

SHOULD THE GOVERNMENT PROSECUTE MONOPOLIES?

*Maurice E. Stucke**

In the past few years, courts and the Department of Justice have cited approvingly the Supreme Court's dicta in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP. This Article analyzes why the economic thinking in Trinko is wrong, and how the Court ignores its precedent involving the Sherman Act's concerns regarding monopolies' political, social, and ethical implications. It responds to the Court's claim that cartel behavior is easier to identify and remedy than monopolistic behavior and proposes an improvement to the Court's current rule of reason standard to reduce the risk of false positives, while enabling the antitrust agencies and courts to remedy certain monopolistic conduct more quickly.

INTRODUCTION

Once hailed by President and Chief Justice Taft as among “the most important statutes ever passed in this country,”¹ the federal antitrust laws are now noteworthy for their “considerable disadvantages.”² The Supreme Court once condemned cartels, monopolies, and monopolistic practices.³ Now the Court has set the Sherman Act upon itself. It opined

* Associate Professor, University of Tennessee College of Law. The author thanks Benjamin H. Barton, Matthew Bester, Kenneth Davidson, Hillary Greene, Joan MacLeod Hemingway, Bernard Hollander, Christopher R. Leslie, Robert Pitofsky, Richard Rappaport, Charles Romeo, D. Daniel Sokol, Gregory M. Stein, Spencer Weber Waller, Dean Williamson, and the participants of the Eighth Annual Loyola Antitrust Colloquium for their helpful suggestions.

1. WILLIAM H. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 2 (Fred B. Rothman & Co. 1993) (1913).

2. Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).

3. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (“[W]hatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by maintenance of competition.”); *see also* United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) (“From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few.”); United States v. Line Material Co., 333 U.S. 287, 309 (1948) (“Monopoly is a protean threat to fair prices.”); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553–54 (1944) (“‘Trusts’ and ‘monopolies’ were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but

that competitors who fix prices or allocate markets are more culpable than monopolists engaging in anticompetitive practices.⁴ A cartel “presents greater anticompetitive concerns” than monopolistic behavior and is the “supreme evil of antitrust.”⁵ The Court’s view on monopolies has become forgiving. It surmised for the first time that charging monopoly prices is “an important element of the free-market system,” and that monopoly pricing serves as an inducement to “attract[] ‘business acumen’ in the first place” and engage in “risk taking that produces innovation and economic growth.”⁶

Why the Court opined about monopolies and cartels is unclear. The Solicitor General, during oral arguments, agreed with the opinion’s author that the Court need not “go into broader general principles.”⁷ Respondent’s attenuated antitrust claim was weak, as Verizon’s violation of the 1996 Act lasted at most several months, and the injured competitors already obtained relief.⁸ Instead of addressing the precise issue,⁹ or even the indirect relationship between the monopolist’s alleged miscon-

some of numerous evils ascribed to them.”); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923) (“The Sherman Act was intended to secure equality of opportunity, and to protect the public against evils commonly incident to monopolies, and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain.”); *Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Can.*, 260 U.S. 501, 512 (1923) (“The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.”).

4. *Trinko*, 540 U.S. at 410 n.3.

5. *Id.* at 407.

6. *Id.*

7. Transcript of Oral Argument at *22–23, *Trinko*, 540 U.S. 398 (No. 02-682), 2003 WL 22364051 (Oct. 14, 2003).

8. The case involved Congress’s attempt to eliminate local telephone monopolies arising from the antitrust decree against AT&T with the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56, (1996 Act). As part of its authorization to provide long distance service in New York, Verizon (then Bell Atlantic) was required to provide its competitors nondiscriminatory, unbundled access to certain pieces or “elements” of its network. The FCC alleged that Verizon failed between a two- to four-month period to notify competitors of their electronic orders’ status or properly process their orders. (Verizon attributed the problem of missing and delayed notifiers to a defect in its purchased software product, which Verizon thereafter replaced.) Verizon paid \$10 million to compensate the injured competitors, including AT&T, and \$3 million to the United States. Its consent decree with the FCC required Verizon to regularly report, remediate, and improve its performance in processing orders; Verizon also agreed to voluntarily pay (up to \$24 million in total) if it failed to meet the performance measurements for four consecutive weeks. See *MCI WorldCom, Inc.*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N.Y. Pub. Serv. Comm’n July 27, 2000); Press Release, Fed. Comm’n Comm’n, FCC Ensures Bell Atlantic Compliance with Terms of Long Distance Approval (Mar. 9, 2000), http://www.fcc.gov/eb/News_Releases/bellatl.html. The day after the FCC’s consent decree, a local telephone customer, allegedly of AT&T, sued on behalf of similar customers, alleging that Verizon’s actions impeded entry and competition in the local telephone service market.

9. The issue was whether an alleged purchaser of telephone services from a competitor had a claim under section 2 of the Sherman Act when a local telephone monopolist breached its duty under the 1996 Act to share its network with competitors. The Court, as the district court in dismissing the complaint, held that the affirmative duties imposed by the 1996 Act are not coterminous with a monopolist’s antitrust duties to refrain from exclusionary practices. *Trinko*, 540 U.S. at 410–11.

duct and the customer's alleged injury,¹⁰ the Court pronounced, without citing any empirical basis, that monopolies are important to the free-market system and pose fewer anticompetitive concerns than cartels.¹¹ If only harmless theorizing, this dicta would merit a footnote. But over the past few years, lower courts have quoted *Trinko*'s dicta approvingly,¹² leading one antitrust practitioner to note that *Trinko* "has had an immediate impact on refusal to deal law well beyond its specific regulatory context, and, perhaps more importantly, is leading courts down a non-interventionist path that reaches well beyond refusals to deal or Section 2."¹³ Indeed, one district court wondered whether antitrust plaintiffs have better chances after *Trinko* by alleging a conspiracy to monopolize rather than a monopolization claim.¹⁴

The Court's antitrust hierarchy brings George Orwell's addendum to mind: "All [antitrust violations] are equal but some [antitrust violations] are more equal than others."¹⁵ From what sources do the *Trinko* dicta arise? As Part I of this Article discusses, neither the federal antitrust laws nor their legislative history support this antitrust hierarchy. Indeed, Congress rejected *Trinko*'s notion that concerted action presents greater anticompetitive concerns than unilateral action.

Part II examines how the Court erred when straying from its precedent in interpreting the Sherman Act. This Part compares the economic harms from hardcore cartels with those from monopolistic practices and questions whether either ranks "supreme." Cartels do not involve any unique anticompetitive effects or impose greater harm on society than monopolistic practices. Judge Learned Hand recognized the "absurdity" of condemning cartels while not extending the condemnation to

10. *Id.* at 417 (Stevens, J., concurring) ("[W]hatever antitrust injury [the customer] suffered because of Verizon's conduct was purely derivative of the injury that AT&T suffered," so AT&T was in a far better position to vindicate the public interest by bringing the antitrust suit.). As it turned out, the defendant's allegedly "discriminatory" service problems, which lasted only four months, had ended before the plaintiff even became a customer of AT&T. Thus, the district court found "no evidence that Trinko ever suffered as a result of Verizon's purported discriminatory conduct." Law Offices of Curtis V. Trinko, LLP v. Verizon Commc'ns Inc., No. 00 CIV 1910 SHS, 2006 WL 2792690, at *2 (S.D.N.Y. Sept. 27, 2006).

11. *Trinko*, 540 U.S. at 407.

12. See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004); *Digene Corp. v. Third Wave Techs., Inc.*, 536 F. Supp. 2d 996, 1008 (W.D. Wis. 2008); *Am. Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175 (DWF/SRN), 2007 WL 142173, at *9-11 (D. Minn. Jan. 17, 2007); *Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 387 (S.D.N.Y. 2007); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090, 1100-01 (N.D. Cal. 2006); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 429 F. Supp. 2d 752, 759 (E.D. La. 2005); *Nicsand, Inc. v. 3M Co.*, No. 1:03CV2619, 2005 WL 4704988, at *4 (N.D. Ohio Mar. 1, 2005); *Medtronic Minimed Inc. v. Smiths Med. MD Inc.*, 371 F. Supp. 2d 578, 588-89 (D. Del. 2005); *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 568-69 (S.D.N.Y. 2004).

13. James A. Keyte, *The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis*, ANTITRUST, Fall 2005, at 44 (2005).

14. *linkLINE Commc'ns, Inc. v. SBC Cal., Inc.*, No. CV 03-5265 SVW (SHx), 2004 WL 5503772, at *6 n.12 (C.D. Cal. Oct. 20, 2004).

15. GEORGE ORWELL, *ANIMAL FARM* 133 (Signet Classics 1996) (1945).

monopolistic practices: The cartel's agreements "are only steps toward that entire control which monopoly confers."¹⁶ Moreover, the richer empirical record today rejects the Court's Schumpeterian belief that monopoly rents are necessary "to safeguard the incentive to innovate."¹⁷ Professor Baker, in analyzing the recent economic literature, found that the "antitrust rules and enforcement today are appropriately focused to promote innovation."¹⁸ Not only is its economic thinking in *Trinko* wrong; the Court also ignores its precedent involving the Sherman Act's concerns regarding monopolies' political, social, and ethical implications.

Part III responds to *Trinko*'s claim that the cartel's anticompetitive behavior is easier to identify and remedy than monopolistic behavior.¹⁹ The Court's legal standard for evaluating monopolistic conduct has been criticized over the years, yet the *Trinko* Court uses its own legal standard's infirmities as a justification for limiting liability. Part III suggests an improvement to the Court's rule of reason standard to reduce the risk of false positives, while enabling the antitrust agencies and courts to remedy certain monopolistic conduct.

This Article does not denigrate prosecuting cartels that inflict substantial consumer harm. Indeed, this Article would question any dictum that monopolies are the "supreme evil." Instead, this Article endorses vigorously prosecuting the three key antitrust provisions: the prohibitions against cartel and monopolistic behavior under sections 1 and 2 of the Sherman Act, and anticompetitive mergers under section 7 of the Clayton Act.

The Department of Justice has new leadership. In setting its enforcement policies, the incoming Obama Administration should discount *Trinko*'s dicta, which rest on infirm legal and theoretical grounds. The stakes are too high to deemphasize monopolistic restraints. The attendant risks include:

- creating nearly impossible standards for challenging monopolistic behavior,²⁰ lending to little, if any, enforcement in this area;²¹

16. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945); *see also* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993) (stating that a "predatory pricing scheme designed to preserve or create a stable oligopoly . . . can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly").

17. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

18. Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 576 (2007).

19. 540 U.S. at 408 (noting the difficulties of "identifying and remedying anticompetitive conduct by a single firm").

20. The federal antitrust agencies in *Trinko* advocated a "no economic sense" standard, discussed, *infra*, at notes 239 and 246.

21. The Bush Administration cited the *Trinko* dicta to create an enforcement hierarchy. Antitrust enforcers should focus primarily on cartel behavior, followed by mergers, and lastly monopolies. This third priority's focus means not vigorously prosecuting monopolistic practices. Rather, it is developing and promoting objective standards to judge monopoly behavior, so as not to chill pro-competitive behavior and prevent monopolists from reaping the rewards of their success. *See, e.g.*, R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Speech Before the 2004

- alienating other nations' competition authorities that challenge monopolistic behavior;²²
- prolonging monopolies, leading to sustained harm to consumers through higher prices, fewer choices, and less innovation, and ultimately more intrusive regulatory controls;²³
- foreclosing opportunities for innovative and efficient rivals to compete on the merits;²⁴ and

ICN Cartels Workshop: International Anti-Cartel Enforcement (Nov. 21, 2004), <http://www.usdoj.gov/atr/public/speeches/206428.pdf> [hereinafter Pate, ICN Speech]; *Protecting and Promoting Competition*, U.S. DEPARTMENT OF JUSTICE: ANTITRUST DIVISION UPDATE, Spring 2006, <http://www.usdoj.gov/atr/public/216254.pdf>; R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Securing the Benefits of Global Competition (Sept. 10, 2004), <http://www.usdoj.gov/atr/public/speeches/205389.pdf>. This hierarchy is inconsistent with earlier Republican administrations that followed "principles of equal enforcement of the anti-monopoly and unfair-competition statutes" to "relentlessly protect our free enterprise system against monopolistic and unfair trade practices." Stanley N. Barnes, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Competition: Current Antitrust Problems and Policies (Oct. 25, 1954) (on file with author) (quoting the 1952 platform pledge of the Republican Party). In contrast to the European Commission, the Bush Administration did not challenge any significant monopolistic restraints. Between 1998 and 2000, for example, the DOJ filed five section 2 cases. In the six years thereafter, the DOJ cited one action involving section 2. ANTITRUST DIV., U.S. DEP'T OF JUSTICE: WORKLOAD STATISTICS, FY 1997-2007, <http://www.usdoj.gov/atr/public/workstats.pdf>. The Executive Branch retains broad discretion to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; cf. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 293-94, 33 I.L.M. 1167 (1994), available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (United States's general obligation to prevent monopolistic conduct); North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 663 (1993). Although a presumption of regularity supports prosecutorial decisions (*United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)), such discretion does not equate with abdication.

22. See Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision (Sept. 17, 2007), http://www.usdoj.gov/atr/public/press_releases/2007/226070.pdf (expressing concern that Court of First Instance's legal standards on monopolistic conduct may harm consumers); Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in Its Microsoft Investigation (Mar. 24, 2004), http://www.usdoj.gov/atr/public/press_releases/2004/202976.pdf (quoting then-Assistant Attorney General R. Hewitt Pate: "While the imposition of a civil fine is a customary and accepted aspect of EC antitrust enforcement, it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement. For this fine to surpass even the fines levied against members of the most notorious price fixing cartels may send an unfortunate message about the appropriate hierarchy of enforcement priorities."). The Bush Administration promoted its antitrust hierarchy within international organizations. See, e.g., Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Presentation to the 11th Annual Competition Law & Policy Workshop European Union Institute: Seven Steps to Better Cartel Enforcement (June 2, 2006) (antitrust enforcement is the highest priority in an explicit enforcement hierarchy), <http://www.usdoj.gov/atr/public/speeches/216453.pdf>; Pate, ICN Speech, *supra* note 21. This could affect capacity building around the world and shape enforcement priorities of new agencies, even those with large state-owned or formerly state-owned monopolies.

23. Baker, *supra* note 18.

24. AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 13, 62-64 (2008).

- deemphasizing antitrust, creating risks to our economy and political system.²⁵

Tomorrow's business organizations will reflect the opportunities provided by today's legal institutional matrix.²⁶ If our industries are to remain innovative, why should monopolistic practices go unpunished?²⁷ As an Assistant Attorney General during the Eisenhower Administration said:

An enforcement program built around a lackadaisical government enforcement eliminates much of the deterrent values found in private treble damage suits. What monopolist would fear his victim, when the victim could not afford to prove the monopolist's treble damage liability other than by means of a litigated government judgment? What defendant could plead a Sherman Act defense to a case brought against it by a monopolist whose secret illegal operations had not been called to public attention by a government prosecution? What deterrent effect would be found in a government prosecution that did not expose the root of a monopolist's power?²⁸

The present Court's priorities raise a larger issue: Should our courts and antitrust enforcers adopt a philosophy that is indifferent to, or even condones, monopolies? If so, competition agencies would function as professional wrestlers: not to prosecute monopolistic practices, but "to go exactly through the motions which are expected" of them.²⁹ At a minimum, the Court ought to supply the evidentiary support for its philosophy and address how its philosophy is reconcilable with the premise that our nation, since its inception, has opposed monopolies (whether politi-

25. See Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 33-34 (1953).

26. Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 361 (1994).

27. As the United States earlier asserted, "[T]he history of US international antitrust enforcement shows that when international cartels are broken up, when monopolistic behavior on an international scale is thwarted, and when anticompetitive international mergers are required to be restructured or prohibited altogether, then the positive effects on competition (and often on trade) are soon felt, and consumers are well-served." Communication from the United States, *Impact of Anti-Competitive Practices of Enterprises and Associations of International Trade*, WT/WGTCP/W/66 (Mar. 26, 1998), at 10, available at <http://docsonline.wto.org/DDFDocuments/t/WT/WGTCP/W66.DOC> [hereinafter U.S. Communication]; see also MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 662-64 (1990) (noting that leniency toward mergers and monopolies in several countries, including the United States, has become counterproductive); WORLD ECON. FORUM, *THE GLOBAL COMPETITIVENESS REPORT 2000*, at 19 (2000), available at http://www.cid.harvard.edu/archive/res/gcr_2000_overview.pdf; Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, in *UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE* 156, 156 (Charles D. Weller ed., 2004) ("[O]pen competition, stimulated by strict antitrust enforcement, is essential not only to national prosperity, but to the health of companies themselves.") [hereinafter Porter, *Antitrust*]; Mariko Sakakibara & Michael E. Porter, *Competing at Home to Win Abroad: Evidence from Japanese Industry*, 83 REV. ECON. & STAT. 310, 319 (2001) (empirical analysis showing how intense domestic rivalry is positively associated with internal trade).

28. Stanley N. Barnes, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Speech Before the Metropolitan Economic Association: Promoting Competition: Current Antitrust Problems and Policies (Oct. 25, 1954) (on file with author).

29. ROLAND BARTHES, *MYTHOLOGIES* 16 (Annette Lavers trans., Vintage 2000) (1957).

cal or economic) and favored an open door to economic opportunity. Even if such a theory's normative economic foundations were well developed, the Court ought to justify why it, rather than Congress, should establish this philosophy.³⁰ Ultimately, the goals of competition law and their ordering must reflect citizens' preferences and be determined politically, not judicially.

I. LEGISLATIVE HISTORY OF THE SHERMAN ACT

The Sherman Act's text does not evidence any Congressional bias for prosecuting cartels or against prosecuting monopolistic practices.³¹ The criminal and civil penalties for violating sections 1 (which reaches cartel agreements) and 2 (which reaches monopolistic practices) of the Sherman Act were, and remain, identical.³² Neither section imposes a higher evidentiary burden or affords fewer remedies or defenses.

Nor does the Sherman Act's legislative history support the hierarchy between cartels and monopolistic practices. The Sherman Act was primarily a law against trusts and monopolistic behavior, and the Clayton Act did not concern itself with conspiracies, with the exception of prohibiting interlocking directorates.³³ Senator Sherman described his

30. Entrusting the Court with the power to say what are good and bad trusts according to its economic and political views, Taft responded, is unwise. "It would be legislative power, not judicial power." TAFT, *supra* note 1, at 114; *see* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbade all.>").

31. Section 1 of the Sherman Act outlaws every "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1 (2006). Section 2 makes it unlawful for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *Id.* § 2.

32. Over the past fifty years, Congress has increased the maximum criminal fines and term of incarceration for Sherman Act violations. From a misdemeanor, the criminal penalties now stand as a felony with up to ten years imprisonment and a fine up to \$100 million for corporations and \$1 million for individuals. *Id.* § 1. The Sherman Act does not delineate which conduct should be criminally or civilly prosecuted; this has been left to the DOJ's discretion. Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 450. Until the late 1970s, the DOJ criminally prosecuted section 2 violations. *See* *United States v. Braniff Airways*, 453 F. Supp. 724, 725 (W.D. Tex. 1978). The DOJ has brought fewer criminal cases under section 2 than section 1. Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 REV. INDUS. ORGAN. 75, 95-96 (2000) (finding that between 1955 and 1997, DOJ brought seventy-five civil and three criminal monopoly or attempt to monopolize cases under section 2). Since the Reagan Administration, the DOJ has not prosecuted section 2 violations criminally. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-20 (4th ed. 2008), <http://www.usdoj.gov/aatr/public/divisionmanual/atrdvman.pdf> ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."). Moreover, the DOJ would not prosecute the *per se* illegal offense criminally if (1) "the case law is unsettled or uncertain"; (2) "novel issues of law or fact [are] presented"; (3) past prosecutorial decisions may have caused confusion; or (4) clear evidence exists that the defendants were unaware of, or did not appreciate, their actions' consequences. *Id.*

33. George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 5 (1982).

remedial statute “to enforce by civil process in the courts of the United States the common law against monopolies.”³⁴

Rather than mutually exclusive, sections 1 and 2 of the Sherman Act were drafted as complements that, “when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed.”³⁵ No socially undesirable anticompetitive practices could escape both sections, when working in tandem.³⁶

Indeed, the Senate rejected *Trinko*’s notion that concerted action somehow presented “greater anticompetitive concerns”³⁷ than unilateral action. When Senator Gray proposed an amendment to limit Sherman Act violations to concerted acts—namely combining or conspiring to monopolize³⁸—the Senate Judiciary Committee rejected his amendment, reasoning that if one company acted anticompetitively, “it was just as offensive and injurious to the public interest as if two had combined to do it.”³⁹

II. ECONOMIC HARMS OF CARTELS & MONOPOLISTIC BEHAVIOR

Although the Sherman Act’s text and legislative history reject the *Trinko* hierarchy, the Court recently stated that Congress incorporated into the Sherman Act the common law’s evolving standards and, by doing so, delegated to the courts the duty of fixing the standard for each case.⁴⁰ Consequently, the Court can acknowledge legal precedent, but then rest its decision on its perception of prevailing economic theory.⁴¹ If

34. HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* 181 (1954).

35. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181 (1911).

