in *Leegin Creative Leather Products*, “is not as significant” in the field of antitrust.¹² Why? Because “[f]rom the beginning the Court has treated the Sherman Act as a common-law statute.”¹³ It went on in *Leegin* to say that “[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach.”¹⁴

The flexibility afforded by the common-law approach does not apply only to such questions as the types of business practices covered by the statutes or the choice of the *per se* rule or the rule of reason. It applies with equal force to the fundamental issue of the scope and purpose of the laws. Over the nearly 130 years since the Sherman Act was passed, we have experienced vigorous trust-busting, Depression-era market control, aggressive measures toward international cartels, movements to control the overall size of companies, the Chicago School, and post-Chicago (or post-post-Chicago, by now).¹⁵ This might not be a pendulum, technically, but one cannot deny the ebbs and flows, and most importantly the persistence, of the debate.

I could go on: We have explored and occasionally embraced doctrines ranging from the desirability of crisis cartels, to predatory pricing prohibitions, to the proper understanding of price discrimination, to the regulation of vertical distributional restraints, to conglomerate mergers, to the need for *per se* rules.¹⁶ Now and then, it appears that we thought we had finally settled on the “right” course. For example, around the decade of the 1990s, mainstream antitrust thinking might have told a story of a broad, nonpartisan consensus and the achievement of Antitrust

11. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

12. *Id.* (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

13. *Leegin Creative Leather Prods.*, 551 U.S. at 899 (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978)).

14. *Leegin Creative Leather Prods.*, 551 U.S. at 899 (citing *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 688).

15. For a historical discussion of the ebb and flow of antitrust enforcement, see William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989).

16. *See, e.g.*, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), *overruled by* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1982) (crisis cartels); *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing); *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (vertical restraints of distribution); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965) (conglomerate mergers); *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (*per se* rules).

Nirvana. But it is getting harder and harder to insist that our 1990 understanding of antitrust represented Final Wisdom. It is just possible that we have not.

And there lies the rub. One does not have to look far in today's world to find sincere concern over the concentration of economic power in the hands of only a few giant companies, whether they are the tech companies, the energy companies, office retailers, banks, or others. You have only to look at the newsfeed on your cellphone (or if you are really old-fashioned, the TV news) to see people across the political spectrum expressing fears that these huge companies are not only exercising market power in the economic sense, but that they are also dominating political debate.¹⁷ A great deal of the backlash against *Citizens United v. Federal Election Commission* stemmed from this concern.¹⁸ But if we were to step into our Time Machine and visit the years and months leading up to the enactment of the Sherman Act, we would find much the same concern: that huge "trusts," as they probably would have said, will have an outsized influence in the United States political system.¹⁹ And that idea leads one very quickly into the debate over whether Big is Bad. Other questions include these: what is the threshold for concern (or put more formally, at what level of market power should the law begin to intervene); do antitrust enforcers (whoever they may be) have the knowledge and the tools to intervene successfully (that is, not be guilty of too many Type 1 errors); and what reason is there to think that we can somehow craft an effective law now, when all previous efforts along these lines have failed?

17. See Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019) <https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html> [<https://perma.cc/6P42-PSFS>] (describing Senator Elizabeth Warren's legislative solution to breaking up Big Tech companies); Berkeley Lovelace Jr., *Trump says administration is looking into antitrust violations by Amazon, other tech giants*, CNBC (Nov. 5, 2018, 2:20 PM) <https://www.cnbc.com/2018/11/05/trump-looking-into-antitrust-violations-against-amazon-other-tech-giants.html> [<https://perma.cc/HUT6-5EJ7>] (detailing President Trump's recent comments about looking into potential antitrust violations committed by Big Tech companies).

18. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010). Years later, Justice Ginsburg opined, "the notion that we have all the democracy that money can buy strays so far from what our democracy is supposed to be." Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW (Sept. 28, 2014), <https://newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> [<https://perma.cc/J6TX-9U39>]. The rest of the backlash to *Citizens United* took issue with the Court's assumption that huge amounts of money sloshing around the political system were not likely to create problems of corruption. That topic, however, lies well beyond the scope of this Colloquium.

