The Sedona Conference Journal

Volume 11 2010

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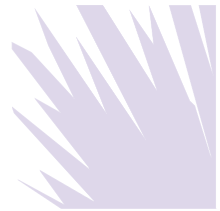

Recommended Citation: Daniel R. Shulman, *Refusals to Deal: Is Anything Left; Should There Be?*, 11 SEDONA CONF. J. 95 (2010).

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REFUSALS TO DEAL: IS ANYTHING LEFT; SHOULD THERE BE?

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I. INTRODUCTION

This paper will explore the state of the law on refusals to deal. This was an area of the jurisprudence under Section 2 that used to put some rather stringent limits on the conduct of monopolists and would-be monopolists. At least until *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009), which appear, when taken together, to have seriously placed those limits in doubt.

This paper will compare the pre-*Trinko* law of refusals to deal with the current state of the law under *Trinko* and *linkLine* (hereafter collectively "*TrinkLine*"). It will then ask what if anything is left on the limits of a monopolist's refusal to deal. Finally, this paper will ask whether the economic theory underlying *TrinkLine* has been called in question, in whole or in part, by our current economic difficulties, and, if so, what should be left of the law on refusals to deal.

II. THE LAW BEFORE *TRINKLINE*

Any discussion of the law of refusals to deal must start with two caveats. First, the discussion relates to unilateral refusals to deal, not concerted refusals to deal, which fall generally within the purview of Section 1 and the group boycott cases, such as *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); and *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941). Although the law of concerted refusals to deal has gradually shifted in this area from per se treatment to rule of reason treatment (compare *Klor's* with *Northwest Wholesale Stationers*), concerted refusals to deal are generally a concern of Section 1, and not Section 2.

Second, for any unilateral refusal to deal to be actionable under Section 2, the party refusing to deal must have sufficient market power either to amount to monopoly power, or to create a dangerous probability of success in achieving monopoly power. In the absence of actual monopoly power, or a dangerous likelihood of success, there can be neither monopolization nor an attempt to monopolize in violation of Section 2. This means, in practical terms, that before a court even reaches its analysis of whether a refusal to deal violates Section 2, the court will have to go through the exercise of finding a relevant product and geographic market, and determining the refuser's power, if any, in the relevant market. If monopoly or market power in a relevant market cannot be shown, the court never gets to the legality of a unilateral refusal to deal.

The refusal to deal law that is reviewed hereafter thus involves cases in which the refusal is unilateral, not joint, and the refuser has market or monopoly power.

Before *TrinkLine*, the law on refusals to deal was generally that a monopolist was free to refuse to deal, ***but***… The "but" was where the rubber met the road. In *Monsanto Company v. Spray-Rite Service Corporation*, 465 U.S. 752, 760-61 (1984), the Supreme Court articulated the right to refuse to deal:

> A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 7 ALR 443 (1919); *cf. United States v. Parke, Davis & Co.*, 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

The "but" element was often expressed by courts as a requirement that the refusal to deal not be in furtherance of a plan to coerce the refused to party to agree to an anticompetitive scheme or otherwise promote a monopoly through anticompetitive means. *Tidmore Oil v. BP Oil Co./Gulf Products Div.*, 932 F.2d 1384, 1389 (11th Cir. 1991):

> This is not to say that all refusals to deal are beyond the reach of the antitrust laws. Courts have found the 'agreement' element to be satisfied where a manufacturer uses the threat of termination (1) to coerce retailers to adhere to stated resale prices, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S. Ct. 503, 4 L.Ed.2d 505 (1960), (2) to coerce compliance with a scheme of exclusive territories, *Graphic Products Distributors, Inc. v. ITEK Corp.*, 717 F.2d 1560, 1573 (115h Cir. 1983), (3) to coerce the retailer to refrain from selling competitor's products and to comply with certain tying arrangements, *Perma Life Mufflers*, 392 U.S. 134, 88 S. Ct. 1981, and (4) to obtain the buyer's acquiescence in some other anticompetitive provision, *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980) (creating territorial restrictions by enforcing compliance with warranty fees on products sold outside dealer's territory).

Another formulation of the rule, as articulated by the Supreme Court, allows a monopolist to refuse to deal only where the monopolist has a legitimate business justification. *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483 n.32 (1992) ("It is true that, as a general matter, a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal. See *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S., at 602-605, 105 S.Ct., at 2857-2859.") The citation to *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585 (1985), is instructive as it reflects the Court's view of that case in 1992, a view that was to change radically with *Trinko* in 2004.

In *Aspen Skiing*, the Supreme Court affirmed a judgment under Section 2 when a large ski company discontinued a long-term relationship with a smaller competitor, which had been permitted to sell lift tickets as part of a four-site package offered by the large company. After first acknowledging the right of a monopolist to refuse to deal, the Court observed that the right was not unqualified:

> The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified. [472 U.S. at 600-01.]