36. *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 553 (1944); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60–61 (1911). The DOJ historically challenged certain anticompetitive conduct under both sections. *See, e.g.*, *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 134 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 140 (1948); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 783 (1946) (criminal).

37. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 n.3 (2004).

38. 21 CONG. REC. 3152 (1890).

39. *Id.* Senator Edmunds analogized the offense of monopolization to the sugar trust: “One man, if he had capital enough, could do it just as well as two.” *Id.* Section 7 of the Clayton Act views cartels and monopolies equally unappealing in prohibiting mergers where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18 (2006). *Compare* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* § 2.1 (1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter *HORIZONTAL MERGER GUIDELINES*], *with id.* § 2.2.

40. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007).

41. This issue arose during the oral argument in *Leegin*:

JUSTICE BREYER: What that sounds like is that if at least he, who is an economist, thinks if you get rid of Dr. Miles, every American will pay far more for the goods that they buy at retail. Now that’s one economist, of course. There are other whose [sic] think differently. So how should we decide this?

MR. OLSON: Well—

JUSTICE BREYER: Should we overturn Dr. Miles and run that risk?

the Court determines which anticompetitive practices it finds good or bad based on its current economic or political bent, the Sherman Act becomes a vehicle for the Court's determination and ordering of the political, social, and ethical values underlying our competition policy.⁴² But the Court's role is to interpret the antitrust laws based on (1) the original laws and (2) precedent that is true to the original laws, not what it believes to be the latest economic thinking on what competition policy should be.⁴³ Not only is the Court's economic thinking in *Trinko* wrong, but the normative economic foundations of competition law also remain undeveloped.⁴⁴ Ultimately, the goals of competition law and their ordering must reflect citizens' preferences and be determined politically, not judicially.

A. *Wealth Transfers and Deadweight Loss*

For many, the evil of cartels and monopolists lies in the higher prices that consumers must pay, with the result that the cartels and monopolists become richer and consumers poorer than in a competitive market.⁴⁵ But antitrust economists are generally agnostic about these wealth transfers because our sympathies may differ from the expected if the colluders and monopolists are orphans and widows (e.g., colluding on the minimum acceptable wage), and the victims are greedy industrialists, reliant on their labor.⁴⁶

MR. OLSON: In, in the vast majority of the economist[s] whose [sic] have looked at this have come out to the opposite conclusion, Justice Breyer. Secondly—

JUSTICE BREYER: We're supposed to count economists?

MR. OLSON: No. No. I think that—

JUSTICE BREYER: Is that how we decide it?

(Laughter.)

MR. OLSON: But what this Court—what this Court has repeatedly said, that under circumstances such as this where there's a consensus among leading respected economists, that is one factor. There's another factor—

JUSTICE BREYER: Well, I haven't seen a consensus. A consensus? Isn't, doesn't Sherer and all these people, doesn't that point of view count, too?

Transcript of Oral Argument at 7–8, *Leegin*, 127 S. Ct. 2705 (No. 06-480), available at http://www.supremecourt.us/oral_arguments/argument_transcripts/06-480.pdf.

42. One could ask whether Congress intended this. The Sherman Act, by its terms, does not order the political, social, and ethical values. But Congress did not intend to give the courts unfettered discretion to interpret the Sherman Act in any manner for the advancement of the particular judge's ideologies. See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1267359>.

43. Spencer Weber Waller, *Microsoft & Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 749 (“The *Trinko* Court's pronouncements on this score stand merely as a naked assertion of a policy preference that has been rejected since the passage of the antitrust laws themselves.”).

44. Wolfgang Kerber, *Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law*, in ECONOMIC THEORY AND COMPETITION LAW 24 (Josef Drexler et al. eds., 2008); see also *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting) (“[A]ntitrust laws cannot, and should not, precisely replicate economists' (sometimes conflicting) views.”).

45. Phillip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 525 (1983).

46. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 111 (1993); see also William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653

Under neoclassical economic theory, the principal harm from a cartel or monopolist in a market with a downward-sloping demand curve is the deadweight loss brought about by the reduction of output below competitive levels.⁴⁷ Monopolists and cartels restrict output and extract a supra-competitive price from their remaining customers.⁴⁸ Absent perfect price discrimination, some forego (or reduce) their purchases at the supra-competitive price, and this reduction in efficiency represents the deadweight welfare loss.⁴⁹

If deadweight loss arises under both cartels and monopolies, which produces the greater loss? Most standard economics treatises view cartels as an imperfect joint attempt to duplicate the results of monopoly.⁵⁰ The monopolistic price and concomitant deadweight loss represent the outer boundary for a would-be cartel in the particular industry. The cartel's supra-competitive price and deadweight loss may approach, but never exceed, that of a perfect monopoly.⁵¹

Justice Scalia, who authored *Trinko*, earlier assumed (like certain members of the Chicago school) that cartels are inherently unstable.⁵²

(1983) (noting that the “standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss, . . . a loss to consumers without an offsetting gain to producers”); COMPETITION COMM., DIRECTORATE FOR FIN., FISCAL & ENTER. AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV., REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 6 (2002) (noting economists’ agnosticism about whether wealth transfers from consumers to cartel members makes society worse off), <http://www.oecd.org/dataoecd/16/20/2081831.pdf>.

47. Landes, *supra* note 46, at 665–66.

48. *Id.* at 666.

49. See BORK, *supra* note 46, at 111.

50. *Id.* at 112–13.

51. HORIZONTAL MERGER GUIDELINES, *supra* note 39, §§ 0.1 & 2.11; see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427–28 (2d Cir. 1945) (monopoly’s difference from price-fixing agreement is that monopoly necessarily involves an equal, or greater, power to fix prices). Assuming market share is a good indicator of market power, a company with 70% market share has a significant degree of market power, but less than that of a perfect monopoly (100%) or cartel controlling 90% of the market.

52. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 (1988) (“Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier.”); John S. McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 197–99 (1960); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979). Whether this assumption is empirically sound is another issue. Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 521 (2007) (citations omitted). As Judge Posner observed from his study of prosecuted cartels, the hypothesis that cartels with more members are less stable than cartels with fewer members “yielded a negative result.” Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 402 (1970); see also Simon J. Evenett et al., *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECON. 1221, 1226 (2001) (average duration of surveyed cartels prosecuted in 1990s was six years, with some lasting two decades). The empirical analysis of successfully prosecuted cartels between 1910 and 1972 showed that cartels on average had many participants. Arthur G. Frass & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. INDUS. ECON. 21, 25, 36–41 (1977) (where trade association facilitated cartels, 33.6 firms was the mean of firms involved, and fourteen firms was the median; in price-fixing cartels (without a trade association involved) 8.3 firms was the mean and six was the median). Cartels may also last longer than neoclassical economic

With differing levels of scale at which they operate, production costs, and assessments of market demand and conditions, companies have different incentives to collude and to agree upon an output reduction (or concomitant supra-competitive price). Even if the conspirators can agree, the price increase or output reduction may be less than that achievable through the perfect monopoly.⁵³ Each conspirator also has an incentive to cheat—through secretive discounting or nonprice dimensions, such as better products or services tailored to meet the customers' needs.⁵⁴ A monopoly, unlike a cartel, will not cheat itself. Thus, to the extent such cheating goes undetected and unpunished, customers may fare better with a cartel than a monopoly.⁵⁵

B. Total Welfare Effects of Cartel Versus Monopolistic Practices Under a Static Equilibrium

Unlike a price-fixing cartel, a monopolist is economically integrated and has internal productive efficiencies.⁵⁶ Some argue that this leads to a societal benefit as the monopolist consumes fewer resources and is more efficient than a cartel.⁵⁷ With a cartel, there is no integration of assets, no resulting efficiency gains, only deadweight loss. Therefore, a company with real economies must have substantial market power (and resulting output reduction) for the net allocative effects to be negative.

Society is not always better off under a total welfare standard with an economically integrated monopolist than with a cartel. First, the Sherman Act is aimed not at the monopolist per se, but at its incremental anticompetitive conduct that society has deemed welfare reducing or un-

theory assumes. Gallo et al., *supra* note 32, at 99 (average duration of price-fixing and other per se illegal cartels between 1955 and 1959 was 7.4 years; average length of the conspiracies prosecuted in the four-year periods thereafter ranged between 6.2 and 7.8 years; average duration of the mostly localized bid-rigging conspiracies prosecuted during the Reagan Administration was 3.7 years (1980–1984), and four years (1985–1989); average duration of conspiracies prosecuted thereafter was 5.8 years (1990–1994) and 2.6 years for the two-year period of 1995–1997). The empirical evidence does not address whether cartels are more durable than monopolies.

53. The cartel must use limit pricing given the risk of greater cheating on the cartel if the cartel price is too high. Although a monopolist may worry that setting too high a price will attract entry into its market, the cartel has a greater threat when the productive capacity is already there and available. See Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 555 (2004).

54. Indeed, market allocation schemes (whereby each cartel member is given a regional monopoly) avoid some of these issues.

55. In certain circumstances, however, where incremental profits are available, monopolies, under neoclassical economic theory, may produce a greater variety of products than competitive firms. See, e.g., Daniel L. Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DEPAUL L. REV. 1009, 1017 & n.56 (1996) (citing Peter O. Steiner, *Program Patterns and Preferences, and the Workability Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212–17 (1952)). With a common denominator product, however, monopolists may not have the incentive to offer more than that product.

56. BORK, *supra* note 46, at 166.

57. See, e.g., Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1509 (1998).

desirable.⁵⁸ If the behavior is independently wrongful (such as anticompetitive intentional torts committed against an entrant), it is irrelevant that the actor is economically integrated. Second, measuring total welfare depends on what is measured, and over what period.⁵⁹ The deadweight welfare loss represents only the social costs arising from supra-competitive pricing. It misses the other social costs of monopolistic practices.

Monopolies and cartels incur costs to illegally attain and maintain their market power. A cartel, for example, may incur and impose costs on its members in agreeing upon, and policing, the cartel.⁶⁰ A profit-maximizing cartel or monopolist would incur such private costs if (a) the action's incremental benefit equals or exceeds its incremental cost and (b) the action's costs plus other incurred costs are less than the discounted net present value of the incremental supra-competitive profits from the monopoly or cartel. Although a difficult, if not impossible, figure to calculate, every monopolist or cartel must ascertain on some level whether incurring these costs is worthwhile.⁶¹

If the monopoly rents represent the outer boundary of gain, then the ceiling of private costs a cartel is willing to incur cannot exceed that of a monopolist. This also assumes that the probability of detection and punishment and resulting penalties are similar for monopolies and cartels.⁶² For the past eight years, monopolies had less to fear from govern-

58. Aaron S. Edlin, Essay, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 950 (2002).

59. Both monopolies and cartels impose nontrivial harm, and being a monopolist should not constitute an antitrust defense. Moreover, there are limits to the efficiencies of any monopoly. From a Coasian transaction-cost perspective, integration within a firm has its advantages, but also its disadvantages after a certain point. (For if integration were always pro-competitive, all production and services should have been organized into one mega-monopoly in countries without antitrust laws or comparable restraints.) A monopolist, in the short run, may have net positive effects compared to a cartel; but the cartel may collapse after six years, whereafter competition resumes. At some point, the cartel may become more efficient than the lumbering monopolist. The efficiency assumption is that the monopolist's average production cost is lower than the cartel's. One could envision after successive rounds of intense competition, less efficient competitors exit, and the remaining, after achieving minimum optimal scale, form a cartel. With the risk of their cartel collapsing, conspirators have incentives to trim costs for post-cartel competition. A monopolist, that for years dominated an industry, in contrast, has less incentive to trim costs. Even if the cartel's average cost were higher, the defense assumes that this difference in cost savings exceeds the difference, if any, in the deadweight losses. A monopolist, as discussed *supra*, could extract a higher price than a cartel.

60. Leslie, *supra* note 53 (explaining and giving empirical examples of these costly cartel enforcement methods).

61. Ideally, the profit-maximizing monopolist or cartel would (1) graph its product's or service's demand curve and calculate the profit-maximizing price in year one; (2) assess the time period for which it could extract such rents, project economic conditions for each year, including the costs of significant inputs and likelihood of entry (and its impact), and calculate the rents for each year; (3) calculate legal repercussions, such as the probability of antitrust enforcement, the magnitude of likely damages, and the opportunity costs of foregone actions; and (4) estimate the discounted net present value of these future rents with both external (such as the inflation rate and entry) and internal (probability of obtaining such rents in each year) factors.

62. Optimal deterrence is achieved under neoclassical economic theory when the total penalty (which includes civil damages and criminal penalties) levied against a cartel equals the violation's expected net harm to others (plus enforcement costs) divided by the probability of detection and proof

ment prosecution than criminally prosecuted cartels.⁶³ Indeed, under the Bush Administration's enforcement hierarchy, it made more sense for the dominant cartel member to acquire, rather than collude with, its competitors.⁶⁴

Besides incurring costs, monopolies and cartels may impose wasteful costs on third parties. Unlike incurred costs, these social costs are independent of, and could exceed, the monopoly rents' discounted net present value. For example, blowing up the competitor's plant imposes millions of dollars in damage, but costs the culprit only several days in preparations and a few hundred dollars for the explosives.⁶⁵ Whether a cartel or monopolist imposes greater costs than those already discussed is unclear as an empirical or theoretical matter.⁶⁶ But limited analysis of third-party costs misses the fundamental point that the social costs under either cartels or monopolies can be lethal to competition; the degree of their toxicity is immaterial.

C. *Dynamic Innovation Concerns of a Monopolist*

The *Trinko* Court defended the short-run allocative efficiency losses from monopolists with the belief that monopoly rents attract business acumen and the risk taking that produces innovation and economic growth.⁶⁷ The Court assumed that companies enter, innovate, and compete with the expectation of monopoly rents.⁶⁸

of the violation. For example, if the net harm (plus enforcement costs) is \$1,000 and the probability of detection is 50%, the optimal fine is \$2,000. Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 46 (1996) (discussing more complex variations of this formula, including an individual's taste (or distaste) for crime, moral values, proclivity for violence, and preference for risk); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656, 666–68 (1983). For a discussion on optimal deterrence theory's shortcomings, see Stucke, *supra* note 32, at 475–88.

63. See *supra* text accompanying notes 3–5.

64. The U.S. merger law, of course, was amended to prevent the dominant firm from increasing its market power.

65. In a price-fixing cartel in the 1920s Chicago garment industry, the cartel punished firms that cheated by an explosion paid for by the cartel administrator. Leslie, *supra* note 53, at 616.

66. A cartel has more members to inflict damage, but a ceiling exists on the social costs any monopolist or cartel member can impose (e.g., it can blow up a competitor's plant only once). Moreover, another risk for cartels is detection. Even if the cartel's actions are legal, if committed publicly, this concerted action may rouse suspicion of the cartel's existence and subject the cartel to criminal liability. To avoid detection, conspirators devise "sophisticated regimes" to operate their cartels and go to great lengths to hide their cartel's existence. ORG. FOR ECON. CO-OPERATION & DEV., *HARD-CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 RECOMMENDATION 15* (2005), <http://www.oecd.org/dataoecd/30/2/36600303.pdf>; see also COMPETITION COMM., DIRECTORATE FOR FIN., FISCAL & ENTER. AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV., *REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 8* (2002), <http://www.oecd.org/dataoecd/16/20/2081831.pdf> (citing as examples of cartel members' efforts to keep their activities secret, burning bid files in bonfires and hiding computer files in eaves of one employee's grandmother's house).

67. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

68. *Id.*

Policy-makers generally recognize Schumpeter's "creative destruction" thesis that capitalism "is by nature a form or method of economic change and not only never is but never can be stationary."⁶⁹ Many accept that competition from new commodities, technologies, sources of supply, and organizational structures can be more important than static price competition.⁷⁰ The difficulty lies in predicting where and when this innovation will emerge and what motivates this innovation.

As Douglass North noted in his Nobel Prize speech, "Neoclassical theory is simply an inappropriate tool to analyze and prescribe policies that will induce development."⁷¹ Neoclassical economic theory assumes static equilibrium systems. When subject to an exogenous force (entry, government regulation, new technology, energy crisis), this equilibrium is disrupted temporarily. But neoclassical theory does not explain how markets develop.⁷²

Recently, evolutionary economic theory (building on Schumpeter's disequilibrium dynamics) has identified the shortcomings of competition under neoclassical theory in explaining industries where technological change drives economic growth.⁷³ Many markets may be complex adaptive systems. Firms, as individuals, make mistakes, readjust, and undertake new strategies. The competitive process "is inherently a process of trial and error with no stable end-state considered by the participants in the process."⁷⁴ Although the economics treatises recognize that monopolies' impact on innovation is likely to far outweigh any deadweight losses or static pricing effects,⁷⁵ economic theory cannot predict in such com-

69. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 82–83 (3d ed. 1950).

70. Several economists testifying before the Antitrust Modernization Commission expressed this view. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 45 n.59 (2007) [hereinafter AMC REPORT] (Richard J. Gilbert: "[D]ynamic competition to develop new products and to improve existing products [in innovation-driven industries] can have much greater impacts on consumer welfare than static price competition."; M. Howard Morse: "Everyone should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time."; Carl Shapiro: "[A]t least over the medium to long term, the lion's share of consumer benefits associated with competition in our most dynamic industries results from innovation."); see also Porter, *Antitrust*, *supra* note 27, at 157–58 (questioning whether antitrust should focus primarily on static price competition, when other aspects of competition, such as innovation or productivity, may play a more important role).

71. North, *supra* note 26, at 359.

72. For a discussion of the role of legal and informal institutions in furthering the objectives of competition policy, see Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951 (2008).

73. *Id.* at 980.

74. François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 851 (2004).

75. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 584 (13th ed. 1989); see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911) ("[T]he evils which led to the public outcry against monopolies and to the final denial of the power to make them [include] . . . [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.").

plex adaptive systems the long-term impact of monopolies on innovation, productivity, or society.⁷⁶

In contrast to *Trinko*'s belief that the opportunity for monopoly rents induces risk taking and innovation, an evolutionary outlook assumes that companies take risks and innovate in order to persevere.⁷⁷ Even a cursory review of the Yellow Pages reveals many industries, none of which are natural monopolies (or whose market structure is susceptible to monopolization). Nonetheless, without the prospect of monopoly rents, companies enter these markets and innovate.⁷⁸ Although participants in some industries, such as pharmaceuticals, incur significant R&D expenses with the expectation of patent protection for their innovation and any ensuing monopoly rents,⁷⁹ the empirical evidence does not support any general conclusion that monopolies (or the prospect of monopoly rents) are necessary for innovation.

Schumpeter, like the *Trinko* Court, hypothesized that firms with market power, not just the prospect of market power, were the driving force in the process of innovation—"a view that empirical studies have somewhat called into question."⁸⁰ The OECD and others found "little empirical support" for Schumpeter's hypothesis that large firm size or high concentration is strongly associated with a higher level of innovative

76. The recent economic literature recognizes that "[c]ompetition has pervasive and long-lasting effects on economic performance by affecting economic actors' incentive structure by encouraging their innovative activities, and selecting more efficient [activities]." Sanghoon Ahn, *Competition, Innovation and Productivity Growth: A Review of Theory & Evidence* 5 (Econ. Dep't, Org. for Econ. Co-Operation & Dev., Working Paper No. 317, 2002), available at [http://www.oalis.org/oalis/2002doc.nsf/LinkTo/NT0000BF2/\\$FILE/JT00119556.pdf](http://www.oalis.org/oalis/2002doc.nsf/LinkTo/NT0000BF2/$FILE/JT00119556.pdf).