19. See Jennifer Szalai, *A Look at Competition in Business Urges Us to Think Small*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/books/review-curse-of-bigness-antitrust-law-tim-wu.html> [<https://perma.cc/KQH5-5D6Q>] (discussing Tim Wu's new book: *The Curse of Bigness: Antitrust in the New Gilded Age*).

I wish I could answer those questions for you, but regrettably, apart from saying that I agree with those who have argued that we have come to accept too much market power in our Section 7 and Section 2 cases, as well as our Section 1 rule of reason cases,²⁰ I do not have quite that much chutzpah. What I can do is take a few minutes to talk about one problem that seems increasingly prevalent in the modern market: the bottleneck monopoly. My suspicion is that the obituary for that part of antitrust was prematurely written. I'll explain why, and I'll also take the reckless step of saying that we might need to resuscitate the old essential facilities doctrine, if we hope to address some of the most pressing current and foreseeable problems for competition in the global market.

Once upon a time, antitrust law addressed the special problems that exist when a single firm (or a coordinated group of firms) controls a bottleneck facility, and through that control, the firm or group is able somehow to harm competition. The phrase "essential facilities doctrine" arose to describe this insight.²¹ It conjured up images of the vital nature of the asset in question, and it implied that something more than an ordinary refusal to deal by a monopolist or cartel was at hand. Applications of the doctrine were not common, yet they also were not hard to find for the first eight decades of the twentieth century.²² That changed in the 1980s, when new economic approaches to antitrust led many to question the intellectual basis and the utility of this doctrine. Reputable scholars called for severe limitations or even abandonment.²³ This movement reached its culmination with the Supreme Court's 2004 decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,²⁴ where the Court threw a bucketful of ice over the notion of an "essential facilities" doctrine, though it conceded that it had "no

20. See Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 275 n.280 (2017).

21. See *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984) (describing *Terminal Railroad's* insight into the bottleneck effect), *aff'd*, 472 U.S. 585 (1985).

22. See, e.g., *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 348 n.5 (1963) (noting that withholding valuable services important to effective competition with others sufficed to create a Sherman Act violation); *Moore v. Boating Indus. Ass'ns*, 754 F.2d 698, 706 (7th Cir. 1985) (finding a trade association's withholding of certification in a discriminatory manner such that they were not equally available was an antitrust violation), *cert. denied*, 484 U.S. 854 (1987); *Vandervelde v. Put & Call Brokers & Dealers Ass'n.*, 344 F. Supp. 118, 139 (S.D.N.Y. 1972) (holding an association that did not allow access to its exchange forum on an equal basis violated antitrust laws).

23. See, e.g., David J. Gerber, *Rethinking the Monopolist's Duty To Deal: A Legal and Economic Critique of the Doctrine of "Essential Facilities"*, 74 VA. L. REV. 1069, 1072 (1988) (arguing that the essential facilities doctrine, presently applied, is inefficient and advocates for a new approach based on consumer welfare standards).

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

need either to recognize it or to repudiate it [t]here.”²⁵ At the very moment *Trinko* appeared, however, digital broadband, social media, and online markets were exploding.

I will briefly trace the rise, fall, and future of the essential facilities doctrine. After speculating about why this notion arose to begin with, I’ll comment on the nearly universal criticism that became for a time the common wisdom. The comments that the Supreme Court made in its *Trinko* decision are, against that backdrop, hardly surprising. But this may have been a quintessential case of bad timing. Just as the Court was foreshadowing the death of any distinct “essential facilities” doctrine, the “new economy” was coming into its own.²⁶ Competition now takes place in cyberspace, more than in factories or even service markets. Tactics have changed, the pace of change has sped up, path dependence pops up everywhere, and new and creative ways to distort the competitive process have arisen. We talk incessantly about platforms, whether one or two-sided.²⁷ A revamped essential facilities doctrine may help to identify exclusionary practices that are inconsistent with the antitrust laws—practices that can be understood and controlled within the limitations of the courts, to which private parties and governments alike must turn in the end for antitrust enforcement.

