U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law

Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online

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Testimony of John Thorne

Chairman Cicilline, Ranking Member Buck, Members of the Subcommittee, I am honored to be invited to appear before the Subcommittee on this topic. The views expressed are solely my own, not those of any client or of my partners at my law firm.

I represent both plaintiffs and defendants in antitrust cases. Having worked both sides of the "v," I have both positive and cautionary suggestions to offer as you consider legislation to energize antitrust enforcement and address gatekeeper power. There is an urgent need for energetic, aggressive law enforcement. To quote noted price theorist Archbishop Desmond Tutu: The price of freedom is eternal vigilance. Economic freedom does not sustain itself; it must be actively advanced and defended.

In my experience in bringing offensive antitrust cases, including several Section 2 monopolization cases, the biggest obstacle has not been legal doctrine. When a company sets about to harming competition, it tends to violate the antitrust laws in multiple ways. The biggest obstacles to enforcement have been cost and time. Antitrust cases are hugely expensive to prosecute. And they take too long, but don't need to. I urge the Subcommittee to take immediate actions to increase funding for enforcement and to expedite the decisions in antitrust cases.

In defending antitrust cases, I advocated for economic liberty so that courts don't harm competition. I represented some of the pieces of the broken-up Bell System and worked on issues arising from the Bell breakup remedy. Parts of that remedy were very effective, other parts less so. In particular, requiring portability of telephone numbers and interconnection between rival networks reduced entry barriers. By contrast, line-of-business restrictions designed to purify a company's incentives so it wouldn't self-preference failed as a remedy and created huge administrative burdens that resembled regulation more than antitrust law enforcement.

I also worked on several of the legal precedents that supposedly give monopolists a privilege to continue monopolizing. The Supreme Court decisions in *NYNEX v. Discon*, *Bell Atlantic v. Twombly*, *Verizon v. Trinko*, and *Pacific Bell v. linkLine* all arose out of the telephone industry. I argued *Trinko* in the Second Circuit and was counsel of record in the Supreme Court. *Trinko* would not have been an obstacle to the Bell breakup case. *Trinko* is not an obstacle to the current cases against Google that DOJ filed in the District of Columbia and that the ten State Attorneys General filed in Texas. You do not need to repeal these decisions to have better antitrust enforcement. Repealing these decisions would have a cost to competition because businesses are less likely to build great products if they must share them with rivals, and rivals are less likely to build competing products if they have the option to share. A shared monopoly is not as good as competition between independent companies.

Enforcement is most needed where monopolists are affirmatively disrupting rivals' independent efforts to compete. If there is time, I would like to describe a particular imminent problem involving Apple. Judge Gorsuch in his *Novell* decision in the Tenth Circuit has a partial list of the sorts of conduct that may properly be condemned under Section 2: limiting the abilities of third parties to deal with rivals (exclusive dealing); requiring third parties to purchase a bundle of goods rather than just the ones they really want (tying); and deceiving third parties in the marketplace and interfering with rivals' "shelf space" (*Conwood*).[1]

In case you aren't familiar with it, *Conwood v. U.S. Tobacco*, 290 F.3d 768 (6th Cir. 2002), resulted in the largest plaintiff's antitrust verdict in the United States – $1.3 billion actually paid by the defendant. *Conwood* was a Section 2 monopolization case. Conwood and U.S. Tobacco were rival producers of "moist snuff" smokeless tobacco. Because U.S. Tobacco was the market leader, it was able to insert itself as "category captain" for thousands of independent retailers. It controlled the shelf space where the product was sold. U.S. Tobacco abused its position to exclude Conwood's independent product in two ways. First, U.S. Tobacco provided misleading information to dupe retailers into believing that its products were better selling so that retailers would carry its products and discontinue carrying Conwood's products. Second, if a retailer carried Conwood's products, U.S. Tobacco, as category captain, dispatched employees either to bury Conwood's products behind U.S. Tobacco's competing offerings or remove them from retail shelves entirely. For example, U.S. Tobacco occasionally bagged up Conwood's products and placed them under a counter. I have a charming video back in my office of the young lawyer Neil Gorsuch eliciting testimony in that case: "Q. Does removing a competitor's rack have an effect on a competitor's sales? A. Certainly. Q. Why is that? A. No exposure, no sales. Product availability – if it's not there, you can't sell it."

The jury found that U.S. Tobacco's interference with its rival violated Section 2, the Sixth Circuit agreed, and the Supreme Court denied cert.