77. Michael A. Carrier, *Of Trinko, Tea Leaves, and Intellectual Property*, 31 J. CORP. L. 357, 364 (2006) (noting that the Court's assertion that the quest for monopoly power provides the motivation driving firms today is not empirically supported). In a recent Business Week/Boston Consulting Group survey, 2,500 senior executives from fifty-eight countries and all major industries identified their company's risk-averse culture as the major obstacle to innovation. These executives cited customer satisfaction as the top metric to measure innovation success followed by revenue growth. Fewer than 40% cited higher margins, which the *Trinko* Court surmised as the inducement for innovation. Jena McGregor, *Innovation Insights: Key Findings of Our Annual Survey of Senior Executives*, BUS. WK., May 3, 2007, http://images.businessweek.com/ss/07/05/0503_inno_ranking/index_01.htm. As the then head of the Antitrust Division stated, "[I]n a world driven by rapid changes in technology, empirical evidence indicates that the firms that prosper are far more likely to be those that face fierce rivalry in their home markets than the sheltered monopolists. In a very real sense, the fear of being left behind is more likely to spur innovation than the security bred of stable market power." Anne K. Bingham, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Competition & Innovation: Bedrock of the American Economy* (Sept. 19, 1996), <http://www.usdoj.gov/atr/public/speeches/0877.pdf>.

78. Approximately 465,000 new businesses were created each month in 2006. ROBERT W. FAIRLIE, KAUFFMAN INDEX OF ENTREPRENEURIAL ACTIVITY 1996-2006, at 1 (2007), available at <http://ssrn.com/abstract=988167>.

79. Even absent patent protection, companies innovate. By being the first mover, the company can maintain its market position through reputation effects, slow information diffusion, and regulatory or other entry barriers. Michele Boldrin & David K. Levine, *The Economics of Ideas and Intellectual Property*, 102 PROC. NAT'L ACADEM. SCI. U.S. 1252, 1254 (2005).

80. John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1, 16 (1995).

activity.⁸¹ Modern economic studies, in seeking to correct the flaws of earlier studies, find that a “strengthening of competition policy is likely to have a positive overall effect on innovation,” and contradict the sixty-year-old Schumpeter hypothesis that *Trinko* adopts.⁸²

Ultimately, the dynamics of competition are more complex than *Trinko*’s simple premise that monopoly power induces innovation. In assessing the current empirical analysis, Professor Gilbert concluded that this complexity stems from the many factors that influence the incentives to innovate (which “depend on the nature of intellectual property protection, characteristics of the invention, the extent of competition before and after innovation, and the dynamics of R&D”) and these factors’ of-

81. Ahn, *supra* note 76, at 3, 5, 14–15 (collecting studies); *see also* Baker, *supra* note 18, at 583–86. Other recent surveys of the economic literature reach the same conclusion. *See, e.g.*, AMC REPORT, *supra* note 70, at 76 n.85; RICHARD A. POSNER, ANTITRUST LAW 20 (2d ed. 2001) (discussing empirical studies indicating it is unclear “whether monopoly retards or advances innovation”); SECTION OF ANTITRUST LAW, AM. BAR ASS’N, COMMENTS OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION IN RESPONSE TO THE ANTITRUST MODERNIZATION COMMISSION’S REQUEST FOR PUBLIC COMMENT REGARDING EXCLUSIONARY CONDUCT 8 (2006), <http://www.abanet.org/antitrust/at-comments/2006/03-06/Comments-AMC-ExclusionaryConductFinal.pdf> (“Some disagreement exists among experts as to whether the ability to charge monopoly profits indeed induces risk taking, innovation and economic growth.”); Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495, 512 (1999) (“As a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general.”); Wesley M. Cohen & Steven Klepper, *A Reprise of Size and R & D*, 106 ECON. J. 925, 925–26 (1996) (observing that “policyfakers continue to harbour beliefs about the advantages of large firm size in R & D competition despite the apparent absence of empirical evidence that would support these beliefs” and suggesting that some advantages may exist to large firms in conducting R&D); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 43 (2004) (“[U]nless firms are hopelessly disconnected from the real world, the pipe dream of ‘monopoly’ can hardly be the major incentive that drives most firms to innovate. Profits, not monopoly profits, are the principal spur to innovation that attracts ‘business acumen.’”) (footnote omitted); Michael L. Katz & Howard A. Shelanski, *Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?*, 5 INNOVATION POL’Y & ECON. 109, 136 (2005) (“The evidence overall thus suggests that, to the extent firm size has an effect on innovation, its magnitude and direction depend on associated industry-level variables and are susceptible to few general presumptions. The results suggest that especially large firms like those created by some recent mergers will have no special tendency—nor any predictable reluctance—to engage in innovation, and that small, fringe firms may play important roles over time in technologically advancing markets.”); Michael L. Katz & Howard A. Shelanski, *Mergers & Innovation*, 74 ANTITRUST L.J. 1, 26 (2007). Booz Allen Hamilton’s recent survey found “no statistically significant connection between the amount of money a company spent on innovation and its financial performance.” BARRY JARUZELSKI & KEVIN DEHOFF, THE CUSTOMER CONNECTION: THE GLOBAL INNOVATION 1000, at 3 (2007), <http://www.strategy-business.com/media/file/resilience-12-10-07.pdf>.

82. Baker, *supra* note 18, at 585 (quoting Peter Howitt, *Endogenous Growth, Productivity and Economic Policy: A Progress Report*, 8 INT’L PRODUCTIVITY MONITOR 3, 10 (2004)). Professor Baker states that these cross-industry studies still do not control satisfactorily for differences in the extent and rate of growth of technological opportunity and in the conditions of appropriability. Given the inherent issues of cross-industries studies, an alternative strategy is to study the performance of the same industry across countries (and market conditions). These empirical studies find that greater competition among firms within a nation leads to greater productivity. *Id.* at 585–86. Other empirical studies find greater productive efficiency and innovation from greater competition arising from changes in import penetration or other industry shocks. Richard J. Gilbert, *Competition and Innovation* 18–19 (Competition Policy Ctr., Working Paper No. CPC07-069, 2007), available at <http://repositories.cdlib.org/iber/cpc/CPC07-069>.

ten opposing effects.⁸³ Some monopolies continually innovate to maintain their competitive edge or better price discriminate. Some monopolists, such as AT&T and IBM, innovate, but dictate for many years the progress of innovation.⁸⁴ Some monopolists retard innovation.⁸⁵ Consequently, the *Trinko* Court's premise that monopoly rents are necessary to attract the risk taking that produces innovation and economic growth is empirically suspect.⁸⁶

Even if *Trinko*'s premise were true, no one contends that the monopolist's reward be unlimited to spur innovation. The Court does not address the optimal level of monopoly rents to attract socially beneficial innovation. Innovation is not an end itself, but the means of promoting societal welfare; it inherently involves trade-offs.⁸⁷ With intellectual property, the reward to its owner is a secondary consideration to the general benefits that the public derives from the innovation.⁸⁸ For example, if greater medical innovation could arise from cloning individuals and harvesting their organs, would this be justified?⁸⁹

83. Gilbert, *supra* note 82, at 9; see also Clayton M. Christensen et al., *Innovation Killers: How Financial Tools Destroy Your Capacity to Do New Things*, HARV. BUS. REV., Jan. 2008, at 98, 100–01 (noting difficulties to forecast stream of cash from investment in innovation and financial performance absent investment).

84. Harvey D. Shapiro, *Think, Sell, Grow: I.B.M. and All the Dwarfs*, N.Y. TIMES, July 29, 1973, at SM11. In the DOJ's monopoly action, AT&T argued that its integrated structure enabled the "Bell System to provide the public with the finest telecommunications system in the world at rates that compare very favorably with those available in any other country." F.M. Scherer, *Technological Innovation and Monopolization* 21 (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. RWP07-043, 2007), available at <http://ssrn.com/abstract=1019023> (quoting Defendants' First Statement of Contentions and Proof, Civil Action No. 74-1698, at 44–45, 436–37 (Jan. 1979)). Some decried the AT&T consent decree fearing poorer quality telephone service and less technological innovation as the industry became more fragmented. SAMUELSON & NORDHAUS, *supra* note 75, at 620 (noting, but not endorsing, this objection).

85. See, e.g., Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY 609, 609–25 (Richard R. Nelson ed., 1962); Wendell Berge, *Can We End Monopoly*, N.Y. TIMES, Sept. 26, 1943, at SM12–13 ("[D]evelopment of television, improvements in electrical refrigeration, streamlining trains and countless other progressive steps in manufacturing techniques have been delayed to enable dominant corporations to use up old supplies and shift to newer and better methods without hazard of financial gamble.").

86. Although the empirical literature supports the presumption in certain industries that competition promotes innovation, it does not support a "strong conclusion that competition is uniformly a stimulus to innovation." Gilbert, *supra* note 82, at 24. For example, some mergers may generate greater incentives to increase output, and thus to invest in process R&D to lower costs. *Id.* at 21. Thus, depending on the particular industry and market participants, an efficiencies defense based in part on innovation should sanction some mergers.

87. In enacting the copyright law, Congress considered "how much the monopoly granted [would] be detrimental to the public . . . [as] the granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly." H.R. REP. NO. 60-2222, at 7 (1909); see also *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) ("The balance between the interest in motivating innovation and enlightenment by rewarding invention with patent protection on the one hand, and the interest in avoiding monopolies that unnecessarily stifle competition on the other, has been a feature of the federal patent laws since their inception.").

88. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

89. For a haunting fictional development of this theme, see KAZUO ISHIGURO, *NEVER LET ME GO* (2005).

Additionally, *Trinko* ignores the costs of monopolies to future innovation. If innovation in an industry is iterative, protecting today's monopolies may raise the input costs for developers seeking to refine that technology.⁹⁰ Moreover, monopolies do not always wane after a "short period."⁹¹ Neoclassical economic theory posits that monopolies are short-term phenomena: the innovator's supra-competitive profits serve as chum for imitators, who "first reduce and then annihilate [the monopolist's] profit," which reverts to the competitive mean.⁹² Innovation should attract imitation, which leads to commoditization. One shortcoming of this often-made argument is its empirical deficiencies.⁹³ Neoclassical economic theory assumes entry occurs when profitable; instead, entry occurs at times when it should not,⁹⁴ and does not occur when it should.⁹⁵ Persistent market power may reflect (a) structural or regulatory impediments, (b) anticompetitive restraints, (c) continual innovation by the innovator, or (d) some market anomaly.⁹⁶ In the United States' monopoly case, for example, ten years ago, Microsoft's economic expert Richard L. Schmalensee depicted Microsoft as striving to hold its fragile lock on the market, even suggesting that the operating system used in the Palm Pilot personal organizer posed a serious potential threat to Microsoft's Windows: "Is it a significant competitor today? No. But it is a germ of a potential competitor."⁹⁷

Contrary to the assumption that imitators pursue the monopolist, monopolists at times pursue the innovators. One complaint is that with its operating systems monopoly (enforced by network effects), Microsoft can ward off potential threats by adding (some assert tying) an imitation product. Consumers or OEMs are unlikely to incur the time or cost to add a second media player, Internet browser, or spreadsheet or word processing program, because Microsoft can tie an imitation version to its operating system.⁹⁸ Once Microsoft adds its version, as the European Commission found for the media players, programmers will develop solutions for the Microsoft platform because it will reach automatically 90% of client PC users, and thus save the content providers the costs of supporting different technology platforms.⁹⁹ Under this positive feed-

90. Boldrin & Levine, *supra* note 79, at 1255.

91. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

92. JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* 89 (1934).

93. Indeed, some economists argued in the late 1800s that cartels would decay on their own or by the active influence of the potential competitor. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 240 (1956).

94. Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 489-92 (2002).

95. Stucke, *supra* note 52, at 563-72.

96. Peter W. Roberts, *Innovation and Firm-Level Persistent Profitability: A Schumpeterian Framework*, 22 MANAGERIAL & DECISION ECON. 239, 244-48 (2001).

97. Joel Brinkley & Steve Lohr, *Dueling M.I.T. Economists Testify at Microsoft Trial: Government Ends Case, and Defense Begins*, N.Y. TIMES, Jan. 14, 1999, at C2.

98. *Case T-201/04, Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601.

99. *Id.*

back loop, more users of a given software platform lead to a greater incentive to develop products compatible with that platform, which reinforces that platform's popularity with end-users (and the software company's market power).¹⁰⁰ Under *Trinko's* logic, Microsoft denies the innovator any monopoly rents and chills the incentives for potential innovators to challenge the entrenched monopolist. Thus, as the EC argued and Court of First Instance found, such bundling "discourages investment in all the technologies in which Microsoft could conceivably take an interest in the future."¹⁰¹

In assuming that these potential competitors will germinate to deprive the exercise of market power and veer the market toward its natural competitive equilibrium, the *Trinko* Court is also silent on path dependence arising from network effects. Disruptive innovations occur "every few decades, so that dominant positions create substantial costs to productivity growth and to society" in the interim.¹⁰² But what about other costs? Private and government agents' prior choices affect the set

100. *Id.* The district court in *Microsoft* made a similar finding:

Consumer demand for Windows enjoys positive network effects. A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it. The fact that there is a multitude of people using Windows makes the product more attractive to consumers. The large installed base attracts corporate customers who want to use an operating system that new employees are already likely to know how to use, and it attracts academic consumers who want to use software that will allow them to share files easily with colleagues at other institutions. The main reason that demand for Windows experiences positive network effects, however, is that the size of Windows' installed base impels ISVs [independent software vendors] to write applications first and foremost to Windows, thereby ensuring a large body of applications from which consumers can choose. The large body of applications thus reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetuating ISV incentives to write applications principally for Windows. This self-reinforcing cycle is often referred to as a "positive feedback loop."

....

What for Microsoft is a positive feedback loop is for would-be competitors a vicious cycle. For just as Microsoft's large market share creates incentives for ISVs to develop applications first and foremost for Windows, the small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows. To provide a viable substitute for Windows, another PC operating system would need a large and varied enough base of compatible applications to reassure consumers that their interests in variety, choice, and currency would be met to more-or-less the same extent as if they chose Windows. Even if the contender attracted several thousand compatible applications, it would still look like a gamble from the consumer's perspective next to Windows, which supports over 70,000 applications. The amount it would cost an operating system vendor to create that many applications is prohibitively large. Therefore, in order to ensure the availability of a set of applications comparable to that available for Windows, a potential rival would need to induce a very large number of ISVs to write to its operating system.

United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999). This positive feedback loop occurred with IBM. By 1973, IBM produced an estimated 70% of the world's computers. Computer training and programming were geared toward IBM, which "only reinforced the inclinations of many data processing customers to buy I.B.M. equipment." Shapiro, *supra* note 84, at SM11.

101. *Microsoft*, 2007 E.C.R. II-3601. Earlier monopolization cases, like the 1969-1982 case against IBM, did not come to fruition, and the targets no longer monopolize their transformed industries. But antitrust dogged IBM since the 1930s (*Int'l Bus. Machs. Corp. v. United States*, 298 U.S. 131 (1936)), and the computer software industry flourished after IBM, in response to the Government's antitrust investigation, stopped bundling its software with its hardware. *See infra* note 107.

102. Porter, *supra* note 27, at 182.

of future choices.¹⁰³ Some complex adaptive industries, like evolutionary processes generally, may be characterized by a significant and persistent degree of random events.¹⁰⁴ “Rather than being additive to a deterministic equilibrium, small random events in evolutionary processes may accumulate into larger factors that may change the nature of the system and its history.”¹⁰⁵ Under an evolutionary economic process “chance plays a significant role,” and “small, random (and therefore unpredictable) events may have severe long-run consequences.”¹⁰⁶ History does matter, and market power, if left unchecked, may have greater implications beyond that immediate industry and timeframe. The long-run consequences of monopolistic practices are unknown. To what extent do the former AT&T and IBM monopolies still affect us today? For example, to what extent did the DOJ’s antitrust investigation of IBM facilitate Microsoft’s growth,¹⁰⁷ and had Microsoft not bundled its word processing

103. Moreau, *supra* note 74, at 852. One study of the evolutionary design changes to a software program found strong support that software developments bear the consequences of earlier design decisions, which can be long-lasting and potentially irreversible. Alan MacCormack et al., *The Impact of Component Modularity on Design Evolution: Evidence from the Software Industry 27–28* (Tech. & Operations Mgmt. Unit, Harvard Bus. Sch. Research Paper No. 08-038, 2007), available at <http://ssrn.com/abstract=1071720>.

104. Richard R. Nelson & Sidney G. Winter, *Evolutionary Theorizing in Economics*, 16 J. ECON. PERSP. 23, 24 (2002).

105. BART VERSPAGEN, *THE USE OF MODELING TOOLS FOR POLICY IN EVOLUTIONARY ENVIRONMENTS 4* (Eindhoven Centre for Innovation Studies ed. 2006); North, *supra* note 26, at 361 (“[E]conomic change is a ubiquitous, ongoing incremental process that is a consequence of the choices individual actors and entrepreneurs of organizations are making every day.”). In Stucke, *supra* note 72, at 980–82, I discuss three adjacent Connecticut rivers (Housatonic, Shepaug, and Naugatuck). Over time, the persistence of random events (a failed company, a leak in a dam, and the growth in demand for brass) led to different outcomes among the three rivers. Today, the Housatonic River is heavily wooded, with trout anglers; the Naugatuck is heavily industrialized. If the history tape were rewound and events again unfolded (the dam did not leak, the brass industry did not take hold in Connecticut), the outcomes among the three rivers might differ. See also GEORGE BLACK, *THE TROUT POOL PARADOX: THE AMERICAN LIVES OF THREE RIVERS* (2004).

106. VERSPAGEN, *supra* note 105, at 6.

107. In the late 1960s, IBM controlled about 70% of the computer market. After the DOJ challenged IBM’s practices, particularly its “bundling” hardware and software, IBM changed course. This led to the development of the computer software industry. “Precipitated by a massive antitrust complaint filed against IBM by the Justice Department in January 1969, the company reexamined its practices and decided to stop requiring customers to buy software, services, and hardware as one bundle in June of the same year. This pricing change opened up software markets to independent companies.” R. Lougee-Heimer, *The Common Optimization Interface for Operations Research: Promoting Open-Source Software in the Operations Research Community*, 47 IBM J. RES. & DEV. 57, 59 (2003) (citing THOMAS J. WATSON, JR., *FATHER, SON & CO.: MY LIFE AT IBM & BEYOND* (1990)). A decade later, when preparing to launch its personal computers, the still dominant IBM approached the start-up Microsoft about creating a version of a BASIC computer program. Microsoft suggested that IBM talk to Digital Research, whose CP/M operating system had become the standard for computer hobbyists. Digital Research’s president apparently disliked the arrogant IBM from his university days and was late in meeting the IBM executives. After the negotiations stalled, IBM returned to Microsoft to create an operating system for its personal computer. When introducing its PC, IBM sold the Microsoft operating system for a much lower price than the CP/M-86 system. See ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH 326–27* (2006); Classic ScobleShow, <http://www.podtech.net/scobleshows/technology/1593/> (Aug. 8, 2007, 09:34 EST). Two decades later, arising out of the DOJ’s monopoly case against Microsoft, IBM settled its own antitrust claims against Microsoft for \$775 million. Press Release, Microsoft and IBM Resolve Antitrust Issues (July 1, 2005), <http://www-03.ibm.com/press/us/en/pressrelease/7767.wss>.

program with its operating system, how would the experience of typing this Article differ?

Finally, the Court does not address the attendant economic benefits of variety in complex adaptive systems. One empirical study, for example, found a positive correlation between industry variety and performance.¹⁰⁸ In considering why the entire industry benefits when firms pursue various competitive strategies, the study's authors posit that with less variety there will be fewer opportunities for firms to learn of the changing conditions and demands, and appropriate responses thereto.¹⁰⁹ In this complex adaptive system, such competition might have informational benefits, as firms learn from their rivals' mistakes and mimic and improve upon their rivals' successes. Increased localized competition may lead firms to differentiate, develop new products, and experiment with new processes, technologies, or designs. It may also lead to greater variety and interest in the competitive category, as well as further experimentation in production techniques and strategies that yield more innovation and productive efficiencies. Competitors mutually gain from localized competition by improving their labor pool's quality and strengthening their supplier network.¹¹⁰

Consequently, *Trinko's* hierarchy cannot be defended on its assumption that promoting monopolies or tolerating their anticompetitive abuses somehow spurs innovation.