Let’s start by recalling why the essential facilities doctrine arose in the first place. During the period when the Supreme Court had direct review over most antitrust cases, thanks to the old Expediting Act,²⁸ *United States v. Terminal Railroad Association of St. Louis* reached the Court.²⁹ The case concerned the vital linkage of the United States rail system over the Mississippi River in St. Louis. The United States had sued thirty-eight corporate and individual defendants for violations of the Sherman Act, and the lower court had dismissed the action by a 2-2 vote.³⁰ The principal defendant was the Terminal Railroad Association of St. Louis, which the defendants had formed for the purpose of creating a unified system for these railroad crossings.³¹ The Court noted that the

25. *Id.* at 411.

26. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001).

27. *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280–81, 2285–88 (2018) (distinguishing between one- and two-sided markets); David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. REG. 325, 336–39 (2003) (comparing multi-sided platform markets with single-sided markets).

28. *See* Act of Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823 (1903), *amended by* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, § 4 (noting that this appellate jurisdiction was substantially restricted in 1974 by the Antitrust Procedures and Penalties Act).

29. *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912).

30. *Id.* at 390–91.

31. *Id.* at 391.

Association's properties "included the great union station, the *only* existing railroad bridge—the Eads or St. Louis bridge—and *every* connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river."³² For a time, competition existed, furnished by a ferry company and another toll bridge (the Merchants' Bridge) that was open to every railroad on equal terms.³³ Although this resulted in some duplication of facilities, it also provided modest competition for each facility.³⁴ In order to squelch that competition, the Association acquired a controlling share of the stock in the Merchants' Bridge, its related companies, and the ferry company, thereby combining the three independent terminal systems into one.³⁵

Without using the term "essential facility," the Supreme Court concluded that this unification of the terminal facilities at such a critical point on the Mississippi violated the Sherman Act.³⁶ It denied, however, that its holding meant that "the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce."³⁷ Compatibility with the statute depended also, it said, on the extent of the control secured, the intent of the parties, the methods they used, and the manner in which the control was asserted.³⁸ With that in mind, the Court turned to a consideration of the "natural conditions" affecting railroads in St. Louis.³⁹ None of the twenty-four rail lines converging on the city passed through it; half had their termini on the Illinois side of the river, half on the Missouri side.⁴⁰ And the topography of the St. Louis area (described in detail by the Court) made it, "as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company."⁴¹

The Association conceded that it had this monopoly, but it tried to persuade the Court that it was a natural monopoly that could not be avoided.⁴² The Court was not moved, particularly because the history of

32. *Id.* (emphasis added).

33. *Id.* at 392.

34. *Id.* at 393.

35. *Id.* at 394.

36. *Id.* at 409.

37. *Id.* at 394.

38. *Id.* at 394–95.

39. *Id.* at 395–96.

40. *Id.* at 395.

41. *Id.* at 397.

42. *Id.*

the Association showed that competition was possible.⁴³ It was also significant, in the Court's view, that the Association was not an independent corporation, but instead was simply the vehicle through which the twenty-four railroads were cooperating.⁴⁴ What was necessary, given what the Court regarded as the highly unusual (if not unique) physical situation, was either competition or a unified system of terminals that was "[an] impartial agent of all" and that operated, for all practical purposes, as a public utility.⁴⁵ Since neither existed, the Court found a violation of both Section 1 and Section 2 of the Sherman Act.⁴⁶ Interestingly, it rejected the government's requested remedy of dissolution and ordered instead that the parties revise the Association's agreement in a way that would eliminate its anticompetitive effects.⁴⁷ The Association would have to be open on equal terms to all; the facilities would have to be open to non-members on "just and reasonable terms"; no company could be restricted in its use of the terminal facilities; billing practices would have to be reformed; special charges for essentially local traffic would have to be eliminated; and procedural safeguards would have to be added, including one permitting resort to the district court if necessary.⁴⁸

The concepts at play in *Terminal Railroad* lay fallow for many years, perhaps because most instances of "essential facilities" occurred in regulated industries, and the responsible regulatory agency was handling issues relating to access, pricing, and dispute resolution.⁴⁹ They reappeared more than three decades later, in 1945, in *Associated Press v. United States*.⁵⁰ *Associated Press* presented a distinctly different set of facts. Rather than topography that had existed since the time of the last Ice Age,⁵¹ more conventional constraints were at issue. The publishers of more than 1200 newspapers had jointly created an association for collecting, assembling, and disseminating the news.⁵² Members paid a

43. *Id.* at 398.

