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Property, Aspen, and Refusals to Deal

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Free markets and the prosperity they create depend critically upon the institution of private property. Without property, markets would collapse, as parties would have nothing to trade. A nation with no property rights would be very poor indeed; individuals would produce too few goods, while consuming too many.

Property entails many rights, the most important of which is the right to exclude. Even at common law, however, this right was not absolute. Instead, courts qualified the right in rare cases when such qualification was necessary to facilitate the low-cost formation of efficient markets. Antitrust regulation follows this common law tradition, further qualifying rights of contract and property when necessary to prevent market failure.

The Sherman Act, of course, does not mention property. Instead, Section 1 prohibits unreasonable contracts, and Section 2 forbids monopolization. Yet, contracts generally involve the disposition of property, and firms that monopolize often do so by exercising their property rights to the disadvantage of rivals. For instance, the classic (though rare) example of monopolization—predatory pricing—involves the manufacturer's use of its property to manufacture more property—a product—and the subsequent sale of that property at a predatory price. Imposition of liability for this offense interferes with the right of an owner to use and dispose of his property as he sees fit.

Section 2 also seeks to regulate what seems to be the opposite of predatory pricing—the refusal to sell one's property to certain customers at any price. Such refusals, it is said, can bolster a firm's monopoly position by denying rivals access to important inputs and thus raising rivals' costs of entry or expansion. Section 2 seeks to interdict those refusals that destroy more wealth than they create.

The law on refusals to deal is extremely sparse, at least in Supreme Court precedent. This Symposium examines the most important decision...
on such refusals, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*

Aspen is important for two reasons. First, the decision articulates the general test governing refusals to deal. Second, on its facts, the decision applies the test in a way that established what the Supreme Court in *Trinko* recently called “the outer boundary of [Section 2] liability.” Thus, *Aspen* is what one might call a “paradigm case,” that is, one that informs larger judicial thinking about the proper approach to refusals to deal.

This article sets forth the argument that *Aspen* was wrongly decided. *Aspen,* it is shown, erred in refusing to consider why the defendant in that case refused to deal with the plaintiff. In particular, the Court failed to notice that the defendant’s refusal was part and parcel of the parties’ renegotiation over the allocation of the fruits of their joint enterprise. When the plaintiff refused to accept the defendant’s terms, the defendant made good on its threat—implicit in all bargaining—to refuse to deal with the plaintiff. The Court sustained the jury’s finding that this refusal had no legitimate business purpose without first asking whether the terms that the defendant proposed were, in fact, unreasonable. Thus, the Court failed to consider the very real possibility that the new agreement offered by the defendant was an effort to create a contractual property right that prevented the plaintiff from free riding on the defendant’s promotional investments. By requiring the defendant to deal with the plaintiff, then, the Court unduly qualified the defendant’s property rights and did so in a way that enhanced the prospect of opportunistic free riding by venture partners that decline to engage in promotional efforts.

The analysis offered here does more than undermine the result in *Aspen.* It also calls into question efforts to generalize the decision beyond

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3 See John Shepard Wiley, Jr., *Exclusionary Agreements,* in *The New Palgrave Dictionary of Economics and the Law* 110 (Peter Newman ed., 1998) (explaining that “definitive accounts of the governing cases [are] the type of evidence most persuasive to the judges who craft American antitrust policy and must grapple with precedent”); see also THOMAS S. KUHN, *The Structure of Scientific Revolution* 23 (2d ed. 1970) (analogizing scientific paradigms to “accepted judicial decisions in the common law”); *id.* at 23–24 (explaining how scientific community embraces those paradigms that purportedly solve the problems that are most salient to the community).

It should be noted that I am using the term “paradigm” in the narrow, original sense, to refer to concrete problem solutions that a given profession has accepted as the basis for further research, often by analogy. THOMAS KUHN, *The Essential Tension,* in *The Essential Tension: Selected Studies in Scientific Tradition and Change* 225–39 (1977) (articulating Kuhn’s original definition); THOMAS KUHN, *Second Thoughts on Paradigms,* in *id.* at 293, 294–308; *id.* at xvii–xx (recognizing that the definition of the concept expanded in *The Structure of Scientific Revolution* to refer to the set of values and pre-commitments shared by a particular scientific community).
its particular facts. For instance, courts and scholars have read *Aspen* for the more general proposition that a refusal to deal is particularly suspect if the parties previously dealt with one another, thus supposedly establishing that such dealing is efficient. The actual facts of *Aspen*, however, seem to cut the other way. Moreover, relying upon *Aspen* as an example, courts and scholars have also suggested that a monopolist's discriminatory treatment of rivals raises a presumption at least that the monopolist is engaged in unlawful exclusion. Here again, *Aspen* itself provides no support for this notion. Courts and scholars seeking to build a jurisprudence of exclusion will have to find a new paradigm case that draws a different "outer boundary" of liability under Section 2.