D. Monopoly Represents the Reward in Free-Market System

Section 2 jurisprudence recognizes that some monopolists achieve their status by virtue of their "superior skill, foresight and industry"; so it would be fundamentally unfair to the successful competitor, "having been urged to compete," to be "turned upon when he wins."¹¹¹ Judge Learned Hand's "penalty" applies to borderline monopolists that would cease aggressively competing if the penalty for success (monopoly power) exceeded the rewards. Consumers, in the long run, would be deprived of better services and products, lower prices, and more innovation. "The antitrust laws would thus compel the very sloth they were intended to prevent."¹¹² This narrow defense applies to a subset of natural monopolies that achieved their monopoly faultlessly. Thus, to distinguish "willful acquisition or maintenance of [monopolistic] power" from "growth or development as a consequence of a superior product, busi-

108. Grant Miles et al., *Industry Variety & Performance*, 14 STRATEGIC MGMT. J. 163, 168–72 (1993). The study also found that such variety decreased as the industry matured and declined.

109. *Id.* at 174.

110. Miles et al., *supra* note 108, at 164 (collecting studies); Porter, *supra* note 27, at 162–65.

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

112. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979).

ness acumen, or historic accident,” section 2 requires monopolistic conduct.¹¹³

The *Trinko* Court cites, but never reconciles, this narrow exception with its dicta.¹¹⁴ The Court instead advances its flawed economic belief that monopolies uniformly foster innovation. It is to “safeguard the incentive to innovate,”¹¹⁵ the Court now argues, that makes the mere possession of monopoly power lawful. The Court thereby assumes that many monopolies achieve their status because of innovation (e.g., by a superior product, business acumen, or historic accident). The empirical basis for its belief, however, is missing.

Judge Hand’s first element requires a natural monopoly: the relevant market cannot sustain more than one dominant firm because the incumbent firm has an overwhelming cost advantage over its rivals and can supply all or almost all the industry output more efficiently than multiple firms.¹¹⁶ No empirical evidence, however, supports any general contention that all, or nearly all, monopolies have such large economies of scale that it is efficient for only them to supply the market.¹¹⁷ In *Trinko*, it is true that the rationale for originally allowing local phone service monopolies “was the belief that having more than one local provider would lead to unwarranted duplication in the physical connecting wires through which local calls are transmitted.”¹¹⁸ Nevertheless, the 1996 Act recognized that the local telephone markets can support more than one competitor, and sought to impose certain duties on the previously protected monopolist to facilitate market entry.¹¹⁹

113. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)).

114. *See id.* at 407.

115. *Id.*

116. *Aluminum Co.*, 148 F.2d at 430.

117. Empirical analyses of two industries commonly accepted as natural monopolies question the assumption. *See* William M. Emmons III & Robin A. Prager, *The Effects of Market Structure and Ownership on Prices and Service Offerings in the U.S. Cable Television Industry*, 28 RAND J. ECON. 732, 747 (1997) (finding that opening markets to competition effectively constrained cable prices without any measurable quality loss); Nakil Sung & Michael Gort, *Economies of Scale and Natural Monopoly in the U.S. Local Telephone Industry*, 82 REV. ECON. & STAT. 694, 697 (2000) (finding “negligible economies of scale . . . with firm size,” leading to the conclusion that “monopoly is not necessary for efficiency”). Some question the existence of monopolies attained by efficiency alone. *See, e.g.*, LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* 114 (Osmond K. Fraenkel ed., 1934) (“No business has been so superior to its competitors in the processes of manufacture or of distribution as to enable it to control the market solely by reason of its superiority.”).

118. *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 294 F.3d 307, 312 (2d Cir. 2002).

119. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 401 (2004). Before 1982, AT&T monopolized the markets for long-distance phone service, local phone service, and telephone equipment. The United States challenged AT&T’s monopolistic practices, and in 1982, AT&T settled by agreeing to split from its local subsidiaries to encourage competition in the long-distance and equipment markets. AT&T’s former subsidiaries kept their local telephone service monopolies; the states regulated these local monopolies and prohibited them from entering the long-distance markets. “[N]ational policy [as] to the desirability of allowing competition in the local phone service markets . . . changed dramatically.” *Trinko*, 294 F.3d at 312. Under the 1996 Act, state regulators can no longer prohibit entry into their local phone service markets. *See* 47 U.S.C. § 253(a) (2006).

Judge Hand's second element requires that the means of attaining monopoly arise from historic accident or superior management, products, or services. Many monopolies are attained and maintained through acquisitions,¹²⁰ anticompetitive use of intellectual property rights,¹²¹ anticompetitive conduct,¹²² or government action.¹²³ Verizon's monopoly arose from the landmark antitrust action against AT&T and was preserved by regulatory entry barriers.¹²⁴

Moreover, contrary to the *Trinko* Court's concern, section 2 permits the unwitting competitor to enjoy its natural monopoly.¹²⁵ After crossing the monopoly threshold, companies in the United States are not pena-

120. Monopolies are precisely what section 7 of the Clayton Act enjoins. If the company attains its monopoly through acquisitions devoid of any significant productive efficiencies, this acquisition represents a failure in enforcing section 7. *See, e.g.,* *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (defendant's monopoly perfected through its acquisition of controlling interests of its significant competitors); *Lorain Journal Co. v. United States*, 342 U.S. 143, 146 (1951) (same); *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 391-94 (1912) (defendant railroad association was organized under an agreement between Jay Gould and defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies, with a view to combining and operating them as a unitary system). Classic examples are when the company acquires, and closes, its rivals' plants (*United States v. Am. Tobacco Co.*, 221 U.S. 106, 165-66 (1911)), or acquires the supply of a key manufacturing input, such as mineral rights. Moreover, horizontal mergers, as some argue, require no skill, foresight, or industry, only financial resources. *See* Porter, *supra* note 27, at 174. Savvy management, at times, recognize strategic mergers that create significant productive efficiencies. In lowering its product's average cost, the more efficient merged entity outperforms its rivals, who eventually exit. But management, at other times, overstates the likely efficiencies, so the percentage of mergers in various industries that produce such significant efficiencies is unclear.

121. General Electric, for example, maintained its dominance in light bulbs by acquiring key patents and cross licensing with European rivals to allocate global markets. *See* Scherer, *supra* note 84, at 10. As the district court found, GE

developed a tremendous patent framework and sought to stretch the monopoly acquired by patents far beyond the intentment of those grants. It constructed a great network of agreements and licenses, national and international in scope, which had the effect of locking the door of the United States to any challenge to its supremacy in the incandescent electric lamp industry arising from business enterprise indigenous to this country or put forth by foreign manufacturers. Its domestic licenses gave fiat to a few licensees whose growth was carefully limited to fixed percentages of its own production and expansion so that over the years its share of the business was not materially diminished and its dominant proportion was never exposed to any hazard in that direction.

United States v. Gen. Elec. Co., 82 F. Supp. 753, 905 (D.N.J. 1949).

122. If the monopoly results from anticompetitive actions, this too represents a failure in antitrust enforcement. Indeed, a monopoly results from a *per se* illegal market allocation scheme, whereby each company monopolizes its allocated territory. *See, e.g., Grinnell*, 384 U.S. at 568-70; *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 422-32 (2d Cir. 1945).

123. If a monopoly results from mandatory standards, high tariffs, other trade barriers (a concern during the Sherman Act's enactment), or other government intervention (such as granting the company an exclusive franchise or license), this reflects little on the company's skill, and more on its political might. For example, high tariffs aided du Pont's dominance of the American cellophane market. Before 1930, imports were about 20% of domestic consumption, but there were serious obstacles, including "poorer quality," to successful sale of imported cellophane. In 1929, it was judicially determined, in a suit instituted by du Pont, that cellophane had been given a wrong tariff classification and that the applicable duty was 60%, not 25%, *ad valorem*; thereafter imports were negligible. Brief for the United States, *United States v. E.I. du Pont de Nemours & Co.*, 1955 WL 72626, at *16 (Aug. 5, 1955); *see also* Berge, *supra* note 85, at SM12 (writing that tariff barriers "culminating in the Hawley-Smoot act, built the final wall behind which American monopolies could dictate their own terms of competition").

124. *Trinko*, 294 F.3d at 312.

125. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

lized for being a monopoly. Unlike sex offenders, monopolists need not report to government officials. The government does not seize their assets. Even if the government vigorously enforced section 2 of the Sherman Act, monopolists could impose on society many anticompetitive actions. Monopolies in the United States, unlike those in the European Union, can gouge their customers with supra-competitive prices,¹²⁶ poor quality, and little, if any, innovation. Under the most ardent antitrust regime, monopolists can retreat to a quiet life.¹²⁷ But when it engages in additional anticompetitive conduct to maintain its monopoly, it then violates the Sherman Act.¹²⁸

E. Monopolies' Political, Social, and Ethical Implications

The *Trinko* Court assumes that monopolies are good based on its flawed concept of dynamic efficiency. But the Court's view of monopolies (and its interpretation of the antitrust laws generally over the past thirty years) is economic: humans producing and consuming, getting and spending, laying "waste our powers: Little we see in Nature that is ours; We have given our hearts away, a sordid boon!"¹²⁹ The Court ignores its earlier decisions addressing the Sherman Act's concerns over the political, social, and ethical implications of concentrated wealth and power.¹³⁰ These legislative concerns undermine the Court's flawed economic belief that monopolies are an important element of a free market.

126. The European Court of Justice, for example, found that a firm "abuses" its dominant position where it has an administrative monopoly and charges for its provided services fees disproportionate to their economic value. Case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne*, 1994 E.C.R. I-5077, I-5106. Although still applicable today, it is not widely enforced.

127. "The best of all monopoly profits is a quiet life! . . . The quiet life which a monopoly allows will therefore probably result in a slowing down of the rate of progress." R.H. Coase, *Some Notes on Monopoly Price*, 5 REV. ECON. STUD. 17, 30 (1937) (quoting John Richard Hicks).

128. By analogy, each oligopolist unilaterally can determine and charge supra-competitive prices. These oligopolists can declare, as the monopolist, that they earned that right to charge supra-competitive prices owing to their products' superiority over the vanquished competitors. But when oligopolists take additional anticompetitive steps (such as exchanging price information), no one questions the antitrust enforcers' intervening. Likewise, the monopolist may engage in socially beneficial behavior (such as product innovation) and certain detrimental behavior (such as higher prices, output reduction, and reduced innovation). But society need not tolerate other welfare-reducing actions for the sake of some reward, especially when such carrots are unavailable for oligopolies.

129. WILLIAM WORDSWORTH, *THE POETICAL WORKS OF WILLIAM WORDSWORTH* 197 (London, Routledge 1858).

130. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 569 n.5 (1972) (quoting Senator Ke-fauver on the "evil" of increasing concentration, "with more and more corporations purchasing out their competitors" such that when "people lose their economic freedom, they lose their political freedom"); cases cited *supra* note 3. One could respond that the Sherman Act's term "monopolize" involves economic phenomena, economic theory's objective is efficiency, so using the antitrust laws for goals unrelated or antithetical to efficiency is unjustifiable. But this assumption is dubious. "A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combating collusion or monopolization in the economy at large." George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. (PAPERS & PROC.) 1, 3 (1982). Whether antitrust policy can or should have one economic goal is discussed in Stucke, *supra* note 72.

1. *Monopolies' Political Implications*

Not only may powerful domestic producers sway the government to erect protectionist measures,¹³¹ they also dampen the democratic process. A more atomistic structure of buyers and sellers decentralizes and disperses power.¹³² This distrust of monopolies is evident in three critical junctures in the United States's development.

At its onset, the colonists opposed state-granted monopolies, which the English sovereign had bestowed to varying degrees.¹³³ Other than intellectual property,¹³⁴ some colonies, and later states, sought to limit or prevent altogether the bestowment of monopolies.¹³⁵

Although monopolies were generally avoided or regulated early in U.S. history, circumstances changed by the late 1800s. The threat was not government-bestowed monopolies (although some expressed concern about import tariffs sheltering domestic trusts), but the emergence of the modern-day corporation and its offspring of monopolies and trusts.¹³⁶ U.S. corporations, "which should be the carefully restrained creatures of the law and the servants of the people, [were] fast becoming

131. PORTER, *supra* note 27, at 662. Atomistic producers, such as farmers, seek protectionist measures but must overcome the collective action costs and varying incentives (farmers favoring no or lower tariffs, as they fear retaliatory measures for their exported crops), which may make their subsidy less than the monopolist's.

132. F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 18–19 (3d ed. 1990); *see also* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

133. RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 196 (1965); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 47 (1872) (quoting Sir John Culpeper that the Kings' and Queens' patents of monopoly led to their denunciation as a "nest of wasps—a swarm of vermin which have overcrept the land"); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 226 (1956). The English common law, however, neither uniformly condemned nor condoned monopolies. William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

134. *Evans v. Eaton*, 20 U.S. (7 Wheat.) 356, 399–400 (1822) ("But for the encouragement of industry and ingenuity a proviso was introduced into the statute, that the king might still grant a monopoly 'of any manner of new manufactures,' to the first inventors, for any term not exceeding 14 years. Upon this short proviso, this apparently scanty foundation, the whole structure of the English patent law, was raised by the English government and Courts.").

135. This dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 57 (1911); *see also* *United States v. Columbia Steel Co.*, 334 U.S. 495, 526 (1948) ("The evils and dangers of monopoly and attempts to monopolize that grow out of size and efforts to eliminate others from markets, large and small, have caused Congress and the Executive to regulate commerce and trade . . .").

136. The *New York Times* compared the trusts to the oppression by England's guilds. Those sovereign-created monopolies "bear the strongest analogies to the sugar, oil, and other trusts of to-day." W.J. Ashley, *English Economic History: An Introduction to English Economic History and Theory*, N.Y. TIMES, Jan. 6, 1889, at 12. Among the trusts mentioned in the Sherman Act's legislative history were the Beef Trust, Standard Oil Trust, Steel Trust, Barbed Fence Wire Trust, Cordage Trust, Cotton-Seed Oil Trust, and Whiskey Trust. *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 319 (1897).

the people's masters."¹³⁷ If Congress did not heed this appeal, there would "soon be a trust for every production and a master to fix the price for every necessity of life."¹³⁸ One legislative theme throughout the Sherman Act is the political implications of such economic might.¹³⁹ The Sherman Act was enacted so that these vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, would not enslave the populace.¹⁴⁰ With various agrarian-political movements protesting against monopolies and trusts during the late 1800s, both the Republican and Democratic party platforms in 1888 opposed trusts, which unduly enriched the few while robbing the many of natural competition's benefits.¹⁴¹ So great were the antitrust forces that the issue of monopolies and trusts became nonparti-

137. Grover Cleveland, President of the U.S., Fourth Annual Message, (Dec. 3, 1888), *reprinted in* 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 58 (1978).

138. 21 CONG. REC. 2460 (1890). Twenty-one years after the Sherman Act's enactment, the Court wrote:

[The debates] conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil, 221 U.S. at 50.

139. As Senator Sherman said:

If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life.

21 CONG. REC. 2457 (1890); *see also* Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879, 882-83 (1990); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 96 (1982).

140. As Justice Harlan wrote:

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong.

Standard Oil, 221 U.S. at 83-84 (concurring & dissenting in part); *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 555 n.41 (1944) ("The objects of the National Alliance are . . . to oppose all forms of monopoly as being detrimental to the best interests of the public" (National Farmers' Alliance, Constitution (1887)); "We hold to the principle that all monopolies are dangerous, . . . tending to enslave a free people . . ." (National Farmers' Alliance and Industrial Union, Constitution (1889)); "We oppose the tyranny of monopolies." (National Grange, Declaration of Purposes (1874))). The Court also quoted a historian of the Wheel, one of the stronger farmers' organizations in the 1880s:

The question has often been asked, what gave rise to the Wheel? This question is as easily answered as asked, *Monopoly!* . . . Monopoly aspires to make the people its servants, politically, financially and socially, and demands that we offer on its golden altar all that we are and have, souls, bodies, lives, liberty, and common country, unreservedly and without complaint.

Id. at 553-54 n.39.

141. *Se. Underwriters*, 322 U.S. at 555; *see also* 1 KINTNER, *supra* note 137, at 54.

san.¹⁴² For Congress, the question was not whether, but how, to abolish monopolistic abuses under its Commerce Clause authority.

The populist distrust of monopolistic power again manifested during and after World War II. Despite inconsistent enforcement in its first forty years,¹⁴³ the Sherman Act embodied at least a competitive ideal of curbing trusts, monopolies, and cartels, and the last obstacle to complete industrial autocracy.¹⁴⁴ In contrast, as President Franklin D. Roosevelt observed, cartels and monopolies flourished in pre-war Germany because of the absence of antitrust laws and a lack of popular distrust of the concentration of power and monopolies.¹⁴⁵ Industries in pre-war Germany enlisted the state through compulsory cartel laws to complete their market power.¹⁴⁶ Inevitably, as with any dictatorship, once economic

142. The Republicans charged the Democrats with standing behind the Sugar Trust. The Democrats retorted that when the issue of trusts was finally voted upon, the Republicans would vote on the side of the trusts. The New York Times was unsure what, if anything, would become of Senator Sherman's resolution: "The record of the Republican Senate in recent years has not been such as to lead many persons to look to it for deliberate legislation hostile to the great monopolies which have grown up under the protective tariff." *Mr. Sherman on Trusts: Suddenly Awake to the Dangers of Monopoly*, N.Y. TIMES, July 11, 1888, at 1. The recorded vote in the House on the final conference report on the Sherman Act shows 242 ayes, no nays, and eighty-five not voting. 21 CONG. REC. 6314 (1889). The bill passed the Senate with fifty-two voting in favor, one against, and twenty-nine not voting. 1 KINTNER, *supra* note 137, at 25.

143. The Sherman Act's passage did not allay the public's concern over monopolies and trusts. Few antitrust cases were prosecuted, notably against organized labor activities. See, e.g., *United States v. Eugene V. Debs*, 158 U.S. 564, 591 (1895); *United States v. Workingmen's Amalgamated Council*, 57 F. 85 (5th Cir. 1893). Enforcement increased under President Theodore Roosevelt's Administration (forty-four government cases filed) and President Taft's Administration (seventy-seven cases filed). 1 KINTNER, *supra* note 137, at 367 n.1.394. In creating the Federal Trade Commission, Congress sought to preserve competition through the agency's supervisory action and protect competitive business from further inroads by monopoly. *FTC v. Gratz*, 253 U.S. 421, 433-34 (1920) (Brandeis, J., dissenting). Antitrust enforcement waned in the 1920s, given the administrations' concern that vigorous enforcement might disrupt the prosperity bandwagon. Between 1929 and 1932, over a third of the attorneys left the Antitrust Division. In the early 1930s, the federal government viewed cooperation with businesses as the priority: "Industries were organized under codes of 'fair competition' with their representatives empowered to adjust supply to demand, to stabilize prices within limits, to regulate wages, and to otherwise institute self-government under Government supervision." U.S. DEPT OF JUSTICE, A STUDY OF THE DEVELOPMENT OF THE ANTI-TRUST LAWS AND CURRENT PROBLEMS OF ANTI-TRUST ENFORCEMENT, submitted to the U.S. SENATE SUBCOMMITTEE ON MONOPOLY 9 (1952). When a rapid general price advance occurred following the start of World War II, the Justice Department received up to 250 complaints per day. Between 1938 and 1939, the number of antitrust lawyers at the Antitrust Division nearly tripled, and antitrust enforcement increased. Stucke, *supra* note 52, at 538.

144. For example, in 1921, a former U.S. Senator criticized the "ancient and mischievous" Sherman Act and "noxious" Clayton Act as hampering American businesses against the Europeans: "In prewar days, representative business men of England, France and Germany, told me that business in those countries could not function for a single year if handicapped as was and is the American business by the Sherman Law." Herbert Hugh Naujoks, *Monopoly and Restraint of Trade Under the Sherman Act*, 5 WIS. L. REV. 129, 139-40 (1929).

