On Refusing to Deal with Rivals

Glen O. Robinson
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This Article examines refusals to deal with competitive rivals as an antitrust offense. It claims that refusals to deal should be eliminated as a separate violation except in the unique case of essential facilities. This Article first examines the confusing distinction between single-firm and group refusals, and concludes that both should be adjudicated under the same liability rule. The misunderstanding about the standards of liability as between concerted and single-firm refusals pales beside a larger confusion about why refusals to deal are an antitrust offense at all. The Supreme Court has offered neither a theory nor a coherent standard requiring a dominant firm to deal with rivals. This Article argues that the essential facilities doctrine presents a duty to deal framework that is both coherent and limited. There remain, however, a number of vexing issues concerning the doctrine's scope and application, as illustrated by two on-going controversies in communications law involving competitors' access to dominant firm facilities.

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INTRODUCTION

According to a longstanding declaration of antitrust law, any firm—even one with monopoly power—may deal with whomever, and on such terms as, it chooses.1 Like so many declarations in law, this doctrine quickly wilts under challenge, much as Captain Corcoran's claim of sea-hardiness in H.M.S. Pinafore.

CAPT.: . . . I am never known to quail
    At the furry of a gale,
    And I'm never, never sick at sea!
ALL: What, never?
CAPT.: No, never!
ALL: What, never?
CAPT.: Hardly ever.2

Even the "hardly ever" qualification overstates the matter, however. A duty to deal may be an exception, but it is an exception of fairly indefinite scope. It would be a closer approximation to say not "never" nor "hardly ever," but rather "it all depends."

On what? That too is not very well specified. Refusals to deal make many appearances in antitrust law. Because they are means to ends, their appearance is as varied as the end purposes themselves.3 Indeed, nearly all antitrust conduct can be characterized as a refusal to deal. Thus, price fixing is essentially a refusal to deal except on the basis of an artificially set price, tying involves a refusal to deal except on the basis of artificially bundled separate products, and so on. In such cases the refusal element is not independently pulling any weight, so giving it separate attention adds confusion to the underlying conduct issues. Unfortunately, adding confusion is not itself an antitrust offense, so the practice of loose characterization proceeds undeterred.4

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1 The no-duty rule is at least as old as United States v. Colgate & Co., 250 U.S. 300, 307 (1919), and has since been frequently reaffirmed, albeit primarily in dictum. See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 483 n.32 (1992) (observing that a monopolist may refuse to deal with its competitors "if there are legitimate competitive reasons for the refusal").


3 See Richard A. Posner, Antitrust Law: An Economic Perspective 207–08 (1976) (emphasizing that the legality of group refusals to deal depends on their end purpose, which may be used to either enhance or undermine competition).

4 For example, in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979), plaintiff characterized defendants' blanket licenses as a concerted refusal to deal, as well as a price-fixing violation, and an illegal tying arrangement even though the elements of the alleged refusal were contained in the other claims. See id. at 6.
Because refusals to deal occur in such a variety of contexts and may serve a variety of malign or benign purposes, it is arguable whether refusals, as such, should be treated as a discrete antitrust offense. However, this Article's concern is not the refusal to deal characterization across the range of antitrust offenses; rather, it is concerned with refusals to deal specifically with competitors. In cases involving competitors, the refusal claim often stands alone as the conduct element. Here the element of refusal not only drives the result, but also propels it in the wrong direction insofar as cooperative dealing undermines the competitive rivalries that antitrust laws are intended to promote.

Part I of this Article attempts to clarify the liability standard for refusals to deal, a matter which has long been confused by the dichotomy between concerted refusals and refusals by single-firm monopolists. At one time the former were considered *per se* illegal, even though the latter have never been. In the mid-1980s, the Supreme Court seemingly abandoned the *per se* rule for concerted refusals in general, but preserved an exception for cases involving market power or control of an element essential for competition. While this approach suggests that some residue of *per se* illegality remains, this cannot make sense. Single-firm refusals have never been judged by a *per se* rule even when they involved market power or control of an essential facility, and there is no basis for supposing that concerted refusals are inherently more harmful than single-firm refusals. The fact that concerted and single-firm conduct implicate two different sections of the Sherman Act might warrant classifying these cases separately, but it furnishes no reason to treat them as distinctive harms. Setting aside the element of agreement, the underlying substantive standard of harmfulness should be the same, and in both cases that means application of the rule of reason.

This bit of doctrinal housecleaning serves mainly to introduce the more profound question of whether, in any form, refusals to deal should be considered a discrete antitrust offense. Part II addresses this question by exploring the underlying premise for the supposed baseline rule of no duty to deal with competitors. This precept has a mantra-like quality that does not invite explanation. Perhaps the reasons for the no-duty rule are so obvious that they need no explanation. However, even the obvious needs to be repeated every once in a while lest it be overlooked. In this spirit, the obvious point of the no-

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duty rule is that an obligation to deal with competitors is inconsistent with a conception of competition as independent rivalry.

Unfortunately, antitrust law seems to be conflicted about its conception of competition. There are two ways to think about competition. One way is to invoke the model in which a large number of small producers act autonomously to determine their output. Call this the "farm model" after the fashion of traditional introductory economics textbooks which use farmers to illustrate perfect competition. In this scheme, the output of each producer is so small that it cannot affect price, and cooperative action among firms is defeated by the rules of the game (i.e., antitrust law) and by the composition of the market, which has too many producers to make group action sustainable. The farm model describes competition in the sense that the market produces competitive results, but it does not imply that producers act in a self-consciously competitive way; the structure of the market naturally induces them to act competitively. In contrast to the farm model is the model of rivalrous competition. This model assumes that individual producers still do not control enough of the market to determine prices, but that the number of producers is small enough and their market shares large enough for each to perceive competition as a strategic game aimed at best known rivals. In the introductory textbooks this is sometimes described as "imperfect" or "monopolistic" competition, though these terms carry baggage that is not important here. Significantly, this second model is the only form of competition that is relevant to antitrust. Antitrust law is not needed to keep farmers "competing," because they cannot help but do so—unless they get a little help from their government friends. Thus, antitrust law is only needed to enforce rivalrous behavior, not to transform rivalrous markets into farmers' markets.

Rivalrous competition is a zero-sum game. Joseph Schumpeter famously called it a process of "[c]reative [d]estruction," with rivals seeking to kill off their competitors. Antitrust law has always been uncomfortable with Schumpeter's taste for competitive rivalry, which is red in tooth and claw. In part, this may be attributable to antitrust

9 See id. at 250–52.
10 See, e.g., id. at 253.
11 The most obvious example of such help is government approved and enforced agricultural marketing agreements under the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1340 (2000). See, e.g., Block v. Cnty. Nutrition Inst., 467 U.S. 340, 352 (1984) (precluding consumer challenges to a milk marketing order issued by the Secretary of Agriculture that was intended to raise milk prices because consumer groups were not within the class of persons Congress intended to benefit).
law's shorter time horizon as compared with the lengthier temporal scale that implicitly underlies Schumpeter's view of competition. Schumpeter was not concerned with firms that achieved monopoly status by acting aggressively to kill off rivals, for in a dynamic economy, monopolies are always being destroyed by other aspiring monopolists.\footnote{Id. (remarking that "we are dealing with a process whose every element takes considerable time in revealing its true features and ultimate effects").}

Antitrust enforcement, however, is driven primarily by a short time horizon. The legality of particular commercial conduct is either assessed on the basis of its intrinsic badness (\textit{per se} illegal) or its probable effects (rule of reason). This assessment is typically cabined by a short-run perspective that permits little if any consideration of the general character of the industry, the longer-term movement of competitive forces within the particular market, and so on.\footnote{There are exceptions. The modern approach to predation adopts a "long view" in evaluating the probability that pricing below cost will inflict long-term injury on consumers. \textit{See}, \textit{e.g.}, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (requiring that courts consider possibility of recoupment of lost profits after predatory behavior eliminates competition); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590-91 (1986).} This particularized focus is not all bad; a longer-term perspective risks transforming the system of common law adjudication into a system of industrial planning, and making courts regulatory agencies. And it is no easy matter to determine the appropriate temporal period in which to view the effects of a particular practice. On the one hand, a Schumpeterian perspective teaches that in the long run, the effects of anticompetitive practices dissipate in the face of enduring market forces. On the other hand, one needs to remember Keynes's famous quip about those market forces: "\textit{In the long run we are all dead.}"\footnote{JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923).} Asking enforcement agents and courts to calibrate precisely between the ephemeral and the eternal may be asking too much.

Undoubtedly, though, the present focus on discrete conduct threatens to conflate ephemeral and insignificant business conduct with durable and important economic harm. In truth, most antitrust cases more closely resemble tort actions than public enforcement actions. I suppose one could not reasonably expect otherwise given that antitrust enforcement is overwhelmingly dominated by private claims.\footnote{Since 1975, private antitrust cases have accounted for more than 80% of all cases filed each year, ranging from a low of 83.4% (in 1990) to a high of 95.6% (in 1976). \textsc{Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics} 451 tbl.5.37 (2000), \textsl{available at} \url{http://www.albany.edu/sourcebook/1995/pdf/t537.pdf}.} These private claims are typically filed by competitors, which lends another anti-Schumpeterian bias to antitrust. Modern antitrust
courts and scholars may endlessly proclaim that their sole concern is harm to competition, and not competitors, but the evidence from some decisions suggests that they only half believe it. Moreover, even if this conviction were absolute, a selection bias would still result from the fact that private claimants are driving the agenda.

The bias towards short-run effects and the conflation of injury to competitors with injury to competition combine with particular force in refusal to deal cases to forge a kinder, gentler model of competition. To be sure, antitrust law does not always make dominant firms (or groups of firms with market power) deal with rivals. It merely says that if they refuse to do so, they must furnish a valid business justification for their decision. Unfortunately, the Supreme Court has issued no guidelines as to the nature and scope of valid business justifications, presumably because it cannot usefully summarize every business strategy that could be considered valid. Indeed, the best business reason for refusing to deal with rivals is that in a zero-sum game, one competitor’s loss is another’s gain. Needless to say, that kind of response is not what the Court seems to have in mind. Even a slight modification of this position, to say, for example, that “we can make more profit by not dealing with rivals,” would probably not suffice without additional spin. However, this spin is more often a product of legal creativity than business rationale. Aspen Skiing, the canonical reference for modern single-firm refusals to deal, vividly illustrates this practice.

Part III discusses how the Court in Aspen Skiing erred in its approach to the defendant’s refusal to deal. The Court mistakenly assumed that rivalrous competition could be evaluated as reasonable or unreasonable according to standards of business efficiency. In essence, the Court required the defendant to demonstrate affirmatively that its refusal to deal with a rival was efficient. In itself this might seem unobjectionable; competition, after all, is supposed to be efficient. However, it is one thing to hold that objective up as a general norm, and quite another to devise a set of judicially enforceable standards. In this case, the “efficiency” question was a matter of determining whether the defendant’s bargaining terms were reasonable or unreasonable. The Court perceived the defendant’s terms to be so

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19 See, e.g., Aspen Skiing, 472 U.S. at 608.
21 See id. at 609–11.
manifestly unreasonable as to constitute a refusal. Because that refusal meant foregoing some short-term profits from cooperation, the Court deemed this behavior anticompetitive. This analysis invites a level of judicial scrutiny that seems inappropriate to the commercial context of antitrust. More fundamentally, this approach perversely prioritizes competitor cooperation over competitive rivalry.

I do not suggest there is never an occasion warranting forced dealing between rivals. Following the redoubtable Captain Corcoran, I am content with a “hardly ever” condition which is best confined to the essential facilities doctrine. While this doctrine has been attacked by antitrust scholars, their criticisms ring hollow when one considers the much vaguer framework used to evaluate refusals to deal independent of whether essential facilities are involved. The essential facilities framework is an unalloyed improvement over the kind of “analysis” that underlies scrutiny of refusals to deal in cases like Aspen Skiing. And despite the common complaint that courts have stretched the essential facilities doctrine too far, they have actually applied it with restraint. Critics have perhaps been misled by the ease with which the doctrine is invoked by frustrated competitors, and have ignored the fact that the lower courts have generally (with notable exceptions) understood its proper limits. Unfortunately, so long as liability for refusals to deal can be predicated on amorphous standards of general monopolization doctrine, understanding the limits of the essential facilities doctrine accomplishes little.

Understanding the limits of the essential facilities doctrine requires an understanding of what the doctrine itself entails, to which task Part IV is devoted. The numerous discussions of the doctrine in the literature preclude the need for a detailed treatment of the case law. The elements of essential facilities doctrine are mostly intuitive, but they involve certain complexities that most commentators overlook. For example, one intricacy concerns the element of “essentiality”—namely, whether the essential facilities doctrine implies a natural monopoly with respect to the facilities in question, and if so, whether it makes sense to promote competition through forced sharing of these facilities. Another issue is the extent to which the feasibility of dealing or sharing facilities should influence a court’s decision to order sharing of essential facilities. Some critics claim that the essential facilities doctrine invites courts to act as regulators. Contending that antitrust and regulation are like oil and water, these scholars suggest

22 See id.
23 Id. at 610–11.
25 See infra notes 128–31 and accompanying text.
that forced sharing of facilities is best left to regulators. This attempt to draw a sharp demarcation between antitrust and regulatory objectives is a mistake. Although in some situations a regulatory environment may help to define the terms of forced dealing or sharing of facilities, in general, if mandatory dealing is an inappropriate antitrust objective, then it is an inappropriate objective for regulation as well. Thus, the essential facilities doctrine provides the proper framework for analyzing both regulatory and antitrust requirements for forced dealing or sharing among rivals.

Two recent controversies over forced sharing of facilities illustrate the nexus between antitrust and regulation. The first, involving access provisions in local telecommunications services, is purely a matter of regulatory policy. Access is mandated by statute, and the only open questions concern implementation, including whether to apply the essential facilities framework. The second controversy, which centers on demands for sharing cable broadband facilities providing Internet access, has provoked skirmishes on both antitrust and regulatory battlegrounds. In both controversies, it is a close question whether the access requirement makes sense, but the bottom line is less important than the methodology. Neither controversy has been modeled in terms of a carefully limited essential facilities doctrine, and consequently, the access question has been left to the untethered discretion of regulators and the vagaries of regulatory politics.