Monopolization like that condemned by the *Conwood* decision is still ongoing. If we can enforce antitrust to promote competition in tobacco products, we should be promoting competition for all speech and information and all the necessities of life. We can do better than we are doing.

Recommendation #1: <u>Start with Time and Money</u>.

There should be bipartisan support for increasing the resources of the federal antitrust enforcers. If Republicans were leading the Department of Justice, they would be asking Congress for additional resources. When Judge Garland is confirmed as Attorney General and a new AAG for Antitrust is nominated and confirmed, they will be asking for additional resources. The request is well-founded.

In 1997, I brought a Section 2 case in a "rocket docket" forum. The case was quite hard fought by the defendants. I spent $24 million on lawyers and experts to get the case to trial. According to the U.S. Bureau of Labor Statistics, prices for legal services are 125.50% higher in 2021 versus 1997. In today's dollars, that same case would cost $54 million.

In 2020, a group of ten State Attorneys General filed a Section 2 case in a "rocket docket" forum. Earlier this month, the Texas Attorney General asked the Texas Senate Finance Committee for an appropriation for $43 million to help fund that case. The Texas AG said the

[1] *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013).

$43 million is needed just for the expert witnesses. He said the states are in an expert witness bidding war with Google, and that the states' outside counsel are working under contingency fee-like contracts. The chair of the Texas Senate Finance Committee responded that she was "doubtful" that $43 million would be enough for Texas to pursue its claims that Google is violating the Sherman Act by monopolizing the display advertising market. "I'm not sure we can afford lawyers that can compete with the lawyers that Google can buy," she said.

A monopoly has a greater incentive to defend itself than a competitive firm to bring an antitrust case. If the monopolist wins, it holds onto monopoly returns. If the competitive firm wins and competition results, driving prices to a competitive level, the competitive firm gets only a competitive return. Government enforcers are very talented, but they are paid much less than market salaries. Google's ad business generates $15 billion per month.

The other dimension of cost is time. The longer a case is being litigated, the more it costs. When a case is staffed by hourly-billing lawyers and experts, cost is approximately a linear function of time. A hard-fought case that takes five years to go to trial will cost twice as much as a case that takes two and a half years to go to trial. That's just the legal enforcement costs. The cost to consumers from prolonged litigation may be even greater. Every extra year it takes to get to trial is an extra year of monopoly.

Of course, government enforcers typically don't dive right in to stop a monopoly when it is first starting. Being cautious, government enforcers will typically study the problem for quite a while. One of the touchstones of monopoly power is whether it is durable. Sometimes monopolies are quickly competed away. I haven't done a study, but I would guess that the typical big government antitrust case involves five years of investigation before it is filed. The FTC staff recommended filing a complaint against Google in 2012, eight years before DOJ and the ten state AG group filed their complaints. If you count from the time the FTC started investigating, maybe it was ten years before complaints were eventually filed. When you add the time spent investigating to the time spent litigating, it is a very long process of enforcing the antitrust laws.

I know from experience that big cases can be litigated faster than they are. I got a Section 2 case to trial in 13 months. There are models in other kinds of complex litigation for getting a decision expeditiously. For example, the U.S. International Trade Commission tries to get all its cases decided, including review by the Commission, in 18 months. I tried a case there last year where we filed the complaint at the end of February and had a trial at the end of October. The judge will give us a decision next month followed by possible Commission review that will be completed this summer.

To promote competition and economic liberty, it will help if antitrust cases can be heard faster. Several specific proposals:

a. Prioritize judicial review of DOJ antitrust enforcement. 28 U.S.C. § 1657(a) identifies civil actions that the district courts should prioritize. The current list of priorities includes habeas corpus, issues regarding recalcitrant witnesses, requests for injunctive relief, and some Constitutional claims. To clarify that DOJ antitrust actions should be added to the priority list, 28 U.S.C. § 1657(a) could be amended as follows: after "injunctive relief," add: "any action in which the United States is a complainant arising under the antitrust laws,"

If DOJ brings more cases, the Judiciary may need more resources as well. Congress should support that.

b. Clarify that State AG antitrust cases are not transferred by the Judicial Panel on Multidistrict Litigation to slower forums. Another procedural provision, 28 U.S.C. § 1407(g), has a textual carve-out that allows DOJ to file a case in a proper forum and then not have that case moved by the JPML to another forum. To clarify that State Attorney General antitrust cases similarly are not moved from proper forums by the JPML, 28 U.S.C. § 1407(g) should be amended by adding the underlined language: "Nothing in this section shall apply to (i) any action in which the United States is a complainant arising under the antitrust laws, or (ii) any action in which a State is a complainant arising under the antitrust laws where the effect of transferring the State action would be to delay the action."