145. Wilhelm Cohnstaedt, *Germany's Cartels and State Control: A Revealing Study of the Reich's Post-War Industrial Monopoly Organizations*, N.Y. TIMES, May 19, 1935, at BR9; John H. Crider, *Roosevelt Calls for Cartels Curb: In Letter to Hull He Says Types of 'Trusts' Used by Reich Must Be Ended*, N.Y. TIMES, Sept. 9, 1944, at 1. The FDR Administration also significantly departed from its early 1930s view of cooperation with businesses as the priority.

146. F.A. HAYEK, *THE ROAD TO SERFDOM* 93-94 (Univ. of Chi. Press 2007) (1944). An estimated 550 to 600 German cartels existed in 1911, about 1,000 in 1922; 1,500 by 1933; and 1,800 by 1938.

power was consolidated, these monopolies and cartels became “governmental instrumentalities to achieve political ends.”¹⁴⁷

But the United States did not view such monopolistic behavior from afar. As the head of the DOJ’s Antitrust Division wrote, the German monopolies and cartels were enlisting the dominant American companies to allocate worldwide markets and suppress competition, which compromised national security.¹⁴⁸ Indeed, in 1942 the DOJ prosecuted Standard Oil Co. of New Jersey, its subsidiaries, and I.G. Farbenindustrie (“Farben”) for conspiring to restrain trade in the oil and gas industries, including synthetic rubber.¹⁴⁹ With the country facing a domestic rubber shortage, the Assistant Attorney General Thurman Arnold testified before a Senate committee, headed by Harry S. Truman, as to how Standard Oil refused to reveal to the U.S. Navy and British government its process for making synthetic rubber (or to license to independent domestic producers), but had turned over its discoveries to the German cartel.¹⁵⁰ Standard Oil was not unpatriotic; it just “desired a world monopoly on oil and synthetic gasoline” and thus agreed not to compete with Farben: “Each company gave the other a world monopoly in so far as

JOHN M. KLEEGER, GERMAN CARTELS: MYTHS AND REALITIES, http://www.econ.barnard.columbia.edu/~econhist/papers/Kleeberg_German_Cartels.pdf.

147. Crider, *supra* note 145, at 1 (quoting President Roosevelt). Twenty days after seizing power, the Nazis enlisted twenty leading German industrialists in a secret rearmament program. Among them were Krupp von Bohlen of the Krupp armament works and representatives of I.G. Farbenindustrie and other Ruhr heavy industries. Hitler and Göring explained their program to the industrialists, who “became so enthusiastic that they set about to raise 3 million Reichsmark to strengthen and confirm the Nazi Party in power. Two months later Krupp was working to bring a reorganized association of German industry into agreement with the political aims of the Nazi Government.” Justice Robert Jackson, Chief Counsel for the U.S., Summation for the Prosecution Before the Nuremberg War Crimes Tribunal (July 26, 1946), <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Jacksonclose.htm>. Deutsche Post, under the 1928 Communications Act, maintained the technical infrastructure and provided the news transmission services, and later restricted news transmission into Germany and furthered Nazi propaganda. During the 1920s, Carl Bosch consolidated the German chemicals industry into I.G. Farbenindustrie, which became closely connected with the Nazi regime and whose subsidiary produced Zyklon B, the gas used to murder concentration camp inmates. Daniel Bogler, *Germany Comes Clean: Companies Are Putting the Past Behind Them by Revealing the Truth About Their History*, FIN. TIMES, Dec. 20, 2002, at 13. Farben also provided the Nazis with industrial espionage on a large scale to uncover chemical discoveries in other countries. Farben blackmailed foreign producers or threatened them with predatory pricing to reduce industry output, allocate markets, and to learn of their competitors’ new processes or formulae. *Espionage, Trickery & Bribery Unearthed in Farben Records: U.S. Dep’t of Justice Agents Find Data Showing Huge German Combine Exercised Control of Plants in U.S.*, N.Y. TIMES, July 14, 1945, at 14.

148. WENDELL BERGE, CARTELS: CHALLENGE TO A FREE WORLD 234–44 (1944). Bausch & Lomb agreed with Carl Zeiss not to compete in the other’s market for military optical instruments. *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y. 1942). Farben entered into market allocation agreements with dominant U.S. firms over (1) the strategic commodity magnesium (*United States v. Aluminum Co. of Am.*, 44 F. Supp. 97 (S.D.N.Y. 1941)); (2) fertilizer nitrogen (*United States v. Allied Chem. & Dye Corp.*, 42 F. Supp. 425 (S.D.N.Y. 1941)); (3) dyestuffs (*United States v. Gen. Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944)); (4) photographic materials (*United States v. Gen. Aniline & Film Corp.*, No. 111-136 (S.D.N.Y. Dec. 19, 1941)); and (5) nickel (*United States v. Int’l Nickel Co. of Can.*, 203 F. Supp. 739 (S.D.N.Y. 1962)).

149. JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* 89–90 (1978).

150. *Id.* at 92; Frank L. Kluckhohn, *Arnold Says Standard Oil Gave Nazis Rubber Process*, N.Y. TIMES, Mar. 27, 1942, at 1.

they were able to convey it, with the exception that Germany reserved its own market in synthetic gasoline, while Standard Oil gave Germany control of synthetic rubber in the United States.”¹⁵¹

Seeking, with mixed results, to break up the German cartels,¹⁵² the United States after World War II domestically strengthened its merger laws to arrest concentration of economic might in its incipiency¹⁵³ and reinvigorated its antitrust efforts. Thus, raising the dangers that economic power poses to our democracy, Senator Kefauver reiterated Senator Sherman’s and the colonists’ concerns: “When [the American people] lose the power to direct their economic welfare they also lose the means to direct their political future.”¹⁵⁴ Once power and wealth are concentrated, social policies are directed to preserve the status quo. Invariably this concentration in economic power threatens our nation’s democratic ideas and leads to corporatism.

2. *Other Social Concerns About Monopolies*

Even assuming that monopoly prices attract “business acumen,” the *Trinko* Court never explains how this improves, rather than worsens, overall living conditions. Even before the current financial meltdown, most Americans saw their wages stagnate. It is unclear to what extent the widening disparity in wealth today is attributable to antitrust policies. One concern, however, in the late 1800s was the distributional effects of market power. With executives “madly striving in the race for riches,”¹⁵⁵ income disparities increased, creating two distinct classes, “one comprising the very rich and powerful, while in another are found the toiling poor.”¹⁵⁶ Senator Sherman identified this inequality of condition, wealth, and opportunity as the greatest threat of disturbance to social order.¹⁵⁷ The disparity in income (the index of income concentration or Gini coef-

151. Kluckhohn, *supra* note 150, at 12 (quoting Thurman Arnold).

152. Among the Allies’ post-war plans developed at Potsdam was to eliminate Germany’s “present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements.” *Europe’s Future: Architects for a New Germany and a New Europe*, N.Y. TIMES, Aug. 5, 1945, at 59.

153. Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (2006)). As Senator Kefauver said,

I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.

96 CONG. REC. 16,452 (1950).

154. 96 CONG. REC. 16,452.

155. Cleveland, *supra* note 137, at 58.

156. *Id.*

157. 21 CONG. REC. 2460 (1889) (This inequality “has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.”).

ficient) decreased between 1947 and 1968, but increased thereafter, especially during the Reagan Administration (which outside of localized bid-rigging schemes had curtailed its antitrust enforcement) and the George W. Bush Administration.¹⁵⁸ According to another measure, the disparity in wealth in recent years is higher than when the Sherman Act was enacted.¹⁵⁹ Other measures show a widening salary gap between the average CEO and worker,¹⁶⁰ and between the richest 1% and the average worker.¹⁶¹

Utilitarian welfare economics and many antitrust economists are agnostic about distributional effects from the exercise of market power.¹⁶² Under social contract theory, individuals may consent *ex ante* to the Court's belief about monopolies if the gains and losses are distributed evenly. But as the income gap widens, the poor have less incentive to perpetuate the status quo. If monopolies do promote innovation at some level, the Court never discusses how these benefits flow to the disenfranchised. For example, if the wealthiest 1% mostly appropriates the gains, then the poorest 40% would be unlikely to consent to reduce their wealth further (without compensation) because this will somehow spur innovation.¹⁶³

158. U.S. CENSUS BUREAU, *THE CHANGING SHAPE OF THE NATION'S INCOME DISTRIBUTION 1947-1998* (2000), <http://www.census.gov/prod/2000Pubs/p60-204.pdf>; U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005*, at 40 tbl.A-3 (2006), <http://www.census.gov/prod/2006pubs/p60-231.pdf>. The census data may understate the income disparity. Peter H. Lindert, *When Did Inequality Rise in Britain and America?*, 9 *J. INCOME DISTRIBUTION* 11, 13 (2000). Other studies reflect the growing income disparity. See, e.g., Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States: 1913-1998*, 118 *Q.J. ECON.* 1 (2003).

159. See Lindert, *supra* note 158, at 18.

160. In 2005, according to an Economic Policy Institute study, "the average CEO in the United States earned 262 times the pay of the average worker, the second-highest level of this ratio in the 40 years" for which data exist. "In 1965, U.S. CEOs in major companies earned 24 times more than an average worker; this ratio grew to 35 in 1978 and to 71 in 1989." The ratio "hit 300 at the end of the recovery in 2000. The fall in the stock market reduced CEO stock-related pay (e.g., options) [and the ratio declined] to 143 times that of an average worker in 2002." Since then, CEO pay has increased, and by 2005 the average CEO was paid \$10,982,000 a year, or 262 times that of an average worker (\$41,861), and a CEO earned more in one workday than an average worker earned in fifty-two weeks. Lawrence Mishel, *CEO-to-Worker Pay Imbalance Grows*, *ECON. POL. INST. SNAPSHOT*, June 21, 2006, http://www.epi.org/content.cfm/webfeatures_snapshots_20060621. In examining the widening income disparity in the United States, Piketty and Saez found that since 1970, the increasing CEO compensation could not be attributed solely to tax episodes in the 1980s. Piketty & Saez, *supra* note 158, at 32-34.

161. The Economic Policy Institute measured "the ratio of the wealth of the richest 1% to that of a household with typical wealth in the middle," and found that the wealth inequality has widened over time. "The richest 1% of wealth holders had 125 times the wealth of the typical household in 1962; by 2004 they had 190 times as much or \$14.8 million in wealth for the upper 1% compared to just \$82,000 for the household in the middle fifth of wealth." Sylvia Allegretto, *Wealth Inequality Is Vast and Growing*, *ECON. POL'Y INST.*, Aug. 23, 2006, http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20060823.

162. Eleanor M. Fox, *Economic Development, Poverty and Antitrust: The Other Path*, 13 *SW. J.L. & TRADE AM.* 211, 219-20 (2007) (noting that proponents of this perspective on aggregate efficiency or wealth do not answer the deontological questions of power and how opportunity is distributed).

163. Kerber, *supra* note 44, at 11.

Another important dimension is how the monopoly obtained its rewards. Like Learned Hand, citizens may be less opposed to a monopoly secured by a superior product, business acumen, or historic accident, than by normatively “unfair” means.¹⁶⁴ But citizens may balk when the Court, without any empirical basis, argues that most monopolies reached their position through fair means.

The Court surmises the benefits of monopolies, but is silent on these policy issues.¹⁶⁵ Instead, the Court, like some antitrust scholars, may hope that the legislators will cure the distributional effects flowing from the Court’s competition policies.¹⁶⁶ But over the past eight years, American workers have not shared in the benefits from their increased productivity. Their wages stagnated during the George W. Bush years, while the wealthiest 1% increased their income by 203%. Thus, songs of praise for monopolies, besides being economically unsound, may exacerbate the tension arising from the widening wealth gap.¹⁶⁷

3. *Ethical Concerns About Monopolies*

The *Trinko* Court ignores why people work and how our work reveals the fundamental truths of society and the treatment of individuals. Under one construction, work is a means to improve the welfare of others, and thereby expresses and deepens individual dignity. Competition is not a self-contained end but represents the more efficient (or democratic) means to achieve the higher end of human progress, namely,

164. *Id.* at 21; Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986).

165. Cartels and monopolies have other social costs. A competitive media, for example, can increase political accountability and reduce corruption by: (1) informing policy makers of their policies’ unintended social effects, (2) providing a voice to pressure the government for change, and (3) serving as a catalyst for institutional change to promote competition policy. In countries with media monopolies, the World Bank reported that “political, economic, and social outcomes are worse than in those where the media are competitive, in part because the former are less effective in improving institutional quality (governance).” WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 188 (2002). Given the media’s important role, any sound competition policy must include fostering a competitive marketplace of ideas. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249–50 (2001); AM. ANTITRUST INST., *supra* note 24, at 247–79.

166. Competition authorities point to federal tax legislation to effect wealth distribution; tax officials may respond that such tax hikes undermine competitiveness. *Higher Taxes Will Stifle US Entrepreneurship*, FIN. TIMES, July 12, 2007, at 6. One study examined child poverty rates for sixteen developed countries both before and after government intervention. Before distributional taxes and transfers, the United States had among the higher market-based rates of child poverty in 2000: 26.6%. Four other countries—New Zealand, France, the United Kingdom, and Ireland—had comparably high market rates of child poverty. After taxes (including refundable taxes) and distributional wealth transfers, the United States still led the sixteen developed countries in child poverty. On average, government taxes and transfers in the other fifteen countries reduced child poverty significantly—by about half—dropping 10.4 percentage points to 10.7%. Sylvia A. Allegretto, *U.S. Government Does Relatively Little to Lessen Child Poverty Rates*, ECON. POL’Y INST., July 19, 2006, http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20060719. The notion that a purely economic focus keeps antitrust policy free from political and social pressures is questioned in Stucke, *supra* note 72.

167. Edward Luce, *Stuck in the Middle*, FIN. TIMES, Oct. 29, 2008, at 9.

greater justice, higher quality of life, and a more humane ordering of social relationships.¹⁶⁸ Because the material and economic means for attaining that progress are subservient to, and can never supplant, that end, the dignity of the individual remains paramount.¹⁶⁹

Courts have long recognized a concern that monopolies tend to impoverish individuals of their livelihood; if monopolies flourish, workers, who maintained for their families, “will of necessity be constrained to live in idleness and beggary.”¹⁷⁰ Monopolies thus “deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.”¹⁷¹ Some may dispute such dire predictions. But even if monopolies were beneficent, opportunity and liberty remain limited.

Moral and economic progress may be reinforcing, rather than anti-theoretical.¹⁷² Traditional economic theory of Pareto optimality is consistent with such humane ordering by seeking to increase individuals’ satisfaction until no further reorganization will increase satisfaction without reducing another individual’s satisfaction.¹⁷³ Whereas neoclassical theory posits individuals as undifferentiated in promoting their profit-maximizing self-interests, evolutionary economics stress the importance of the individuality, creativity, and distinctiveness in dynamic competition. When a firm engages in exploitative behavior, a competitive mar-

168. Some posit work as a commodity, an instrument for providing goods and services. Human labor can be downsized, outsourced, automated, and made subservient to productive efficiencies. But if efficiency is the end, there is no inherent dignity in work or greater social calling to use one’s skills to society’s betterment (unless this gloss of self-satisfaction improves morale and, in turn, productive efficiency). Absent ethical content, industriousness is not a virtue; virtue, as a moral habit, is something toward which an individual progresses through virtuous conduct. Pope John Paul II, *Laborem Exercens: On Human Work*, in CATHOLIC SOCIAL THOUGHT 364 (David J. O’Brien & Thomas A. Shannon eds., 2006). Where then does industriousness lead us (other than Elvis Santa Claus singing “Silent Night” priced at marginal cost)? Moreover, if human labor is exploited or oppresses others, this is not social progress (even if the cartels in Nazi Germany were more efficient than U.S. firms). For a discussion of the morality of antitrust crimes, see Stucke, *supra* note 32; New Advent, Catholic Encyclopedia: Moral Aspects of Monopoly, <http://www.newadvent.org/cathen/10497b.htm> (last visited Jan. 14, 2009). Thus,

[w]hile monopoly is not necessarily unjust, and while any particular monopoly may be free from unjust practices, experience shows that the power to commit injustice which is included in monopoly cannot be unreservedly entrusted to the average human being or group of human beings. Consequently, it is the duty of public authority to prevent the existence of unnecessary monopolies, and to exercise such supervision over necessary monopolies as to render impossible monopolistic injustice, whether against the independent business man through unjust methods, or the consumer through unjust prices.

Id. For a discussion of Catholic Social Thought’s origins and growth, see Spencer Weber Waller, *The Chicago School Virus* 60–66 (Working Paper, 2007), available at <http://ssrn.com/abstract=1017882>.

169. The Clayton Act provides that the “labor of a human being is not a commodity or article of commerce.” 15 U.S.C. § 17 (2006).

170. *Case of Monopolies*, (1602) 77 Eng. Rep. 1260, 1263 (K.B.); see also *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347, 350 (Ch.) (deprives public of useful member).

171. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898) (quoting *Alger v. Thacher*, 19 Pick. 51, 54 (1837)).

172. See BENJAMIN M. FRIEDMAN, *THE MORAL CONSEQUENCES OF ECONOMIC GROWTH* (2005).

173. C. Mantzavinos, *The Institutional-Evolutionary Antitrust Model*, 22 EUR. J.L. & ECON. 273, 276 (2006).

ket provides alternatives. “When the no-barriers-to-entry condition of perfect competition is satisfied, individuals are free to choose whatever trade or profession they prefer, limited only by their own talent and skill and by their ability to raise the (presumably modest) amount of capital required.”¹⁷⁴ If the firm violates the community standards of fairness, buyers in a competitive market can take their business elsewhere.¹⁷⁵

III. ADMINISTRABILITY OF STANDARDS AND REMEDIES

Trinko’s dicta are unfounded: cartels are not more “evil” than monopolistic practices; cartels do not have unique anticompetitive effects or pose greater economic, political, social, or ethical concerns than monopolistic practices; nor are monopolies necessary for innovation.

The remaining issue is whether cartels are easier to prosecute under the Court’s current legal standards. The *Trinko* Court states that prosecuting monopolies implicates two practical realities. First, the Court’s legal standard for evaluating monopolistic conduct has greater infirmities than its per se standard for hardcore cartels.¹⁷⁶ The Court warns that under its current standard the “cost of false positives” (namely, chilling the monopoly’s procompetitive activity) “counsels against an undue expansion of [section] 2 liability.”¹⁷⁷ Second, remedying monopolistic behavior, as the *Trinko* Court found, may be more complex than fining or incarcerating price-fixers. Courts cannot remedy monopolistic conduct by assuming “the day-to-day controls characteristic of a regulatory agency.”¹⁷⁸

This problem of administrable standards did not originate with *Trinko*. Part of the difficulty lies in identifying monopolistic conduct. Identifying anticompetitive coordinated conduct is, at times, easier. Section 1 of the Sherman Act requires an “agreement,” which may minimize, but not eliminate, the risk of false positives.¹⁷⁹ It is suspicious when competitors agree on price, but a “monopolist acting unilaterally cannot

174. SCHERER & ROSS, *supra* note 132, at 19.

175. Although some economists are agnostic on price discrimination or believe in certain instances it is pro-competitive, 91% of individuals in one survey thought such exploitation by charging higher prices to those more dependent on the product was offensive. Kahneman et al., *supra* note 164, at 735.

176. “Under the best of circumstances, applying the requirements of [section] 2 ‘can be difficult’ because ‘the means of illicit exclusion, like the means of legitimate competition, are myriad.’” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *United States v. Microsoft*, 253 F.3d 34, 58 (2001)).

177. *Id.* at 414.

178. *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

179. By requiring direct or circumstantial evidence of an agreement, section 1 excludes conscious parallelism among competitors, which, at times, is pro-competitive. But even with an agreement among competitors, characterizing such coordinated conduct as per se illegal (if a hardcore cartel) or subject to the rule of reason standard (if an ancillary restraint on price or geographic markets is imposed by a joint venture) may be difficult. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). Because competitor collaborations may be pro-competitive, horizontal price fixing is also susceptible to false positives.

do business without setting a price.”¹⁸⁰ When competitors agree to boycott a discounter or refuse to license their patents, this conduct is easier to challenge than when a monopolist refuses to deal. Although conduct by the cartel and the monopolist may have the same anticompetitive effect, monopolies generally have no legal duty to price competitively, assist discounters, or license their technology.¹⁸¹

On the other hand, the often protracted and costly litigation under the Court’s rule of reason standard burdens the antitrust litigants and hinders the prosecution of monopolistic practices.¹⁸² While criticizing of

180. Herbert Hovenkamp, *The Legal Periphery of Dominant Firm Conduct* (Univ. of Iowa, Legal Studies Research Paper No. 07-21, 2007), available at <http://ssrn.com/abstract=1014426>.