The limits on the right to refuse to deal, as described by the Supreme Court, citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), is that the right must be exercised "in the absence of any purpose to create or maintain a monopoly." 472 U.S. at 601-02. The Court found the refusal to deal in *Aspen Skiing* actionable because "the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." 472 U.S. at 603. The Court observed, "By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." 472 U.S. at 604 n.31. The Court concluded,

> If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself. [472 U.S. at 605.]

"Attempting to exclude rivals on some basis other than efficiency" would seem on its face to offer an intelligible test for evaluating not only refusals to deal, but all other alleged forms of predatory or anticompetitive conduct. Perhaps the formulation may be deceptively simple, but no one can claim it to be outside the comprehension of the ordinary juror. A number of courts have employed it. *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 189, 191 (2d Cir. 1992); *Minnesota Mining and Mfg. v. Appleton Papers*, 35 F.Supp.2d 1138, 1145-46 (D. Minn. 1999); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783 (6th Cir. 2002); *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990); *Pacific Exp., Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735 (9th Cir. 1986); *Willamette Dental Group, P.C. v. Oregon Dental Service Corp.*, 882 P.2d 637 (Or. Ct. App. 1995); *Catch Curve, Inc. v. Venali, Inc.*, 519 F.Supp.2d 1028, 1036 (C.D. Cal. 2007); *Compuware v. International Business Machines*, 366 F.Supp.2d 475, 486 (E.D. Mich. 2005); *M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1993); *Sunshine Cellular v. Vanguard Cellular Systems*, 810 F. Supp. 486, 497 (S.D.N.Y. 1992); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987); *Blue Cross v. Marshfield Clinic*, 883 F. Supp. 1247, 1257 (W.D. Wis., 1995), aff'd in part, rev'd in part on other grounds, 65 F.3d 1406 (7th Cir. 1995) ; *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1273-74 (E.D. Pa. 1987); *Lepage's Inc. v. 3M*, 324 F.3d 141, 146-47 (3rd Cir. 2003); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 635 F. Supp. 1287, 1332-33 (D. Kan. 1986), *aff'd*, 899 F.2d 951 (10th Cir. 1990). A search of case law has revealed 36 decisions employing the language since *Aspen Skiing*, and only a few in the past five years - not a particularly large number in light of the number of Section 2 cases going through the courts. As discussed in the next section of this paper, the survival of this test for evaluation of a refusal to deal by a monopolist is probably doubtful after *TrinkLine*.

Several other aspects of the law of refusals to deal pre-*Trinko* deserve mention. First is *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), cited in *Aspen Skiing*, which appears to be good law, certainly in the view of the current Antitrust Division. In *Lorain Journal*, the Supreme Court found a violation of Section 2 based on a monopoly newspaper's refusal to deal with advertisers who also placed ads with a radio station viewed as a competitor by the newspaper. The case appears to stand squarely for the proposition that a monopolist's refusal to deal violates Section 2 if it results from the other party's unwillingness to enter into an anticompetitive agreement intended to injure competition without any substantial business justification.

Second is the essential facilities or bottleneck doctrine, which imposes a duty to deal on a monopolist in control of a so-called essential facility under the following conditions: "(1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors." *Advanced Health-Care Serv. v. Radford Com. Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990); *MCI Communications v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 355 (1973); *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990); *Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 178-79 (2d Cir. 1990); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1379, 1380 (9th Cir. 1992) (" A company which has monopoly power over an essential facility may not refuse to make the facility available to others where there is no legitimate business reason for the refusal.") The doctrine finds its origins in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), in which the Court found an antitrust violation where an association formed by a group of competitors controlled all terminal facilities through which rail entry could be gained to the city of St. Louis.

Finally, an extraordinarily good overview of the law of refusals to deal pre-*TrinkLine* appears in *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979). The plaintiff, Byars, distributed magazines for Bluff City until he was terminated, and then brought a Section 2 claim. The Sixth Circuit observed that in addition to the essential facilities doctrine, a monopolist could be liable for a refusal to deal intended unfairly to preserve its monopoly. The Court's decision is here quoted at length because of the summary it provides of the various categories of unlawful refusals to deal by a monopolist, with a discussion of the leading cases:

> There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is a straightforward "intent" test which originated from dicta in *United States v. Colgate & Co.*, *supra*, 250 U.S. at 307, 39 S.Ct. at 468 where the Court stated that a business is free to deal with whomever it pleases so long as it has no "purpose to create or maintain a monopoly." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468-69 (1962). [The second line of cases is the essential facilities or bottleneck line.]
>
> The intent test was applied in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). There, the Court affirmed a finding of illegal monopolization where a monopolist refused to deal and the jury inferred monopolistic intent because the defendant's policies were "in pursuance of a purpose to monopolize." *Id.* at 375, 47 S.Ct. at 404. Kodak had monopoly power over the national wholesale market for certain photographic supplies. It desired to vertically integrate and take over retail distribution of these

supplies as well. To that end, it began buying out distributors. One such distributor, however, refused to be bought out. Kodak responded by refusing to sell photographic supplies to the distributor at wholesale prices. From these facts, the jury was permitted to infer an illegal intent to monopolize. *Kodak* comes perilously close to establishing an absolute duty to deal since it permitted a finding of illegal intent where the only evidence of monopolistic purpose was Kodak's desire to buy out retail distributors and its inability to provide an independent business reason for its refusal to deal.