For a concrete example, the most recent data reported by the Federal Judicial Center show a disparity of speeds in different district courts. In the Eastern District of Texas, the median time from filing a complaint to trial in a civil case is 18 months. In the Northern District of California, the median time from filing a complaint to trial in a civil case is 44.5 months. The difference in speed is a function of judicial workload. The Eastern District of Texas judges have on average 654 pending cases. The Northern District of California judges have on average 870 pending cases. The proposed amendment would clarify that if one or more State AGs files an antitrust action in a proper forum, the action should not be transferred by the JPML to a slower forum.

Recommendation #2: Add a New Enforcement Tool to Pause Imminent Harm.

As noted, winning an antitrust case is hard. It is even harder to win a temporary restraining order or preliminary injunction. The burden on the party seeking such a remedy is high, and when you are facing an emergency situation with imminent irreparable harm there is less time for the plaintiff to gather evidence and prepare a case.

Congress gave DOJ and the FTC a set of tools for reviewing mergers. The Clayton Act and the Hart Scott Rodino Act allow the federal enforcer to push a "pause button" before a merger is consummated. Significant mergers require the parties to file a report and prohibit their closing the transaction until the expiration of a waiting period (which the enforcers may terminate early if there is clearly no concern). If the enforcer has a concern, it can extend the waiting period and gather additional information through a second request.

There are instances where DOJ or the FTC becomes aware of non-merger conduct that threatens to harm competition. In those non-merger situations, the government enforcer, based on probable cause to suspect an imminent antitrust violation, should be able to push a pause button for a limited period of time, allowing the enforcer more fully to investigate. You could model a "conduct HSR" on the existing "merger HSR" process, which most practitioners would say works pretty well. You don't want the agencies interfering with ordinary business conduct and when there is a pause it should be time limited. And often market-harming changes of conduct will not be previewed in advance by the party about to harm competition. But when a monopolist informs the world that it is about to take some action that threatens to harm competition, the same rationale that allows DOJ or FTC to look at a merger should apply.

Here is a concrete, current example where the enforcers' having such a power would be useful. Late last year, Apple announced plans to roll out an update to its "iOS" mobile operating system (iOS 14.5) that threatens to eliminate free, ad-supported apps on Apple devices. Apple decided to delay that decision after overwhelming outcry from app developers and advertisers alike. But now Apple is planning to enforce the software update imminently — likely before the end of next month. Apple's conduct violates current antitrust law and threatens to inflict irreparable harm on millions of everyday Americans. It is precisely the kind of conduct that a "conduct HSR" framework would allow enforcers to investigate before users are harmed.

Many millions of iPhone and iPad users — representing 60% of all mobile-device users in the U.S. — rely on and enjoy free apps for news, entertainment, and other kinds of content. App developers can offer free apps because, rather than charge subscriptions or download fees, they can sell advertising space to advertisers. When put to the choice between seeing advertisements and paying fees, millions of users prefer free content. And developers cannot bombard users with too many ads; otherwise they stand to lose their customers.

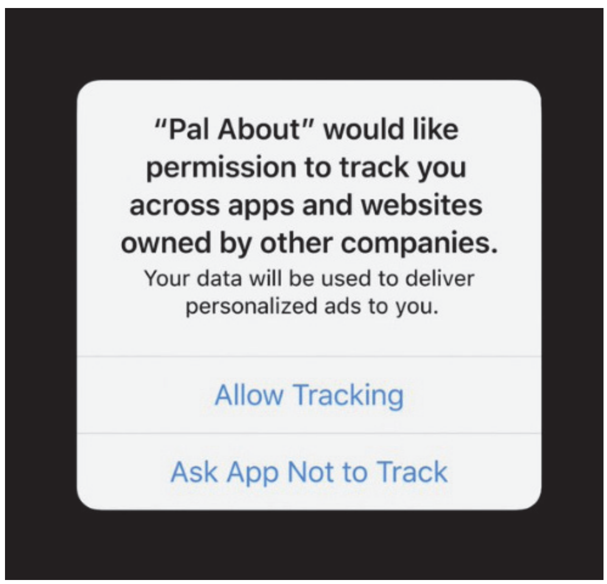
But Apple makes nothing from free, ad-supported apps. Apple has tried for years to make inroads into online advertising but has had little success competing on the merits. Instead, Apple makes money when an app charges download fees or subscriptions. That way, Apple takes its 15 or 30% cut — several times greater than what credit cards charge when they process transactions. Additionally, free apps compete with Apple's own apps — apps like Apple News or Apple Music. So, by doing away with free apps, Apple wins either way. It can take a cut of a third-party subscription or charge its own subscription once rivals exit the market. And users lose either way. They're left with fewer, more expensive apps on their iPhones and iPads.