44. *Id.* at 399.

45. *Id.* at 405.

46. *Id.* at 409.

47. *Id.* at 411.

48. *Id.* at 411–13.

49. Gerber, *supra* note 23, at 1087–88 (discussing the essential facilities doctrine and advocating for consumer welfare standards).

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

51. See Kim Ann Zimmermann, *Pleistocene Epoch: Facts About the Last Ice Age*, LIVE SCIENCE (Aug. 29, 2017) <https://www.livescience.com/40311-pleistocene-epoch.html> [<https://perma.cc/8SHY-JYEE>] (discussing the Pleistocene Epoch, which started around 2.6 million years ago and lasted until 11,700 years ago).

52. *Associated Press*, 326 U.S. at 3–4.

fee designed to cover costs for that service.⁵³ Competitors of the member newspapers were not eligible for membership, nor could members sell news to non-members in advance of publication.⁵⁴ The United States sued the AP on the theory that these restraints (contained in the association's bylaws) were unlawful under Sections 1 and 2 of the Sherman Act.⁵⁵ Lack of access to the AP's news, the complaint said and the Court agreed, "hindered and restrained the sale of interstate news to non-members who competed with members."⁵⁶

The Court rejected a number of defenses, including one based on the right of each business to decide with whom it would deal, and one premised on the empirical assertion that sufficient competition existed from other news agencies.⁵⁷ The former, the Court said, failed to take into account the fact that the Sherman Act itself embodies a restriction on business autonomy if the actor is a monopolist or an unlawful combination.⁵⁸ The latter, the Court thought, was not supported by the record. It noted in this respect that morning newspapers controlling 96 percent of total circulation in the United States were AP members.⁵⁹ It seems to have conceded that AP membership was not strictly indispensable for participation in the news business, but it rejected an "indispensability" test as something that would "fly in the face of the language of the Sherman Act and all of our previous interpretations of it."⁶⁰ This is in some tension with *Terminal Railroad*, you will note, but the majority never mentioned that opinion.⁶¹

Associated Press did have at least one thing in common with *Terminal Railroad*: like the earlier case, it did not mark the beginning of a robust development of an essential facilities doctrine. Instead, another twenty-eight years went by before the Supreme Court put in place the third leg of the stool: *Otter Tail Power Company v. United States*.⁶² While *Terminal Railroad* did no more than allude to the idea of regulated industries, *Otter Tail* unambiguously involved the way in which antitrust

53. *Id.* at 10–11, 11 n.5.

54. *Id.* at 10–11.

55. *Id.* at 4.

56. *Id.* at 13.

57. *Id.* at 14–15, 17–18.

58. *Id.* at 15.

59. *Id.* at 18.

60. *Id.*

61. *Id.* at 25 (Douglas, J., concurring). It appeared only in Justice Douglas's concurrence as an aside, *id.*, and in Justice Roberts's partial dissent in a string-cite in a footnote, *id.* at 38 n.8 (Roberts, J., dissenting), and in Justice Murphy's dissent as an example of true dominance, *id.* at 55 (Murphy, J., dissenting).

62. *See generally* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

law intersects with regulation. Once again, the United States brought the suit, based on the theory that Otter Tail (an electric utility) had attempted to monopolize and monopolized the *retail* distribution of electric power in its service area.⁶³ It did so, the government charged, by refusing to sell power at wholesale to proposed municipal systems where it had been selling power at retail, instead refusing to wheel power to those systems at all.⁶⁴ The district court ruled in favor of the government, and Otter Tail appealed.⁶⁵