I

THE LIABILITY STANDARD FOR COLLECTIVE AND SINGLE-FIRM REFUSALS

Beginning in the mid-1980s, the Supreme Court discarded its earlier assumption that collective boycotts are an unambiguous evil. In so doing, it essentially ratified lower court holdings in apparent defi-

26 See, e.g., Areeda, supra note 24.
27 The modern view that boycotts should be analyzed under a rule of reason stems from Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 297–98 (1985). See also FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 457–65 (1986) (evaluating FTC findings under rule of reason analysis). The classic per se cases addressed many types of refusal. See, e.g., Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (overturning the dismissal of a claim against members of an association that set standards for gas burners for refusing to sell gas for use in unapproved burners); Klor’s, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959) (ruling on allegations that retailer, distributors, and manufacturers conspired to refuse to supply equipment to retailer’s competitor); Associated Press v. United States, 326 U.S. 1 (1945) (considering bylaws that prohibited members from disseminating news to nonmembers and granted members a veto over admission of new members); Fashion Originators’ Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (condemning as illegal a group boycott of retailers who sold women’s clothing patterned on pirated designs).
The Court's acceptance of a rule of reason standard for concerted refusals seemed to eliminate the distinction between assumptions about the harms from collective refusals to deal and single-firm refusals, which have always been analyzed under a rule of reason. Unfortunately, the Court did not say the per se rule never applies; it merely said the rule applies "hardly ever." Some lower courts are not even certain that "hardly ever" is the correct phrase, and have suggested that the rule of reason is still the exception to the per se baseline rule. This is an upside-down interpretation of the Supreme Court's decision in Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., which treated the per se rule as the...
exception to be applied only when the group possesses "market power or exclusive access to an element essential to effective competition." 32

However, fussing over which rule is the baseline and which is the exception is itself a diversion. The real confusion lies in the notion that a per se rule can be sensibly applied to refusal cases. Despite the Court's casual statement that a company may incur per se liability in market power/essential facility cases, such a literal interpretation makes no sense. First, since the Court has continued to affirm the dictum in United States v. Colgate & Co. that even monopolists may not be required to deal with competitors, 33 the mere existence of market power is not a sufficient basis for imposing per se liability for refusing to deal unless there is a special exception for collective refusals. Yet there is no reason to distinguish a group wielding monopoly power from a single-firm monopolist. Even though group action is technically governed by § 1 of the Sherman Act while single-firm conduct falls under § 2 of the Sherman Act, 34 that simply means that there must be proof of agreement in the first case. That in itself should not affect the basic standard for proving wrongful effect. The mere fact of agreement among competitors is not a sufficient basis for per se liability any more than the existence of market power. If neither agreement nor market power standing alone is sufficient to trigger per se liability, it is difficult to see how combining both changes the equation. An actionable agreement to monopolize between two firms should require the same anticompetitive conduct as monopolization itself. 35 If the conduct element of the latter is not subject to the per se rule, then it makes no sense to treat the former under per se analysis. In both cases the reasonableness of the conduct is a critical determinant of whether there has been an antitrust harm. 36

32 Id. at 296.
33 See discussion supra note 1.
34 15 U.S.C. §§ 1–2 (1994 & Supp. V. 1999). Of course, group action could also fall under § 2 if the criterion of market power is sufficient to meet the tests of monopolization or conspiracy to monopolize.
35 I say "should" mindful of the fact that some courts have held that a "conspiracy to monopolize" under § 2 does not require the same proof of monopoly power as the completed offense of monopolization. See, e.g., Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1181 (8th Cir. 1982); Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 108 F. Supp. 2d 549, 588–90 (W.D. Va. 2000). Insofar as this approach suggests that a conspiracy to monopolize is actionable under § 2 even though the parties lack the market power to succeed, it makes no economic sense. It also seems inconsistent with the spirit, if not the precise holding, of Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 547 (1986), in which the Court determined that a conspiracy to monopolize by means of predatory pricing is not actionable in the absence of proof of a reasonable prospect of success. Id. at 596–97. In all events, as applied to mere refusals to deal, Northwest Wholesale Stationers clearly holds that the mere fact of an agreement is not a sufficient basis for imposing liability without proof of market power. 472 U.S. at 298.
36 One could make a nonfrivolous argument for revising the antitrust laws to make the mere existence of monopoly power a sufficient basis for antitrust intervention, as was
ception for control of an essential facility also makes no sense of per se liability. Applying the essential facility doctrine necessitates an inquiry into such issues as essentiality and practicability of sharing, which are the routine matters of rule of reason inquiry.\textsuperscript{37}

Some commentators argue that collective activity should be scrutinized more closely than single-firm activity because it has a greater potential for harm.\textsuperscript{38} As a general proposition this is dubious. Power is power, whether exercised by one firm acting alone or four firms acting in collusion. In the face of certain alleged offenses, such as horizontal price fixing, singling out the element of concerted activity is appropriate.\textsuperscript{39} However, refusals to deal bear little resemblance to price fixing. If refusing to deal harms a competitor, then that harm is not greater at the hands of a four-firm cartel with substantial market power than from a single firm with equal market power. Consider a group of four competitors who collectively account for eighty percent of the market for gizmos. They form a joint venture for purchasing certain inputs but refuse to admit any other gizmo manufacturer into the joint venture. The joint venture might facilitate the development of a cartel, both on the selling side as well as the buying side. Excluding other manufacturers might strengthen that cartel, on the principle that too many cartel members are like too many cooks in the proposed many years ago by the "Neal Report." See Report of the White House Task Force on Antitrust Policy [The Neal Report] (1968), reprinted in 1 J. Reprints for Antitrust L. & Econ. 631, 637–38 (1969). I rather doubt that would be a good idea, for the reasons explored by Judge Richard Posner, supra note 3, at 78–95. However, the relevant point for now is that in such a scheme it is the element of market power, not the element of agreement, that is doing all the work.

\textsuperscript{37} Cf. IIIA Areeda & Hovenkamp, supra note 17, ¶ 773e, at 213–14 (stating that essential facilities doctrine "is not a 'per se' rule in any sense"). There is some confusion on this point. For example, in Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986), the court treated a group refusal to lease an essential facility (a stadium) as per se illegal because the refusal was unaccompanied by a procompetitive justification. Id. at 541. Citing Northwest Wholesale Stationers, the court held that "group boycotts may properly be characterized as per se illegal if the defendants have either 'market power' or 'exclusive access to an element essential to effective competition.'” Id. (quoting Northwest Wholesale Stationers, 472 U.S. at 296). The per se characterization is confusing because it apparently relies on the fact that the defendants offered no justification for their refusal. However, a practice that is truly per se illegal is one that is beyond justification, not simply one that the defendant has the burden of justifying. The typical application of the essential facilities doctrine contemplates an inquiry into the element of practicability, which in effect functions as a rule of reason.

\textsuperscript{38} See Herbert Hovenkamp, Federal Antitrust Policy 194–96 (2d ed. 1999); see also Data Gen. v. Grumman Sys. Support, 36 F.3d 1147, 1183 (1st Cir. 1994) (distinguishing unilateral and concerted refusals to deal, but failing to explain the reason for the distinction).

\textsuperscript{39} Thus, unilateral price fixing would not be illegal, even if done by a monopolist. While we might outlaw the accumulation of monopoly power, it would be silly to condemn a firm for doing what a firm is supposed to do—namely, fixing its own prices. Glen O. Robinson, Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method, 80 Va. L. Rev. 577, 597 (1994).
kitchen. However, one cannot credibly claim that the joint venture presents a greater threat on either the selling or buying side than a single firm that controls eighty percent of the market. Indeed, our experience with the inherent fragility of cartels tells us the contrary; all else being equal, the monopolist is the more dangerous actor.

Granted, collective refusals might be linked to activities that are independently illegal per se, such as price fixing. But if the refusal to deal is per se illegal only because it is a component of behavior that is illegal on its own terms, then the refusal element is superfluous. While the refusal might provide probative evidence of the separately unlawful activity, that should have no bearing on whether the refusal itself is an element of the violation. Consider, for example, the Klor's, Inc. v. Broadway-Hale Stores, Inc. case. A group of appliance manufacturers agreed among themselves and with the Broadway-Hale department store chain to boycott Klor's, a competitor of Broadway-Hale. The boycott appears to have been an effort to enforce a resale price maintenance scheme, though this is not discussed by the Court. If it was a resale price maintenance scheme, then it almost certainly benefitted the manufacturers as a group, rendering Klor's allegation that they were forced into the boycott by Broadway-Hale's "monopolis-

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40 See, e.g., F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 244-47 (3d ed. 1990) (discussing the susceptibility of cartels to chiseling and ultimate breakdown). This is simply an instance of the central problem of all collective action—how to maintain collective cohesion in the face of individual incentives to cheat.

41 There might be a special reason for distinguishing the two situations when the issue is whether to stop the formation of a joint venture. The merger or even partial merger of firms producing a market share of 80% would be subject to challenge even though the mere existence of a single firm with 80% market share would be immune from antitrust liability. This result simply reflects the political economy of antitrust enforcement policy: preventing monopoly concentration is less costly than breaking it up when it is found to exist.


43 Herbert Hovenkamp observes that even if the refusal to deal claim is not grounds for a separate violation, a refusal to deal claim might grant certain plaintiffs access to the courts. Hovenkamp, supra note 38, at 218. Apparently the aim is to allow these plaintiffs to challenge practices that they would have no independent standing to challenge. For instance, a firm that is excluded from a price-fixing cartel presumably could not claim antitrust injury for the illegal price fixing. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (holding that rivals of a cartel cannot claim injury from the cartel if they benefit from the cartel's activities). If the substantive offense does not provide a basis for private standing, it seems odd to create a bogus violation simply to allow a challenge that the standing rules would otherwise preclude. Although one might argue that courts should liberalize the standing rules to facilitate private enforcement of antitrust laws, there is no legitimate reason to relax standing requirements just for exclusion cases.


45 Id. at 209.
tic" buying power implausible. Indeed, the group of appliance manufacturers included the leading firms in the industry, who were unlikely to be held captive by a single department store chain. The Supreme Court's recent interpretation of Klor's is that a horizontal restraint warranted per se treatment, meaning presumably that the purpose of the boycott was to enforce an upstream cartel among the manufacturers. Whether or not this accurately reflects the Court's thinking in Klor's is debatable, but the opinion itself gives no indication either way. Accepting the current interpretation simply confirms that the refusal functions not as the offense, but merely as the evidence. In other words, if the manufacturers were engaged in an upstream cartel and used the boycott to enforce that cartel, the basis for per se illegality would be the former and not the latter.

As discussed previously, confusion over the nominal distinction between collective and single-firm refusals is interesting primarily for what it suggests about the incoherence of the refusal to deal doctrine. The enduring legacy of Klor's reflects a larger confusion about antitrust methodology, specifically the roles of per se and rule of reason analyses. More immediately, it exposes uncertainty over the role and purpose of refusals to deal as an antitrust offense. Absent some theory for imposing the duty to deal, or some doctrinal principle that defines its boundaries, the question whether collective refusals should be treated differently from single-firm refusals is trivial.

II

Competing Without Apology

In 1919, the Court in Colgate held that its earlier proscription of resale price maintenance applied only to manufacturers who set

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47 In this case, the upstream cartel would benefit from enforcing resale prices as a means of discouraging price cutting among the cartel members, because if prices were fixed at retail, a cartel cheater could not increase its market share. See Lester G. Telser, Why Should Manufacturers Want Fair Trade?, 3 J. L. & Econ. 86, 96–99 (1960).
48 The once bright line between per se violations and offenses analyzed under a rule of reason has become so blurred in modern antitrust cases that it seems unwise to rely on this distinction to differentiate among the different refusal to deal cases. At one time there was a hard and fast rule that persons may never fix prices, but in 1979, the Court amended that rule to hardly ever. See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–24 (1979) (establishing that price fixing incident to group licensing is not illegal per se); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100–01 (1984) (holding that price fixing in team sports is not illegal per se). In 1999 the price-fixing rule morphed again into an “it all depends” standard with California Dental Ass'n v. FTC, 526 U.S. 756 (1999), when the Court reversed a lower court's "quick look" condemnation of an association's ethical rules restricting price and nonprice advertising, and suggested a “sliding scale” of relevant factors in evaluating the probable consequences of this kind of restraint. Id. at 779–80. The Court, it seems, is not enamored with per se rules about rules. See Stephen Calkins, California Dental Association: Not a Quick Look but Not the Full Monty, 67 Antitrust L.J. 495, 520 (2000).
prices through agreements with retailers that did not restrict unilat-
eral action by the manufacturers.\footnote{United States v. Colgate & Co., 250 U.S. 300, 307 (1919).} The Court explained its decision with a broad declaration of principle: absent a purpose of creating or maintaining a monopoly, merchants should be free to trade with whomever they wish and on such conditions as they choose.\footnote{Id.} Col-
gate's declaration remains the baseline norm and continues to be cited in antitrust cases with programmed repetition. The norm itself re-
mains unexplained; it is just one of those original principles that is grounded only on itself.

Another way of analyzing the Colgate norm is to view it in terms of basic property rights principles. Economic liberty has always been as-
associated with property rights, and vice versa.\footnote{See Glen O. Robinson, Evolving Conceptions of 'Property' and 'Liberty' in Due Process Jurisprudence, in Liberty, Property and Government 63, 82–86 (Ellen Frankel Paul & Howard Dickman eds., 1989) (discussing the overlap of property and liberty concepts in the context of economic rights).} In modern functional-
ist jargon, the freedom to deal or not to deal with parties of one's choosing would be associated with the right to exclude, which was de-
clared by the Supreme Court to be one of the most fundamental prop-
erty rights.\footnote{See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).} Conceptualizing Colgate's freedom formulation as a property right may not enhance its legitimacy, but it does illuminate the economic justification for exclusive property rights. This justifica-
tion ought to be particularly compatible with the antitrust laws, which are supposedly grounded on the same economic principle.

The economic justification for exclusive property rights is re-
hearsed in every introductory property course: exclusive property rights allow resources to be used more efficiently. Forced dealing translates into forced sharing of property.\footnote{Not dealing and not sharing have different connotations. A refusal to share connotes a refusal to allow access to certain property, such as a capital asset used as part of a firm's production function. A refusal to deal, on the other hand, might further entail refusing to sell end products. At bottom, however, both invoke the exercise of property rights, and there is no reason to base legal distinctions on whether the refusal involves a refusal to sell or lease an end product or a capital asset. The antitrust problem triggered by the refusal to deal with rivals in either case invariably concerns a refusal to sell or lease a good that is used as an input to the rival's end product.} The sub-optimality of this result can be expressed as a tragedy of the commons problem.\footnote{For the classic source of the "tragedy" label, see Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE (n.s.) 1243 (1968). But see Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986) (demonstrating that common property is not always tragic). Rose's qualification of the typical characterization of the commons dilemma suggests that some types of social activities depend on common access to places, such as beaches and parks. These uses, however, are not part of the normal organization of commerce with which the antitrust laws are concerned.} Perhaps it is a stretch to equate forced dealing with the commons prob-
lem because the former always assumes a pricing mechanism that will ration demand. However, the underlying issue is the same: forced dealing or sharing of property discourages investment. Significantly, the perverse incentives of forced sharing are two-fold. It is not simply that such sharing undermines the investment incentive of the firm that is forced to cooperate. It also erodes the incentives of firms considering investment in new, unproven technologies. Consider the case of a firm contemplating competitive entry into a market where an incumbent firm has established, but aging, facilities. A new company might opt to invest in new facilities to gain a competitive advantage through more efficient production. However, allocating scarce resources to expensive and unproven assets puts more capital at risk than the alternative strategy of attempting to access and exploit the incumbent firm’s facilities. This strategy may not be risk-proof, as competitive entrants into local telecommunications markets can attest. However, the option to share the incumbent’s assets undoubtedly skews the new entrant’s investment incentives away from new technologies.

This is all unexceptionable as a matter of basic principle, but insofar as these principles derive from economic efficiency objectives and not property rights themselves, one might question whether preserving normal property rights is in fact the best way to achieve economic efficiency in any particular case. It is not freedom to choose “all the way down” but only down to the point where the freedom conflicts with some other requirement of economic efficiency. But what is that “other requirement of economic efficiency?” More importantly, who has the burden of establishing economic efficiency? Surely it cannot be enough for a firm to assert that it would be desirable for them to use their competitor’s property and then shift the burden to the competitor to prove that the suggested arrangement is not efficient. Our concept of competition is based on a regime of exclusive property rights, and it sounds trite to observe that exclusive rights entail the possibility of excluding others. Competitors are supposed to compete with their own property, not with the assets of their competitors—witness the common law doctrine of “unfair competition,” which prohibits firms from helping themselves to a competitor’s prop-

55 See infra Part IV.C.1. Competitive local exchange carriers (CLECs) that counted on developing an advantage over incumbent local exchange carriers (ILECs) by selectively leasing incumbent facilities are now questioning whether this is a viable long-term strategy. The CLECs complain that the ILECs will not provide access on terms that permit them a profit and that the FCC is not enforcing fair and reasonable terms. See Rebecca Blumenstein, Reform Act Hasn’t Delivered Promises to Customers, WALL ST. J., May 3, 2001, at B1; Carolyn Hirschman, A Question of Strategy: CLECs Look for the Best Way to Break ILEC Monopolies, TELEPHONY, Feb. 19, 2001, at 86.

56 See Kaiser Aetna, 444 U.S. at 176 (asserting that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).
When a Wal-Mart comes to town, it is a safe bet that many smaller retailers that sell similar merchandise will suffer. Those who think that small retailing serves a vital community function may lament this new competition, but sensible people are unlikely to propose the remedy of forcing Wal-Mart to provide floor space to its smaller competitors so that they may enjoy the benefits of Wal-Mart's magnetic pull on consumers. Turning Wal-Mart into a wholesaler of retail space might not forge a rift in the moral fabric of society, but it would be a counterproductive strategy if competition is what we are seeking.

Significantly, forced sharing promotes competition only when two exceptional circumstances exist. First, the situation must be one in which forced sharing is a necessary condition of competition. Second, the circumstances must be such that competition under a regime of forced cooperation would be efficient. Without such a showing, a firm can free-ride on another company's investments in infrastructure by demanding access to those assets on more favorable terms than it could realize by supplying the assets itself.