181. Even if the law imposed that uniform duty, the remedy, as the *Trinko* Court noted, is hard for the district court to administer. *Trinko*, 540 U.S. at 415.

182. I examine elsewhere the infirmities of the Court’s rule of reason standard. See Stucke, *supra* note 42. The Court’s rule of reason standard for section 2 has become a popular piñata for antitrust scholars and enforcers. See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003) (suggesting standards are “not just vague but vacuous”); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147–48 (2005) (“Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined.”); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1623 (2005) (stating section 2 “has been a source of puzzlement to lawyers, judges and scholars”); see also *Oversight of the United States Department of Justice, Antitrust Division: Hearing Before the Task Force Antitrust and Competition, Comm. Judiciary*, 110th Cong. 20 (2007) (statement of Thomas O. Barnett, Asst. Att’y Gen. of the United States) (“Because the current state of the law does not always define clearly what is lawful and what is not, uncertainty can chill procompetitive behavior while undermining deterrence of anticompetitive conduct.”). As Assistant Attorney General Barnett noted, the DOJ, in conjunction with the FTC, recently conducted eighteen days of hearings, spanning over eleven months, in which the agencies received submissions and heard from twenty-eight different panels and 130 panelists about unilateral conduct. Instead of an objective and empirical-based analysis of section 2 enforcement by the two agencies, the Bush Administration published unilaterally its perspective of the desired standards for analyzing single-firm conduct. U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <http://www.usdoj.gov/atr/public/reports/236681.pdf>. The FTC notably did not endorse the DOJ’s report. In their statement, three FTC commissioners “strongly distance[d] themselves” from the enforcement positions stated in the Report.” PAMELA JONES HARBOUR ET AL., FED. TRADE COMM’N, STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE 5 (2008), <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>. Moreover the three FTC commissioners vowed that they were ready “to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report.” *Id.* at 11. It is unlikely that the Obama Administration will adopt the Report’s proposed legal standards. During the election campaign, then-Senator Obama criticized the Bush Administration for its nonenforcement of section 2 and for having “what may be the weakest record of antitrust enforcement of any administration in the last half century.” Michael Cohen, *In Obama We Antitrust*, THEDEAL.COM, Dec. 12, 2008, <http://www.thedeal.com/newsweekly/community/in-obama-we-antitrust.php>. Others criticized the DOJ section 2 report as another example of the Bush Administration’s dismal enforcement of the antitrust laws and willingness “to allow big business to run roughshod over consumers.” Peter Whoriskey, *Justice’s Monopoly Guidelines Assailed*, WASH. POST, Sept. 9, 2008, at D1; see also Eric Lichtblau, *Antitrust Document Exposes Rift*, N.Y. TIMES, Sept. 9, 2008, at C1. The FTC Chairman, however, writing separately on the DOJ report noted how modern presumptions under the Chicago and Harvard Schools disfavor intervention into the markets, and that market forces will blunt the exercise of monopoly power. WILLIAM E. KOVACIC, FED. TRADE COMM’N, MODERN U.S. COMPETITION LAWS AND THE TREATMENT OF DOMINANT FIRMS (2008), <http://www.ftc.gov/os/2008/09/080908section2stmkovacic.pdf>. Consequently, the DOJ report’s relevance is as strong as its underlying belief that “monopoly power is self-destructive and that markets are self-correcting.” HARBOUR ET AL., *supra*, at 3. For alternative rec-

late the risk of false positives arising from its rule of reason, the Court has failed to improve its standard and provide guidance as to what constitutes monopolistic practices. Instead, the *Trinko* Court uses its standard's failures to restrain the Sherman Act's reach.¹⁸³ This Part offers several suggestions to rectify the Court's handiwork and return to the essential purpose of section 2 of the Sherman Act.

A. The Administrability of the Court's Legal Standards for Cartels and Monopolistic Conduct

Although the antitrust laws do not directly penalize monopolies for being monopolies, courts may condemn their competitive vigor as monopolistic practices. Behavior formerly legal is now, because of the offender's monopoly status, illegal. Increased enforcement of section 2 of the Sherman Act, warns the *Trinko* Court, increases the risk of false positives by chilling hard-edged yet legitimate competition.¹⁸⁴ One wonders, however, whether the recent concern over false positives is itself a false positive.¹⁸⁵ The Court has expressed no concern recently about false negatives, including the impact of its rule of reason on promoting anti-competitive behavior to consumers' detriment.¹⁸⁶

Regardless, the risk of false positives lies in the lack of clear standards for section 2 behavior. Under Anglo-American jurisprudence, courts, in determining liability, generally focus on the actor's conduct, rather than the actor's status or the consequences of the actor's conduct.¹⁸⁷

ommendations to reinvigorate section 2 enforcement that balance concerns for "false negatives" as well as "false positives," see AM. ANTITRUST INST., *supra* note 24, at 55–93.

183. See *Trinko*, 540 U.S. at 414–16.

184. See, e.g., *id.* at 414 (stating that the "cost of false positives counsels against undue expansion of [section] 2 liability"). One district court cited this language in dismissing the complaint. *Broadcom Corp. v. Qualcomm Inc.*, No. 05-3350 (MLC), 2006 WL 2528545, at *12 (D.N.J. Aug. 31, 2006), *aff'd in part, rev'd in part*, 501 F.3d 297 (3d Cir. 2007).

185. Despite the federal securities laws' broad savings clauses that preserve other laws' rights and remedies, the Court held the securities laws implicitly precluded the application of the antitrust laws to the challenged conduct. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 127 S. Ct. 2383, 2389 (2007). The Court surmised that "antitrust courts are likely to make unusually serious mistakes" as to what constitutes lawful securities marketing activity. *Id.* at 2386 (emphasis added). It was unclear why the rate of false positives increases when the same federal judge decides an antitrust (rather than a securities) case. A 2008 search of the DOJ's Antitrust Division Web site, for example, found 155 documents with the term "false positives" compared to eighty-nine documents with the term "false negatives," of which all but two also had the term "false positives."

186. In contrast, the head of the Antitrust Division (during WWII no less) cautioned of the greater risk of false negatives:

It is a dangerous thing for the Government to interfere unreasonably with private business or impose undue restrictions; it is more dangerous for private groups to have the power to impose such restrictions. There is some constituent redress when prescriptions are imposed by the state; when imposed by private groups the only remedy is enforcement of the anti-trust laws.

Berge, *supra* note 85, at 13.

187. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 348 (1980). For example, the Federal Rules of Evidence, consistent with the common law, generally prohibit character evidence to show the accused's bad character or propensity to engage in wrongdoing. See FED. R. EVID. 404. Of course, some crimes do inquire into the status of the offender, such as a convicted felon's possession of a firearm. See 18 U.S.C. § 922(b)(1) (2006). Even here, the Court

Indeed, for per se illegal antitrust offenses, the illegality inheres in the conduct (namely, the agreement to tamper with prices or allocate markets), and not the actor's status (i.e., whether the actors have market power) or the conduct's effects (e.g., price increase).¹⁸⁸

Rather than identify specific unfair anticompetitive practices, as Congress intended, the Court instead prefers to "resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record."¹⁸⁹ Liability under the Court's unsatisfactory rule of reason¹⁹⁰ depends on the offender's status (i.e., whether the defendant is a monopolist) and the challenged action's net competitive effects.¹⁹¹

The risk of false positives arises in part in the initial status determination (i.e., that the company is indeed a monopolist). For example, assume a monopolist controls 95% of widget sales and its market share is not contested because two regional widget manufacturers, for various reasons, have failed to increase share. The widget monopolist is presumably extracting monopoly rents. Consumer welfare is already lost to a degree equal to (if not greater than) a cartel. If the widget monopolist is undertaking anticompetitive and socially undesirable measures to maintain its dominance, the risk of false positives diminishes; there is, presumably, little actual legitimate competition chilled through "overzealous" antitrust enforcement.¹⁹²

Thus, the greater the degree of competition being chilled, the lesser the degree of market power. A gradation exists between price-takers in a perfectly competitive market and those in a pure monopoly. In between are companies (particularly those with differentiated branded

is sensitive to the risk that the jury will convict the accused because she is a bad person deserving of punishment. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 181 (1997).

188. See Sheryl A. Brown & Christopher Kim, *Antitrust Violations*, 43 AM. CRIM. L. REV. 217, 227 (2006).

189. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 467 (1992) (internal quotation marks omitted).

190. Except in the shrinking sphere of per se illegal conduct, antitrust violations are determined under a rule of reason standard. Since the 1970s, the Court has recategorized formerly per se illegal conduct as subject to its rule of reason. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977) (vertical, nonprice restraints); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712 (2007) (minimum resale price maintenance). The Court recently said that its rule of reason is now the "accepted" standard for testing whether a practice is an unreasonable restraint of trade. *Id.* at 2712. Under its standard, the fact finder "weighs all of the circumstances of a case," including the "specific information about the relevant business," "restraint's history, nature and effect," and whether the companies involved with the restraint have market power. *Id.*

191. Under the lower courts' structured rule of reason, a plaintiff establishes a prima facie case by demonstrating anticompetitive effect. The monopolist then may proffer a procompetitive justification for its conduct—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal. The burden then shifts to the plaintiff to rebut that procompetitive justification. If the procompetitive justification stands unrebuted, the plaintiff must demonstrate that the conduct's anticompetitive harm outweighs its procompetitive benefits. *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

192. For example, in *Lorain Journal Co. v. United States*, the sole local daily newspaper reached 99% of the community's families. Its only competitors were a small Sunday-only publication and a nearby radio station. 342 U.S. 143, 150 (1951).

products¹⁹³) that enjoy different degrees of market power. Depending on where the company falls along that gradation, its market power is circumscribed by its competitors, likely new entry, or superseding technology.

How much market power must a company have to be a monopolist (such that the risk of false positives diminishes)?¹⁹⁴ Neoclassical economic theory offers no objective measure of an existing industry's competitiveness.¹⁹⁵ Absent direct evidence of anticompetitive effects,¹⁹⁶ there is no satisfactory measure for market power. Courts generally use market share as circumstantial evidence of market power,¹⁹⁷ but market share may overstate¹⁹⁸ or understate¹⁹⁹ market power.

The risk of false positives increases when monopolies are prohibited from engaging in behavior permissible for nonmonopolists. Here company executives face two concerns: a court later will find (a) the company a monopoly because it exercises some degree of market power (e.g., it produces premium-tier consumer products), and (b) the company's conduct anticompetitive based on intervening events, a smattering of com-

193. Despite being functionally comparable, a premium consumer brand may command a higher price (and margin) than the mid-tier brand, which sells at a premium to the retailer's private label.

194. Distinguishing monopolies from firms with some market power may be difficult. One could calculate, if such data exist, the company's marginal cost, and derive a Lerner Index value. Alternatively, one could calculate supra-normal profits over time. See SCHERER & ROSS, *supra* note 132, at 415–22. Both approaches have their shortcomings. Other indicia that the company has been, and is, acting as a monopolist, include (1) little switching to smaller rivals and relatively stable market shares despite changes in relative pricing; (2) little, if any, innovation (relative to other markets overseas); and (3) significant, non-cost-based price increases by the dominant company.

195. See Kahn, *supra* note 25, at 50. An economist could compare the current market to (a) the theoretical model of perfect competition, which is unsatisfactory (few, if any, such markets exist, and even then one cannot determine what the monopolist's costs should be in this perfectly competitive market); (b) other competitive geographic markets (but independent variables may prevent informative comparisons); or (c) premonopoly market conditions (same).

196. See, e.g., *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

197. COMPETITION COMMITTEE, ORG. FOR ECON. CO-OPERATION & DEV., *ABUSE OF DOMINANCE AND MONOPOLISATION* 8 (1996), <http://www.oecd.org/dataoecd/0/61/2379408.pdf> [hereinafter OECD, *MONOPOLISATION*] (“‘Market share’ seems to be an almost universally applied criterion, although the details of measurement are undoubtedly different.”).

198. Even with high entry barriers, the company may be ruthlessly efficient; as its price approaches marginal cost, the company will produce the efficient level of outputs with more efficient techniques and the minimum quantity of inputs, and drive out its inefficient competitors.

199. If the monopolist is charging the profit-maximizing price, and one defines the product and geographic market using this price, then the market will be too broadly defined. The Court committed the “Cellophane Fallacy” in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). As a former FTC chairman noted, “the measurement of market power, which requires the definition of relevant product and geographic markets, is the most elusive and unreliable aspect of antitrust enforcement.” Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 825 (1987); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2730 (2007) (Breyer, J., dissenting) (“The Court’s invitation to consider the existence of ‘market power,’ for example, . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.”).

pany documents, and the testimony of disgruntled competitors and a few former customers.²⁰⁰

1. *Toward a More Workable Standard*

A good starting point is the essential purpose of section 2 of the Sherman Act. Seeking to preserve economic opportunity,²⁰¹ the Sherman Act does not criminalize bigness. It is not intended to target, as Learned Hand characterized, the company that unwittingly finds itself a monopoly because of its “superior skill, foresight, and industry.”²⁰² Rather, the Sherman Act targets monopolistic practices that make “it impossible for other persons to engage in fair competition.”²⁰³ The widespread belief in 1890 was that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resorting to *unfair* practices.²⁰⁴ Senator Kenna’s hypothetical generated the most extensive debate on section 2:

Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?

Mr. EDMUNDS. It is not intended by it and the bill does not do it. Anybody who knows the meaning of the word “monopoly,” as the courts apply it, would not apply it to such a person at all; and I am sure my friend must understand that.

....

It does not do anything of the kind, because in the case stated the gentleman has not any monopoly at all. He has not bought off his adversaries. He has not got the possession of all the horned cattle in the United States. He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price. So I assure my friend he need not be disturbed upon that subject.

....

200. See, e.g., Mark M. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041 (1996).

201. The Sherman Act, at its broadest level, sought to preserve a person’s right to freely trade and “to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.” *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 42 (1930) (quoting *Charles A. Ramsay Co. v. Associated Bill Posters of U.S. & Can.*, 260 U.S. 501, 512 (1923)).

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

203. 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar).

204. *FTC v. Gratz*, 253 U.S. 421, 434 n.4 (1920).

Mr. HOAR. I put in the committee . . . the precise question which has been put by the Senator from West Virginia, and I had that precise difficulty in the first place with this bill, but I was answered, and I think all the other members of the committee agreed in the answer, that “monopoly” is a technical term known to the common law, and that it signifies, I do not mean to say that they stated what the signification was, but I became satisfied that they were right and that the word “monopoly” is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man’s self by means which prevent other men from engaging in fair competition with him. Of course a monopoly granted by the King was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power. I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.²⁰⁵

Congress focused not on the end—monopolization—but the means of attaining (or maintaining) that end. Were the means normatively fair (i.e., by virtue of the monopolist’s superior skill in that particular product) or unfair (i.e., actions making it impossible for other persons to engage in fair competition, such as engrossing or acquiring all other persons engaged in the same business)? Instead of forcing the parties and the lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 of the Sherman Act is to proscribe specific “means which make it impossible for other persons to engage in fair competition.”²⁰⁶

It is beyond this Article’s scope to define all specific actions by entrenched dominant firms that are presumptively illegal.²⁰⁷ One must distinguish between socially undesirable conduct generally and conduct that is undesirable only when undertaken by a monopolist. With the former, there should be little, if any, risk of false positives. Society seeks to deter the conduct (such as fraudulent misrepresentations, physical violence, and other well-established tortious or illegal anticompetitive conduct) generally. It does not matter whether a monopolist or fringe firm engag-

205. 21 CONG. REC. 3151–52 (1890).

206. 21 CONG. REC. 3152.

207. Several commentators, for example, identified categories of “cheap” predation and exclusion that (1) costs or risks little to the entrenched firm, both in absolute terms and compared to the gains (or potential for gains) it brings, and (2) lacks any cognizable efficiency claims. Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005).

es in such behavior; only the anticompetitive effects likely increase when undertaken by the monopolist.

Thus, if the monopolist's conduct is shown to harm competition and is independently wrongful (i.e., an act long proscribed by a constitutional, statutory, common law, or other determinable legal standard), then a *prima facie* violation of section 2 of the Sherman Act is established. This standard reduces the risk of false positives if the challenged behavior is socially undesirable (regardless of the offender's status).

Under this standard, however, not all independent wrongs constitute monopolistic conduct. An individual state's inchoate conception of a wrongful practice should not shape federal competition policy.²⁰⁸ For example, one state may expand liability for tortious interference of contract by focusing on the actor's predominant motive, rather than the act's wrongfulness.²⁰⁹ Other states that reject this vague standard of tort liability should not bear it under a federal antitrust claim. Second, what is illegal under state law may be pro-competitive (such as real estate brokers offering customers rebates and inducements).²¹⁰ If such "illegal" conduct were condemned under the Sherman Act, a dominant real estate broker that offers pro-competitive rebates could be found in violation thereof. Third, if the independently wrongful conduct suffers the same vagueness and unpredictability as the Court's rule of reason standard, nothing is gained in lending predictability and administrability to the Sherman Act.²¹¹

To mitigate these risks, the independent wrong must be well established, such as fraud, and the anticompetitive conduct must reasonably appear capable of making a significant contribution to maintain monop-

208. For criticisms of some business torts' nebulous standards, see, e.g., Dobbs, *supra* note 187; Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487 (1986); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrines*, 49 U. CHI. L. REV. 61 (1982). *But see* Marina Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 76-77 (1997) (arguing that long-accepted legal principles have their own merit, both from economic and social standpoints, and to disavow these principles, long embedded in our commercial jurisprudence, on the basis of indeterminacy, is unwarranted and extreme).

209. See, e.g., *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090, 1093-94 (Alaska 1979).

210. See *United States v. Ky. Real Estate Comm'n*, No. 3:05-cv-00188-S, slip op. at 5-6, 8 (W.D. Ky. July 15, 2005) (amended final judgment), available at <http://www.usdoj.gov/atr/cases/f210100/210142.pdf>.

211. "When asked by his professor to define 'unfair competition' a law student answered, 'Well, it seems to me that the courts try to stop people from playing dirty tricks.' The professor's comment was, 'One might spend weeks reading cases and find many definitions less satisfactory than this.'" Zechariah Chaffee Jr., *Unfair Competition*, 53 HARV. L. REV. 1289, 1289 (1940). Another judge observed, "It is easy to tell whether the conduct of a defendant is fair or foul. This law is given an appropriate name of 'unfair competition.' One can feel the unfairness better than one can express it from the bench." *Champion Spark Plug Co. v. Champion*, 23 F. Supp. 638, 641 (D. Mich. 1938).

ly power.²¹² Under this standard, the monopolist can overcome the presumption by showing first, that its tortious conduct does not harm competition, and second, even if it remotely harms competition, the conduct is incapable of significantly contributing to the defendant's maintaining its monopoly power. A defamation action against Microsoft for content on its message board is not an antitrust action.²¹³ But when Microsoft deceived Java developers to maintain its monopoly, as the D.C. Circuit found, this violated section 2 of the Sherman Act.²¹⁴

Deception at critical junctures can have significant anticompetitive consequences. One well-recognized example is when a patentee procures by deliberate fraud its patent, and thereafter seeks whatever monopoly rents from its ill-gotten patent.²¹⁵ An emerging and positive trend in section 2 enforcement is the recognition of the anticompetitive risks of deceptive and other independently wrongful conduct in the standard-setting process.²¹⁶ To circumvent the patent hold-up problem,²¹⁷ a standard-setting organization may require its members to disclose any pa-

212. For example, a firm with market power might violate many laws that "have little or nothing to do with its position in the market: an agricultural firm might fail to comply with safety or cleanliness standards applicable to food processing; a computer processor firm might violate employment discrimination laws; a pharmaceutical firm might run afoul of the Food and Drug Administration's rules for approval of new drugs." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000) (noting these violations are too attenuated to competition to support an antitrust claim). Thus, in *Trinko*, the plaintiff could not equate every violation of the 1996 Act as monopolistic conduct, especially when the 1996 Act had an elaborate enforcement structure for such technical infractions.