Although the Court began by reiterating the unremarkable notion that repeals by implication are disfavored, this would not have been necessary if it had not accepted that Otter Tail's actions raised antitrust concerns.⁶⁶ The Court announced that the Federal Power Act ("FPC") did not entirely displace the antitrust laws, and so there was room for antitrust liability despite the fact that Otter Tail's prices and terms of service were regulated.⁶⁷ With that established, the Court turned to Otter Tail's unilateral refusal to deal with the municipal systems. It held that Otter Tail used its monopoly power over transmission to foreclose or destroy competition at the retail level in the affected municipalities.⁶⁸ Notably, the court relied on the assumption—widely accepted during this period—that power transmission was a natural monopoly and thus a suitable subject of regulation.⁶⁹ Use of monopoly power in that way, it said, is forbidden by the "attempt to monopolize" clause of Section 2 of the Sherman Act.⁷⁰ At the same time, the Court recognized that the district court had properly taken into account Otter Tail's assertion that compulsory interconnection or wheeling might threaten its overall system.⁷¹ It did so by making future connection subject to the approval of the FPC, and by retaining jurisdiction over the case as a whole.⁷²

Once again, the Court did not speak in terms of an "essential facility." Outside observers, however, linked together these three cases and discerned in them a broad principle.⁷³ Even though, in a capitalist system, private actors—even monopolists—do not ordinarily have any obligation

63. *Id.* at 368.

64. *Id.*

65. *Id.* at 368–69.

66. *Id.* at 372.

67. *Id.* at 373–74.

68. *Id.* at 377.

69. *Id.* at 383 (Stewart, J., concurring in part and dissenting in part).

70. *Id.* at 377.

71. *Id.* at 381.

72. *Id.* at 376–77.

73. Marina Lao, *Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557, 563–64 (2009).

to share their assets or facilities with all outsiders, holders of “essential facilities” are an exception to that rule.⁷⁴ Sometimes, even though no formal regulatory structure requires nondiscriminatory access, such access must be provided.⁷⁵ That duty arises if and only if several criteria are met: first, the facility must be a necessary input to participation in a market (that is, it is “essential,” or it creates a “bottleneck”); second, it must not be practically or reasonably possible to duplicate the essential facility; third, the holder of the facility must be using it either to harm competition with a potential entrant into its own market, or (more problematically) to leverage its economic power from one market into the adjacent market for which the facility is needed; and fourth, it must be possible to devise some kind of access scheme for outsiders.⁷⁶

Many questions arose about the scope of the newly identified doctrine. How was one to distinguish between an ordinary refusal to deal by a firm (or group of firms) with market power and a decision to deprive others of access to an essential facility? To what extent was the real problem rooted in government regulation? If there is a problem, does the solution lie in the federal courts, or does this reveal a need for legislation and the creation of a regulatory structure? Does the imposition of a duty to deal on the holder of an essential facility interfere in an undesirable way with the market mechanism, and thus over the long run actually impede competition by dampening market signals suggesting the need for investment in substitutes? And finally, will false positives overwhelm any benefit that recognition of this doctrine may yield?

No perfect answers to any of those questions were ever offered. The courts occasionally saw cases that seemed to fit the criteria of the essential facilities doctrine, and even more occasionally, they applied it to require the holder of the facility to provide nondiscriminatory access. But many of those applications were contestable at best. For example, is a football stadium “essential,” or is it just expensive to find the land to build another stadium?⁷⁷ Is a flour mill that would be very expensive to replace “essential”?⁷⁸ These and other examples are certainly troubling.

In time, growing unease with the doctrine burst out into the open. In 1990, Professor Philip Areeda published an article whose title spoke volumes: “Essential Facilities: An Epithet in Need of Limiting

74. Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 445–46 (2002).

75. *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1102–03 (7th Cir. 1983).

76. *Id.* at 1132–33. This is roughly the way that the Seventh Circuit summarized these ideas.

77. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977).

78. *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1319 (9th Cir. 1975).