Two other Supreme Court decisions have found refusal to deal by monopolists to be illegal. *Lorain Journal v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), a newspaper which was indispensable to local businesses refused to sell advertising space to customers who bought advertising on a local radio station. The Court found that this conduct was designed to destroy the competitor and enjoined it as an illegal attempt to monopolize.

Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), the Court found that a private utility company with monopoly power in a wholesale power market had illegally "sought to substitute for competition anticompetitive uses of its dominant economic power." Id. at 380, 93 S.Ct. at 1031. In addition to supplying wholesale power, Otter Tail also was responsible for providing power at retail to the inhabitants of certain small towns. Otter Tail's wrongful conduct was its refusal to sell power at wholesale prices or to "wheel" power to municipalities who proposed to replace Otter Tail in the local retail market with their own power companies.

Two lower court cases have found a monopolist's refusal to deal unlawful because it was done with intent to preserve a monopoly. *See Poster Exchange, Inc. v. Nat'l Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), Cert. denied, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed.2d 811 (1971) (". . . National Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level."); *United States v. Klearflax Linen Looms*, 63 F.Supp. 32, 39 (D. Minn. 1945) ("(monopolist) cannot refuse to sell if its design and purpose is to establish a wrongful monopoly.").

* * *

Whether the analysis of refusals-to-deal by monopolists is premised on the "intent" test or the "bottleneck" test, there is a discernible uniformity of holdings of illegal refusals-to-deal in various factual contexts.

First, there are situations where a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal. This is forbidden, at least absent a valid business justification for the refusal to deal. *Six Twenty-Nine Prods, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958); *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948)

> (Invalidating use of monopoly power in one geographic market to acquire monopoly power in another).
>
> Second, there is the context in which a monopolist refuses to deal with customers who deal with its rivals. This behavior is inherently anticompetitive; *Lorain Journal, supra*, makes it clear that this is illegal, either as monopolization or attempt to monopolize. See also *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), Cert. denied, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.), Cert. denied, 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438 (1957).
>
> Third, there is the context in which a group of competitors control an indispensable facility which cannot be easily duplicated. This is the classic case where the "bottleneck theory" applies. Absent valid business reasons, equal access is required for all. See *United States v. Terminal R.R. Ass'n, Supra; Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), Cert. denied, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952).
>
> Fourth, there is the most conceptually difficult context of all that in which a monopolist seeks to vertically integrate. These were the circumstances in *Eastman Kodak Co. v. Southern Photo Materials Co., supra,* where Kodak cut off one of its retail distributors as part of its efforts to vertically integrate into the retail distribution of photography supplies. Likewise, in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), Otter Tail, among other things, refused to deal when small towns proposed to replace it with their own retail power systems. In that case, Otter Tail used its monopoly power in the wholesale power market to prevent the displacement of its (natural) monopoly in the local retail power market.

Of particular significance is that a number of the cases described in *Byars* are "price squeeze" cases, in which the monopolist vertically integrates while charging prices to its wholesale customers that are sufficiently high so that the wholesale customers cannot compete with the monopolist's prices at retail. These include *Southern Photo Materials* and *Otter Tail Power*. The same price squeeze claim also appears in *United States v. Aluminum Co. of America*, 148 F.2d 416, 436-38 (2d Cir. 1945) (L. Hand, J.), perhaps the leading example of a price squeeze in violation of Section 2. As will be seen, these cases may well not survive *linkLine*.

III. ALONG CAME *TRINKLINE*

A. *Trinko*

The first blow to refusal to deal cases comes in *Trinko*, where the issue was addressed largely in dictum in Justice Scalia's majority opinion. In *Trinko*, the issue before the Supreme Court was the intersection between the Section 2 of the Sherman Act and the Telecommunications Act of 1996, which required local telephone companies like the defendant, Verizon, to provide access to their networks to competitors wishing to sell various unbundled services. The plaintiffs, customers of Verizon's competitors, claimed that Verizon had not complied with its obligations under the Telecommunications Act to

provide access to its network, and that Verizon's violation of the Act constituted anticompetitive conduct in violation of Section 2. The narrow issue for the Supreme Court was whether conduct violative of the Telecommunications Act could form the predicate for a violation of Section 2 where the defendant satisfied Section 2's other requirement, the possession of monopoly power in a relevant market.

The Court could easily have answered this question in the negative, and eventually did, but not before Justice Scalia authored what was essentially a paean to monopoly. In fulsome language, which can appropriately be characterized as Chicago-School-and-Bork-rampant, Scalia enthused:

> 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.*
>
> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.,* 250 U. S. 300, 307 (1919). [540 U.S. at 407-08.]