213. *Eckert v. Microsoft Corp.*, No. 06-11888, 2007 WL 496692 (E.D. Mich. Feb. 13, 2007).

214. Microsoft deceived Java developers regarding the Windows-specific nature of its tools. Microsoft's tools included certain keywords and compiler directives that only Microsoft's version of Java could execute properly. Java developers thus relied upon Microsoft's public commitment to cooperate with Sun Microsystems and used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications. Instead, the deceived Java developers ended up producing applications that ran only on Microsoft's Windows operating system. Although Microsoft publicly denied the accusation, its internal documents showed the contrary: Microsoft intended to deceive Java developers, and predicted that the effect of its actions would be to generate Windows-dependent Java applications and thwart Java's threat to Microsoft's monopoly in the operating systems market. *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001). Even if Microsoft proffered a procompetitive explanation for its deception campaign (which it did not), the plaintiff, under the proposed standard, need not demonstrate that the conduct's anticompetitive harm outweighs its pro-competitive benefits.

215. *Walker Process Equip. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176-77 (1965).

216. See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on [fair, reasonable, and nondiscriminatory] terms, (3) coupled with [a standard-setting organization's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."); *In re Union Oil Co. of Cal.*, No. 9305, 2005 WL 2003365 (July 27, 2005) (the defendant, while pursuing a patent, misrepresented to CARB that certain gasoline research was non-proprietary and in the public domain; permitting the defendant to enforce its patent rights could result, the FTC estimated, in over \$500 million in additional consumer costs annually); *In re Dell Computer Corp.*, 121 F.T.C. 616, 618 (1996) (after certifying having no relevant patents, Dell sought to enforce its patents adopted by a standard-setting organization).

217. For a discussion of the hold-up problem in standard setting, see U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT & INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION & COMPETITION 35-41 & n.11 (2007), <http://usdoj.gov/atr/public/hearings/ip/222655.pdf> [hereinafter DOJ & FTC, IP GUIDELINES].

tents at the onset of the standard-setting process and to commit to licensing any disclosed technologies that are incorporated in the standard on fair, reasonable, and nondiscriminatory terms.²¹⁸ The standard-setting organization cannot ascertain or police its members' current or prospective IP rights and therefore depends on its members' truthfulness. This transparency enables the organization to accurately weigh *ex ante* the benefits and costs of using the patent holder's technology versus alternative technologies.

A defendant can manipulate this standard-setting process through deception, namely, concealing its patents and promising to deal fairly. After the industry-wide standard incorporates the defendant's intellectual property, it becomes increasingly difficult to switch to other technologies or standards, as industry participants start designing, testing, and producing goods that conform to the industry standard. The greater the switching costs, the greater the defendant's market power.²¹⁹ Once the industry is locked in, the defendant reveals its deception when extracting its monopoly rents from the industry. Such deception can stifle the efficiencies from standard setting if members either hedge their bets for potential patent hold-up or forego standard setting altogether.²²⁰ Not only is such deception unethical, it can violate, as the FTC's extensive opinion found, section 2 of the Sherman Act.²²¹

At one time, some federal courts condemned "unfair" business practices that, because of their pernicious competitive effects, were presumptively unreasonable.²²² In the past thirty years, however, the federal courts have hesitated to condemn independently wrongful conduct under the Sherman Act. One oft-cited basis for not converting business torts and other independently wrongful acts into antitrust violations is the concern of creating "a federal common law of unfair competition which

218. Daniel G. Swanson & William J. Baumol, *Reasonable & Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5 (2005); DOJ & FTC, IP GUIDELINES, *supra* note 217, at 42.

219. DOJ & FTC, IP GUIDELINES, *supra* note 217, at 38.

220. *In re Rambus, Inc.*, 2006-2 Trade Cas. (CCH) ¶ 75, 364, at n.120 (Aug. 2, 2006) (citing concerns from industry participants).

221. *Id.* ("[P]roof of the deceptive conduct alleged in this case would establish the exclusionary element required by Section 2. . . . Just as 'false or misleading advertising has an anticompetitive effect,' distorting choices through deception obscures the relative merits of alternatives and prevents the efficient selection of preferred technologies."). In setting aside the FTC's order, the D.C. Circuit found there was insufficient evidence that the standard-setting organization would have standardized other technologies had it known the full scope of Rambus's intellectual property. *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008). Moreover, a monopoly could use deception simply to obtain higher prices, which the court surmised tends to attract competitors, not to repel them. On August 26, 2008, the D.C. Circuit denied the FTC's petition for a rehearing *en banc*.

222. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879, 884 (1st Cir. 1960) ("[T]he purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act."); *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 102 (1st Cir. 1932).

was not the intent of the antitrust laws.”²²³ It is unclear why the lower federal courts have resisted a federal common law of unfair competition, when, as the Court recently reiterated, the federal antitrust laws represent the federal common law on unfair competition.²²⁴ In its early antitrust decisions, the Court said that the common law on unfair trade practices provided the necessary certainty for determining anticompetitive practices under the Sherman Act.²²⁵

Another basis is that other laws, such as “unfair competition” or regulatory laws and business torts, provide remedies for various “competitive practices thought to be offensive to proper standards of business morality.”²²⁶ Thus, even in *Conwood*, the Sixth Circuit found that such business torts violate the Sherman Act in “rare gross cases.”²²⁷ This may be true for independent wrongful acts with little, or no, competitive ef-

223. *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990); *see also* *Byars v. Bluff City News Co.*, 609 F.2d 843, 855 (6th Cir. 1979) (“Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws.”); *Merkle Press Inc. v. Merkle*, 519 F. Supp. 50, 54 (D. Md. 1981) (“Courts must be circumspect in converting ordinary business torts into antitrust violations. To do so would be to ‘create a federal common law of unfair competition’ which was not the intent of the antitrust laws.”).

224. The Court stated that, from its inception, the Sherman Act was treated as a common law statute. “Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.” *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007); *see also* *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997) (“[G]eneral presumption that legislative changes should be left to Congress has less force . . . to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”). For over ninety years, the Court viewed resale price maintenance as per se illegal. In switching to its rule of reason standard, the Court argued that, unlike other statutes, principles of stare decisis were not as significant to the Sherman Act. *Contra Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (declining to overturn its heavily criticized decision that professional baseball is not within the scope of the federal antitrust laws on stare decisis grounds).

225. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (stating that “the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether, in a given case a particular act had or had not brought about the wrong against which the statute provided”); TAFT, *supra* note 1, at 3 (The Sherman Act was drafted by “great lawyers who may be presumed to have used those expressed with the intention that they should be interpreted in the light of common law.”); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 207–09 (2003) (“[A]ntitrust began as the common law tort of restraint of trade.”). Whether the common law provided this certainty was itself questioned. Herbert Pope, *The Reason for the Continued Uncertainty of the Sherman Act*, 7 ILL. L. REV. 201 (1912). Similarly, section 5 of the FTC Act specifically targets “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45 (2006).

226. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 651d, at 78 (rev. ed. 1996)).

227. The monopolist, as category manager for retailers, engaged in deceptive and tortious anti-competitive actions of (1) removing, discarding, and destroying its competitor’s point-of-sale advertising racks from retail stores without store management’s permission; (2) training its employees to take advantage of inattentive store clerks with various ruses such as obtaining nominal permission to reorganize or neaten the store racks in an effort to destroy its competitor’s racks; and (3) misusing its position as category manager by providing misleading information to retailers to dupe them into believing, inter alia, that the monopolist’s products are better selling so that retailers carry the monopolist’s products and discontinue carrying its competitor’s products. *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783 (6th Cir. 2002).

fects, such as a monopolist defaming its former employee. But if the monopolist is intentionally engaging in independently wrongful anticompetitive conduct, the court need not ramble through the wilds of economic theory to determine its net effect under a total welfare standard. As a DOJ antitrust official during the Kennedy Administration said, “Realistically, the antitrust law is always concerned with a pragmatic judgment about the reasonableness of trade practices from the social viewpoint.”²²⁸

A third concern is that the prospect that treble antitrust damages may chill pro-competitive behavior.²²⁹ If the behavior is independently wrongful and anticompetitive, then “the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”²³⁰ The Reagan Administration sought legislative initiatives to eliminate treble damages in private antitrust cases (except in price fixing and bid rigging) because treble damages invited private plaintiffs to pursue doubtful claims.²³¹ This was empirically suspect. Fewer private federal antitrust cases have been brought since the Court’s *Sylvania* decision.²³² In contrast, the interest in economic torts has increased.²³³

228. Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 29 (1964).

229. *NYNEX*, 525 U.S. at 136–37 (“To apply the per se rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases.”).

230. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969); see also 21 CONG. REC. 2569 (1890) (comments of Sen. Sherman).

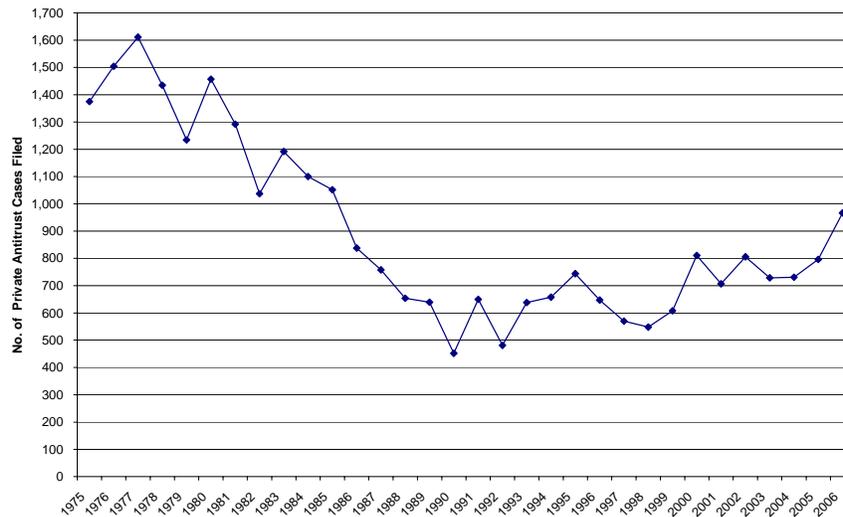
231. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES: JUSTICE DEPARTMENT, CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 61 (1990), available at <http://archive.gao.gov/d22t8/142779.pdf>.

232. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977), the Court abandoned its per se standard of liability for nonprice vertical restraints and adopted as the Chicago School antitrust adherents argued, the rule of reason standard. The chart reflects the number of private antitrust cases filed annually between 1975 and 2006 in federal district court. UNIV. AT ALBANY, STATE UNIV. OF N.Y., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.41 (2006), <http://www.albany.edu/sourcebook/pdf/t5412006.pdf>.

Whether treble antitrust damages are chilling pro-competitive activity is questionable, given the prospect of business torts' potentially excessive punitive damages.²³⁴ Moreover, private plaintiffs can recover multiple damages for willful violations of twenty-five states' unfair and deceptive practices acts.²³⁵

Consequently, the Court cannot use the infirmities of its rule of reason standard to defend its antitrust hierarchy. If antitrust plaintiffs have

Fewer Private Antitrust Cases Have Been Filed Since the 1977 Sylvania decision



233. The perception is that plaintiffs are pursuing business tort claims in lieu of federal antitrust claims. See SECTION OF ANTITRUST LAW, AM. BAR ASS'N, BUSINESS TORTS AND UNFAIR COMPETITION HANDBOOK xiii (2d ed. 2006) (noting shift in prominence of state business tort claims and federal antitrust claims); A. Michael Ferrill, Addendum, *Survey of Antitrust Practitioners on the Interplay Between Antitrust & Business Tort Claims in Private Litigation*, 59 ANTITRUST L.J. 389, 389 (1991); A. Michael Ferrill & James K. Spivey, *Clearing the Sylvania Hurdle: Developments in Business Torts and Dealer Termination*, 11 ANTITRUST L.J. 5, 5 (1996) (As with other traditional antitrust claims, dealer complaints are increasingly being brought under state law tort theories, given the availability of punitive damages (which may far surpass the treble damages available under the antitrust laws) and more receptive state courts. And with the infusion of economic theory into antitrust law, business torts often are easier to explain to a jury and, ultimately, to prove.); Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1190-95 (1996); William L. Jaeger, *New Tools for the Plaintiff in the 1990s*, 4 ANTITRUST L.J. 4, 5 (1990) ("Consigning state claims to second class status in an antitrust case may not be the wisest move for plaintiffs, in view of the increasing hostility of the federal courts to antitrust claims, and the eagerness of some courts to dismiss antitrust claims on summary judgment motions."); Lao, *supra* note 208, at 76 (addressing the Chicago School's effects on antitrust jurisprudence and the resulting use of business torts theories); Harvey I. Safenstein, *The Ascendancy of Business Tort Claims in Antitrust Practice*, 59 ANTITRUST L.J. 379, 379 (1991).

234. For example, the district court awarded a private plaintiff \$153,438 in treble damages and \$212,500 in attorney's fees and costs on its attempted monopolization antitrust claim, or, in the alternative, \$6,066,082.74 in compensatory and punitive damages on the state-law tortious interference claim. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989).

235. See DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW 571-73 (2008).

abandoned federal antitrust claims for state law tort claims, this may signal the failings of the Court's current standard. Moving from reviewing *ex post* the conduct's effects and offender's status to determining *ex ante* specific anticompetitive practices that are presumptively illegal is a desirable step. Otherwise we are left fathoming when conduct is other than "competition on the merits" or restraints that impair competition in an unnecessarily restrictive way.²³⁶ Calling the action "unreasonable," "unfair," or "competition on the merits" is trading one hopelessly vague standard for another.²³⁷

2. *How Objective Is the Objective Standard?*

A monopolist may engage in nontortious and otherwise legal behavior that is nonetheless anticompetitive. Such anticompetitive conduct falls within the Sherman Act's proscriptions, but it may be difficult to determine when (a) practices are exclusionary, "predatory," or competitive; (b) a monopolist must deal with its rival; or (c) an added product represents an innovation or an illegal tie-in.

Before the *Trinko* decision, there was discussion of evaluating such potentially anticompetitive conduct under a single objective, transparent standard.²³⁸ Although this Article is critical of the *Trinko* decision, the Court wisely rejected the proffered "no-economic sense" standard.²³⁹

236. *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 308 (3d Cir. 2007) (citing *Aspen Skiing Co. v. Aspen Highland Co.*, 472 U.S. 585, 604–05 & n.32 (1985)).

237. The OECD described the term "competition on the merits" as hopelessly vague: Lawyers, judges and competition law enforcement officials have been using this phrase for many years to explain and justify their arguments and decisions, but there is no consensus on what the term means. The same may be said of terms such as "unreasonable," "improper," and "level playing field." The continued use of these terms despite the absence of precise, generally accepted definitions for them has led to inconsistent interpretations, and therefore to unpredictable results. Consequently, these phrases have not helped to promote a better understanding of the law and policy on abuse of dominance. There is a need for a more principled and consistent basis for determining liability in unilateral conduct cases. COMPETITION COMM., ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION ON THE MERITS (2005), <http://www.oecd.org/dataoecd/7/13/35911017.pdf>.

238. As the OECD noted: Over the years, scholars searching for more principled ways to sort out pro-competitive conduct from anti-competitive conduct have proposed a number of tests that agencies and courts can apply in abuse of dominance and monopolisation cases. These include the profit sacrifice test, the no economic sense test, the equally efficient firm test, and various consumer welfare balancing tests. There is general agreement that no single test is suitable for every type of case, but there is also some variation . . . to the test that different delegates tend to favour.

Id. at 10.

239. See Brief for the United States & FTC as Amici Curiae Supporting Petitioner at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), available at <http://www.usdoj.gov/atr/cases/f201000/201048.pdf> ("Where . . . plaintiff asserts that defendant was under a duty to assist a rival, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."); see also Reply Brief for the United States at 2, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (No. 03-4097), available at <http://www.usdoj.gov/atr/cases/f203200/203296.pdf> ("Conduct is 'predatory' or 'exclusionary,' within the meaning of Section 2's prohibition against maintaining a monopoly, if it would make no economic sense but for its tendency to harm competition.").

First, the Court must examine the objectivity of any “objective” standard. Over fifty years ago, Dr. Kahn observed that the “insistence of economists on economic tests might be understandable if objective standards capable of commanding general acceptance had in fact been developed.”²⁴⁰ Despite the free reign of neoclassical economic theory on antitrust, no generally accepted objective standard exists today. This does not represent an infirmity in economic theory, but in certain ideologues’ belief that competition policy’s objectives can be constricted to one economic principle.

Invariably, subjective value judgments underlie any “objective” standard. As the OECD recognized, an “objective” standard reflects the antitrust enforcers’ objectives.²⁴¹ These objectives can vary. When the International Competition Network surveyed thirty-three members to identify their competition policy’s objectives regarding monopolistic behavior, what emerged were the following ten objectives:

- Ensuring an effective competitive process,
- Promoting consumer welfare,
- Enhancing efficiency,
- Ensuring economic freedom,
- Ensuring a level playing field for small and mid-sized enterprises,
- Promoting fairness and equality,
- Promoting consumer choice,
- Achieving market integration,
- Facilitating privatization and market liberalization, and
- Promoting competitiveness in international markets.²⁴²

It is doubtful any single “objective” economic standard of conduct can capture all or many of the desired goals.²⁴³ If economic efficiency is the enforcers’ main objective, then welfare-reducing actions are illegal.²⁴⁴ If fair trading is the main objective, then taking advantage of a better

240. Kahn, *supra* note 25, at 40.

241. See OECD, MONOPOLISATION, *supra* note 197, at 162.

242. ADVOCACY WORKING GROUP, INT’L COMPETITION NETWORK, ADVOCACY AND COMPETITION POLICY REPORT 25–40 (2002), http://www.internationalcompetitionnetwork.org/OutreachToolkit/media/assets/resources/advocacy_report.pdf.

243. Some argue for a single economic goal for antitrust, which not surprisingly matches their values and beliefs of antitrust, markets, and human behavior. For a critique of antitrust requiring a unitary economic goal, see Stucke, *supra* note 71, at 999–1008; AM. ANTITRUST INST., *supra* note 24, at 66–68.

244. OECD, MONOPOLISATION, *supra* note 197, at 9.

bargaining position is illegal.²⁴⁵ If protecting against monopolies is the objective, then only those monopolistic actions that make *no* economic sense *but for* their lessening of competition are illegal.²⁴⁶

The Sherman Act does not rank these objectives in importance. Different interest groups can graft their objectives onto the Sherman Act. At times, the objectives are inconsistent: consumers want more choices, lower prices, and their domestic manufacturing jobs protected. Competition policy cannot exist in isolation. Given that competition is not an end, but the means to achieve greater societal goals, antitrust policymakers must consider other social policies and how competition law interacts with other social policies.²⁴⁷ But Congress, not the Court, should rank the competing objectives and, depending on the ranking of these objectives, draft any “objective” standards to promote that ranking.

B. Issue of Workable Remedy

The *Trinko* Court said that cartels, unlike monopolies, have a workable, administrable remedy “that does not require judicial estimation of free-market forces.”²⁴⁸ When competitors collude, consumers are

245. *Id.*

246. Under this standard, a plaintiff must prove that the monopolist cannot proffer any economic justification for its action (even one whose benefit is small compared to its harm to consumers). This standard is more deferential than the efficiencies defense in merger analysis, where *defendants* must show the productive efficiency gains outweigh the alleged allocative inefficiencies. Indeed, if this “no economic sense” standard were applied to mergers (which presumably present a greater likelihood of false positives than monopolistic practices), any efficiencies, where proven, would constitute an absolute defense. See Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 217 (2005) (noting how the standard fails to quantify effects). In their amicus briefs in *Trinko*, several, including Judge Bork, criticized this standard as inconsistent with the D.C. Circuit’s en banc *Microsoft* decision: “Business efficiency is an affirmative defense and, in the right circumstances, can appropriately lead to a balancing of pro- and anticompetitive effects.” Brief for the Project to Promote Competition and Innovation in the Digital Age as Amici Curiae Supporting Respondent at 4, *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682). Both the DOJ and the FTC eventually rejected their “no-economic sense” standard as “a necessary condition for liability in all section 2 cases.” U.S. DEP’T OF JUSTICE, *supra* note 182, at 43; see *In re Rambus, Inc.*, 2006-2 Trade Cas. (CCN) ¶ 75,364 (Aug. 2, 2006).