Principles.”⁷⁹ The topic had become popular at the time because the deregulation movement was in full swing, in the wake of airline deregulation under President Carter and expanded deregulation initiatives under President Reagan.⁸⁰ Areeda thought that “essential facilities” was an example of “judging by catch-phrase,” and he was deeply skeptical about the results.⁸¹ And he was right to worry. He noted, correctly, that the facility in *Terminal Railroad* came about because of concerted action by competitors, and thus, was not a good fit for a rule against single-firm behavior.⁸² He warned, quite sensibly, that the antitrust “essential facilities” doctrine would become meaningless if “anything one has that another wants may be called an ‘essential facility.’”⁸³ He also cautioned against any doctrine that threatened to turn federal district courts into public-utility commissions, charged with on-going supervision of entire industries.⁸⁴ In an effort to cabin but not abolish the doctrine, Areeda suggested six limiting principles:

- There is no general duty to share; compulsory access is required only in exceptional circumstances.
- A single-firm facility is “essential” *only* when it is both critical for the plaintiff’s vitality, and the plaintiff is essential for competition in the market.
- There should be no forced dealing unless it predictably will substantially improve market competition by reducing price or increasing output or innovation.
- Denial of access is never per se unlawful.
- The defendant’s intention is not central; what is critical is whether the means of exclusion are improper.
- There should be no duty to deal that cannot be explained, and no duty to deal that requires extensive supervision by the court.⁸⁵

Another noted antitrust scholar, Professor Herbert Hovenkamp, joined Areeda’s position and raised the ante. In his treatise, *Federal Antitrust Policy: The Law of Competition and Its Practice*, he pulled no punches.⁸⁶

79. See generally Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1990).

80. Michael Collins, *Did Deregulation Work?*, INDUSTRY WEEK (Oct. 26, 2016), <https://www.industryweek.com/regulations/did-deregulation-work> [<https://perma.cc/K63G-74NE>].

81. Areeda, *supra* note 79, at 841 (discussing generally how the essential facilities doctrine is often expansively and mechanically applied by inexperienced judges with little regard to policy).

82. *Id.* at 844.

83. *Id.*

84. *Id.* at 853.

85. *Id.* at 852–53.

86. See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF*

Here is how the section introducing the doctrine begins:

The so-called “essential facility” doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of refusal to deal to fill any gaps.⁸⁷

Hovenkamp identified several critical questions that he found to be seriously under-theorized: “1) what is a qualifying ‘essential facility’? 2) does the duty to deal extend only to rivals, or also to vertically related firms or others? 3) when is the refusal to deal unjustified?”⁸⁸

In the face of this criticism, few defenders of “essential facilities” could be found in the United States,⁸⁹ although interestingly, competition laws of other countries continued to borrow and apply it.⁹⁰ That is where matters stood when *Trinko* reached the Supreme Court.⁹¹

Trinko may come to be seen as a victim of bad timing. The case involved the way in which the antitrust laws relate to the ambitious deregulation of the telecommunications industry that was accomplished by the Telecommunications Act of 1996.⁹² The Telecommunications Act imposed special duties on so-called Incumbent Local Exchange Carriers (ILECs); those duties were designed to facilitate the entry of new, Competitive Local Exchange Carriers.⁹³ Among other things, ILECs were required to interconnect with competitors at reasonable prices, and they were required to provide access to individual elements of their networks on an unbundled basis.⁹⁴ In return, ILECs such as Verizon obtained the opportunity (theretofore restricted) to enter the long-distance market.⁹⁵

The litigation arose when a customer of AT&T, Trinko’s Law Offices, filed an antitrust class action in the district court asserting that Verizon was not complying in a variety of ways with its obligations to provide

COMPETITION AND ITS PRACTICE (5th ed. 2016). The language quoted has appeared unchanged through several editions of the book.

87. *Id.* at 410.

88. *Id.*

89. See, e.g., Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1824 n.4 (2007).

90. Spencer Weber Waller & William Tasch, *Harmonizing Essential Facilities*, 76 ANTITRUST L.J. 741–42 (2010).

91. I put to one side the intervening decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), even though it could be regarded as another example of a facility made essential by geography.

92. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 5 (1996).

93. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004).