After paying lip service to *Aspen Skiing's* admonition that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified," Scalia went on to emasculate not only *Aspen Skiing*, but also *United States v. Terminal R.R. Ass'n* and every other prior decision holding a monopolist's refusal to deal unlawful, in language that is clearly dictum:

> Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. [*Id.* at 408.]

As to *Aspen Skiing*, according to Scalia, that case "is at or near the outer boundary of Section 2 liability." *Id.* at 409.

> The Court there found significance in the defendant's decision to cease participation in a cooperative venture. See *id.,* at 608, 610-611. The

> unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent. [*Id.*; emphasis in original.]

Scalia found the case before the Court distinguishable from *Aspen Skiing* and *Otter Tail* based on the absence of a prior course of dealing between the parties, which was terminated by the defendant, and based on the absence of evidence of anticompetitive intent in Verizon's refusal to deal. *Id.* at 410.

He also took the somewhat gratuitous step of trying to squash any future Section 2 claims premised on the essential facilities doctrine:

> 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. *See generally* Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841 (1989). We have never recognized such a doctrine, see *Aspen Skiing Co.,* 472 U. S., at 611, n. 44; *AT&T Corp.* v. *Iowa Utilities Bd.,* 525 U. S., at 428 (opinion of BREYER, J.), 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." P. Areeda & H. Hovenkamp, Antitrust Law, p. 150, Paragraph 773e (2003 Supp.). 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 Section 2 argument, we reject it. [*Id.* at 410-11.]

In a footnote, Scalia distinguished the *Terminal Railroad Association* and *Associated Press* cases as being concerted action cases, and not refusals to deal by monopolists: "Respondent also relies upon *United States* v. *Terminal Railroad Assn. of St. Louis,* 224 U. S. 383 (1912), and *Associated Press* v. *United States,* 326 U. S. 1 (1945). These cases involved *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." *Id.* at n.3.

Finally, after holding that Verizon's violations of the Telecommunications Act could not be a predicate for a Section 2 violation, Scalia held that Verizon's refusal to share its network did not fit within any exceptions to a monopolist's right to refuse to deal, for the very reason that the Telecommunications Act provided an extensive regulatory framework and an administrative remedy for those denied access. *Id.* at 411-15.

In other words, according to Scalia, monopoly is good; monopolists should be free to do what they want because the market will fix everything; and don't complain if a monopolist violates a regulatory scheme by refusing to deal because those excluded can invoke the regulatory scheme the monopolist has violated.

Underlying all this are two possibilities repugnant to Scalia: first, that a monopolist might be found to have done something anticompetitive which really may not be anticompetitive; and, second, that judges and juries, who are not really qualified to evaluate the conduct of monopolists, may be asked to do so.

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of Section 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States* v. *Microsoft Corp.,* 253 F.3d 34, 58 (C.A.D.C. 2001) (en banc) *(per curiam).* Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574, 594 (1986). The cost of false positives counsels against an undue expansion of Section 2 liability.
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> * * *
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> Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of Section 251 may be, as we have concluded with respect to above-cost predatory pricing schemes, "beyond the practical ability of a judicial tribunal to control." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.,* 509 U. S. 209, 223 (1993). Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853. In this case, respondent has requested an equitable decree to "[p]reliminarily and permanently enjoi[n] [Verizon] from providing access to the local loop market . . . to [rivals] on terms and conditions that are not as favorable" as those that Verizon enjoys. App. 49-50. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations. [*Id.* at 414-15.]

The fear of forcing a court to act as a regulatory agency in prescribing terms of enforced dealing is, however, somewhat of a red herring. If a monopolist has refused to deal for anticompetitive reasons without a valid business justification, a finder of fact is surely competent to make such a determination. If it does, and it further finds that the refusal to deal has caused injury, then damages can be awarded. Further, if the refusal is continuing and threatens future harm, the court can enter an injunction prohibiting the refusal to deal unless supported by a valid business justification. Neither remedy places the court in the position of operating as a regulatory agency, or requires the court to engage in any type of

fact-finding, application of law, or administration of justice for which it is unsuited or with which it is not familiar.