I use the phrase “free-ride” advisedly. Whether there is a free-ride on the competitor's investment depends on the extent to which the competitor is compensated for the use of its assets. On some terms there would be no free-ride, but there would also be no controversy. Insofar as forced sharing involves a compromise of exclusive property rights, it is equivalent to a private power of eminent domain. In both the eminent domain and forced sharing contexts there will always be a voluntary exchange if the property seeker is willing to pay the reservation price of the property owner. In both situations, the controversy over forced acquisition/sharing arises only because the initial offer is less than the reservation price. So in both cases, given the

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57 See, e.g., Int'l News Serv. v. Associated Press, 248 U.S. 215, 240 (1918) (ruling that the act of copying news from a competitor's bulletin board constitutes unfair competition). Intellectual property law limits the scope of the misappropriation tort because of possible preemption by federal copyright or patent law. See, e.g., Fin. Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 208 (2d Cir. 1986) (finding that state law of misappropriation of financial information was preempted by copyright law if the state law provided protection that was “equivalent” to that of the copyright law). However, the possibility of federal preemption does not alter the basic proposition that the unauthorized use of a competitor's property is generally considered an unacceptable form of competition.

58 This, of course, is the point of the essential facilities doctrine, examined below, infra Part IV.B.

59 The latter showing might appear superfluous since it is the underlying assumption of the antitrust laws. However, as discussed subsequently, the assumption that the shared use of a facility is a prerequisite to competition implies the existence of a natural monopoly with respect to that facility. According to conventional wisdom, competition in a naturally monopolistic market is not efficient. That conventional wisdom is incomplete insofar as it ignores dynamic industry conditions and evolutions in relevant technology that might allow the market to become competitive over time. Rather than blindly following conventional wisdom, courts should consider these issues and not dismiss them out of hand.
absence of voluntary exchange, it is necessary to calculate reasonable
terms for the coerced transaction. In the standard eminent domain
case, the formula is straightforward; the terms of the transaction are
simply price-related, and the “fair” price is always an estimate of objec-
tive market value.\textsuperscript{60} In the antitrust context, establishing fair terms for
forced sharing is not as trivial. For one thing, the question of fair
compensation is complicated by the absence of a market for the assets
to be shared. For example, there is no established market for another
firm’s established business methods, or for unique assets such as intel-
lectual property.

More importantly, fairly compensating a competitor for forced
sharing incorporates considerations not usually encountered in the
conventional eminent domain context. If the highway department
takes my house, for example, the fair market value that I receive in
exchange will not include the personal or subjective value I have “in-
vested” in the house.\textsuperscript{61} I could reasonably object to the unfairness of
being forced to sacrifice personal value for the sake of the general
public welfare, but I could not accuse the government of “free-riding”
on my investment. To be sure, undervaluing my house might errone-
ously induce the government to bypass a voluntary exchange in favor
of a coercive transfer. However, at least the government is not adding
insult to injury by using my house to cause me further loss in the mar-
ketplace. When a firm is granted access to another firm’s assets, how-
ever, this is precisely what happens if the intruding firm does not
compensate its competitor for risks undertaken at the time of the in-
vestment. When, for example, Firm A invests in assets (both tangible
and intangible), there is a risk that its costs of investment will be
“stranded” if the market will not yield a payoff sufficient for the firm
to recoup its investment.\textsuperscript{62} While this risk is continuous in a dynamic
market, it is most acute in the start-up years. Now, after Firm A is
successfully established, Firm B seeks to share its assets. At what price
will Firm A be fully compensated and Firm B prevented from free-
riding? To avoid free-riding it would seem that Firm B should not get
the assets at any price less than their value \textit{in the hands of Firm A}, which
is to say, the opportunity cost to Firm A of losing exclusive use of the

\textsuperscript{60} The assumption here, of course, is that the asking price of the owner is higher than
the objective market price as a consequence of opportunistic holding out or subjective
valuation.

\textsuperscript{61} See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (“Because
of serious practical difficulties in assessing the worth of individual places on particular
property at a given time, we have recognized the need for a relatively objective working
rule.”).

\textsuperscript{62} While “stranded costs” are associated with “sunk costs,” sunk costs are stranded only
to the extent that the assets cannot be redeployed or sold.
assets. Only in this way can Firm A be compensated for the risk incurred in making the initial investment.63

While at first glance the opportunity cost valuation in this example appears to approximate the subjective value in my homeowner example, upon closer examination the two are quite different. By assumption, subjective value has no reliably objective measure, which is the conventional justification for excluding it from eminent domain compensation.64 For business assets, however, the opportunity cost is easily measured in terms of the revenue lost by the owner as a consequence of not being able to use the asset exclusively.65 A duty to deal with others in the abstract is meaningless until one specifies the terms on which such dealing must take place. Before a court directs that Firm A or a group of firms including Firm A66 deal with Firm B, it should determine a reasonable level of compensation. Unfortunately, this step is often overlooked by courts ordering firms to deal with their competitors, as illustrated by Aspen Skiing,67 the leading modern decision on refusals to deal.

III
LET’S (NOT) MAKE A DEAL

In Aspen Skiing, defendant Aspen Skiing Company (Ski Co.) controlled access to three of the four downhill skiing mountains in Aspen, Colorado. Ski Co. refused to renew a contractual arrangement with a competitor, Aspen Highlands Skiing Corp. (Highlands), which owned the fourth downhill skiing mountain in town. Under that arrangement, Ski Co. and Highlands had offered skiers a six-day, four-mountain ski ticket that allowed skiers access to all the mountains in Aspen at a discount from the daily rate. The two firms split revenues from the sale of six-day tickets based on area usage. After fifteen years of this arrangement, Ski Co. demanded that Highlands accept a share of the revenues that was below its historical average based on usage.

63 Commentators have explored the theoretical argument for an opportunity cost standard at length in the context of pricing inputs sold to competitors. See, e.g., William J. Baumol & J. Gregory Sidak, The Pricing of Inputs Sold to Competitors, 11 Yale J. on Reg. 171, 199–201 (1994); J. Gregory Sidak & Daniel F. Spulber, The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996, 97 Colum. L. Rev. 1081, 1095–98 (1997). However, the opportunity cost standard can be controversial. See infra note 192.
64 564.54 Acres of Land, 441 U.S. at 511.
65 The example generalizes from a conflict over pricing of access by CLECs to network elements owned by ILECs. For further discussion, see infra notes 188–93 and accompanying text.
66 The discussion assumes a single firm for expositional convenience. However, all else being equal, the following arguments are as applicable to refusals by a collection of firms as to refusals by a single firm.
ON REFUSING TO DEAL WITH RIVALS

Highlands refused and suffered a loss of patronage because it was unable to offer skiers the convenience of discounted access to all four mountains. Ski Co. offered several business justifications in defense of its refusal to deal, all of which the Supreme Court found wanting. The Court found Ski Co. guilty of monopolization for having failed to offer any efficiency justification for its conduct.

Although the lower court's finding of monopoly power was contestable, Ski Co. did not in fact contest it before the Supreme Court. The sole question before the Court was whether Ski Co.'s refusal to deal with Highlands satisfied the conduct element of the monopolization offense. Predictably, the Court's decision began by affirming the time-worn principle that even monopolists do not have a general obligation to deal with competitors. The opinion then proceeded to undermine that principle by holding that a monopolist has the burden of justifying a refusal to deal. Instead of providing convincing business justifications for its refusal to deal, Ski Co. offered a smoke screen of explanations that the Court easily blew away. Apparently relying on the epistemological principle that where there is smoke there must have been fire, the Court found Ski Co.'s conduct sufficiently offensive to satisfy the bad conduct element of § 2.

The Court's opinion reversed the normal burden of proof. Instead of compelling the plaintiff to show that the defendant's refusal to deal undermined competition, the Court required the defendant to demonstrate that any harm to competition was justified by legitimate business purposes. The burden shift in this case was crucial. Highland would have been hard-pressed to demonstrate harm to competition (as opposed to harm to a competitor). After all, forcing the

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68 Id. at 589-95.
69 Id. at 610-11.
70 Id. at 595-600.
71 Id. at 608.
72 Id. at 608-10.
73 See id. at 605-11. It has been argued that showing specific harm to the competitive marketplace is not one of the "black letter elements of the monopolization offense," Jonathan B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule, 7 GEO. MASON L. REV. 495, 507 (1999). While this is technically correct, the conduct element of monopolization implicitly requires some likelihood of ultimate harm to competition, as distinguished from harm to a particular competitor. This is the central premise of Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Indeed, in rejecting a monopolization claim based on refusal to deal, the First Circuit observed: "We label as improper that conduct which harms the competitive process and not conduct which simply harms competitors. That process is harmed when conduct "obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods." Data Gen. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1182 (1st Cir. 1994) (citation omitted) (emphasis in original) (quoting Town of Concord v. Boston Edison Co., 915 F.2d 17, 21-22 (1st Cir. 1990)). By holding that firms with market power have a presumptive duty to deal with competitors, the Court in Aspen Skiing effectively circumvented this larger principle of showing harm to "competition's basic goals."
only two firms in a market to form a cooperative partnership does not create competition; it merely creates a shared monopoly.74

Aspen Skiing offered no guidance on which justifications for refusing to deal might be legitimate. This vague approach comports with the indeterminacy of the rule of reason generally, except that here the cost of that indeterminacy falls squarely on the defendant because of the reversed burden of proof. This burden shift is not itself objectionable, provided there is some prima facie basis for liability based on the specific conduct. However, given that refusals to deal are not presumptively wrongful (the premise of the no-duty baseline rule), there is no basis for presumptive liability based on the conduct of Aspen Skiing. Furthermore, the only circumstance that appears relevant is Ski Co.’s substantial market power. Thus, the lesson of Aspen Skiing is that a firm with market power must justify its conduct by providing a legitimate business reason for refusing to deal.

What constitutes a legitimate business reason?75 The explanations offered by Ski Co. were transparent and unconvincing based on the facts of the case. However, forensic deficiency is a flimsy basis for antitrust liability in the absence of some clear principle justifying a presumption of wrongdoing.76 Suppose the defendant had simply said: “Faced with the terms that plaintiff was demanding, we concluded we could make more money without a deal.” The Court would undoubtedly have demanded a more detailed response, but what kind of detail would be required? Must the defendant produce spreadsheets, backed by economists and accountants, to prove that its profits would be eroded by cooperative action?77

74 The Court noted that the Colorado Attorney General had filed a complaint alleging that the previous joint arrangements facilitated price fixing as well as attempted monopolization, a dispute the parties settled by consent decree. Aspen Skiing, 472 U.S. at 591 n.9. Apparently, it never occurred to the Court that the cooperative arrangement forced by its decision amounted to no more than a sharing of the monopoly between the parties. In the end, neither the antitrust suit nor the forced partnering with Ski Co. produced a viable competitor. Highlands continued to lose money and finally merged with Ski Co. in 1993. Ski Merger May Perk Up Aspen, N.Y. TIMES, Nov. 20, 1993, at 37.

75 See Patrick J. Ahern, Refusals to Deal After Aspen, 63 Antitrust L.J. 153, 172-82 (1994) (examining proposed business justifications that lower courts have accepted and rejected after Aspen Skiing). Ahern’s cases are not limited to those involving competitors but include, for example, exclusive distribution arrangements. Reviewing the array of business justifications that lower courts have sustained and rejected confirms the ad hoc nature of this requirement.

76 See Frank H. Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 975–76 (1986). Easterbrook observes that businessmen find it difficult to articulate their strategies, either because they are unsure as to why something works, or because they have not mastered the appropriate legal and economic jargon. Id. However, the defectiveness of Ski Co.’s proffered justifications was most likely attributable to its lawyers rather than its executives.

77 Even profit maximization might not be sufficient justification, according to at least one lower court. See Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d
One approach might be to apply a standard predation test—the refusing firm must demonstrate that its profitability is not dependent on driving its rival from the market.\textsuperscript{78} However, this test is easier to state than to apply. Even in predation cases when the court can consult objective indicators of profitability, such as whether prices are above or below “an appropriate measure” of cost,\textsuperscript{79} there is no consensus on how the test should operate.\textsuperscript{80} Applying the test to all corporate conduct, including the refusal to enter into or continue deals with rivals, is an adventure in second-guessing. Exactly how would one show that a firm’s maximizing strategy is premised on harm to a rival? The activities of firms are not modeled by equations for profit maximization in which all the variables are neatly specified. Judicial scrutiny of business judgments is not inappropriate when the investigation is guided by objective standards for “honestly industrial” conduct, to borrow Learned Hand’s phrase.\textsuperscript{81} However, such inquiries are tricky. A monopolist may not set out to deliberately “exclude” rivals, but surely a firm can contemplate the exclusion of a rival as a secondary consequence of its own profit-maximizing strategy—that is what competition is all about. Under the rivalrous competition model, the firm that does not consider, and seek, its rivals’ disappearance from the market should contemplate its own disappearance from the market.

How one demonstrates reasonable profit maximization is beside the point in the absence of any clear indication that this is a proper criterion. 	extit{Aspen Skiing} did not apply such a test. The Court was skeptical of Ski Co.’s rejection of a chance to earn additional revenues from

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\textsuperscript{78} See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX 144 (1978) (defining predation as the implementation of strategies that are not profit maximizing except on the expectation that they will drive a rival from the market or induce the firm to abandon competitive behavior). Judge Bork affirmed his own test in \textit{Neumann v. Reinforced Earth Co.}, 786 F.2d 424, 427 (D.C. Cir. 1986). See also Janusz A. Ordover & Robert D. Willig, \textit{An Economic Definition of Predation: Pricing and Product Innovation}, 91 \textit{Yale L.J.} 8, 9–10 (1981) (noting that firms exhibit predatory behavior when the losses resulting from pricing below cost can only be recouped by exercising the monopoly power that will accrue if a rival is driven from the market).


\textsuperscript{80} The wide-scale acceptance of the Areeda-Turner average variable cost test of predation by lower courts has not resolved the controversy over the “appropriate” level of cost. The Supreme Court has yet to affirm the test, and lower courts differ over its application. For their part, antitrust scholars continue to debate its appropriateness and reliability, and many have added their own refinements. For recent reviews of the judicial status of the test and its various embellishments by courts and commentators, see Patrick Bolton et al., \textit{Predatory Pricing: Strategic Theory and Legal Policy}, 88 Geo. L.J. 2239, 2250–55 (2000), and also HOVENKAMP, supra note 38, at 337–60.

\textsuperscript{81} United States v. Aluminum Co. of Am., 148 F.2d 416, 431 (2d Cir. 1945).
the joint venture, but it did not formulate any general test of justifiable profit maximization from this observation, nor could it have done so without further examination of the business alternatives. Suppose Ski Co. calculated that its ability to offer a package for three of the four slopes would allow it to capture most of the market on its own. A sensible, noncooperative business strategy might be to exclusively allocate resources to developing the three-slope package, rather than to compete with itself by offering both a three-slope and a four-slope (or perhaps only a four-slope) package. The assumption is that in the long run, Ski Co. would profit more from capturing the total gains of a three-slope package than it would from receiving a share of the four-slope package. This is particularly the case when the sharing formula does not compensate Ski Co. for attracting skiers to Aspen, allowing Highland to free-ride on Ski Co.’s investments.

Whether the defendant is willing to forego some short-run profits cannot be the applicable test in these cases. Such an approach would put at risk the strategy of every dominant firm that faces market rivalry. Of course, any firm’s long-run strategy implies hurting the competition. This is a classic illustration of the zero-sum character of rivalrous competition. If a defendant’s noncooperative strategy is successful, its revenue gains are likely to come at the plaintiff’s expense.

To carry it one step further, suppose a defendant knows that its noncooperative strategy will inevitably chase plaintiff from the market. The mere contemplation of plaintiff’s demise should not make the defendant’s conduct anticompetitive unless we formulate a rule that a competitor may not pursue any competitive strategy with the intended

82 Aspen Skiing, 472 U.S. at 610–11 (concluding that Ski Co. “was willing to sacrifice short-run benefits and consumer goodwill”).

83 In fact, Ski Co.’s president made just such a calculation. See id. at 592.

84 See Easterbrook, supra note 76, at 976 (suggesting that Ski Co.’s insistence upon a share higher than historic usage might have been justified as compensation for attracting more skiers). My colleague, Ed Kitch, provides anecdotal corroboration from personal recollections of skiing in Aspen that Highlands had not invested in upgrading its facilities in a manner that would encourage more skiers to visit Aspen. Indeed, a former operator of Highlands stated pointedly in 1993 that “Highlands is the only operating ski lift museum in the world.” Ski Merger May Perk Up Aspen, supra note 74, at 37 (quoting Rick Jones, Highlands operator for six years).