94. *Id.*

95. *Id.*

fair access to its rivals.⁹⁶ The district court dismissed the complaint, but the Second Circuit reversed for further proceedings.⁹⁷ At that point, the Supreme Court granted certiorari, limited to the question whether it was error to reinstate the antitrust claims.⁹⁸

The Court acknowledged that the Telecommunications Act did not effect a wholesale repeal of the antitrust laws.⁹⁹ To the contrary, section 601(b)(1) of the Act said “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.”¹⁰⁰ Nevertheless, the Court said, “just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create *new* claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause’s mandate that nothing in the Act ‘modif[ies], impair[s], or supersede[s] the applicability’ of the antitrust laws.”¹⁰¹ It then concluded that the various interconnection and unbundling duties at issue went well beyond anything mandated by the antitrust laws and thus could not support an antitrust claim.¹⁰² In the course of doing so, it offered the following cold remarks about essential facilities:

We conclude that Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents. 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.¹⁰³

Not surprisingly, a great number of people wondered whether this passage should be read as a diplomatic burial of the essential-facilities

96. *Id.* at 404.

97. *Id.* at 405.

98. *Id.*

99. *Id.* at 406.

100. *Id.* (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 5 (1996)).

101. *Id.* at 407 (emphasis added).

102. *Id.* at 410.

103. *Id.* at 410–11 (internal citations and quotation marks omitted).

idea.¹⁰⁴

I am here to say that it is premature to publish the obituary. Why might that be? Since the time that *Trinko* appeared, the debate about the way in which the antitrust laws function (or should function) in the digital economy has been intensifying.¹⁰⁵ There are at least three schools of thought about the way antitrust relates to this new type of economy: (1) it can't keep up and so should be abandoned, either through judicial interpretation or legislation;¹⁰⁶ (2) the digital economy simply presents a new set of problems for antitrust, but the law and its analytic methodologies are adaptable enough to apply to serious distortions of competition and consequent harm to consumer welfare in the *nouveau monde*;¹⁰⁷ and (3) as a concept antitrust may retain some importance and so should escape repeal, but the risk of false positives is very great in the digital world, and so the presumption should be strongly in favor of *laissez-faire*.¹⁰⁸

Human nature has not changed, even though people may be spending inordinate amounts of time on their digital devices. Standard antitrust doctrine offers many ways in which to exonerate potentially useful business behavior: perhaps the firm or firms have no market power; perhaps entry is easy; perhaps a collective arrangement promises to create efficiencies; and so on.¹⁰⁹ Given this fact, position number two has the greatest appeal for me. As soon as we start putting a thumb on the scale for certain types of markets, we risk the benefits of competition in those markets.

I am not the first to suggest that the essential facilities doctrine may have an important and largely unanticipated role to play, for instance, in the digital broadband market. Many have argued that the doctrine can

104. See Daryl Lim, *Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*, 17 ALB. L.J. SCI. & TECH. 481, 529 (2007) (“While not stating it in so many words, *Trinko* may have effectively brought the era of essential facility claims in the US to an end . . .”).

105. Maxwell Meadows, *The Essential Facilities Doctrine in Information Economies: Illustrating Why the Antitrust Duty to Deal is Still Necessary in the New Economy*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 795, 802 (2015) (“Scholars debate whether these platforms should be analyzed under the net-neutrality framework, antitrust tying analysis, or the essential facilities as discussed here.”).

106. Charles Duhigg, *The Case Against Google*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/magazine/the-case-against-google.html> [<https://perma.cc/XV7J-MVSS>].

107. Maureen K. Ohlhausen, Acting Chairman, FTC, Remarks Before the Georgetown University Global Antitrust Enforcement Symposium: Antitrust Enforcement in the Digital Age (Sept. 12, 2017).

108. John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1499 (2019).

109. See generally Horizontal Merger Guidelines, U.S. Dep't of Justice & The FTC, available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/Y6QB-LVX5>].

usefully apply, without triggering the objections that have been raised in the past, for markets in which there are substantial network effects, where it is also true that the marginal cost of using the bottleneck facility or product or service (once created) is close to zero.¹¹⁰

This does not fully answer the institutional-capacity objection, which is a serious one. I know few judges who want to become business regulators. Nonetheless, there are ever more sophisticated economic tools that help us detect undesirable market power, and there are ways of structuring remedial decrees that avoid this evil. One could imagine, for example, transferring any case that required ongoing supervision to the Federal Trade Commission, which is better suited for such action than the courts. Consent decrees in the information economy already commonly call for open architecture; they already require sellers to offer products in both a bundled and an unbundled format. These types of orders do not require judicial price surveillance, and they have helped to keep competition and innovation strong.