B. *linkLine*

Before one reads *linkLine*, one should carefully scour the opinion in *Trinko*, as well as every other antitrust decision prior to *linkLine* since the passage of the Sherman Act, for the term "antitrust duty to deal." The term is nowhere to be found in *Trinko*. It appears in only two other decisions, *Z-Tel Communications v. Sbc Communications*, 331 F.Supp.2d 513, 540 (E.D. Tex. 2004), and *Virginia Vermiculite v. W.R. Grace & Co.-Conn.*, 108 F.Supp.2d 549, 597, 600 (W.D. Va. 2000). In both cases, the context is a discussion of the essential facilities doctrine and the duty of a monopolist to share such facilities under certain conditions. The point is that prior to *linkLine*, the term either did not exist, or had no meaning outside the essential facilities doctrine. To say that a firm had no antitrust duty to deal was to use a phrase without content, beg the question, and engage in circular reasoning. A firm has an antitrust duty to deal when the courts say that a refusal to deal will violate Section 2. The relevant inquiry is under what circumstances courts will so hold. To be informative and intelligible, a decision should say that under the particular or generalized facts of record, a monopolist may or may not refuse to deal, and why. To refer in the abstract to the presence or absence of an antitrust duty to deal is really to state nothing except a bald conclusion without explanation or rationale, and to be intellectually evasive and unforthcoming.

The foregoing disquisition is prompted by the decision in *linkLine*, where, like Athena springing full-grown from the brow of Zeus, the term "antitrust duty to deal" suddenly appears full-grown and full-blown, without reasoned development, in Supreme Court antitrust jurisprudence.

In *linkLine*, the plaintiff, a provider of DSL services, claimed that the defendant, Pacific Bell, was subjecting the plaintiff to a price squeeze by charging the plaintiff a price for wholesale access to Pacific Bell's network that was too high to permit the plaintiff to compete with Pacific Bell in the retail sale of DSL services—a classic price squeeze in the mold of *Alcoa*. At the time the case went to the Supreme Court, there was no evidence that Pacific Bell was selling its DSL services at retail below any measure of cost. The first paragraph of the Court's opinion, written by Chief Justice Roberts, summarizes the issue, as seen by the Court, and its disposition:

> The plaintiffs in this case, respondents here, allege that a competitor subjected them to a "price squeeze" in violation of Section 2 of the Sherman Act. They assert that such a claim can arise when a vertically integrated firm sells inputs at wholesale and also sells finished goods or services at retail. If that firm has power in the wholesale market, it can simultaneously raise the wholesale price of inputs and cut the retail price of the finished good. This will have the effect of "squeezing" the profit margins of any competitors in the retail market. Those firms will have to pay more for the inputs they need; at the same time, they will have to cut their retail prices to match the other firm's prices. The question before us is whether such a price-squeeze claim may be brought under Section 2 of the Sherman Act when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place. We hold that no such claim may be brought.

Five short paragraphs later, "antitrust duty to deal" is born, as the Court states, "In *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP,* 540 U. S. 398, 410 (2004), we held that a firm with no *antitrust duty to deal* with its rivals at all is under no obligation to provide those rivals with a 'sufficient' level of service." (Emphasis added.) Four paragraphs later: "We granted certiorari, 554 U. S. ___ (2008), to resolve a conflict over whether a plaintiff can bring price-squeeze claims under Section 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff."

In analyzing Pacific Bell's pricing at the wholesale level, the Court observes that apart from predatory pricing,

> There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. *See Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, 608-611 (1985). Here, however, the District Court held that AT&T had no such antitrust duty to deal with its competitors, App. to Pet. for Cert. 84a-85a, and this holding was not challenged on appeal.[2]
>
> 2. The Court of Appeals assumed that any duty to deal arose only from FCC regulations, 503 F. 3d, at 878-879, n. 6, and the question on which we granted certiorari made the same assumption. Even aside from the District Court's reasoning, App. to Pet. for Cert. 77a-85a, it seems quite unlikely that AT&T would have an antitrust duty to deal with the plaintiffs. Such a duty requires a showing of monopoly power, but—as the FCC has recognized, 20 FCC Rcd., at 14879-14887-the market for high-speed Internet service is now quite competitive; DSL providers face stiff competition from cable companies and wireless and satellite providers.

The footnote is both troubling and puzzling. The Supreme Court says that it is proceeding under the assumption that any requirement imposed on Pacific Bell to deal with the plaintiff arises only under FCC regulations. If so, the case is indistinguishable from *Trinko*, and could have been summarily reversed on that basis. But the Court goes on to observe that "the market for high-speed Internet service is now quite competitive; DSL providers face stiff competition from cable companies and wireless and satellite providers." If this is a finding, then the Court is saying that Pacific Bell cannot have monopoly power in the relevant market, which is another basis for summary reversal. If Pacific Bell cannot possibly be a monopolist, then there is no reason to discuss refusals to deal, price squeezes, or predatory pricing. The entire opinion begins to look more and more like dictum. This is particularly so, in light of the plaintiff's having conceded prior to oral argument that it was no longer asserting a Section 2 price squeeze, and instead was asking only for remand to the district court to prosecute a retail predatory pricing claim.

Nonetheless, the Court ploughs ahead:

> The challenge here focuses on retail prices—where there is no predatory pricing—and the terms of dealing—where there is no duty to deal. Plaintiffs' price-squeeze claims challenge a different type of unilateral conduct in which a firm "squeezes" the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze

> its downstream competitors by raising the wholesale price of inputs while cutting its own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price). Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between the wholesale price and the retail price. In this case, we consider whether a plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale.