The mechanics of iOS 14.5 are not overly complicated. Currently, advertisers pay app developers to display their ads to individual devices, which are identified by a device ID called the "Identifier for Advertisers" ("IDFA"). When a user visits an ad-supported app, the app sees the IDFA and passes it on to the advertiser. The IDFA is anonymized and does not personally identify the user — it is a random string of letters and numbers — and it is of critical importance for advertisers to see if their ads are working. For example, advertisers need the IDFA to see if the device clicks on their ads, and also to make sure they're not showing a particular device the same ad over and over again. This ability to optimize advertising campaigns is very valuable to advertisers — they pay app developers several times more when the IDFA is available.

Right now, an Apple user can reset the device IDFA whenever he or she wants, and can opt out entirely of sharing the IDFA with any ad-supported aps — including apps offered by Apple. With iOS 14.5, however, Apple is going to enforce an *opt-in* rule on independent app developers. As a result, third-party app developers will be permitted to access the IDFA only if the developer secures the user's affirmative consent. (More recently, Apple has made clear that app developers also will have to secure consent if they try to use other identifiers like email logins.) Apple, meanwhile, will continue to enjoy an *opt-out* rule on its own apps. Apple (and only Apple) will be able to pass important campaign-optimizing data to advertisers by default. And advertisers will have to use Apple's ad-buying software to get that information.

The impact of iOS 14.5 threatens to be devastating for app developers. Industry analysts expect that 85% of users will decline to opt in. That will make independent developers' advertising space (but not Apple's) several times less valuable. Moreover, even for the users that do opt in, there will be less advertiser demand and therefore still lower prices. Many free apps will not be able to survive, and those that remain will charge subscription or download fees.

Apple's story is that iOS 14.5 is designed to promote user choice and privacy. But the facts indicate otherwise. First, Apple forces app developers to display a scary, false warning when seeking affirmative consent. The goal is to mislead users into withholding consent, not to encourage a fully informed decision. As seen in the image below, Apple plans to makes developers disclose that they "track" users across the internet.



But that is not what app developers do with the IDFA. Most app developers don't track users anywhere. They don't even store the IDFA. It's an identifier for *advertisers* that permits campaign optimization. And Apple knows as much. When a user goes to opt out of providing optimization data to Apple's apps, Apple says nothing of tracking. Instead, it warns the user that "[t]urning off personalized ads will limit Apple's ability to deliver relevant ads to you. It may not reduce the number of ads you receive." Of course, the same is true of rival app developers, but they don't get the benefit of the less alarming disclosure. Indeed, app developers see very high opt-in rates when they are able to craft the accurate, informative consent notices as required in the European Union by the General Data Protection Regulation ("GDPR"). Thus, to get users to give up free content, Apple has decided that it has to scare them.

Second, Apple continues to enjoy opt-out protection even though it (unlike most app developers) actually *can* track users across the internet — and across the planet. According to Apple's own website, it can offer optimization data to advertisers based on device location, gender, name, address, subscriptions, downloads, searches on the App Store, in-app purchases, and several other sources.[2] That *personalized* information is a far cry from the anonymized, alphanumeric identifier that Apple now plans effectively to shut down for its rivals. Yet, Apple protects itself with an opt-out rule despite sharing significantly more sensitive information because it knows that changing the default threatens revenue.

Traditional antitrust tools squarely address Apple's conduct. First, iOS 14.5 imposes a term of *de facto* exclusive-dealing — Apple deceives its users into offering optimization data to its own apps but not to rivals. That way, Apple forecloses the market for an indispensable data input and thereby secures a competitive advantage in news, games, music, and many other content markets. Second, iOS 14.5 also imposes a tying arrangement: advertisers can access optimization data only if they buy advertising space through Apple's ad-buying tools, *i.e.*, Apple's ad network. That tie forecloses competition downstream among certain online-digital advertising services, where Apple has tried and failed for years to enter that market. Frustrated with competition, Apple now has turned to unlawfully exploiting its market dominance.