247. As Judge Wood observed:

Related to this observation is . . . that the generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart, despite the best of intentions on the latter’s side. If one never emerges from the world of antitrust, to take one field that I know well, one can lose sight of the broader goals that lie behind this area of law; one can forget the ways in which it relates to other fields of law like business torts, breaches of contract, and consumer protection, and more broadly the way this law fits into the loose “industrial policy” of the United States. Economic mumbo-jumbo is already prevalent in the field, but lawyers talk of the trade-off between the deadweight loss “triangle” and the income transfer “rectangle” at their peril in front of a judge who does not live and breathe the field. Specialists need to emerge from their cocoons from time to time and find out how their smaller world fits in with the larger one.

Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

248. 540 U.S. at 410 n.3. The *Trinko* Court distinguished *Terminal Railroad Association* as involving “concerted action, which presented greater anticompetitive concerns and is [more] amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.” *Id.* But the Court mischaracterizes its ear-

denied temporarily the benefits of lower prices. If the price fixing (along with any facilitating practices) is detected and punished, the cartel members in theory should price at or above marginal cost, but below the cartel price.²⁴⁹

It is true that courts, at times, lack a quick fix for monopolistic conduct. Having antitrust enforcers or the courts act as “central planners, identifying the proper price, quantity, and other terms of dealing” is “a role for which they are ill suited.”²⁵⁰ If the market can support only one dominant competitor (e.g., oil and gas pipelines, local distribution of electricity), then regulation is the policy antidote. Nationalizing the monopolist may relieve consumers in the short run with lower prices, but harm them in the long run with a state-supported entrenched monopoly. Breaking up the monopoly may cause greater economic harm. One argument in favor of deemphasizing section 2 is that the remedy may be worse than the problem. Although remedying monopolistic behavior is difficult at times, competition officials need not wait for the Schumpeterian creative destruction; such passivity at times may delay its arrival. So what do you do with a monopolist?

1. *Keeping Structural and Behavioral Entry Barriers as Low as Possible*

Contrary to the *Trinko* Court’s dicta that monopolies are important to our free-market system, competition policy should prevent their formation through anticompetitive mergers or restraints of trade. The *Trinko* Court has great faith in regulation to perform “the antitrust function” in diminishing the likelihood of and remedying anticompetitive harm.²⁵¹ The Court offers no empirical support that a regulatory scheme can perform the antitrust function in a competitive market. In addition to the risks of imperfect information and regulatory capture, the government regulators, unlike private actors (who often bear the costs of their mistakes), may undertake anticompetitive actions because of weaker incentives to avoid mistakes, political myopia, and the lack of direct accountability to the public.²⁵²

lier decision in three respects. First, the Court held that defendants’ concerted and unilateral actions in *Terminal Railroad Association* violated both sections 1 and 2 of the Sherman Act. Second, the principal defendant was a monopoly, which the United States sought to break up. Third, the remedy in *Terminal Railroad Association* was not free of “judicial estimation of free-market forces.” *Id.* The Court provided that if any dispute arose between the company applying to become a joint owner or user of the terminal properties and the defendants over what constitutes “just and reasonable terms,” the parties could submit the dispute to the district court for resolution. *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 412–13 (1912).

249. This belief that cartel members, after criminal sanctions, price competitively needs to be empirically validated. Cartels, after years of colluding, may no longer need to collude expressly.

250. *Trinko*, 540 U.S. at 407.

251. *Id.* at 412.

252. Moreau, *supra* note 74, at 850. For example, the Federal Energy Regulatory Commission’s merger review policies were recently criticized for relying on data supplied by the regulated entities, rather than conducting its own independent fact gathering and analysis of market definition. Sara Ste-

As Dr. Kahn stated, the “essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors, letting the results take care of themselves.”²⁵³ Similarly, to prevent the formation of monopolies, the United States historically focused on maintaining competitive market structures, rather than regulatory dictates.²⁵⁴ To maintain competitive market structures, competition policy should promote (1) the introduction of variation, (2) a consistent selection process by end-users, (3) mechanisms that preserve and propagate the selected variation, and (4) mechanisms that further promote the introduction of variation on the selected variation.²⁵⁵

Besides targeting specific private restraints that thwart entry (and thus the possibility of innovation), the government, through its competition advocacy efforts, should continue to limit government restraints on entry, such as trade barriers,²⁵⁶ immunities from the competition laws,²⁵⁷

fanini, *Think Tank Urges FERC to Reform Merger Policies*, LAW360, Mar. 15, 2007, <http://competition.law360.com/Secure/ViewArticle.aspx?id=20553>.

253. Kahn, *supra* note 25, at 39. Ordoliberal legal scholar Franz Böhm when working on the concept of “Leistungswettbewerb” used as a central tenet that the rules for this market game should be shaped so that only the quality of performance (merit) should determine market success. Kerber, *supra* note 44, at 21.

254. Hovenkamp, *supra* note 180, at 4; Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 178–79 (2002) (FTC enforcement efforts during the 1990s were directed toward preserving open access to markets.). Thus, section 1 of the Sherman Act focuses on concerted activity to eliminate competitors and raise entry barriers. Section 7 prevents mergers that tend to create a monopoly. Attempts to monopolize violate section 2.

255. Mantzavinos, *supra* note 173, at 275 n.6.

256. “Cross-country and cross-industry studies of industrial and developing countries have found evidence that industries in decline, industries that are highly unionized, and industries that make substantial campaign contributions all tend to be rewarded with higher tariff protections.” WORLD BANK, WORLD DEVELOPMENT REPORT: BUILDING INSTITUTIONS FOR MARKETS 105 (2002).

257. “Virtually every jurisdiction has exemptions from anti-cartel laws, either in connection with regulation of an industry or because legislative choice has been made not to apply antitrust laws to certain conduct or industries.” INT’L COMPETITION NETWORK WORKING GROUP ON CARTELS, *Defining Hard-Core Cartel Conduct: Effective Institutions, Effective Penalties*, in BUILDING BLOCKS FOR EFFECTIVE ANTI-CARTEL REGIMES 1, 13 (2005), available at http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG1_General_Framework/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf. Similarly, the German cartels that usually sought government cooperation in the formation of forced cartels were in distressed industries that could not achieve a cartel through their own efforts. Bruno Birnbaum, *The Industrial Cartel: Its Methods in Germany*, N.Y. TIMES, July 2, 1933, at 5. At the same time, U.S. industry members could be compelled to abide by the National Industrial Recovery Act’s “codes of fair competition.”

and other protectionist measures,²⁵⁸ and should not further extend or prolong monopolies' intellectual property rights.²⁵⁹

2. *Improving the Standard of Liability*

Not all honestly earned monopolies exhibit natural monopoly (i.e., extreme economies of scale) cost characteristics. One should inquire how the monopoly arose. Did it arise primarily because of anticompetitive conduct? If so, will enjoining that conduct defeat the market power? By the time an antitrust plaintiff collects sufficient evidence to prevail under the rule of reason and successfully challenges the monopolistic conduct, it may be too late to remedy the anticompetitive harm. Given the acceleration of a firm's market power through network effects, the monopolist may no longer require the exclusionary behavior to maintain its market power.²⁶⁰ At other times, evolving market conditions may have dispossessed the company of its monopoly.²⁶¹ To shorten the inves-

258. Deborah Platt Majoras, *The Federal Trade Commission: Learning from History as We Confront Today's Consumer Challenges*, 75 UMKC L. REV. 115, 124 (2006) (FTC Chairwoman noting her agency's competition advocacy mostly "involves commenting on state and federal regulations or legislation that erect barriers to entry"). "Less obviously," noted the United States, "domestic regulatory schemes can create unnecessary burdens on competition and undermine the competitive process. This can happen when regulatory policy indirectly promotes monopolies and oligopolies, favours some domestic competitors over other domestic (and foreign) competitors, and fails to keep up with new technologies and becomes an inflexible restraint on change—leading to entry and market access barriers and removing the need for companies to innovate and become efficient, and often concerning itself more with the health of incumbent firms than with competition (whether domestic or foreign) in the industry." U.S. Communication, *supra* note 27, at 13.

259. Professor Scherer, among many others, argues that the "for limited times" language in Article I, Section 8, of the Constitution "should be taken seriously in order to promote the progress of science and the useful arts." Scherer, *supra* note 83, at 48–49. Despite this Constitutional limitation, intellectual property holders have a vested interest to prolong that "limited" time. The optimal form of the reward or optimal level of protections for intellectual property are unsettled, as that level may vary by industry. See Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173, 175 tbl.1 (1986); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 540–45 (2001). Innovation occurs in countries with limited or no enforceable intellectual property rights.

260. Moreau, *supra* note 74, at 865. For example, in 1981, Microsoft released its first version of its Microsoft Disk Operating System, commonly known as "MS-DOS." When IBM selected MS-DOS for its first generation of PCs, Microsoft's product became the predominant operating system for Intel-compatible PCs. By 1993, after the FTC investigated Microsoft for approximately thirty-seven months, Microsoft had secured its dominance. John Markoff, *F.T.C. Stays Deadlocked on Microsoft*, N.Y. TIMES, July 22, 1993, at D4. The DOJ, states, and European Commission thereafter investigated and prosecuted Microsoft.

261. In reviewing the history of seven monopolization cases, Professor Scherer found that by the time courts were ready for judgment, "technological and economic changes had radically altered the environment in which the remedies originally sought would apply." Scherer, *supra* note 84, at 48. The DOJ filed its antitrust complaint against IBM on January 17, 1969; the trial began in 1975 and was in its closing stages by 1981. Before the proposed findings of fact were due, the incoming Reagan Administration abandoned the case. One reason Assistant Attorney General Baxter gave was that the "conduct episodes that appear most promising as potential bases for liability are time-bound and highly specific to the immediate context in which they occurred. It is impossible to fashion injunctions to prevent similar future violations that are neither so specific that they would be meaningless outside those now-extinct circumstances, nor so general that they would simply echo the language of the antitrust laws themselves, which continue to be applicable to IBM in any event." Lawrence A. Sullivan,

tigatory and litigation time and lower litigation costs, the Court can condemn independently wrongful anticompetitive conduct without the need for a full-blown rule of reason analysis. As with cartels, swift punishment deters anticompetitive, independently wrongful conduct.

C. *Are Monopolies Still Relevant?*

A skeptic defending *Trinko* may argue that even if monopolies and trusts were a concern in the late 1800s, they no longer are today. Before the Sherman Act, no federal law inhibited the formation of trusts or monopolies. Hence, forming a trust or monopoly was easier in the 1800s than forming a cartel. With effective merger enforcement over the past century, and the accelerating pace of technological innovation in an increasingly global economy, monopolies are short-lived phenomena readily displaced by emerging technologies. Their deadweight loss, as some have measured, is small relative to GDP. Those monopolies that persist must arise from scale economies and market conditions. Enlightened economic theory exposes formerly misunderstood monopolistic practices as pro-competitive behavior. Thus, monopolies such as Kodak, IBM, AT&T, and Western Union are rarer in today's global economy.²⁶²

The Reagan Administration kept its dwindling cadre of antitrust attorneys busy prosecuting bid rigging involving local road construction markets.²⁶³ This is not to denigrate the prosecution of turtle²⁶⁴ or otter pelt²⁶⁵ cartels, but the Sherman Act has an important role in reaching anticompetitive restraints in key industries. In the early 1900s, the government prosecuted monopolies in the transportation sector, such as railroads,²⁶⁶ and manufacturers of key inputs, such as oil,²⁶⁷ coal,²⁶⁸ steel,²⁶⁹

Monopolization: Corporate Strategy, the IBM Cases & the Transformation of the Law, 60 TEX. L. REV. 587, 641–42 (1982).

262. Some argue that prosecuting cartels is the wisest use of the enforcer's scarce resources, as cartels are cheaper or easier to prosecute, a cartel prosecution carries greater impact on deterrence, and all else being equal, prosecuting cartels benefits consumers and the nation's economy more than prosecuting monopolies. BORK, *supra* note 46, at 406 (surmising that price-fixing cases deliver more consumer welfare for the enforcement dollar than other antitrust prosecution). The DOJ does not track the costs for investigating and prosecuting cases. Moreover, its amnesty program for cartels and criminal prosecutions of cartels skews any comparison.

263. Of the DOJ's 521 restraint of trade cases brought between fiscal years 1982 and 1988, 245 involved price fixing or bid rigging in road construction and forty-three involved government procurement. JUSTICE DEP'T, *supra* note 231, at 43.

264. Plea Agreement, *United States v. Nat'l Turtle Farmers & Shippers Ass'n, Inc.*, (W.D. La. June 19, 1995), available at <http://www.usdoj.gov/atr/cases/f0300/0300.pdf>.

265. Indictment, *United States v. Alaska Brokerage Int'l, Inc.*, No. CR 06 0011 (W.D. Wash. Jan. 17, 2006), available at <http://www.usdoj.gov/atr/cases/f214200/214227.pdf>.

266. *United States v. S. Pac. Co.*, 259 U.S. 214 (1922); *United States v. Lehigh Valley R.R.*, 254 U.S. 255, 257 (1920); *United States v. Reading Co.*, 253 U.S. 26, 40–41 (1920); *United States v. Del., Lackawanna & W. R.R.*, 238 U.S. 516, 519–20 (1915); *United States v. Union Pac. R.R.*, 226 U.S. 61, 79 (1912); *United States v. Lake Shore Ry.*, 203 F. 295, 297 (C.C.S.D. Ohio 1912).

267. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 30 (1911).

268. *Compare Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377 (1933) (proposed association legal under Sherman Act), with *United States v. Chesapeake & Ohio Fuel Co.*, 105 F. 93, 105

and aluminum.²⁷⁰ After dormancy in the 1920s and early 1930s, antitrust enforcement revived, notably in the media industries, such as daily metropolitan newspapers,²⁷¹ which play a key role in a healthy marketplace of ideas.²⁷² The DOJ prosecuted monopolistic restraints in emerging and innovative technologies, such as television and radio,²⁷³ computers,²⁷⁴ the Internet,²⁷⁵ and telecommunications.²⁷⁶ Whenever an emerging technology may displace companies with significant market power, the entrenched company has the incentive to eliminate, minimize, delay, or co-opt the emerging technology.²⁷⁷ Rather than leave enforcement to private parties or the states, Congress felt that the federal government needed to protect the public from a monopoly's harm.²⁷⁸

Ultimately, antitrust enforcement need not be a zero-sum game. *Trinko's* antitrust hierarchy cannot be defended on scarce resources.

(C.C.S.D. Ohio 1900) (association fixing prices and selling members' coal illegal), *aff'd*, 115 F. 610 (6th Cir. 1902).

269. The United States, however, suffered several notable defeats in the steel industry. *See, e.g.,* United States v. Columbia Steel Co., 334 U.S. 495, 532–33 (1948) (merger); United States v. U.S. Steel Corp., 251 U.S. 417, 457 (1920); United States v. Republic Steel Corp., 11 F. Supp. 117, 125 (N.D. Ohio 1935) (merger).

270. United States v. Aluminum Co. of Am., 148 F.2d 416, 422 (2d Cir. 1945) (detailing the June 7, 1912 consent decree).

271. *See* Citizen Publ'g Co. v. United States, 394 U.S. 131, 133–34 (1969); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 602 (1953) (“[A] vigorous and dauntless press is [a] chief source feeding [the] flow of democratic expression and controversy [that] maintains the institutions of a free society.”); Lorain Journal Co. v. United States, 342 U.S. 143, 144 (1951); Assoc. Press v. United States, 326 U.S. 1, 3–4 (1945); Kan. City Star Co. v. United States, 240 F.2d 643, 647 (8th Cir. 1957); United States v. Am. News Co., Civ. Act. No. 77-193, 1955 Trade Cas. (CCH) ¶ 68,128 (S.D.N.Y. Sept. 1, 1955); United States v. Mansfield Journal Co., Civ. Act. No. 28253, 1952 Trade Cas. (CCH) ¶ 67,210 (N.D. Ohio Jan. 15, 1952) (consent decree).

272. Stucke & Grunes, *supra* note 165, at 249.

273. *See* United States v. Radio Corp. of Am., No. 97-38, 1958 Trade Cas. (CCH) ¶ 69,164 (S.D.N.Y. Oct. 28, 1958). The complaint alleged that the radio-television industry was in a stage of active evolutionary development, and that research and patent licensing within the industry not only determined the character of consumer products but had vital significance for national defense. Since 1932, RCA allegedly conspired with AT&T, General Electric Co., and Westinghouse Electric Corp., among others, amassed approximately ten thousand patents in the radio-television field, harassed potential and actual television radio manufacturers and their customers with patent suits (without ever bringing one to trial), prevented innovation in radio and television unless controlled by RCA, and deprived the public the benefit of new radio-television developments that might have emerged from these competitive research activities. RCA settled. *See id.*

274. United States v. Microsoft Corp., Civ. No. 94-1564, 1995-2 Trade Cas. (CCH) ¶ 71,096 (D.D.C. 1995) (consent decree); United States v. Microsoft Corp., No. C95-1393 WHO (N.D. Cal. Apr. 27, 1995) (acquisition of Intuit Inc.).

275. United States v. Microsoft Corp., 253 F.3d 34, 34 (D.C. Cir. 2001).

276. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

277. For example, the DOJ charged a British firm and its U.S. subsidiary with monopolizing the worldwide flat glass market. The complaint alleged that Pilkington entered into unreasonably restrictive licensing arrangements with its likely competitors (including U.S. firms) and, for over three decades, used these arrangements and threats of litigation to prevent U.S. firms from competing to design, build, and operate flat glass plants in other countries, even though Pilkington no longer had enforceable intellectual property rights to warrant such restrictions. The case was settled by a consent decree. Complaint, United States v. Pilkington PLC, No. 94-345, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. May 25, 1994), available at <http://www.usdoj.gov/atr/cases/t220800/220861.pdf>.

278. United States v. E.C. Knight Co., 156 U.S. 1, 44–45 (1895) (Harlan, J., dissenting).

The DOJ's antitrust attorneys in the last Bush Administration devoted time away from antitrust enforcement to defend on appeal the deportation of immigrants seeking asylum in the United States.²⁷⁹ With a similar number of prosecutors and a smaller budget, the DOJ, between 1995 and 1999, opened more section 1, 2, and 7 investigations, filed more civil and criminal antitrust actions, and litigated the monopoly case against Microsoft.²⁸⁰

CONCLUSION

Contrary to *Trinko's* dicta, cartels do not present greater anticompetitive concerns than monopolistic abuses, monopolies are not an important element of the free-market system, and many factors attract the business acumen and risk taking that produce innovation and economic growth. Tomorrow's innovators are unknown. Several technological designs may be at work: some because of quality, mistake, luck, or opportunity, become dominant; others, for similar reasons, fail. Thus, promoting market access to new entrants or small rivals is more important than condoning monopolies. The hubris of a centrally planned economy is its confidence in predicting winners and losers. Both antitrust critics and defenders are wary about the government displacing private enterprises with state-owned monopolies. Likewise, they should be wary of monopolistic practices or government industrial policies that restrain market access by competitors.

The *Trinko* Court and others, however, may have sound reasons for deemphasizing the prosecution of monopolistic practices and erecting an antitrust hierarchy with cartels as the "supreme evil."²⁸¹ Welcomed in this debate is sound evidence to support their conclusions.

279. See, e.g., Brief of Respondent, *Hasan v. Gonzales*, No. 05-15749-BB, 2006 WL 2838236 (11th Cir. Feb. 3, 2006).

280. Between 1995 and 1999, the DOJ opened seventy-six section 2 investigations and filed seven civil actions challenging monopolistic abuses. That dropped to fifty investigations between 2000 and 2004 with two filed civil actions, and dropped further to seventeen actions between 2005 and 2007 with no civil actions challenging monopolistic abuses. The decrease in section 2 activity was not offset by more section 1 or section 7 investigations or lawsuits. Instead, the number of civil and criminal section 1 actions dropped between 2000 and 2004, as did the number of merger investigations and section 7 lawsuits. According to one source, the DOJ was involved in the fewest number of filed antitrust cases in 2001, 2002, and 2003 than in any other year during the past twenty-five years. This decline in antitrust enforcement is not attributable to staffing (the number of Antitrust Division attorneys in these two time-periods was comparable) or budget (which, when factoring inflation, increased after 1999). UNIV. AT ALBANY, *supra* note 232.

281. *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).