In answering, the Court begins, "A straightforward application of our recent decision in *Trinko* forecloses any challenge to AT&T's *wholesale* prices." It certainly does. The Court could have stopped right there. Instead, it goes on to coat its decision with the oobleck of "antitrust duty to deal."

> Given that Verizon had no antitrust duty to deal with its rivals at all, we concluded that "Verizon's alleged insufficient assistance in the provision of service to rivals" did not violate the Sherman Act. *Id.,* at 410. *Trinko* thus makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

With all due respect, this proposition is by no means self-evident and is rather self-serving question begging. Even if Pacific Bell had no obligation to sell to the plaintiff at wholesale, the real question presented in *linkLine*, assuming that Pacific Bell was a monopolist, was what obligations did Pacific Bell have once it chose or started to deal with the plaintiff. For instance, does Section 2 require that a monopolist that chooses to do business at wholesale not intentionally disadvantage customers that also compete with the monopolist at retail? Or that if the monopolist does so, the monopolist have a valid business reason or efficiency justification for doing so? These are not unreasonable or novel requirements for a monopolist that enters into a course of dealing with customers, and find support in the jurisprudence of Section 2 in such cases as *Aspen Skiing*, *Southern Photo Materials*, *Byars*, and *Alcoa*. Because it has already decided the issue, however, and masked its reasoning with the conclusory invocation of "no antitrust duty to deal," the Court never confronts the real issue raised in *linkLine*.

Instead, relying on "no antitrust duty to deal," the Court concludes:

> But a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors. If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred.

Thus, the Court sweeps away almost a century of monopoly price squeeze cases, from *Southern Photo Materials*, to *Alcoa*, to *Otter Tail*. The closest the Court comes to any rationale for why it is overruling these cases *sub silentio* is a reference to the opinion of Justice, then Judge, Breyer in *Town of Concord* v. *Boston Edison Co.,* 915 F.2d 17, 25 (1st Cir. 1990):

> One of our colleagues has highlighted the flaws of this test in Socratic fashion:
>
> "[H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?" *Town of Concord, supra,* at 25.

But, as shown, this is not really an issue in a price squeeze case. No court has to decide whether a price is fair, or set any price whatsoever in a price squeeze case, if the inquiry is whether the monopolist is intentionally trying to disadvantage rivals, or lacks any valid business or efficiency justification for doing so. Is the monopolist trying to exclude rivals on a basis other than efficiency? That begins and ends the inquiry. The remedy need be nothing more than damages or an injunction to cease the practice. The court need set no price.

It is somewhat disconcerting when *Alcoa* and *Otter Tail* are consigned to dust without analysis and express overruling, and John Roberts is dismissive of Learned Hand.

A final word on *linkLine* is that Justice Breyer, concurring in the judgment with Justices Souter, Stevens, and Ginsburg, does not rise to the majority bait to declare *Alcoa* and the other price squeeze cases a dead letter. Instead, he points out that the wholesale pricing of Pacific Bell arose from a regulatory regime, and under those circumstances, as in *Trinko*, the plaintiff's resort should be to the regulators and not Section 2 of the Sherman Act. Breyer aptly observes that price squeeze claims should still retain their viability under traditional and appropriate circumstances:

> A "price squeeze" claim finds its natural home in a Sherman Act Section 2 monopolization case where the Government as plaintiff seeks to show that a defendant's monopoly power rests, not upon "skill, foresight and industry," *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 430 (CA2 1945) *(Alcoa),* but upon exclusionary conduct, *United States* v. *Grinnell Corp.,* 384 U. S. 563, 576 (1966). As this Court pointed out in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP,* 540 U. S. 398 (2004), the "'means of illicit exclusion, like the means of legitimate competition, are myriad.'" *Id.,* at 414 (quoting *United States* v. *Microsoft Corp.,* 253 F. 3d 34, 58 (C.A.D.C. 2001) (en banc) *(per curiam)*). They may involve a "course of dealing" that, even if profitable, indicates a "willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, supra,* at 409. See, *e.g., Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, 610-611 (1985); Complaint in *United States* v. *International Business Machines Corp.,* Civil Action No. 69 Civ. 200 (S.D.N.Y., filed Jan. 17, 1969), Paragraph 20(c), reprinted in F. Fisher, J. McGowan, & J. Greenwood, Folded, Spindled, and Mutilated: Economic Analysis and *U. S.* v. *IBM* 357

> (1983). And, as Judge Hand wrote many years ago, a "price squeeze" may fall within that latter category. *Alcoa, supra,* at 437-438. As a matter of logic, it may be that a particular price squeeze can only be exclusionary if a refusal by the monopolist to sell to the "squeezed customer" would also be exclusionary. But a court, faced with a price squeeze rather than a refusal to deal, is unlikely to find the latter (hypothetical) question any easier to answer than the former.