Apple's iOS 14.5 threatens a robust, free app ecosystem to the detriment of users and competition. Antitrust law is an effective tool to combat that conduct. The immediate problem is that the clock is running out. Apple threatens to enforce the new opt-in regime before enforcers have a chance to investigate Apple's conduct. A narrowly tailored, conduct HSR framework would give enforcers the time necessary to investigate potentially unlawful conduct before the harm to competition is inflicted and irreversible.

Recommendation #3: Learn from Experience with Prior Monopoly Remedies.

There is a wealth of experience available to the Subcommittee from prior antitrust remedies. District Judge Harold H. Greene supervised the antitrust remedy in the *United States v. AT&T* case for 14 years. The breakup of the AT&T Bell System was accomplished in two years. But the ongoing supervision of the Bell companies lasted another twelve years. When Judge Greene approved the breakup decree in 1982, he wrote that he would not want to administer a broad regulatory injunction even if he employed special masters to help him. To administer such a decree would "require[] … a re-creation of the FCC's Common Carrier Bureau in the guise of an arm of the Judiciary" which the judge understood would be an "undesirable" development "for many different reasons."[3]

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[2] *See* Apple, "Advertising & Privacy," https://support.apple.com/en-us/HT205223 (last visited Feb. 24, 2021).

[3] *United States v. AT&T*, 552 F. Supp. 131, 168 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Judge Greene explained: "[T]here is no reason to believe that, in the end, a judicially-created bureaucracy would be any more capable than the FCC itself of performing the unending task of vigilance and oversight that would be required to ensure that an integrated Bell System did not engage in anticompetitive conduct. * * * [S]uch a remedy could contravene the separation of powers doctrine because it would involve the creation of a substantial quasi-legislative, quasi-executive bureaucracy within the Judicial Branch of the government. Practically, the remedy could be impossible to administer because of the need for

Despite Judge Greene's best intentions and his substantial administrative skill, what followed may have been the most ambitious piece of industrial reform ever managed by a single person. Ripping apart the world's largest corporation was easy compared to managing the pieces afterwards. Post-divestiture, the Justice Department issued thousands of advisory letters. Judge Greene's court received more than 6,000 briefs. Thirteen groups of consolidated appeals were carried to the D.C. Circuit. The Supreme Court received a half-dozen divestiture-related petitions for review. The decree developed its own lore, its own common law, its own unique traditions, precedents, procedures, formalities, and technical vocabulary.

The regulatory line-drawing just never ended. May a Bell company repair its local network when there is a network outage?[4] May a Bell company compete for local services outside its initially-assigned footprint against another Bell company?[5] Getting answers to simple questions often took months or even years. In March 1988, for example, the Department of

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substantial budgetary authority and a large administrative apparatus." *Id*. at 168 & n. 158. Justice Rehnquist, writing for a three-Justice dissent to the summary affirmance of the breakup decree, expressed concerns with Judge Greene's overriding state regulation of telephone service and the intractability of the enterprise Judge Greene was embarking on: "I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the Supremacy Clause powers of the Federal Government to pre-empt state regulatory laws. * * * It is not clear to me that this [public-interest] standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Art. III of the Constitution. * * * Questions of policy are not submitted to judicial determination …." 460 U.S. at 1002-04 (citations and inner quotes omitted).

[4] Judge Greene initially threatened that repair might be forbidden (by the decree prohibition on Bell company manufacturing) and that the Bell companies would be "subject to enforcement proceedings." He advised the Bells to seek guidance from the Department of Justice. They immediately did so. DOJ, however, declined to provide guidance because it "has neither the obligation nor the resources" to do so. Subsequently, DOJ opined that the Bells may engage in some repair functions, but it asked Judge Greene to confirm its interpretation because "the decree's 'manufacturing' prohibition is ambiguous with respect to 'repairs.'" Judge Greene did not immediately respond and the particular repair question became moot. The affected Bell company and DOJ urged the court to rule anyway to clarify the issue for the future. Judge Greene refused on the ground that there was no longer any "live controversy." Three years later, during an emergency hearing following a massive network outage affecting millions of local customers, Judge Greene finally ruled that the Bell companies may engage in repairs.