I. PROPERTY, COOPERATION, AND THE INSTITUTIONAL FRAMEWORK

Everyone agrees that society should promote "competition." But "competition" is an ambiguous term.\(^4\) Long before the Sherman Act, or any other law, there was very fierce competition. In this "state of nature," humans competed with each other and animals for scarce resources that Mother Nature provided. The strongest (literally!) survived.\(^5\)

Though very competitive, the state of nature was not conducive to wealth creation. As Judges Holmes and Easterbrook have put it, the war of all against all is not a blueprint for economic progress.\(^6\) Where economic resources flow to those with the most strength or guile, those with less strength and guile will under-invest in the creation and maintenance of wealth. No man will track and kill a bison if he knows that, having "made the kill," he must immediately turn the game over to a band of interloping hooligans.\(^7\) Nor will he make the minor repairs necessary to maintain


\(^5\) See THOMAS HOBBES, LEVIATHAN 104 (1950).

\(^6\) See Polk Bros. Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.) ("The war of all against all is not a good model for any economy."); *see also* Northern Sec. Co. v. United States, 193 U.S. 197, 411 (1904) (Holmes, J., dissenting) (opining that the Sherman Act does not "make eternal the bellum omnium contra omnes and disintegrate society so far as it could into individual atoms").

\(^7\) *Cf*. Pierson v. Post, 3 Cai. R. 175, 180–81 (N.Y. 1805) (Livingston, J., dissenting) ("Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, 'sub jove frigido,' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or
or enhance the value of his hut, if, the repairs having been completed, his stronger neighbors can take possession.  

Property severs the link between possession, on the one hand, and strength or guile, on the other. A social institution, property ensures that those who create wealth can keep it, thus establishing a direct link between the production of wealth and its possession. As such, the institution of property quite obviously improves upon the state of nature, providing all individuals, whether strong or weak, with the incentives to acquire, create, and preserve wealth. Man certainly has prospered as a result.

Economic progress is not a solitary affair, however; most progress depends upon the cooperation of two or more individuals. The institution of property creates the necessary foundation for such cooperation. A farmer who sells his crops to a “country dealer” can do so only because he has dominion and control of such crops, including the right not to sell them in the first place. Moreover, the country dealer will only agree to purchase such crops if he can be certain that, having paid for the crops, he will be able to resell them without interference. Finally, the members of the exchange where the dealer resells the grain cannot create such a venture unless they have dominion and control over the labors of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit.

8) William Blackstone, Commentaries *4 (“[N]o man would be at trouble to provide either [shelter or clothing], so long as he had only a usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.”).

9) See id. at *8 (“Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties.”); see also Yoram Barzel, Economic Analysis of Property Rights 3 (2d ed. 1997) (defining economic property as “the individual’s ability, in expected terms, to consume the good (or the services of the asset) directly or to consume it indirectly through exchange.”); id. at 3 (stating that “legal rights are the means to achieve the end” of economic property rights).


11) Blackstone, supra note 8, at *7 (stating that the rise of agriculture depended upon institution of property); Armen A. Alchian & Harold Demsetz, The Property Right Paradigm, 33 J. Econ. Hist. 16, 16–27 (1973).

12) See Polk Bros. Inc. v. Forest City Enters., Inc., 776 F.2d at 188 (“[C]ooperation is the basis of productivity.”).

13) See Barzel, supra note 9, at 9–10 (explaining how delineation and enforcement of property rights facilitates transactions).