IV. IS ANYTHING LEFT OF REFUSALS TO DEAL?

After due consideration, the answer is yes. *Aspen Skiing* still stands, even with the shackles hung on it in *Trinko*. Just as Justice Scalia did to *Aspen Skiing* in *Trinko*, future courts may confine *Trinko* and *linkLine* to their facts, specifically where the defendant's duty to deal and pricing are subject to a regulatory regime, as the four concurring justices did in *linkLine*. Despite the broad language and Chicago School rhetoric of *TrinkLine*, those decisions do not expressly overrule any of the prior refusal to deal or price squeeze decisions. Even the cabining of *Terminal Railroad Ass'n* to a concerted refusal to deal context in *Trinko* is accompanied by a disclaimer that the Court has never been asked to rule on the essential facilities doctrine, and is not doing so in *Trinko*. *Aspen Skiing* even retains validity as proscribing an unjustified, anticompetitive refusal to deal by a monopolist ending a prolonged course of dealing. Surprisingly, in *Trinko*, Scalia also reads *Aspen Skiing* as authorizing an examination of a monopolist's state of mind and motive in refusing to deal. If done for an anticompetitive purpose, without a valid business justification, ending a course of dealing may run afoul of Section 2. Thus, there is nothing in *TrinkLine* to preclude reliance on pre-*TrinkLine* jurisprudence, particularly in the event of a future change of direction in the Court's philosophy and outlook on antitrust.

Moreover, bestriding the law of refusals to deal like a colossus is *Lorain Journal*. One would think it near impossible for Scalia, Roberts, or the most extreme Chicago School zealot to defend the conduct condemned in *Lorain Journal*, the refusal of a monopoly newspaper to do business with advertisers placing ads on a competing radio station. Certainly, the current Antitrust Division is strongly on record as not tolerating conduct of the type proscribed in *Lorain Journal*. "VIGOROUS ANTITRUST ENFORCEMENT IN THIS CHALLENGING ERA," Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the United States Chamber of Commerce, May 12, 2009.

> While the Department is not proposing any one specific test to govern all Section 2 matters at this time, I believe the balanced analyses reflected in the leading cases interpreting the reaches of the Sherman Act provide important guidance in this regard. In particular, leading Section 2 cases – from *Lorain Journal v. United States* to *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*. to *United States v. Microsoft* highlight a common concern regarding the harmful effects of a monopolist's exclusionary or predatory conduct on competition and, ultimately, consumers. Reinvigorated Section 2 enforcement will thus require the Division to go "back to the basics" and evaluate single-firm conduct against these tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement.

> In 1951, the Supreme Court laid down a marker for Section 2 enforcement in its decision in *Lorain Journal*. In that case, the Court made a clear step forward in identifying single firm conduct that crossed the line separating lawful, fair competition from exclusionary, anticompetitive acts.

So long as *Lorain Journal* stands as good law, a formidable dike exists to prevent the seepage of *TrinkLine* to where the Court's conservative bloc would apparently like it to go. Roberts' remarks at the end of *linkLine* put the issue rather bluntly. If the monopolist has no duty to deal in the first place, then when the monopolist does choose to deal, there can be no antitrust consequences for the terms on which it deals: "But a firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors." If this reasoning were followed to its logical consequences, it would potentially wash away *Lorain Journal*, *Alcoa*, *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001), and much other Section 2 jurisprudence. Because of *Lorain Journal*, this is unlikely.

As *TrinkLine* recedes in time, notwithstanding the extensive dictum purporting to create a monopolist's bill of rights, future courts are likely to look back on *TrinkLine* as standing for the rather limited and unexceptionable proposition that where a regulatory scheme establishes an obligation for a monopolist to deal, complaints are properly addressed to the regulators and not to courts in the form of antitrust suits.

V. SHOULD ANYTHING BE LEFT OF REFUSALS TO DEAL?

The answer is again yes. Obviously, one of the easiest ways for a monopolist to use its power to disadvantage rivals is to refuse to do business altogether, or to refuse to do business unless its customers accept terms that will exclude the monopolist's rivals, a la Microsoft. Behind *TrinkLine*, there is a century of antitrust jurisprudence condemning such uses of monopoly power. The current administration does not appear likely to accept the invitation of *TrinkLine* to turn its back on history and go soft on monopoly.

Beyond this, however, there is another compelling reason that *TrinkLine* will be limited to the regulatory context, and the law of refusal to deal should enjoy continued viability. Specifically, the economic world view of Scalia and Roberts has been shown by events to rest on false premises, or at least is subject to serious questions concerning its validity. Certainly many, if not most, economists today would not blindly accept Scalia's pronouncement in Trinko that "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."