85 To the extent that the defendant's strategy increases overall market demand—in this case, attracting more skiers to Aspen—the plaintiff may gain some spillover benefits. However, to the extent that the defendant attempts to enhance the distinctive benefit of its own product, the spillover gains accruing to the plaintiff are unlikely to offset the loss from being foreclosed from the cooperative venture with defendant. The very fact of the defendant's grievance in Aspen Skiing indicates that Highlands was dependent on spillover benefits from Ski Co., and suggests that Highlands was free-riding on Ski Co.'s investments. Thus, a sharing formula based only on usage would not fully compensate the defendant for its investments to increase the overall demand for skiing in Aspen.
or expected effect of destroying a competitor. One need not embrace Schumpeter's model of competition to reject such a rule.\textsuperscript{86}

Perhaps more important than the vagueness of profit-maximizing strategies in these cases is the vagueness of reasonable bargaining standards. Consider the circumstances of \textit{Aspen Skiing}. For many years the parties had a joint arrangement to share revenues based on respective usage of the defendant's and plaintiff's ski slopes. Ski Co. terminated the arrangement when Highland refused to accept the percentage revenue offered because it was below the historical average based on use.\textsuperscript{87} Perhaps trapped by the respective use formula, Ski Co. never offered a potentially plausible business justification predicated on bargaining power rather than use.

From a bargaining perspective, Ski Co. controlled three of the four slopes, and thus captured most of the gains from the multi-slope ticket package. Promoting a four-slope ticket meant competing with its own three-slope ticket. At some sharing percentage the former might have been profit maximizing (it would yield some unique revenues for defendant), but at another it would merely entail sharing some of its monopoly rents with the plaintiff.\textsuperscript{88} Ski Co.'s offer of a 12.5\% share represented the defendant's marginal gain from cooperating with the plaintiff rather than striking ahead on its own with a three-mountain pass.\textsuperscript{89} While a four-mountain pass may have been more attractive to skiers than a three-mountain pass, the sole concern for Ski Co. was how much unique revenue the four-mountain pass would produce that could not be captured over the long-run with only a three-mountain pass. Put somewhat differently, Ski Co.'s reservation price did not reflect the usage ratio between its slopes and Highland's slopes (as the Court apparently assumed), but instead reflected the comparative values of cooperation and noncooperation.\textsuperscript{90}

Of course, Ski Co.'s bargaining power, or "threat value" (the value of its contribution to the bargaining surplus and the concomitant cost to Highland of refusing to reach a deal) derives from its

\textsuperscript{86} See supra notes 12-13 and accompanying text.

\textsuperscript{87} \textit{Aspen Skiing}, 472 U.S. at 589-93.

\textsuperscript{88} There is no reason to assume that the sharing arrangement would produce more competitive ski prices. In fact, competition was removed from the commercial activities encompassed by the joint venture.

\textsuperscript{89} The assertion here is similar to the free-riding argument suggested earlier, but not identical, because the value of Ski Co.'s contribution does not depend on any tangible efficiencies contributed by the defendant. The measure of this value is not what the defendant brings to the market, but what it brings to the bargaining table. Put plainly, the deal is worth much less to Ski Co. than it is to Highlands.

\textsuperscript{90} I am indebted to my colleague Charles Goetz for illuminating conversations about this aspect of \textit{Aspen Skiing}. The basic idea is now incorporated in CHARLES J. GOETZ & FRED S. MCCHESEY, ANTSRUR LAW 23-24 (1998).
dominant market position. One might contend that dominant firms should not exploit their market power in establishing terms for dealing with competitors. However, this argument presupposes an ability to specify proper bargaining parameters based on idealized economic conditions in a fully competitive market. In the context of regulated firms, such as local telephone companies, this bargaining model is currently used to justify ordering monopolies to provide access to their facilities. Even in this context, where access is driven by special policy considerations, the controversy surrounding the bargaining model suggests the impracticability of expecting courts to enforce such a rule.

Although the Aspen Skiing Court failed to articulate a substantive basis for its rule of presumptive liability, the circuit court below had asserted that the refusal to deal was presumptively unlawful because the ski slopes controlled by the defendant were an essential facility. The Supreme Court, perhaps unwilling to limit the scope of inquiry under the Sherman Act, declined to apply the essential facilities doctrine. The Court’s refusal to apply the essential facilities doctrine might be defended on the ground that the ski slopes were not an essential facility. That characterization would explain the Court’s refusal to apply the doctrine but not its preference for an undefined standard of conduct under the general monopolization offense.

The essential facilities doctrine has a somewhat uncertain status in antitrust law. While the doctrine does not have the official imprimatur of the Supreme Court, the Court’s opinions acknowledge the doctrine as a product of its own prior decisions as well as those of the lower courts. Critics of the essential facilities doctrine have com-

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91 This is at least a fair assumption on the facts of the case. However, bargaining power may also be a function of informational advantages that are independent of market power. See Jason Scott Johnston, Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation, 85 Va. L. Rev. 385, 425–26 (1999).


94 Aspen Skiing, 472 U.S. at 611 n.44.

95 In Iowa Utilities Board, Justice Scalia for the Court both acknowledged and seems to have embraced essential facilities doctrine as a possible standard for interpreting a congressionally mandated telecommunications access requirement. See 525 U.S. at 388; see also Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296
plained that the doctrine is vague, unconfined, and threatens too large an inroad on the basic no-duty-to-deal principle.\textsuperscript{96}

It is hard to know what to make of this lament. In a world where antitrust violations can be conjured from an infinite range of behavior, an ill-fitting essential facilities doctrine is merely a subset of a more general phenomenon. When the fashion du jour is baggy attire, complaints about a particular ill-fitting suit ring hollow. One leading critic, Herbert Hovenkamp, complains that:

The...“essential facility” doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman §2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of the monopolist’s refusal to deal to fill in the resulting gaps.\textsuperscript{97}

This is a very odd criticism. However “troublesome, incoherent and unmanageable” the essential facilities doctrine may be, it is a model of coherence and restraint compared to the unguided “general doctrine” of refusal to deal.\textsuperscript{98} Hovenkamp’s critique suggests that the duty to deal must be narrowly circumscribed. But this should not be done by rejecting the essential facilities doctrine in deference to “the general doctrine of the monopolist’s refusal to deal.” There is no such “general doctrine” if by that is meant some well-defined rule or standard of conduct. \textit{Aspen Skiing} proved that much. The conventional formulation of the monopolization offense is the possession of monopoly power and “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”\textsuperscript{99} Antitrust law provides working definitions of monopoly power, but if God knows the meaning of the second element He has not told the Supreme Court. The only certainty is that given the breadth and vagueness of the conduct standard in \textit{Aspen Skiing}, the question of whether Ski Co.’s three mountains constituted an “essential facility” becomes insignificant.

Was the refusal to deal in \textit{Aspen Skiing} a “willful acquisition or maintenance” of monopoly power? The Court’s affirmative answer re-
lied heavily on *Lorain Journal*, where the Court found a monopoly newspaper liable for attempted monopolization for refusing to sell advertising to patrons of a local radio station that competed with the paper. Because the defendant was accused of committing an attempt offense, the Court in *Lorain Journal* was required to find a specific intent to accomplish an illegal act. Significantly, the Court required no similar finding of intent in *Aspen Skiing*, noting that intent was only “relevant to the question whether the challenged conduct is fairly characterized as ‘exclusionary’ or ‘anticompetitive.’” “Exclusionary” conduct has become the conventional translation of “willful acquisition or maintenance.” Under Learned Hand’s famous formulation in *Alcoa*, a monopolist may plead as a defense that its conduct is “honestly industrial.” Because the monopolist’s state of mind invariably will be inferred from the conduct, the difficult question under Hand’s test is what kind of conduct qualifies as “honestly industrial”? Relying on *Lorain Journal* for this assessment seems misplaced; the case involved a boycott of third persons who were not parties to the competitive rivalry, and there was no question of forcing a firm to share its facilities with a rival. Nor was it problematic to compel the newspaper to justify its profit strategies, because it had no logical reason for refusing to deal with the advertisers except to drive its competitor out of business. It is difficult to fit *Aspen Skiing* into that category; even assuming that Ski Co. was not engaged in short-run profit maximization, it was not refusing to engage in its normal business of selling ski services.

The *Aspen* Court emphasized that the defendant did not simply reject an offer to enter into a joint venture but made “an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.” Some commentators suggest that the Court’s holding on the duty to deal should be limited to substantial alterations of past dealings, distinguishing this circumstance from initial refusals to deal. This gloss on *Aspen Skiing* represents no principle other than limiting a poorly reasoned decision. Businesses constantly adapt their practices and partners. In-

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101 See id. at 153.
102 472 U.S. at 602.
103 HOVENKAMP, *supra* note 38, at 274–75.
104 United States v. Aluminum Co. of Am., 148 F.2d 416, 431 (2d Cir. 1945).
106 See SULLIVAN & GRIMES, *supra* note 29, at 133.
107 472 U.S. at 603.
109 One plausible basis for distinguishing termination cases from initial refusals is that termination cases provide some basis for evaluating the reasonableness of proposed terms of dealing. Cf. Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528, 1536 (S.D. Fla.
ON REFUSING TO DEAL WITH RIVALS

Surely the rule cannot be that every time a firm with market power alters its business method to the detriment of a competitor, the firm must justify any shifts in approach to the court. Not only would such a rule remove the conduct element from § 2, it would also impose the same adverse effects on investment incentives as requiring firms to share their assets in the first instance.

These observations concerning the vagueness of obligations to deal with competitors might suggest that attempting to clarify the role of essential facilities doctrine would have little use. After all, what is the point of determining whether ownership of three out of four ski slopes constitutes control over an essential facility if the Court invokes an independent basis for requiring Ski Co. to share its three slopes with Highland? On the one hand, so long as courts apply an "it-all-depends" rule of reason to refusals to deal, an essential facilities analysis is superfluous. On the other hand, if one takes seriously the declaration that introduced this Article, academics and practitioners ought to be searching for ways to define and limit the obligation to deal with competitors. Ultimately, the best way to accomplish this is to use a narrowly defined essential facilities doctrine as the sole foundation for imposing such a duty.

This argument is not as radical as it might appear. It does not imply that refusals to deal play no role outside the realm of essential facilities. Refusals to deal might be one element of a course of conduct that violates antitrust law on independent grounds. For example, while a group of competitors might refuse to deal with outsiders in order to enforce a price-fixing cartel, the refusal itself would not be actionable independent of the price-fixing offense. Similarly, a single firm's refusal to deal might be evidence of monopolization.

1989) (remarking, in the context of an essential facilities argument, that the absence of any history of dealing complicates "the court's ability to enforce a duty to deal"). However, given the dynamic nature of industry conditions and hence business responses, a history of dealing is a weak predicate for imposing the duty.  

See Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296–98 (1985) (stating that not all collective refusals to deal are per se illegal). A refusal to deal might confirm cartel behavior in several ways. Most obviously, a group refusal to deal with a particular firm might indicate enforcement against a cheating cartel member. See Ian Ayres, How Cartels Punish: A Structural Theory of Self-Enforcing Collusion, 87 COLUM. L. REV. 295, 310–11 (1987) (discussing product exchanges among firms). Second, a collective refusal to deal could represent a conscious effort to keep the group small to facilitate cartel activity. One must be very cautious about either of these inferences in the absence of other evidence of cartel activity, however, lest we return to the old Klor's rule of treating the refusal itself as forbidden conduct. See supra note 30.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), aff'd in part and rev'd in part, 125 F.3d 1195 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998), might be distinguishable on this ground even though it is typically bracketed with Aspen Skiing for the proposition that monopolists bear an affirmative burden of justifying refusals to deal with competitors. See, e.g., Baker, supra note 73. In Kodak, the monopolization conduct was
However, the refusal alone would not constitute a separate offense, except in the rare case in which the monopolist controls an essential facility.

IV
SHARING NECESSITIES

A. Evolution

Notwithstanding the Supreme Court’s refusal to embrace an essential facilities doctrine, its decision in *Terminal Railroad* is universally understood to be the seminal case in the evolution of the essential facilities doctrine. In *Terminal Railroad*, a corporation composed of a number of railroad companies controlled a rail terminal and bridge facilities in St. Louis. The railroad formed the corporation for the purpose of acquiring and consolidating the operation of terminal facilities and rail connections to St. Louis and destinations beyond. Originally three independent terminal and rail access facilities served St. Louis, providing competitive alternatives to some twenty-four railroads that had lines into the city. Six railroads initially founded the corporation but later expanded the association’s membership to fourteen. Only railroads with a proprietary interest in the corporation could use the facilities unless an outside party received the unanimous consent of the member railroads. The Court found that this arrangement violated the Sherman Act, emphasizing the potential for exclusion or discrimination among rail carriers providing service to St. Louis. The Court opined that the consolidation of competing terminal facilities would not violate the antitrust laws provided that the facilities were managed so as to provide equal access to all rail lines: “Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumental-

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not only Kodak’s refusal to sell parts to competitors (in the aftermarket for Kodak equipment repair services), but also its agreement with its own upstream suppliers of original equipment not to provide parts to the repair service competitors. 504 U.S. at 458. The combination of the two refusals might be treated as exclusionary conduct similar to the conduct challenged in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). On this view, the proper remedy would be simply to remove the agreement with the original equipment suppliers, not to force Kodak to deal with its competitors. Unfortunately, this combination theory did not prevail on remand, and Kodak was forced to sell Kodak equipment parts to competitive service organizations. *Eastman Kodak*, 125 F.3d at 1225.

113 Id. at 391–400.
114 Id. at 405–06. However, the Court implied that no outside railroad had actually been denied use. Id. at 401 (“That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies may be true.”).
ties.115 From this it followed, the Court thought, that a sufficient remedy would be to make the facilities owners the "bona fide agent and servant of every railroad line which shall use its facilities."116

In retrospect, it is easy to see how Terminal Railroad could be construed as establishing a doctrine of shared access to essential facilities, but the opinion is far from a clear articulation of that idea. The Court apparently accepted defendants' argument that duplicate facilities were impractical, but declined to extrapolate any broader generalizations from these facts. Although the Court chose to remedy the violation by ordering shared access to the facilities, it conceded that the government's preferred remedy of dissolution (which would restore the original three competitive facilities) might be necessary.117

The Court's failure to establish a clear set of standards for liability complicates the task of describing the doctrinal evolution after Terminal Railroad, since it is unclear what cases to include in the chronology. The next two Supreme Court decisions considered to be part of the Terminal Railroad line are Associated Press v. United States118 and Otter Tail Power Co. v. United States.119 The Court analyzed both cases under conventional antitrust doctrine. In Associated Press, the Court held that an association of newspaper publishers violated antitrust law by forbidding members from selling news to nonmember competitors.120 Similarly, the Court in Otter Tail ruled that an electric power utility's refusal to sell wholesale power or transmission services to a competing municipal utility constituted monopolization.121 Significantly, the Court did not indicate in either case that it was following a

115 Id. at 410.
116 Id. at 410-11.
117 The Court apparently viewed dissolution as a more radical solution, albeit one that might be necessary "unless one equally adequate can be applied." Id. at 409. Three years later, the government was still advocating dissolution, but the Court rejected the government's argument that it had been excluded from the agreements reached by the railroads to implement the original decree. United States v. Terminal R.R. Ass'n, 236 U.S. 194, 202-04 (1915). Dispute over the terms of the decree continued, however, and the case came back to the Supreme Court nine years later. See Terminal R.R. Ass'n v. United States, 266 U.S. 17 (1924) (affirming the lower court's requirement of equal status between proprietary and nonproprietary users of the terminal facilities). The twelve-year litigation history of Terminal Railroad illuminates a recurring problem in monopolization cases in which imposing the remedy requires complex specifications of rights and obligations that survive the original decision. In the final analysis, the government was probably correct (for the wrong reasons) to insist on dissolution.
118 326 U.S. 1 (1945).
120 326 U.S. at 21-22.
121 410 U.S. at 377. At issue was competition for the market, as opposed to long-term competition within the market, given that there was only one utility in each town and that the particular markets were considered natural monopolies. Id. at 369-70.
"doctrine" of mandatory access to essential facilities. The lower court in Associated Press did cite Terminal Railroad for the proposition that there should be non-discriminatory access to the news pool, but declined to explain the basis for this obligation. In any event, the Supreme Court's opinion does not rest on any notion that the AP news pool was an essential facility. The Court seemed swayed by the simple fact that a group of competitors acted in concert in refusing to deal with others. Thus, Associated Press is best understood as the type of collective organization cum boycott case that was routinely treated as inherently suspect if not per se illegal. Otter Tail more closely resembles Terminal Railroad than Associated Press insofar as it involved a facility that the Court explicitly characterized as a natural monopoly (one that cannot be efficiently duplicated) and a regulated utility. It is therefore puzzling that the Otter Tail Court never cited to Terminal Railroad as relevant precedent, but chose instead to rely on general monopolization doctrines to demonstrate that the use of monopoly power to undermine competition is a violation of the Sherman Act.