14) See Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (evaluating restraint designed to facilitate transactions between country dealers and members of grain exchange).
premises of the entity and any elevators where the grain is stored.\footnote{See Barzel, supra note 9, at 10 (explaining how the institution of property facilitates cooperation within the firm); Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 60 AM. ECON. REV. 777, 781–83 (1972) (examining how the institution of the firm depends upon law’s definition of residual claim as “property” of owner).} In short, most useful economic cooperation depends upon the recognition and enforcement of property rights.\footnote{See Demsetz, supra note 10, at 356–57 (explaining that assignment and enforcement of property rights facilitate voluntary transactions that overcome externalities); see also F.A. Hayek, Free Enterprise and Competitive Order, in INDIVIDUALISM AND ECONOMIC ORDER 110–11 (1948) (“[A] functioning market presupposes not only prevention of violence and fraud but the protection of certain rights, such as property, and the enforcement of contracts.”).}

While the protection of property supports the institution of contract, parties may also employ contract to create the equivalent of property. By negotiating enforceable limits on the behavior of trading partners, economic actors can ensure that certain actors reap the rewards of certain activities, thus creating the economic equivalent of a property right.\footnote{See id. at 3–4; see also BLACKSTONE, supra note 8, at *2 (defining “the right of property” as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).} So, for instance, an employer can grant a salesman a partial property right in the fruits of his efforts by promising to pay him a fraction of the profits derived from the territory to which he is assigned.

Central to this conception of property is the “right to exclude” others from that which is “yours.”\footnote{See Nollan v. California Coastal Comm’n, 483 U.S. 825, 831 (1987) (Scalia, J.).} In another context, the Supreme Court has opined that this “right to exclude” is the most important “stick” in the property owner’s “bundle of rights.”\footnote{See Barzel, supra note 9, at 3–4 (defining a property right as the ability to realize the fruits of a resource by consumption or exchange); Demsetz, supra note 10, at 354 (explaining that when land is held in common, inability to exclude others prevents efficient investment).} Hence, it does no good for a farmer to “own” a piece of land if others can trample his crops with impunity.\footnote{See Demsetz, supra note 10, at 10 (explaining that assignment and enforcement of property rights facilitate voluntary transactions that overcome externalities); see also Harold Demsetz, Barriers to Entry, 72 AM. ECON. REV. 47, 49 (1982).} Nor does General Motors care to “own” a factory if its rivals can demand to use such facilities whenever they wish.\footnote{See RESTATEMENT (SECOND) OF TORTS § 158 (1965) (defining an invasion of another’s land as a trespass regardless whether the invader does harm or makes owner whole); cf.}

This “right to exclude” is usually absolute, at least as a legal matter. A farmer can exclude a rival from his land even if the rival offers to pay a “reasonable fee” for access.\footnote{See id. at 3–4; see also BLACKSTONE, supra note 8, at *2 (defining “the right of property” as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”).} Ditto for General Motors. The law protects this right to property with a panoply of civil and criminal remedies, even
going so far as to authorize reasonable private force when necessary to defend it.\textsuperscript{23} If General Motors spots Ford interlopers using its equipment, it can “call out the Pinkertons” and task these agents with expelling the trespassers, so long as they employ only reasonable force.\textsuperscript{24}

It is no exaggeration to say that this right to exclude makes the private market work. Destruction of this right would undermine the process of striking private bargains—the bedrock of a free economy—giving way to private force or centrally determined transfers at state-determined rates.\textsuperscript{25} Private property—created and enforced by the State—is the foundation of the institutional framework that makes the “free market” work.\textsuperscript{26}

In rare cases, however, recognition and enforcement of an absolute right to exclude could reduce economic welfare. A homeowner who installs speakers on his roof and blares Mozart at midnight may impose more harm on his neighbors than he derives in benefits. A property owner who invoked an absolute right to exclude to drive a “hard bargain” with a state agency that hoped to purchase his land for a superhighway or airport could thereby generate significant transaction costs and destroy wealth.\textsuperscript{27} Finally, the owner of a dock who excludes a family whose sloop is about to sink in a storm may create a similar bargaining breakdown.\textsuperscript{28}

In each such case, private property premised upon an absolute right to exclude would result in negative externalities that destroy wealth, as

\textsuperscript{23} See id. § 77.

\textsuperscript{24} Id.