FTC Commissioner Thomas Rosch has succinctly and brilliantly summarized the current questioning of Chicago School orthodoxy in his article, "The Redemption of a Republican," FTC: Watch No. 743, p. 4 (June 1, 2009). Beyond questioning "whether economics concepts expressed in complex formulae featuring the Greek alphabet are useful," Commissioner Rosch says,

> I have questioned the basic tenets of orthodox Chicago School law and economics as those tenets were set forth by Judge Robert Bork in the Antitrust Paradox—that antitrust law is concerned with maximizing societal welfare; that markets are generally perfect; that, if imperfect, they can and will correct themselves; that, accordingly, rational businesspeople will not engage in predatory conduct (because it is not profit-maximizing since markets will correct themselves). [*Id.* at 5.]

Commissioner Rosch cites, with approval, the views of George Osborne, the "shadow" Chancellor of the Exchequer for the Conservative Party in Britain, rejecting the "efficient markets hypothesis' on the grounds that prices 'do not [and] probably never will' 'accurately represent [] all relevant information,' and that even if they did, 'people would still not respond rationally.'" *Id.* at 6. He adds,

> Additionally, Mr. Osborne is reported to have said that since markets do not operate on the basis of complete and accurate information, they are "prone to speculative bubbles," which justify and indeed require control by "effective regulation."…Finally Mr. Osborne is said to have asserted that banks that are "too big to fail" should be "broken up," rejecting the "Chicago School-inspired dictum that market-generated monopolies are the most efficient distributor of resources and price utility." [*Id.*]

Commissioner Rosch concludes,

> Frankly, (except for "breaking up" banks that are "too big to fail" instead of just not letting them merge in the first place), I intended to communicate all of these things in my January New York remarks: that the "ideology of the free market fundamentalists" is arguably "bankrupt"; that markets cannot be as efficient and self-correcting as orthodox Chicago School economists would have it because information is imperfect and human beings do not always act rationally; that there is a need for government intervention to control speculative bubbles; and that monopolies are not the most efficient distributor of resources. I added that vigorous antitrust enforcement could and should play a substantial role in whatever government intervention is appropriate. [*Id.* at 6-7.]

These remarks have been quoted at length because they are right, and because they summarize as succinctly and accurately as possible the reexamination that is taking place of the thinking that has produced not just the country's greatest economic crisis since the Great Depression, but the antitrust jurisprudence of the past thirty years, and especially the last five, in which the Supreme Court has granted certiorari in nine straight antitrust cases in which the plaintiffs have prevailed, and reversed every one, with a consequent and drastic narrowing of both public and private antitrust enforcement. *Trinko*; *Volvo Trucks No. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 127 S. Ct. 1069 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *PSKS, Inc. v. Leegin Creative Leather Prods.*, 551 U.S. 877, 127 S. Ct. 2705 (2007); *Billing v. Credit Suisse First Boston, Ltd.*, 551 U.S. 264, 127 S. Ct. 2383 (2007); *linkLine.*

One can justifiably question whether the same thinking that has brought the world economy to its knees, and is now largely if not completely discredited as a general matter, can nevertheless validly constitute a set of guiding principles for the interpretation, application, and enforcement of the antitrust laws. The emperor has been shown to have no clothes outside the court system. Are judges to be taken seriously when they try to dress the antitrust laws in the same invisible motley, telling us that markets are perfect and self-correcting, monopoly is both beneficial and inherently ephemeral, and regulation is not only dangerous to the health of the free market economy, but beyond the ken and abilities of judges and juries? Is *Trinko* to have credibility when it begins with the Court proclaiming

that monopoly "is an important element of the free-market system"? These rhetorical questions answer themselves.

The point is that antitrust law has followed its recent trajectory propelled by a set of beliefs and ideology that are now in tatters in the world at large, as governments across the globe rush to rescue financial institutions too big to fail, institutions that have reached their present plight through their own greed, improvidence, and chicanery, as regulators sat on their hands in the belief that, as Commissioner Rosch summarizes, "markets are generally perfect; that, if imperfect, they can and will correct themselves; that, accordingly, rational businesspeople will not engage in predatory conduct (because it is not profit-maximizing since markets will correct themselves)." The world now knows that this one-time orthodoxy is pernicious nonsense.

In his column in The New York Times of August 24, 2009, Nobel laureate economist Paul Krugman wrote:

> Washington, it seems, is still ruled by Reaganism — by an ideology that says government intervention is always bad, and leaving the private sector to its own devices is always good.
>
> Call me naïve, but I actually hoped that the failure of Reaganism in practice would kill it. It turns out, however, to be a zombie doctrine: even though it should be dead, it keeps on coming.
>
> Let's talk for a moment about why the age of Reagan should be over.
>
> First of all, even before the current crisis Reaganomics had failed to deliver what it promised. Remember how lower taxes on high incomes and deregulation that unleashed the "magic of the marketplace" were supposed to lead to dramatically better outcomes for everyone? Well, it didn't happen.

One wonders whether the Supreme Court and the rest of the federal judiciary will be the last group in this country to see what everyone else in the world knows, if they ever do, particularly as they interpret and apply the antitrust laws. One hopes not. Refusals to deal may be a good place to start.