With few exceptions, lower courts have adopted a conservative approach to imposing a duty to share essential facilities. Those who criticize the broad scope of essential facilities are perhaps unduly influenced by cases in which plaintiffs invoked the doctrine and overlook the fact that the success rate of these plaintiffs in the lower

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122 Terminal Railroad was cited in Justice Douglas's concurring opinion in Associated Press, but only by way of illustrating an exception to the general remedial practice of dissolution in monopolization cases. See 326 U.S. at 25.

123 United States v. Associated Press, 52 F. Supp. 362, 374 (S.D.N.Y. 1943) (Hand, J.), aff'd, 326 U.S. 1 (1945). Although Judge Hand couched his reference to Terminal Railroad quite casually, Judge Swan vociferously challenged its application on the ground that Associated Press did not have a monopoly on news gathering and was not otherwise subject to a duty to serve all persons. Id. at 377 (Swan, J., dissenting).

124 See Associated Press, 326 U.S. at 18.

125 In his opinion for the majority, Justice Black characterized Associated Press as being similar to Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941), see id. at 19, which was generally interpreted as supporting a rule of per se illegality, see Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("[Group boycotts] have not been saved by allegations that they were reasonable in the specific circumstances . . . ." (citing Fashion Originators' Guild, 312 U.S. at 466-68)). Yet twenty-six years later the Supreme Court repudiated the view that collective boycotts by trade organizations are per se illegal. See Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296-97 (1985). Given the contemporary climate in which even exclusive trade associations are considered benign, it is doubtful that Associated Press would be decided the same way today. At a minimum, the Court would weigh more heavily the justifications for refusing to deal, including protection of the benefits of organization and prevention of free-riding.

126 The Court cited Associated Press for the proposition that a practice may violate antitrust law even if it did not result in a complete monopoly. See 410 U.S. at 377.


128 For a sample of such cases, see Lipsky & Sidak, supra note 96, at 1191-93.
courts is very low.\textsuperscript{129} Terminal Railroad continues to provide the model for finding an essential facility: a regulated utility or common carrier\textsuperscript{130} already under a regulatory mandate to provide service \textit{cum access} to all who demand it.\textsuperscript{131} In nearly every case, the facilities are capital assets that cannot be economically duplicated given the size of the market—a communications network, a central terminal facility, stadium, or energy transmission facilities.\textsuperscript{132}

B. Elements and Issues

There is consensus on the basic elements of the essential facilities doctrine. Most courts cite the Seventh Circuit’s formulation from \textit{MCI Communications Corp. v. AT&T Co.}: “(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.”\textsuperscript{133} This formulation is tolerably clear and largely unexcep-

\textsuperscript{129} To quantify this generalization, I conducted a Westlaw search of all court of appeals and district court opinions from 1980 through 2000 in which the court explicitly addressed “essential facilities” claims. I tabulated district court cases appealed to the court of appeals in the latter category. Of the twenty-eight court of appeals opinions, only five held that there was even a triable issue as to the existence of an essential facility. Similarly, in forty-three district court opinions, the court found at least a triable issue in six cases. Eleven positive outcomes out of seventy-one is not a negligible result, but it hardly paints a picture of a liability doctrine spinning wildly out of control. Indeed, most of the positive outcomes are a symptom of posture, and reflect decisions to reject a motion to dismiss or motion for summary judgment on the claim.

\textsuperscript{130} See, e.g., Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174 (2d Cir. 1990); MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983). The existence of a regulated utility is itself not a sufficient condition for forced sharing of facilities. See, e.g., City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1366 (9th Cir. 1992) (ruling that a utility had a valid business justification for refusing to provide the access demanded by the city). Nor is the existence of a regulated utility even a necessary condition. See, e.g., Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).

\textsuperscript{131} Of course, the classic utility/carrier obligation was to provide service to end users, not competitors, under the assumption that the utility/carrier was a legally sanctioned monopolist (the usual natural monopoly model). However, in modern settings the monopoly is rarely complete. Competitors often challenge the incumbent \textit{for} the market or challenge the boundaries of an incumbent’s monopoly. The former situation was illustrated in \textit{Otter Tail}, see supra note 121; the latter formed the factual basis of the \textit{MCI} case, in which MCI and others sought entry into long distance markets that was predicated on access to switching facilities in AT&T’s local exchange markets. See 708 F.2d at 1093.

\textsuperscript{132} See, e.g., \textit{MCI}, 708 F.2d at 1093; Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977). The most noteworthy outlier in this category is \textit{Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.}, 194 F.2d 494 (1st Cir. 1952). In \textit{Gamco}, the owner of a building specially located and equipped for wholesale marketing of produce declined to renew the lease of one of the tenants. Despite the district court’s finding that other physical facilities were available, the First Circuit found that “exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities.” \textit{Id.} at 488 (citing \textit{Associate Press v. United States}, 326 U.S. 1 (1945)).

\textsuperscript{133} \textit{MCI}, 708 F.2d at 1132–33. While the court relied principally on \textit{Hecht}, 570 F.2d at 992–93, subsequent decisions invariably cite \textit{MCI} as the formative decision. See, e.g., Inter-
tionable, requiring only a little embellishment. For expository purposes, it is convenient to rearrange the MCI formulation into four questions: (1) what is a denial of use; (2) what is an essential facility; (3) what is monopoly; and (4) what is feasible?

1. Denial of Use

The requirement that there be a denial of use seems almost trite because a refusal to deal is what invokes the inquiry in the first place. However, two subtleties of the essential facilities doctrine warrant discussion. First, this doctrine addresses refusals to deal with competitors. Second, it is not always obvious what constitutes a denial. If there is no absolute rejection but merely a refusal to deal on terms deemed reasonable by the competitor, then the court must define “denial” by constructing objectively reasonable terms of sharing. Following the lead of Aspen Skiing, courts treat unreasonable denial as an affirmative defense and require the defendant to offer a legitimate business justification for withholding access once the plaintiff satisfies its burden regarding the other elements.

Treating the issue of unreasonable denial as a matter of affirmative defense is difficult to reconcile with the idea that forced dealing with competitors functions as an exception to the normal principles of competition. This paradox epitomizes the confusion arising from the Court’s refusal in Aspen Skiing to articulate a bounded principle governing forced access to facilities. If instead of applying vague stan-

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134 See, e.g., Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1357 (Fed. Cir. 1999); Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir. 1991); Del. & Hudson Ry., 902 F.2d at 179.

135 See, e.g., Intergraph Corp. v. Intel Corp., 195 F.3d at 1356 (holding that the essential facilities doctrine does not impose a duty to supply downstream buyers who are not competitors of the facility owner); Thomas v. Network Solutions, Inc. 176 F.3d 500, 509 (D.C. Cir. 1999) (finding that plaintiffs who registered domain names with the defendant did not compete with the defendant); Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988) (upholding an exclusive lease to a facility that precluded a lease to a noncompetitor). The case law reiterates this basic principle so frequently that it is dismaying to see noncompetitor plaintiffs continue to advance claims grounded in the essential facilities doctrine. However, as any veteran of the tort system will tell you, it is exceedingly difficult to discourage bogus claims.

136 See Del. & Hudson Ry., 902 F.2d at 180 (ruling that the question of whether an 800% increase from the price previously charged was reasonable is a triable issue of fact).

137 See City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1367 (observing that the essential facilities doctrine does not require a facility owner to relinquish his own use to facilitate usage by a municipal competitor); Laurel Sand & Gravel, 924 F.2d at 543 (finding legitimate business reasons for the defendant’s refusal to grant trackage rights, which would have altered the way defendant did business).

138 See Fla. Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528, 1552 n.* (S.D. Fla. 1989) (noting that “if plaintiff has shown that shared use is feasible, then the burden shifts to the defendant to present its valid business reasons for refusing to allow the plaintiff access to the essential facility” (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600–01 (1985))

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ards of monopolization the Court had approached the case from an essential facilities perspective, it might have perceived the oddity of couching a central element of the doctrine as an affirmative defense rather than as part of the plaintiff's case in chief. Indeed, relegating the issue of reasonableness to affirmative defense status obscures the importance of focusing on the required terms of sharing. It is impossible to judge fairly a defendant's termination of its previous joint venture without the benefit of a backdrop against which to determine a reasonable sharing of revenues. This calls for some investigation into what constitutes "fair" bargaining between two firms that may have radically differing valuations of the relevant gains from trade.

2. Essential Facility

A threshold question is whether the term "facility" has any special meaning, or simply refers to any set of assets controlled by the monopolist. Some commentators argue that essential facilities should be limited to physical structures or capital assets, as distinguished from intangible goods such as intellectual property rights. Although most of the cases address access to physical structures such as a terminal, a stadium, a building, and transmission or other network facilities, some concern access to intangible assets like customer lists and databases. Moreover, a number of concerted refusal cases involve intangible assets, the most noteworthy being Associated Press.

Intellectual property cases might arguably warrant different treatment in light of their unique potential to undermine investment in-

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138 Lipsky & Sidak, supra note 96, at 1220; see also James C. Burling et al., The Antitrust Duty to Deal and Intellectual Property Rights, 24 J. Corp. L. 527 (1999) (arguing against a duty to deal in the area of intellectual property, under either essential facilities theory or the more general refusal to deal doctrine).

139 United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912).

140 Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977).

141 Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952).

142 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983).

143 See Hovenkamp, supra note 38, at 307 n.8; cf. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 538, 544-46 (9th Cir. 1991) (applying the essential facilities doctrine to analyze access to an airline computer database).

144 325 U.S. 1 (1945); see also United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1366 (5th Cir. 1980) (applying concerted refusal analysis to membership in multiple listing service). While the Realty Multi-List court chose not to treat the listing service as an essential facility, one could hypothesize a different market environment in which multiple listing is the dominant mode for real estate transactions. An analogous phenomenon occurs in professional sports cases, where membership in a particular association is the only mode of competing in the sport. It is worth emphasizing that the characterization of a facility as essential is merely a necessary, and not a sufficient condition of a refusal to deal under my proposed rule. Cf. Mid-S. Grizzlies v. NFL, 720 F.2d 772 (3d Cir. 1983) (denying franchise for a new football team in the NFL under a boycott analysis rather than through essential facility investigation).
Protecting the exclusive use of intellectual property through a recognized right not to deal with others is critical for encouraging owners to invest in innovation. But a similar concern prompts protection of all property rights. An incentives problem is created any time one firm is permitted to free-ride on a competitor’s investments, whether those investments are represented by tangible assets or intellectual property. Forced sharing of an unpatented or uncopyrighted gizmo undermines investment incentives to the same degree as forced sharing of a patented or copyrighted widget. In the former case, the owner’s common law property right in the unpatented widget is entitled to the same legal protection as the property right in the patented gizmo for basically the same reason—to protect settled expectations and the incentive to create wealth. Innovation is merely one form of investment in wealth-creating activity. Regardless of the form of the investment, the ultimate task is to accommodate both the general laws of property and the special laws of antitrust.

Although courts have held that the owner of intellectual property is not required to license his property to others, this is really no different from what the Supreme Court has affirmed about the obligation to deal generally. In both cases, of course, the right not to deal does not trump the antitrust laws. Instead of basing a distinction on the classification of the property right, it makes more sense to ex-

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145 See Glazer & Lipsky, supra note 5, at 786; Lipsky & Sidak, supra note 96, at 1219.


147 See supra note 1. If any distinction is to be drawn between intellectual property and common law property, the structure of entitlements of the two types of property dictates that the law should be more restrictive of forced sharing in the case of common law property. After all, intellectual property rights are limited as to subject matter, scope, and duration in ways that common law property rights are not. Consider, for example, the right of fair use, which circumscribes the exclusionary rights of copyright owners. See 17 U.S.C. § 107 (1994). Although common law exclusionary rights are sometimes limited by similar commons-like claims on behalf of the public, such claims are generally limited to cases in which compensation is paid for the privilege of access. See, e.g., Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (ruling that compelling a property owner to devote a public beach easement as a condition for receiving a building permit qualifies as a taking).

148 Indep. Serv. Orgs., 203 F.3d at 1325. A subtle difference between intellectual property and common law property concerns the burden of proof. Some courts have held that the owner of a patent or copyright has a presumptively legitimate business reason for refusing to license that is especially difficult to overcome. See, e.g., id. at 1329 (holding that a plaintiff may not rebut this presumption by relying on subjective evidence that the preferred business reasons were a "pretext"); Data Gen. Corp., 36 F.3d at 1187–88 (remarking that a plaintiff has an "uphill" battle to rebut the presumption). On its face, this burden is more onerous than the burden the Court applied in Aspen Skiing, where the mere presence of market power was sufficient to shift the burden. See supra note 71 and accompanying text. Perhaps these courts did not consciously establish a heavier burden for intellectual property than for common law property, but either way this approach is unjustified. While patent and copyright law generally do not compel sharing, this statutory practice should be irrelevant to the application of antitrust law. See United States v. Microsoft Corp., 253 F.3d
amine the underlying interest at stake. For instance, courts should be skeptical about ordering a firm to share new technologies promising only uncertain returns to the investing firm. Here the firm's investment incentives are especially sensitive to the firm's ability to capture all of the upside return, particularly if it cannot share the downside loss. Similarly, the forced sharing of sensitive corporate information, including customer lists and other proprietary information, may entail deep intrusions into the normal confidentiality that drives the competitive process. Under these circumstances, a court should force sharing of essential information only if there is no alternative method of accomplishing the purpose of establishing workable competition.

Whether "facility" should be narrowly construed is ultimately a question of whether to pretermit inquiry into which facilities may be characterized as "essential." Predictably, commentators who question the essential facilities doctrine wish to skirt the essentiality issue, because it is not easily cabined by fixed definitions. If a facility were characterized as essential because its absence precludes competition, then the definition could encompass everything needed to run a profitable business. The second element of MCI's formulation, however, precludes such open-ended sharing: an essential facility must be an asset that cannot practicably be duplicated or obtained from any source other than the monopolist.

This issue is usually framed in terms of duplicating a facility controlled by the monopolist, which suggests the existence of a unique facility required to conduct business in the market. However, it is misleading to think in terms of the uniqueness of a particular asset when the emphasis should be on functionality. What is important is not whether a particular asset owned by the monopolist can be duplicated but whether the specific economic uses performed by the asset can be...
replicated. The practicability issue is primarily a matter of economics—whether it is possible for a firm to obtain the required facility-functionality at a cost consistent with viable competition. In rare cases duplication may be impossible or legally prohibited, but I have found no case in which duplication was physically impossible. The closest one comes is the original *Terminal Railroad* case in which the Court adverted to geographic features that made it difficult to duplicate the required facilities. On the other hand, legal obstacles to duplication would include patents, licensing, or franchise requirements that preclude independent duplication. Again, however, I have found no case in which a court cites legal restraints in any form as the basis for finding an existing facility essential.

3. Monopoly

A fundamental premise of the essential facilities doctrine is that courts should confine forced sharing to cases in which there would otherwise be demonstrable harm to competition, not merely to competitors. Thus, a threshold condition is the existence of monopoly power, possessed either by a single firm or by a group of firms acting in concert. The criteria for determining monopoly power in the essential facilities context are the same employed generally under §2: there must be a defined market and a determination that the firm or group has the power to raise prices and/or exclude competition. However, the essential facilities case implies a unique kind of monopoly power. The conjunction of monopoly power with the impracticability of duplicating the facilities—the second element of the standard formulation—logically implies a natural monopoly.