[5] DOJ flip-flopped on the question, Judge Greene ruled that the Bell companies were restricted to their territories based on a "policy" of the decree that the Bell companies should "work cooperatively" and not compete, but the D.C. Circuit reversed, permitting the Bells to compete outside their territories against one another. *United States v. Western Elec. Co*., 627 F. Supp. 1090, 1108 (D.D.C.), *rev'd*, 797 F.2d 1082 (D.C. Cir. 1986).

Justice recommended that South Central Bell be allowed to provide private-line service between Northwest Alabama Junior College and its off-campus extension in Tuscumbia, Alabama. Nine months passed before the court authorized the service. It took five years and two months for Bell Atlantic to win an unopposed motion to not have to disconnect cell phone calls in progress on the Amtrak train between Washington, D.C. and Philadelphia. Permissions were granted one local phone company at a time, and sometimes household by household. "Pacific Bell is permitted to provide telephone service to Mrs. Mary Campbell, who lives in the Plymouth exchange in the Stockton, California LATA, via the Placerville central office in the Sacramento, California LATA." "Wisconsin Bell may provide interLATA cross-boundary foreign exchange service to Ms. Vicki Millard and Mr. Ricky Schultz, as directed by the Wisconsin Public Service Commission." These were actual district court orders.

The regulation-by-antitrust-court was, as Judge Greene had predicted, "undesirable," leading Congress in 1996 to end Judge Greene's reign and to transfer the remaining issues from the antitrust court to the FCC.[6]

I recommend that in looking at particular legislative proposals, you take advantage of what worked and didn't work in the remedies and regulations that have been tried before.

I further recommend that legislation recognize the institutional benefits (and limits) of courts versus full-blown agency regulation. Robert H. Jackson, a most vigorous antitrust enforcer, urged trying antitrust before adopting regulation. Jackson was the leading advocate in the Roosevelt administration for robust antitrust enforcement, as opposed to government price controls, as the proper solution to the monopoly-related problems in the national economy.[7] "The antitrust laws represent an effort to avoid detailed government regulation by keeping competition in control of prices," Jackson explained during his time in the Antitrust Division.[8] "It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its responsibility to seeing that a true competitive economy functions."[9]

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[6] The history of the AT&T breakup decree and other antitrust issues in the telecommunications industry is described at length in a series of books I co-authored. *See* Peter W. Huber, Michael K. Kellogg & John Thorne, Federal Telecommunications Law (Aspen Law & Bus. 2d ed. 1999 & Supps. 2004 & 2005) (chapters 4 and 7 of this second edition, plus the 2004 supplement in particular, describe antitrust litigation and mergers in this industry); Michael K. Kellogg, John Thorne & Peter W. Huber, Federal Telecommunications Law (Little Brown & Co. 1992 & Supp. 1995) (chapters 3-8 describe in greater detail the AT&T breakup decree and parallel decree governing GTE); John Thorne, Peter W. Huber & Michael K. Kellogg, Federal Broadband Law (Little Brown & Co. 1995) (chapters 8 and 9 describe antitrust issues involving content, conduit, and media power).

[7] R. Hewitt Pate, Robert H. Jackson at the Antitrust Division, 68 Alb. L. Rev. 787, 790 (2005).

[8] Robert H. Jackson, Should the Antitrust Laws Be Revised?, 71 U.S. L. Rev. 575, 576 (1937).

[9] *Id*.

Recommendation #4: <u>Distinguish Between Competition and Harm to Competition</u>.

Section 2 of the Sherman Act, going back at least to the 1920 case *United States v. United States Steel Corp*., 251 U.S. 417 (1920), does not condemn monopoly itself. *U.S. Steel* declared that Section 2 "does not compel competition" and does not condemn "size."[10] Other cases have reaffirmed that possession of a monopoly, if obtained without violating the Sherman Act, is not a Section 2 offense.[11] What that means is that Section 2 does not compel a monopolist to give rivals a helping hand in displacing its own sales, that is, in dispossessing itself of its monopoly. Although regulations such as the ones created in the 1996 Telecom Act do impose a duty to create competition, Section 2 has been restricted to preventing monopolists from interfering with independently arising competition through conduct that can properly be condemned.

The distinction between affirmative assistance and negative interference is fundamental.[12] Section 2 has never required a retailer to change itself into a wholesaler, or a service provider to transform itself into a renter of facilities.[13] In common sense and doctrinal terms, it is a

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[10] 251 U.S. at 451.