Predatory pricing offers a useful comparison, as it is another possibly abusive exclusionary practice. It normally appears as a form of single-firm exclusionary behavior.¹¹¹ The idea is that the predatorily low prices ultimately harm consumers if a firm with market power destroys a budding rival by pricing so low that the rival cannot survive and competition disappears.¹¹² For a time this was a recognized theory, occasionally applied in litigation and otherwise serving as a deterrent to this form of exclusion.¹¹³ Again, however, in the mid-1980s mainstream antitrust thinkers began to accept the argument that it was actually impossible to carry off a successful predatory pricing strategy.¹¹⁴ In those few cases where someone came close, these people argued, the market would correct the ultimate monopoly faster than antitrust litigation

110. Lao, *supra* note 73, at 593 (discussing how the essential facilities doctrine should increase innovation in network industries with strong network effects because opening access would encourage competition from smaller rivals in secondary markets).

111. Ari Lehman, *Eliminating the Below-Cost Pricing Requirement From Predatory Pricing Claims*, 27 *CARDOZO L. REV.* 343, 347 (“Predatory pricing is one means of establishing a monopoly. By lowering prices to the point that all competitors leave the market, a predator can achieve monopoly status.”).

112. *Id.* at 348.

113. See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 597–98 (1986) (finding that summary judgment for defendant-petitioner would be proper absent evidence of a pricing conspiracy); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 228 (1st Cir. 1983) (affirming district court decision for defendant when manufacturer did not price below cost).

114. *Remarks During the Hearings Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Sci. and Transp.*, 100th Cong., 1st Sess. 1, 12 (Feb. 4, 1987) (statement of Terry Calvani, Commissioner, FTC).

could.¹¹⁵ But then things changed again, as game theory and other behavioral theories revealed that it overstates matters considerably to say that predatory pricing is *impossible*.¹¹⁶ Instead, although it is important to be cautious before punishing a firm for *low* prices,¹¹⁷ both price and non-price exclusionary behavior does occur and is worthy of condemnation when it does.¹¹⁸

We can see that recognition of an anticompetitive practice sometimes has preceded the formal, rigorous economic explanation of why exactly that practice is capable of harming competition and consumer welfare. My suggestion is that the essential facilities doctrine or idea, may belong in that category. More careful study of the markets in other countries in which it has been applied might yield interesting results. In addition, closer examination of the numerous suggestions urging the mandating of access to essential telecom and internet resources, as well as mandating unbundled access, is worth undertaking.

This must be done surgically, not with a meat cleaver. The empirical approach is not well suited to per se rules, and some of the pessimism about regulating exclusionary practices that arose during the mid- to late twentieth century may have stemmed from overuse of those rules. Although we can all chant in unison that “the antitrust laws are for the protection of competition, not competitors,”¹¹⁹ we need to remember that there will be no competition without competitors. When it comes to exclusionary practices, we may have thrown the baby out with the bathwater. Oliver Wendell Holmes was right when he said “[t]he life of the law has not been logic; it has been experience.”¹²⁰ I would suggest that the same is true for antitrust. Our forebears were right to recognize that a vibrant economy that does not place undue market power into a tiny number of hands is essential not just for economic markets but also for political stability. We should get back to work and find ways to implement that insight.

115. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 26 (1984) (“Either the business losses during the period of aggression will act as the penalty, or the conduct will turn out to be efficient.”).

116. Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 54 (2005).

117. Kara E. Harchuck, *Microsoft IV: The Dangers to Innovation Posed by the Irresponsible Application of a Rule of Reason Analysis to Product Design Claims*, 97 NW. U. L. REV. 395, 428–29 (2009) (discussing case law where the Supreme Court urges caution when condemning low prices).

118. Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save it, Let it Go*, 48 EMORY L.J. 1057, 1067 (1999).

119. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 320 (1962) (emphasis omitted) (“Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.”).

120. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).