The natural monopoly requirement presents a conflict between the doctrine's principle of sharing essential facilities with competitors and the conventional lesson of natural monopoly—that competition is neither sustainable nor desirable in a natural monopoly market. Yet courts and commentators generally ignore this conflict. One notable

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151 See Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544–45 (4th Cir. 1991) (discussing alternatives to shared use of a facility, including the resale of services provided by the facility owner).

152 The patent example illustrates the importance of considering functionality rather than the physical asset itself. A patent might block replication of a particular type of input without blocking replication of alternative inputs. For instance, chemical patents that block competitors’ duplication of a particular chemical entity do not foreclose the use of other chemical entities to achieve the same purpose. This strategy is commonplace in the pharmaceutical industry, where different drug companies hold competing but not blocking patents that are designed to achieve the same therapeutic purpose.


exception is Judge Posner, who has criticized the essential facilities doctrine for this reason.\(^{155}\) While grudgingly acknowledging the doctrine’s acceptance in *Terminal Railroad, Otter Tail*, and his own circuit’s leading decision in *MCI*, Judge Posner argued for its demise on the ground that a natural monopolist should not be obligated to share its monopoly profits via access to its facilities with competitors.\(^{156}\)

Judge Posner is correct that it makes no sense to force the sharing of monopoly facilities simply to effectuate a sharing of monopoly rents with other firms. However, the pertinent question is whether forced sharing of facilities deemed to be naturally monopolistic can serve a legitimate competitive purpose beyond the mere sharing of rents. Notwithstanding Judge Posner’s contrary view, the answer is “yes, sometimes.”

First, in some cases the essential facilities doctrine is properly invoked to prevent a monopolist from leveraging its power from one market into another by withholding access to an input that is needed in the second market.\(^{157}\) In such cases the input is assumed to be severable from the monopolist’s market; the fact that the facility may have economies of scale such that replication is impracticable does not imply that all goods to which the facility is an input are naturally monopolistic.

Second, forced sharing might be the only vehicle for testing whether a market is naturally monopolistic. As Judge Posner himself argued in an early critique of natural monopoly, the claim that com-


\(^{156}\) Id. at 1412–13; see also Lipsky & Sidak, *supra* note 96, at 1220 (asserting that natural monopolies are inherently the province of regulators).

\(^{157}\) See, e.g., *Alaska Airlines*, 948 F.2d at 544–46; *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). The conventional “Chicago School” argument that monopoly profits cannot be increased by leveraging, see, e.g., *Posner, supra* note 3, at 173, is misleading to the extent that it claims that a monopolist will not use leveraging to expand or secure monopoly power. A monopolist may not be able to increase its short-run profits by leveraging, but it can certainly increase expected long-run profits by foreclosing competitors in the tied-good market if those competitors would threaten its monopoly. *See* *Jay Pil Choi & Christodoulos Stefanadis, Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52 (2001); *Michael D. Whinston, Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990). The most obvious contemporary example, albeit a contested one, is Microsoft’s attempt to use its monopoly of PC operating systems to gain control of the Internet browser market that threatened its monopoly. *See* United States v. *Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (affirming in part and reversing in part the district court’s finding of monopolization through conduct that included, inter alia, the tying of its Internet browser to the Windows operating system to foreclose the “middleware” threat to its operating system monopoly), *cert. denied*, 122 S. Ct. 350 (2001). More generally, a monopolist might seek to position itself in the second market to expand into sectors of the economy that offer growth potential unavailable in the monopoly market. For instance, telephone and cable television providers are keen to use their monopolies in local distribution of voice and television to gain entry into the Internet distribution market given the greater potential for growth.
petition is not sustainable should always be open to challenge and not impeded by regulatory entry limits.\textsuperscript{158} The same caution ought to apply in the antitrust context; courts should not lightly infer that the apparent conditions of natural monopoly preclude antitrust expectations of competition.

The theory of natural monopoly is a static concept that inadequately accounts for the dynamic conditions of the market. Economies of scale and scope that define a natural monopoly may prove quite ephemeral with changes in technology or economic circumstances. Many markets once thought to be naturally monopolistic, such as local and long distance telecommunications markets, are now considered naturally competitive. However, such changes do not occur overnight, and must sometimes wait to be triggered by developments outside the market.

Again, telecommunications comes to mind. Beginning in the early 1970s and culminating in the breakup of the Bell System in 1984, competition was introduced into the long distance telecommunications market when regulators realized that prior assumptions about the market's natural monopoly structure were no longer valid.\textsuperscript{159} Needless to say, the new regime of competition took some time to take hold. Indeed, even after the breakup of Bell, it was more than a decade before AT&T's share of long distance revenues declined from ninety percent to less than fifty percent.\textsuperscript{160} This glacial process of transforming the local telecommunications markets began anew following Congress's official declaration in 1996 that such natural monopoly markets must be opened to competition.\textsuperscript{161} The conventional wisdom in both the local and long distance markets was that a critical component of the transformation process was to allow new entrants to share the facilities of market incumbents. A new entrant cannot replicate a complete set of network facilities overnight; indeed, for some types of facilities it might never be practicable.

Critics of essential facilities doctrine would probably dismiss the telecommunications example as inapt because these industry transfor-


\textsuperscript{159} The history has been recounted a thousand times, but on the salutary principle that an author's first duty is to cite himself, see Glen O. Robinson, \textit{The Titanic Remembered: AT&T and the Changing World of Telecommunications}, 5 YALE J. ON REG. 517 (1988) (reviewing Gerald R. Faulhaber, \textit{Telecommunications in Turmoil} (1987)).

\textsuperscript{160} In 1984, the year of its breakup, AT&T accounted for 90.1\% of total toll service revenues; it first fell to below 50\% in 1996, the year Congress terminated the antitrust decree. \textit{Common Carrier Bureau, Fed. Communications Comm'n, Trends in Telephone Service} 10-14 tbl.10.8 (2001), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State Link/IAD/trend801.pdf.

mations are the business of legislators and regulators, not the courts and antitrust enforcement agencies. Yes and no. In some cases—and telecommunications is probably such a case—regulators are in a better position than courts and antitrust enforcement agencies to impose sharing requirements because determining the nature and degree of the sharing required will entail complex specification and ongoing monitoring of the terms of sharing. Still, the division of responsibility between courts and antitrust enforcement agencies and regulators is neither as sharp nor as clear as some suppose. Virtually all major monopolization cases require some degree of monitoring, or "regulation." The breakup of AT&T was intended to be a clean structural remedy that would foster an atmosphere of competition without regulation. Indeed, the government's case was implicitly premised on the inadequacy of regulation up to that point. Yet enforcement of this supposed nonregulatory solution produced what many characterized as a rival regulatory regime concerned with enforcing, interpreting, and modifying the terms of the decree. Judge Greene, who administered the AT&T consent decree, became known as the "telecom czar," a label used to suggest, inaccurately, a regulatory power comparable to that of the FCC. Regulation by antitrust decree is problematic to the extent that it gives courts and enforcement agencies a regulatory role they are ill-equipped to handle. However, in a case like AT&T, some degree of "antitrust regulation" is inevitable given the complex and changing character of the industry. Unless one is prepared to say that the antitrust laws should not be concerned with complex cases, the accompanying issue of regulation cannot be avoided.

On the flip side, it does not follow that regulatory enforcement hassles will evaporate in the hands of regulators. Indeed, shifting responsibility completely to regulators is an illusory long-term goal if forced sharing requires complex specification of terms and ongoing oversight, because the courts will inevitably be dragged into the ensuing controversies over applicable principles. Indeed, this is precisely what has happened in the communications field with regard to sharing of network facilities and broadband Internet access facilities.

In short, the need for regulatory supervision is a concern common to antitrust and regulation. In either forum, the costs of such

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165 See infra Part IV.C.
supervision must be weighed against the benefits accruing from forced sharing. The essential facilities doctrine provides a framework for assessing those costs under the element of feasibility.

4. Feasibility of Sharing

Those courts that have addressed the issue of feasibility appear to have regarded it as a matter of physical arrangements, but this is rarely a substantial problem independent of the economic question of whether it makes sense to force the sharing of assets. Thus, the judicial conception of feasibility must be broadened. It is not the feasibility of providing access so much as the feasibility of administering the terms of access that should orient the court's focus. Antitrust commentators are alert to the difficulty of determining the appropriate terms of access and for that reason have chastised courts for capriciously imposing the duty in the first place. Interestingly, some commentators believe that this problem of prescribing and enforcing the required access can be solved through a regulatory program to enforce the court's mandate. Phillip Areeda, for example, suggested that the availability of regulatory expertise might justify cases like Otter Tail. However, the suggestion that courts should impose access more freely in cases when there is a regulatory "backup" to enforce the terms of the order is dubious. Prescribing and enforcing the terms of dealing may be a regulator's job, but enforcing the mandate of antitrust courts is not. A decision by a court directing two regulated firms to deal with one another cannot become a mandate to the regulating agency to implement the terms of the decision for the obvious reason that the court has no jurisdiction over the agency simply because the agency has expertise in the matter. It is up to the court to enforce its own mandate and to specify the appropriate terms.

Moreover, even if courts could somehow transfer the burden of enforcing their mandates to regulatory agencies, they should be discouraged from fashioning mandates that they are not themselves responsible for administering. This loophole would allow judges to externalize a cost of their decisions, thereby undermining the very purpose of the feasibility element. Under such circumstances, a court may not be appropriately sensitive to how implementation details inform the scope of the duty to deal.

Finally, one should not assume that placing regulators in charge is always a reliable solution. Commentators and courts sometimes become preoccupied with the antitrust-regulatory divide and ignore substantive policy questions. Does forced cooperation among rival firms

\[166 \text{ See, e.g., Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 545 (4th Cir. 1991).} \]

\[167 \text{ See Areeda, supra note 24, at 853.} \]
promote competition or merely divide monopoly rents? If the latter is true, it should not be the business of antitrust or regulation. Does forced sharing require a sufficiently high level of regulatory intervention so as to make the game not worth the candle? Same answer.

C. Essential Facilities on the Information Superhighway

Consider two recent controversies generated by the excitement over obtaining access to the new information superhighway. The first controversy concerns the implementation of a congressionally mandated requirement that incumbent local telephone carriers grant competitors access to their local exchange facilities. The second conflict involves a similar issue regarding whether (and how) to force telephone and cable companies providing broadband Internet service to allow competitive Internet Service Providers (ISPs) to use their transport facilities. I shall finesse most of the details because they add more confusion than illumination to the basic argument I want to make. However, a little background is necessary to frame the access issues.

1. Access to Local Telephone Exchange Networks

In 1996, Congress developed a two-tiered approach to promote greater competition in telecommunications service markets. First, it allowed the Bell Operating Companies (BOCs) to enter long distance service markets, from which they had been barred by the 1982 AT&T antitrust consent decree. Second, it opened local telephone exchange markets to competition. The first action was not revolutionary, but the second one was. Opening local markets to competition had not occurred to anyone in 1974 when the government filed the antitrust action, nor in 1982 when the courts dismembered the Bell system. The Justice Department and nearly everyone else regarded local telephone markets as a naturally monopolistic industry in which competition was not sustainable, and hence not economically efficient. Times change, and sometimes ideas change with them. In one

\[168\] For an overview of the structure and regulation of local exchange networks, see INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION (1997).

\[169\] 47 U.S.C. § 271 (Supp. V 1999). Congress granted BOCs permission subject to an elaborate set of conditions. The effect of these conditions was to tie BOC entry into long distance markets (in-region, interLATA service) to the establishment of arrangements for new entrants seeking to access BOC local exchange facilities. The BOCs have yet to satisfy those conditions in most of their local markets. As of April 17, 2002, BOC applications to provide in-region long distance service had been approved for only eleven states. See WIRELINE COMPETITION BUREAU, FED. COMMUNICATIONS COMM'N, RBOC APPLICATIONS TO PROVIDE IN-REGION, INTERLATA SERVICES UNDER § 271, at http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/ (last modified Dec. 20, 2001).

of the most remarkable paradigm shifts in modern industrial history, Congress simply ignored the natural monopoly model.\(^{171}\)

Of course, there is a significant difference between a concept and a reality. The paradigm of local competition was not even remotely a reality when it emerged as an accepted concept. At the time, there was fledgling competition for business services, but it was exceedingly modest when Congress was considering the open competition provisions of the 1996 Act. Against this backdrop, the congressional legislation had to accomplish two objectives: (1) ban states from continuing their traditional opposition to competition; and (2) make it practicable to ensure that competition could flourish. Meeting the first objective was easy; the latter has proved more difficult than Congress could have imagined. Congress envisioned that new competition in local markets could follow three paths: (1) full facilities-based entry, where new entrants overbuild the existing local network; (2) resale by new entrants of incumbent carrier services; and (3) some mixture of new facilities combined with the selective use and resale of particular incumbent network components. Each model would be facilitated by requiring mandatory interconnection, resale, and most controversially, access to and resale of unbundled incumbent local exchange carrier (ILEC) network components.\(^{172}\)

It must have seemed so simple to a Congress accustomed to issuing orders in the manner of Jean Luc Picard of the USS Enterprise: "make it so, number one." And the FCC, a dutiful if not always fully informed number one, tried to make it so. First, the agency decreed

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\(^{171}\) An interesting challenge to the intellectual historian would be to trace the change in the perception of natural monopolies in this industry. In the case of long distance service markets that were opened to competition gradually in the 1970s and 1980s, the shift in the monopoly paradigm was a process of natural erosion in which each successful entry into some part of the market paved the way for a more general entry. Ultimately, there was no basis for arguing that monopoly was natural. In the case of local exchange markets, however, there has been scant erosion of monopoly service, and thus no opportunity to demonstrate that the old natural monopoly model is no longer valid. After the breakup of AT&T, competitive access providers (CAPs) did establish a modest presence in local markets. Initially, CAPs merely provided a link between large commercial users and long distance carriers. Many have now morphed into CLECs providing fully switched local exchange service. Vogelsang & Mitchell, supra note 168, at 28–30. However, this evolution is largely a product of the post-1996 period during which the assumption of a natural monopoly in local switched service was put to rest by Congress. Most remarkably, by the time Congress began deliberating on the bill that emerged as the Telecommunications Act of 1996, the idea of a natural monopoly played no role in the debate. Even the Bell Operating Companies, which inherited the residue of AT&T's monopoly after the breakup of AT&T, were not defending that monopoly on the terms that AT&T itself had argued less than two decades earlier when it resisted the breakup sought by the Justice Department. See Defendants' Third Statement of Contentions and Proof at 189–91, United States v. AT&T, Civil Action No. 74-1698 (Mar. 10, 1980). Perhaps some ideas just die of old age, though in this field there is a lot of evidence to the contrary.

that the basic network components, ranging from operational support systems (OSS) to the switches to the local loop, be unbundled and made available on demand, regardless of whether a CLEC had alternative sources of supply, or even self-supply. Second, the FCC preempted state regulatory discretion over pricing to the extent of mandating that unbundled network elements be priced on the basis of "forward looking" incremental costs (dubbed "Total Element Long-Run Incremental Cost" (TELRIC)).

The coupling of Congress's directive and the FCC's enthusiasm to "make it so" has been a communication lawyer's dream come true. Almost every one of the FCC's rules was contested, though the principal challenges were to (1) the FCC's requirement that all ILEC network elements be offered CLECs, (2) the FCC's preemption of local regulators, and finally (3) the substantive merits of TELRIC as a cost methodology. In *Iowa Utilities Board*, the Supreme Court upheld the majority of the FCC's rules, including the agency's authority to preempt state regulators on pricing standards. However, two critical issues remained. The first was the issue of the FCC's cost standards for use in pricing access, which was not then before the Court. The second residual issue was the scope of mandated access to the local network facilities, which the Court remanded to the FCC for further justification.