[11] See, for example, *National Biscuit Co. v. FTC*, 299 F. 733 (2d Cir. 1924); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

[12] Antitrust properly focuses on *negative* duties (to avoid acts that hinder rivals' independent efforts to attract customers) and not *affirmative* ones. *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) (negative/affirmative line); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co*., 797 F.2d 370, 375-76 (7th Cir. 1986) ("'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.'"); S. Breyer, REGULATION AND ITS REFORM 157 (1982) (antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do."). The distinction between acts negatively interfering with others, on one hand, and a failure to lend affirmative assistance, on the other, is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line to hold that failure to provide assistance is not "deprivation" under Due Process Clause).

[13] See, for example, *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (explaining that it is not "feasible" for CSX to change its business of providing rail transportation service into a business of renting track to other railroads). *See also* Richard A. Posner, ANTITRUST LAW 224 (Chicago 2d ed. 2001): "Were vertical integration deemed a suspect practice under the antitrust laws because of its potential exclusionary effect, all commercial activity would be placed under a cloud as courts busied themselves redrawing the boundaries of firms, even though the normal motivation for and consequence of vertical

legitimate business decision as a matter of law to just continue making one's sales and enjoying the fruits of one's investments, as much for a monopolist as for any other firm. In a system premised on competition, not cooperation, any firm may refuse to turn over its business to rivals, let alone refuse to create an elaborate and burdensome apparatus for entertaining the requests of every would-be intermediary that asks for a piece of the business—an apparatus that, in the context of the telephone industry and the 1996 Telecom Act, has required billions of dollars in investments to create special ordering systems, has forced involvement of different companies to get to the bottom of service problems, and has engendered constant negotiations and disputes over the prices of individual access elements and the when and how of making them available.

There are two core reasons why Section 2 has—independent of any regulatory context—never been applied to impose a duty to start sharing assets with rivals at special discounts: the institutional limits of antitrust courts and the dampening of pro-consumer investment incentives. In short, an antitrust sharing duty presents unmanageable risks of doing more harm than good—of impairing the short-run and long-run investment incentives that the Sherman Act most fundamentally protects, and of generating transaction and administrative costs that offset benefits. The antitrust system is not institutionally suited to reliably counterbalance those risks and costs. The antitrust system therefore has never taken on the challenges that are inherent in implementing duties of sharing—challenges that Justice Breyer recognized in his opinion in *AT&T Corp. v. Iowa Utilities Board*[14] and that the D.C. Circuit, speaking through Judge Williams, discussed in *United States Telecom Association v. FCC*[15] a few years later. These are challenges that historically have been left to regulatory regimes, not the antitrust system.[16]

Today, the 1996 Telecom Act assumes those challenges in the telecommunications setting. The 1996 Act's sharing duties require decisions about what network elements and

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integration are merely to reduce the transaction costs involved in coordinating production by means of contracts with other firms."

14 525 U.S. 366, 430 (1999) (Breyer concurring in part and dissenting in part) (explaining the difficulties of an incumbent being forced to share "virtually every aspect if its business" with its competitors, ultimately leading to "a world in which competitors would have little, if anything, to compete about").

15 290 F.3d 415, 429 (D.C. Cir. 2002) ("In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Association*, 538 U.S. 940 (2003).

16 Then-Judge Breyer explained this in his opinion in *Town of Concord v. Boston Edison Co*., 915 F.2d 17, 25 (1st Cir. 1990) (explaining that to impose an antitrust duty that monopolists sell inputs to rivals at "fair prices" requires the court to conclude that "the anticompetitive risks [of ignoring the monopolist's conduct] outweigh the possible benefits and the adverse administrative considerations" of intervention) (internal citations omitted).

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

The only circumstance where Section 2 has recognized a single-firm duty to engage in some kinds of dealing with rivals is a narrow one: where the firm has refused to sell to rivals (or rivals' customers) what the firm was already voluntarily selling to others on the desired terms. That particular kind of stark discrimination has been present in every one of the Supreme Court's cases finding liability for a refusal to deal.[17] It was also present in the Seventh Circuit's *MCI*