Unsurprisingly, Congress was vague about the details of its unbundled access requirements. With regard to what elements of the local network must be unbundled, the legislation specified separate standards for proprietary and nonproprietary network elements. As to the former, Congress directed the FCC to consider whether access is "necessary"; with respect to the latter, the FCC was to consider whether lack of access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Applying these loose standards, the FCC compiled a list of seven specific network elements to be unbundled and offered to CLECs. The ILECs challenged the list, arguing that the "necessary"

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175 In January 2001, the Court granted certiorari to hear the Eighth Circuit's disapproval of parts of the TELRIC model. See *Verizon Communications Inc. v. FCC*, 531 U.S. 1124 (2001).
176 *Iowa Utilities Bd.*, 525 U.S. at 392.
178 Id. § 251(d)(2).
179 Subsequently the FCC added the high frequency portion of the loop—used to provide broadband service—to the list of network elements the ILECs must provide on an unbundled basis to CLECs. See *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability and Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 14 F.C.C.R. 20,912 (1999) [hereinafter Line Sharing Order].
and "impair" criteria should be understood to incorporate a framework similar to the essential facilities doctrine, which articulates a more limited standard than the FCC applied in compiling its list. While the Supreme Court did not decide whether the necessary and impair standards incorporated the essential facilities doctrine, it agreed with the ILECs that the FCC was bound "to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."

On remand, the FCC adhered to its original list. The agency limited its expansive interpretation of "necessary," but found that most of the required elements could be nonproprietary and could be justified under the "impair" standard. As to that standard, the FCC essentially adopted an "all-things-considered" test that considers relative costs, timing, and quality, among other factors, to determine whether competition would be "diminished." Notwithstanding Justice Scalia's suggestion that the essential facilities doctrine might provide a limiting framework for considering the scope of access, the FCC refused to employ the doctrine, insisting that it limited the FCC's discretion to a degree that Congress never intended.

The FCC's conclusion that Congress did not contemplate application of the essential facilities doctrine is debatable. Perhaps Congress did not specifically intend to invoke the essential facilities doctrine, but nothing in the statute precludes its application. What is certain is that the use of the essential facilities doctrine would in fact have limited the scope of the Commission's power to mandate access. For example, the FCC demanded that competitors receive access to ILEC switching facilities, yet competitively supplied switches are in widespread use and can be readily self-supplied. Whether or not the essential facilities doctrine requires that the facility be strictly a natural monopoly, its application is restricted to circumstances when it is "impracticable" to duplicate the facility or obtain it from any source other

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than the monopolist. This is manifestly not the case with switching facilities.

The scope of access issue cannot be divorced from the terms of access, in particular the pricing of unbundled network elements (UNE). On some set of terms, at some price, the ILECs would presumably be willing to provide whatever the CLECs wanted, unless they were legally constrained from doing so. This is not some crude trade-off between principles and money; in business the principle is money, and all else being equal a firm should be indifferent to whether it is earned from consumers or competitors. The elements of essential facilities were previously discussed in the context of determining whether there has been a denial of sharing. In this particular controversy, Congress attempted to resolve that question by prescribing that the price of the UNE should be nondiscriminatory, based on the "cost" of the network element, and could include a "reasonable profit."\textsuperscript{185} Although one could not expect more detailed specifications from Congress, this direction is vexingly indeterminate. In this context, does the term "cost" refer to incremental cost or fully distributed costs? Is the cost to be measured by embedded book costs or reproduction costs?

Thus the access mandate has been a dream come true for economists and accountants as well as communications lawyers. Battalions of each have been deployed to devise different costing methodologies. The FCC has ruled that the appropriate measure of cost to be used in setting the price of access is forward looking, TELRIC.\textsuperscript{186} The goal is to replicate the terms that would prevail in a maturely competitive market where prices are ultimately driven down to the long-run incremental cost of service.\textsuperscript{187} In the long run, incremental costs will cover the costs of asset replacement and the common costs of the enterprise, including accounting profit. The ILECs have challenged this standard as confiscatory insofar as it will force them to lease network elements at less than their historic costs (the assumption being that the replacement costs for the same functionality will be less than the book value of the assets being leased).

The FCC's pricing methodology is still in dispute. After the Supreme Court's approval of the FCC's authority to determine pricing methodology, the Eighth Circuit addressed the merits of its forward-looking cost model and was troubled by its basis in hypothetical rather than actual cost. Notwithstanding this misgiving, the Eighth Circuit approved the central idea of basing prices on forward-looking incre-


\textsuperscript{186} Implementation of the Local Competition Provisions, supra note 92, at 15,499.

\textsuperscript{187} Id. at 15,499, 15,817, 15,846.
mental costs and rejected the ILECs’ contention that rates had to reflect historic book costs.\(^{188}\)

Commentators have debated the pricing issue endlessly.\(^{189}\) Because another opinion on the merits is not needed, I shall suppress the temptation to offer one. The basic arguments for and against the FCC’s incremental cost standard reprise an ancient debate in utility ratemaking over whether the “fair value” of a utility’s rate base should be based on historic cost or reproduction cost.\(^{190}\) The original debates featured the utilities clamoring for a reproduction cost measure and the regulators arguing for historic costs. In the current telecommunications context, the carriers are arguing for reproductive costs\(^{191}\) and the FCC advocates historic costs.\(^{192}\) The transposition reflects the economics of the time; current technological changes generally portend reproduction costs that are lower than historic costs, translating into lower prices.\(^{193}\)

The appropriate pricing standard and the scope of unbundled access are only important insofar as they illustrate the old adage that God is in the details.\(^{194}\) How much access? What particular facilities are truly essential for competition to flourish? What is a fair and rea-

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\(^{189}\) See, e.g., Sidak & Spulber, supra note 63, at 1084 n.8, 1085 n.10.

\(^{190}\) See 1 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 35–40 (1970). The “fair value” controversy in utility rate regulation more or less died when the Supreme Court ruled that the Constitution did not require the use of any particular costing methodology. See Fed. Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 607 (1944). However, this has not dissuaded opponents from arguing that the TELRIC formula is unconstitutionally confiscatory. Thus far courts have evaded the question for reasons of ripeness. See, e.g., Iowa Utils. Bd., 219 F.3d at 754; GTE S. Inc. v. Morrison, 6 F. Supp. 2d 517, 531 (E.D. Va. 1998), aff’d on other grounds, 199 F.3d 733 (4th Cir. 1999).

\(^{191}\) See Implementation of the Local Competition Provisions, supra note 92, at 15,499, 15,858 (listing ILEC arguments for historic cost recovery). Several ILECs have argued for an “efficient component pricing rule” based on an opportunity cost measure that takes into account the incremental cost of the input plus the opportunity cost that the incumbent carrier incurs when the new entrant provides the services. Id. at 15,859. Such a standard would cover the historic cost of supplying the inputs, except when facilities-based competition through cheaper or superior facilities limits the incumbents’ ability to recover their embedded costs. See Sidak & Spulber, supra note 63, at 1098.

\(^{192}\) The FCC rejected the historic cost standard on the ground that a competitive market would not necessarily allow recovery of embedded costs. Implementation of the Local Competition Provisions, supra note 92, at 15,857–859. The FCC rejected the opportunity cost model (the incremental cost of providing the service input, plus the revenue foregone by the ILEC when the service is supplied by the competitor) on the ground that it utilized existing ILEC retail prices that are not necessarily based on real cost (i.e., they include elements of subsidy as well as monopoly rents that have not been removed by regulation). Id. For a criticism of the FCC’s analysis, see Sidak & Spulber, supra note 63, at 1091–98.

\(^{193}\) See 1 KAHN, supra note 190, at 39–40.

\(^{194}\) A variant of the adage is that the devil is in the details. A quick Google search demonstrates that each rendition is popular, raising the interesting theological question of whether, contrary to the teachings of the Book of Revelation, God and the devil reside in the same place.
ON REFUSING TO DEAL WITH RIVALS

sonable price to charge for those facilities? While no one ever supposed that these questions were easy, Congress did not fully appreciate that the sheer complexity of these matters would bog down the entire scheme in a quagmire of administrative and judicial litigation. Indeed, five years after the basic framework was enacted into law, the most basic elements of access are still unresolved. Meanwhile, major new entrants like AT&T are questioning whether the game is worth the candle and have reduced reliance on incumbent facilities, in favor of deploying their own facilities. This tends to undermine the case for forced access in the first place. It is another angle of the incentives point mentioned earlier. Just as forced sharing may undermine the investment incentives of the firm ordered to share, perhaps it undermines even more the incentive of the firms seeking to share to invest in their own facilities.

2. Sharing Broadband Internet Access

If the controversy over sharing telephone facilities teaches caution in requiring forced sharing of facilities, then the recent demand for access to broadband Internet access facilities demonstrates that not everyone is internalizing the lesson. Broadband access, whether through cable modems, digital subscriber lines (DSL), fixed wireless, or satellite transmission, is the next critical step in the evolution of the Internet. These advances will transform the Internet into an all-purpose pipeline for consumers and business alike. Virtually every major ISP has some broadband strategy. Providers with their own network facilities—most notably the local telephone carriers and cable operators—have a head start in the race to provide broadband service to the extent that they can use their own facilities (with necessary modifications). Providers without existing local facilities have two

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195 AT&T, for example, has pursued a strategy of deploying a combination of cable and fixed wireless facilities to provide a foundation for local exchange telephone services, along with Internet access and video services. See Sam Masud, AT&T's Project Angel Spreading Wings?, TELECOMMUNICATIONS, May 1999, at 9-10.


197 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report, FCC 02-33 (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-33A1.pdf. The popular use of the term "broadband" connotes an ill-defined range of throughput capacity. The FCC uses two terms to describe broadband—"advanced" service or opportunity and "high-speed" service or capability. The first describes speed greater than 200 kbps in both upstream and downstream directions, the second as comparable speed in one direction. Id. para. 7.

198 For example, local telephone carriers can adapt conventional local loops for DSL service, but this limited option is generally ineffective for providing broadband service to users beyond three miles from a central office. To extend the service to subscribers be-
options: build their own facilities, or lease access from other broadband providers. Needless to say, the first option is prohibitively expensive for most ISPs. A new local wireline network seems out of the question. Most markets already have two wireline providers—the local telephone carrier and the local cable operator. With this wire capacity already in the ground, it is unlikely that anyone would invest in another line. Fixed wireless facilities (including satellites) are a cheaper alternative, but here again economies of scale and scope favor existing providers. An ISP seeking only to provide Internet access faces competition from cable operators and telephone carriers that can offer services such as conventional voice telephony, video, and Internet, as a package.

It is a small wonder that ISPs that are unaffiliated with facilities-based broadband providers are anxious about their futures. Whether their anxiety translates into a legal entitlement to the facilities needed to compete with integrated providers like AT&T or AOL Time Warner is another question. As with telecommunications network access, the open access controversy has dimensions that extend beyond the scope of this Article. So again, I finesse the God-like (or devil-like, depending on your perspective) details.

The access arguments have been advanced in different forums and in different forms. Most of the public controversy has focused on demands by ISPs to get open access to cable modem facilities. Access to telephone lines used to deploy DSL service, secured in 1999, was more or less taken for granted until local exchange carriers began to complain of the regulatory asymmetry between cable modem and DSL server. The demands for access to cable modem facilities gained special salience with AT&T’s acquisition of TCI in 1999. As a consequence of acquiring TCI, AT&T became not only the largest cable operator in the country, but also a dominant provider of broadband Internet access service via contracts with ISP and portal provider Excite@Home. The acquisition involved the transfer of TCI’s cable beyond the present reach requires a large investment in modifying the local loop—by constructing remote hubs connected by optical fiber to the central station. Cable modems also have the disadvantage of being a shared service such that the speed of the connection is diminished in proportion to the number of subscribers. On the respective capabilities of DSL and cable modem, see, for example, Jason Fry, The Broad Jump: As High-Speed Internet Lines Become Easier to Get, The Path Is Clear for All Sorts of New Services, WALL ST. J., June 26, 2000, at R22.


200 In October, 2001, Excite@Home filed for bankruptcy and terminated its Internet service contracts with AT&T, which then switched its broadband subscribers to its own facilities. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other
franchises to AT&T, which local cable franchise authorities were required to approve. Access proponents immediately perceived an opportunity to use the local regulatory forums to secure forced access as a condition of local approval for the transfer. Most franchise authorities declined to require access, though a few equivocated, promising to take up the question when the franchises were up for renewal. However, several authorities ordered access as a condition of approving the franchise transfer, including regulators in Portland and Multnomah County.\footnote{See AT&T, Corp. v. City of Portland, 216 F.3d 871, 875 (9th Cir. 2000).} The Ninth Circuit Court of Appeals overturned this condition on the ground that broadband transport is not a cable service within the scope of their franchise authority but is instead a telecommunication that Congress barred them from regulating.\footnote{Id. at 879.} Subsequently other courts invalidated local regulatory efforts to require open access.\footnote{In MediaOne Group, Inc. v. County of Henrico, 257 F.3d 356 (4th Cir. 2001), the lower court treated Internet access as a cable service, but found that the Communications Act preempted the open access condition, \textit{id.} at 361; the Fourth Circuit approved the preemption holding without determining whether the service was telecommunications or cable, \textit{id.} at 365. In Comcast Cablevision v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000), the court also sidestepped the classification issue by finding compulsory access tantamount to forced speech and therefore a violation of the First Amendment. \textit{Id.} at 698.}

These courtroom defeats appear to have foreclosed local regulation as a source of forced access. Federal regulation remains unsettled at the time of this writing. The FCC recently sent a strong signal that it will not impose access requirements on cable broadband providers.\footnote{Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, \textit{supra} note 200. The FCC ruled that a cable modem service is an "information service" not a cable service. \textit{Id.} para. 33. The FCC initiated further rulemaking to determine the regulatory implications of this classification, but it hinted rather clearly that mandated access is not likely. \textit{Id.}} Time Warner, the second largest cable broadband provider in the United States, has agreed to provide open access as a condition of the FTC's approval of its merger with AOL.\footnote{See \textit{In re Am. Online, Inc. \\& Time Warner, Inc.}, 2000 WL 1849019 (F.T.C.) (2000). Briefly, the consent agreement requires that AOL Time Warner enter into agreements for broadband access with unaffiliated ISPs. In its largest markets AOL Time Warner may not offer cable modem service until such service is offered by Earthlink pursuant to an FTC-approved access agreement. Then, within ninety days after AOL Time Warner offers service, it must negotiate with at least two other unaffiliated ISPs and obtain FCC approval. Failing such approved agreements, the FTC is empowered to appoint a Monitor Trustee to negotiate with them on behalf of AOL Time Warner, to be then approved by the FTC. In smaller markets served by AOL Time Warner the same ninety day condition applies. \textit{Id.}} Equally important, other major cable broadband providers, such as AT&T, Cox and Comcast, have voluntarily accepted access and begun field trials to test
shared use among multiple ISPs. Their cooperation has not foreclosed the debate over forced access, however, because the precise scope and terms of voluntary access have yet to be determined. Indeed, for those seeking the protection of legally mandated, common-carrier type access, reliance on voluntary and selective access is a risky business.

The forced access issue has been complicated by the question of regulatory fairness. In 1999 the FCC ruled that ILECs providing DSL-based broadband service are required to give CLECs unbundled access to the high frequency portion of the local loops used to provide DSL service. The resulting regulatory asymmetry has been challenged recently by the ILECs, who insist that cable broadband providers either be subject to the same open access rules or that the ILECs be freed from the regulations. This plea for regulatory parity is understandable. It is difficult to justify the regulatory asymmetry between telephone company DSL service and cable broadband, particularly since cable broadband is currently dominant in the market.

The question of whether the regulatory playing field should be leveled by raising the turf under cable providers or by lowering the ground under local exchange carriers should be governed by the same considerations posed earlier with respect to local exchange telephone facilities. That is say, it should be guided by the framework

206 See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, supra note 200, para. 28.
207 In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 F.C.C.R. 20,912 (1999). Under 47 U.S.C. § 251(c) (Supp. V 1999), only competing local exchange carriers are entitled to unbundled network access. However, ISPs that are not CLECs or that do not purchase transport services from CLECs can take advantage of the Commission’s separate Computer III regulations, which require the Bell Operating Companies to give enhanced service providers (which now includes all ISPs) nondiscriminatory access to the same facilities the BOCs use to provide Internet services. See Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 F.C.C.R. 8360 (1995) (summarizing rules after remand from court of appeals).
208 See, e.g., Regulation of ILECs, Right-of-Way Policies Cited as Barriers to Broadband Service Deployment, TELECOMM. REP., Oct. 1, 2001, at 6–8, 22 (summarizing industry comments in FCC’s general inquiry on the status of advanced services deployment). Industry positions and arguments can be found in comments filed in two FCC inquiries, FCC CC Dkt. No. 98-146 (general inquiry on status of advanced services), and FCC Gen. Dkt. No. 00-185 (inquiry concerning high speed access over cable and other facilities) available online at http://www.cybertelecom.org/regulat.htm.
209 Cable modem service currently enjoys a 2:1 advantage in market penetration, though DSL is reported to be growing faster. See Deployment of Advanced Telecommunications Capability, 16 F.C.C.R. 15,515, para. 6 (2001).
210 The FCC recently began two parallel rulemaking proceedings to review broadband access—one concerned with cable broadband, the other with telephone wireline broadband. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, supra note 200; Appropriate Framework for Broadband Access to the Internet
of the essential facilities doctrine. Fast access to the Internet is lauded as the key to the next generation of Internet wonders. Confronted with such a vision, it is disappointing, but not surprising, that the analytical nuances concerning regulation of competition and respect for property rights are obscured by rhetorical appeals about the "urgent" public need to make the Information Superhighway even more super.