[17] Such discrimination was present in the cases condemning unilateral refusals to deal. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 459, 463 n.8 (1992) (characterizing as not a lawful "unilateral refusal to deal" the refusal by a defendant, while selling parts to customers generally, to sell parts to customers who bought service from competing service providers); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 593-94, 608, 610-11 (1985) (observing that the defendant refused to make full retail price ski-lift ticket sales to its competitor, although it was making such sales to customers generally and had previously voluntarily made such sales in collaboration with the competitor itself); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371, 378 (1973) (involving a defendant who refused to wheel power for certain local-distribution competitors even though it was in the business of wheeling power for other such customers); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (involving a defendant newspaper publisher's flat refusal to sell advertising space, otherwise generally available to all advertisers, to parties who advertised on a competing radio station); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-69, 375 (1927) (involving a defendant manufacturer that suddenly "refused" to sell to the plaintiff dealer "on the same terms as other dealers"). Such discrimination also was present in the concerted action cases of *United States v. Terminal Railroad Association*, 224 U.S. 383, 394 (1912) (involving a multiparty agreement for operating a terminal railroad facility, in which members discriminated against nonmembers), and *Associated Press v. United States*, 326 U.S. 1, 10-11 (1945) (involving a multiparty agreement that openly discriminated between those who would compete against existing members and those who would not).

Communications Corp. v. AT&T,[18] apparently the first and only case of liability for unilateral firm conduct under the "essential facilities doctrine."[19]

The discrimination situation—the stark refusal to make available to competitors (or their customers) the very services and terms being voluntarily made available to other customers—has been the precondition to demanding of a monopolist an explanation for a refusal to share: if you are selling this to others at a price that is profitable and lets you recoup your investment, what reason is there for not selling the same thing at the same price to a rival? There might be answers—differential treatment can be justified; it is not by itself illegal—but without that discrimination there has not been liability for refusals to share. In the discrimination situation, the two basic objections to antitrust duties to deal are weakened. First, where the defendant is already voluntarily offering the desired terms, there is no antitrust intrusion on the basic competitive choices of (a) what to sell and (b) at what price—the choices through which a firm enjoys the rewards of successful investments. There is, accordingly, much less reason to worry about deterring long-run and short-run investments by requiring the results to be shared. Second, the institutional task for courts is much more manageable in this situation. The voluntary sales to others furnish a standard of conduct—equality—that the courts do not have to define on their own.

The situation is sharply different where a claim is made for sharing on newly forced terms (as opposed to terms already being offered voluntarily)—making sense of why Section 2 has never recognized such a claim. Any effort to demand sharing of assets on new terms requires definition of those terms and in particular the setting of "fair" prices, to strike a balance so as not to do more harm than good, both in the long run and in the short run. This is a task antitrust law has never undertaken because it is something antitrust juries and judges, through a treble damages system, cannot reliably do—as Justice Breyer explained when he was a First Circuit judge.[20]

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[18] 708 F.2d 1081, 1144 (7th Cir. 1983) (upholding liability based on AT&T's refusal to sell to MCI, as a competitor, the very same connections that AT&T was already in the business of offering to "local customers, independent telephone companies and others").

[19] That doctrine, as *Trinko* noted, is not a Supreme Court doctrine. 540 U.S. at 411 ("We have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.").

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

> Judge Hand's price squeeze test . . . makes it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory

In the long run, investment incentives would be threatened by a Section 2 rule that says firms must share the rewards if their investments are successful enough. The essence of the *U.S. Steel* point about the limited reach of Section 2 is that antitrust respects that truth.[21]

Even in the short run, there are multiple problems with sharing duties—as recognized in the FCC's orders implementing these duties under the 1996 Act and in the opinions of Justice Breyer, Judge Wood, and Judge Williams mentioned above. First: a duty to share assets risks diminishing the incumbent's investments in creating those assets in the first place, and in maintaining and upgrading them, for the rewards must be shared but not the risks. For example, local telephone networks require continuing investment; they require the constant attention of tens of thousands of employees and billions of dollars of investment. Second: a duty to share risks deterring independent investments by new entrants; sharing may be cheaper, and is certainly less risky, than investing in one's own facilities. Third: a duty of incumbents to share can harm the *best* new entrants, those who do build their own facilities; they are faced with competition not just from the incumbent but from all the rivals who can cheaply share the incumbent's assets. On top of these risks, the costs of implementing and administering any sharing duty can be very substantial, so that any market benefits must be large enough to exceed those costs. And: if the incumbent cannot reliably determine the required sharing terms in advance—if there are vague legal standards requiring years of costly and uncertain litigation—the risk of retrospective treble damages skews choices toward overgenerous sharing that further deters pro-consumer investments.

For all of these reasons, Section 2 of the Sherman Act has never imposed the kind of affirmative duties to assist rivals that were urged by the plaintiff in *Trinko*.

> agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will? We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration.

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