3. Network Effects and Access

The idea that the Information Superhighway may justify special measures is grounded in the notion that communications technologies are characterized by network effects, meaning that expansions of the network yield benefits to users that exceed the value recognized by the "-nth" user, thus producing a positive externality.

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211 See, e.g., François Bar et al., Access and Innovation Policy for the Third-Generation Internet, 24 TELECOMM. POL. 489, 490 (2000). Although the authors' argument purports to rest on the limited competitive alternatives for broadband transport (in particular, the dominance of cable), the thrust of their plea for regulating access appears remarkably short term. Left unexplored are the difficulties of such a regulatory task; after four years of regulating local exchange telephone access, it is still not a reality in most markets.

212 Mark A. Lemley & Lawrence Lessig, The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era, 48 UCLA L. REV. 925 (2001), present a more nuanced case for open access. More nuanced, but not quite convincing. Lemley and Lessig construct their argument for open access around a principle of engineering design called "end-to-end" architecture, which holds that the "lower-level network layers" (read, transport) should accommodate multiple independent applications. See id. at 930-31. This principle is intuitively sensible, but one must be careful about applying a principle of such generality to the specific issue of access. The access issue is not one of network design, but network economics. Lemley and Lessig argue in favor of a move from the end-to-end principle to a principle of competitive provision of network access to ensure that access to network content will continue to be as unconstrained as possible. See id. at 934-38, 943-46. They view basic transport—the broadband facility—and Internet access as inherently separate products that are being illegally tied together, with the effect of eliminating consumer choice. They apparently derive this assumption from the adventitious fact that many cable operators provide Internet access through a separate entity. However, there is no reason why Internet access cannot be an integral part of other services provided by cable operators. Indeed many cable operators do so. See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, supra note 200, paras. 23-27. Whether the integration of transport and access service occurs through contract or corporate structure, the basic question remains the same: whether the economic conditions of the industry justify forbidding firms to integrate the separate functions of content and transport in order to maximize the choice of distribution channels for unintegrated content providers. These conditions are best modeled within the framework of the essential facilities doctrine. In all events, the analysis of the access issue gains no purchase from abstract theorizing about the appropriate architecture of Internet technology. Framing the question as one of Internet network architecture only diverts attention from the issues of economic policy by implying that some unique technological principle is driving the analysis.

213 See Michael L. Katz & Carl Shapiro, Systems Competition and Network Effects, J. ECON. PERSP., Spring 1994, at 93, 96. A network effect does not necessarily imply an externality, and when it does it may not always imply a positive one. The externality exists only to the
Legal and economic scholars have lavished attention on network effects, no doubt inspired by the dramatic growth of information and communications technologies that provide the classic models for such effects. Of course, the idea of network effects is not new. In the case of actual networks, such as telecommunications, positive externalities have been commonplace from the earliest times. Network effects have been an element of telecommunications policy since the time of Theodore Vail, the redoubtable architect of the Bell System, and the inspiration for the enduring universal service policy that is historically linked to him. That policy has been heavily criticized for its complex and inefficient patchwork of pricing distortions designed to subsidize certain use classes, but that debate is irrelevant here. The important point is that there is no simple or obvious connection between promoting network expansion and forced sharing among network firms. Admittedly, some form of interconnection or compatibility among network rivals is probably necessary to prevent monopolization. That was the assumption underlying the first anti-

extent that the market fails to take into account the increasing returns from network expansion—or decreasing returns in the case of negative externalities such as network congestion costs. See S.J. Liebowitz & Stephen E. Margolis, Network Externality: An Uncommon Tragedy, J. Econ. Persp., Spring 1994, at 133, 133–34. Moreover, the public policy prescription even for positive externalities is not obvious. Historically the policy prescription has been some form of government intervention to promote network expansion. This is the economic premise of universal services, though it is a questionable premise. See Glen O. Robinson, The “New” Communications Act: A Second Opinion, 29 Conn. L. Rev. 289, 323–25 (1996). In terms of competitive policy—antitrust or regulatory—network effects do not yield any unequivocal prescription, however.

214 The seminal modern paper on network externalities analyzes communications networks. See Jeffrey Rohlfs, A Theory of Interdependent Demand for a Communications Service, 5 Bell J. Econ. & Mgmt. Sci. 16 (1974). However, the basic concept has application well beyond traditional, physical networks. For an excellent survey, see Mark A. Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479 (1998).

215 Vail actually intended for “universal service” to promote the idea of a single, integrated system (the Bell System, of course)—not a set of internal subsidies designed to expand service, which is the contemporary meaning of universal service. Milton L. Mueller, Jr., Universal Service: Competition, Interconnection, and Monopoly in the Making of the American Telephone System 97–98 (1997).

216 See, e.g., Robert W. Crandall & Leonard Waverman, Who Pays for Universal Service? 23–25 (2000); Jonathan Weinberg, The Internet and “Telecommunications Services,” Universal Service Mechanisms, Access Charges, and Other Flotsam of the Regulatory System, 16 Yale J. on Reg. 211 (1999). One should distinguish between the economic externality of providing increased connectivity to network users on the one hand, and the broader social benefits of providing universal access to modern communications on the other hand. In the age of the Information Superhighway, the latter appears to be the more salient purpose. It is, however, a problematic purpose that warrants closer scrutiny than it has received. See Robinson, supra note 213, at 320–28.

217 This assumes that interconnection or intercompatibility is necessary either to overcome barriers to entry that are created by positive network effects, see Gregory J. Werden, Network Effects and Conditions of Entry: Lessons from the Microsoft Case, 69 Antitrust L.J. 87 (2001), or to prevent the natural tipping of the market in favor of firms with an established subscriber base.
trust case against AT&T,\textsuperscript{218} and many commentators derive the same lesson from the Microsoft case nearly ninety years later.\textsuperscript{219} However, to the extent that these cases rely on some special characteristic of network economics, they also rest on the elements of essential facilities doctrine. This argument remains unchanged by the assumption of positive network effects.\textsuperscript{220} Regardless of whether network externalities exist, the immediate question is how to optimally promote competition and network expansion.

The element of competition is particularly important, for if one relaxes the assumption that competitive rivalry is the best means to ensure promotion of the network, then network externalities are irrelevant to the policy issue at hand.\textsuperscript{221} Unfortunately, it is easy to be

\textsuperscript{218} As part of an antitrust settlement with the Department of Justice in 1913, AT&T agreed, inter alia, to interconnect its long distance with competing independent carriers for local telephone service. \textit{Gerald W. Brock, The Telecommunications Industry} 154–58 (1981) (discussing the “Kingsbury Commitment,” which laid out the terms of the settlement).

\textsuperscript{219} There is a growing consensus that \textit{Microsoft} illustrates the relevance of network effects. \textit{See, e.g., Lemley & McGowan, supra note 214, at 501–07; Howard A. Shelanski & J. Gregory Sidak, Antitrust Divestiture in Network Industries, 68 U. Chi. L. Rev. 1, 59 (2001); Werden, supra note 217. But what that implies in terms of Microsoft’s liability or the appropriate remedies is unclear. Interestingly, the D.C. Circuit Court of Appeals offered a short essay on the importance of network effects, but could find no antitrust lesson to derive from them. See United States v. Microsoft Corp., 253 F.3d 34, 49–50 (D.C. Cir.), cert. denied, 122 S. Ct. 350 (2001).}

\textsuperscript{220} The precise character of the relevant network externality requires more specification than it has received in the commentary. If there is an external benefit from expanding access to the last mile of transport, it does not derive from expanding the number of connections in the network. A single access provider will allow a user to reach the Internet, and thereby claim all of the connections that it facilitates. Competitive access thus does not itself increase the number of connections that a user can make in cyberspace. The most one can say is that anything that facilitates deployment of more broadband will create a positive externality by increasing the demand for broadband applications, thereby increasing the supply. This is a chicken-and-egg externality. \textit{See Jeffrey H. Rohlfes, Bandwagon Effects in High-Technology Industries} 16–17 (2001) (“There may be no incentive for any firm to supply the complementary product (the ‘egg’) until there is a sizable user set for the base product (the ‘chicken’).”). Note, however, the critical assumption that open access will promote greater deployment of broadband. If one believes that forced access will reduce investment incentives, as argued above, the assumption of positive network effects provides an argument against, not for, open access.

\textsuperscript{221} In telecommunications markets, competition was historically perceived to be incompatible with achieving network effects, in accordance with Vail’s theory that network externalities required a single system, and that a single system implied a single provider. \textit{See Mueller, supra note 215, at 96–99. This perception conflates network externalities with natural monopoly. It is certainly possible that a market could be characterized both by positive network effects and natural monopoly (economies of scale or scope over the range of the market). However, these two phenomena are not identical. See Lemley & McGowan, supra note 214, at 488–90. That much is demonstrated by the modern repudiation of natural monopoly in telecommunications services. Of course, this does not imply that every component of the network can be competitively supplied, in which case there would be no basis for an essential facilities doctrine. However, assuming that the scope of the natural monopoly \textit{qua} essential facility is limited to only certain elements required for network functions, we have no reason to believe that monopoly is superior to competition
swept away by the enthusiasm for expansion, and to ignore the conditions for promoting effective competitive rivalry.

CONCLUSION

Refusals to deal are the bane of antitrust and the source of endless confusion. Some of this confusion is avoidable when the refusal is incident to another category of prohibited activity. For instance, every price-fixing arrangement, tying arrangement, or exclusive dealing agreement could also be characterized as a refusal to deal, but doing so would be superfluous. However, the real mischief occurs when a refusal to deal is treated as an independent offense. The gravity of the mischief increases when the offense lies in refusing to deal with competitors, a classification that threatens to put antitrust at war with itself.

We are reminded ad nauseam that the duty to deal is supposed to be exceptional, primarily by courts that are nonetheless enforcing the duty. The exception is typically cast in terms of a firm, or group of firms, exercising monopoly power and seeking to aggrandize that power by refusing to deal with other firms. Unfortunately, inexact methods of measuring market influence, and a vague conception of what it means to aggrandize power, result in a very uncertain scope to the exception. To make matters worse, there is an unsettled question of whether either of these metrics is assessed differently for a group of firms as opposed to a single firm.

The principle that a refusal to deal may be justified by valid business justifications is deceptively complex. In the classic farmers model of competition, individual producers are oblivious to each other and there is no rivalry among firms. But that model has little relevance to the world of antitrust (and some might say it has no relevance at all). The world of antitrust is inhabited by competitors who are rivals, antagonists. When Intel’s Andy Grove famously pronounced that “only the paranoid survive,” he was not expressing a farmer’s concern about general market conditions; he was expressing fear about what his rivals were doing. In this world there is a very fine distinction between conduct that is permissibly rivalrous and conduct that is impermissibly exclusionary.

in producing the conditions that promote positive network externalities. In short, if we set aside Vail’s mistake that equated one system with one firm, the issue of promoting network effects boils down to a question of what economic conditions are most conducive to efficient innovation which is the driving force of network expansion. The existing evidence advocates in favor of competition. See Howard A. Shelanski, Competition and Deployment of New Technology in U.S. Telecommunications, 2000 U. Chi. Legal Forum 85 (surveying literature on the deployment of new technology under conditions of competition and monopoly in the field of regulated telecommunications).

222 Andy S. Grove, Only the Paranoid Survive (1999).
The difficulty of defining legitimate business justifications for refusing to deal with a rival is complicated by conditional refusals. Here the difficulty is not simply a matter of defining business justification in general terms, but ascertaining the specific terms on which it is reasonable to compel the deal. In Aspen Skiing, the Court deemed it unreasonable for a firm to stop dealing with its rival on the same terms that the firms had agreed to in the past. The Court did not bother to ask why the previous terms of dealing were so eminently fair that they could not be reasonably altered. Perhaps Aspen Skiing is limited to cases in which one firm has halted a previous course of dealing, the assumption being that prior arrangements furnished a continuously reasonable basis for dealing. However, this is a precarious assumption. Reasonable business firms do not voluntarily enter into arrangements that bind them indefinitely to the same set of terms, and reasonable courts should not force them to do so.

Antitrust commentators recognize the problematic character of an enforced duty to deal. Ironically, some of these commentators have misdirected their fire at the essential facilities doctrine, which is only one application of the more general duty to deal. Perhaps this is because the essential facilities doctrine is a “doctrine” that squarely defines a duty to deal in affirmative terms. That, however, is its virtue, not its vice. Critics’ complaints that the doctrine is too broad miss the point that all things are relative. In his widely cited critique, Areeda labelled the essential facilities doctrine an “epithet in need of limiting principles.” This phrase could certainly be widely applied to antitrust law. What makes this statement so peculiar in the essential facilities context is that, under present practice, the alternative to the essential facilities doctrine is not a carefully prescribed set of principles governing the duty to deal, but the amorphous and untheorized “it-all-depends” principle followed in Aspen Skiing. The Court explicitly refused to apply or even recognize the essential facilities doctrine. Whether it would have reached a different result under an essential facilities analysis is a matter of speculation, but also unimportant beside the more general principle. Regardless of the outcome, the analytical framework of the doctrine certainly would have provided more “limiting principles” than general monopolization doctrine. Surely that is why the Supreme Court has resisted embracing essential facilities—not because it is too broad, but because it is too limiting. While the Court continues to duck the question of whether there is such a thing as an essential facilities doctrine, the lower courts have formulated a set of criteria, cum principles, that place acceptable

224 Areeda, supra note 24, at 841.
225 Aspen Skiing, 472 U.S. at 611 n.44.
limits on the duty to deal. These criteria are not so tight as to preclude a few false positives (enforcing a duty when it is inappropriate), but no man-made legal rule can meet a standard of perfection. A review of the lower court opinions indicates that lower courts are quite conservative in their application of the essential facilities doctrine. Certainly lower courts have been far more reluctant to impose a duty to deal than has the Supreme Court, applying the more general criteria of concerted action in restraint of trade or monopolization.

As a simple matter of prediction, there is little reason for optimism. Like so many areas of common law (and antitrust is an area of common law notwithstanding its statutory architecture), there is a cyclical oscillation between fixed rules and amorphous standards—what Carol Rose referred to in a different context as “crystals” and “mud.” As a simple matter of prediction, there is little reason for optimism. Like so many areas of common law (and antitrust is an area of common law notwithstanding its statutory architecture), there is a cyclical oscillation between fixed rules and amorphous standards—what Carol Rose referred to in a different context as “crystals” and “mud.”

Today, antitrust is buried deep in the mud cycle. A score of years ago we at least had a clear binary choice between the rule of reason and per se liability rules. However, the clarity of that choice has been obscured by the recent emergence of the “quick look” rule. More recently the “it all depends” principle infiltrated antitrust law again to create what Justice Souter recently described as a “sliding scale” approach. Because it cannot get much muddier from here, perhaps we are on the verge of a movement back to crystals. If that occurs, a good target for clarification will be refusals to deal.

226 Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 577-78 (1988) (discussing the oscillation of courts applying property law doctrines between precise rules—“crystals”—and general standards—“mud”).

227 The clarity of that choice was always deceptive because some cases featured a mix of both liability rules. Tying arrangements are a conventional example; the per se illegality of tying presupposes a kind of rule of reason analysis of what packages of products constitute a tying arrangement. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33-35 (1984) (O’Connor, J., concurring). Merger cases are an example the other way: the liability rule is a rule of reason, but one that generally excludes the most fundamental of reasons, efficiency trade-offs.

228 Cal. Dental Ass’n v. FTC, 526 U.S. 756, 780 (1999) (quoting Phillip E. Areeda, ANTITRUST LAW ¶ 1507, at 402 (1986)).