\textsuperscript{25} See Guido Calabresi & A. Douglas Melamed, \textit{Property Rights, Liability Rules, and Inalienability: One View of the Cathedral}, 85 \textit{Harv. L. Rev.} 1088, 1096–97 (1972) (explaining how absolute legal protection for property can facilitate private bargaining and resulting allocation of resources); Demsetz, \textit{supra note} 10 (explaining that existence of property rights facilitates bargaining); \textit{see also} United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911) (noting that destruction of the “individual right to contract [would] render difficult if not impossible any movement of trade in the channels of interstate commerce”).

\textsuperscript{26} See R.H. Coase, \textit{The Institutional Structure of Production}, 82 \textit{Am. Econ. Rev.} 713, 716–18 (1992) (arguing allocation of resources in free market economy depends upon background rules); \textit{see also} BARZEL, \textit{supra note} 9, at 11–13 (explaining that concept of perfect competition depends on background assignment and enforcement of property rights); Hayek, \textit{supra} note 16, at 110–16 (contending that a well-functioning market depends upon institutions of property, contract, and tort). Here I use the term “institutional framework” as a synonym for Professor Coase’s “Institutional Structure of Production.” \textit{See Coase, supra}.


\textsuperscript{28} Ploof v. Putnam, 71 A. 188 (Vt. 1908); \textit{see also} Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910) (holding that shipowner could lash ship to a dock during a storm but had to pay dock owner compensation for resulting damage); \textit{RESTATEMENT (SECOND) OF TORTS} §197 (1965) (articulating same principle).
parties would not be able to alter such results by contract. In other cases, reliance upon private bargains will destroy potential wealth by increasing transaction costs or producing prices above the true cost of utilizing the property in question, thus distorting the allocation of resources.

An institutional framework that seeks to maximize wealth must therefore seek to qualify the absolute right to exclude in some instances, relying upon “liability rules” to resolve competing claims to a particular resource. So, for instance, the owner whoblares his stereo at midnight will find himself under arrest or the defendant in a nuisance action, under the principle sic utere tuo, ut alienum non laedas—use your property so as not to harm another’s. Moreover, should the same owner decline to sell his land at a reasonable price to the State for a public use, he will find his land condemned and receive a price that the State deems reasonable. Finally, the owner who uses force to exclude a sinking vessel from his dock will soon be a defendant in a trespass action and liable for any damages that resulted. Taken together, these various qualifications to the absolute right to exclude help make up an institutional framework that facilitates the movement of resources to their highest valued use.

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29 See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 15–16 (1960) (arguing that where transaction costs are high, improper assignment of rights will prevent efficient allocation).

30 See, e.g., Posner, supra note 27, at 54–60 (explaining that absolute right to exclude government from private property could result in bilateral monopoly, raising transaction costs and thereby wasting resources); Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J.L. & Econ. 553 (1993); Posner, supra, at 117–18 (explaining how refusal to enforce such agreements reduces transaction costs); id. at 176–77 (explaining how doctrine of necessity reduces the cost of bargaining over property in situations of bilateral monopoly); see also Post v. Jones, 60 U.S. 150, 160 (1856) (courts will not enforce salvage contracts for exorbitant fees as such agreements would interfere with the interests of commerce). These scholars tend to focus on how qualifying the absolute right to exclude reduces the cost of transacting. It should also be noted that, even if transaction costs are zero, enforcement of such a right in these situations could lead to above-cost pricing, and this dynamic deters purchasers from engaging in cost-justified activity.

31 See Calabresi & Melamed, supra note 25, at 1106–10 (explaining distinction between property and liability rules); cf. R.H. Coase, The Choice of the Institutional Framework: A Comment, 17 J.L. & Econ. 493, 493 (1974) (“[T]he way in which property rights are defined can affect the costs of transactions, [and] any change in those rights will affect the transactions that are carried out.”).


33 Calabresi & Melamed, supra note 25, at 1106–07 (employing eminent domain as paradigmatic example of a liability rule).

34 See Ploof, 71 A. at 189–90.

35 See Barzel, supra note 9, at 13–15 (perfect competition and resulting allocation of resources depends on existence and enforcement of property rights); cf. Coase, supra note
II. ANTITRUST LAW'S ADDITIONAL QUALIFICATION OF PROPERTY RIGHTS

Still, consistent application of the institutional framework just described may nonetheless thwart the best allocation of resources in some cases, at least in the short run. For instance, relying upon the right to exclude—even as traditionally qualified under state law—a single individual or firm with a monopoly over a particular product could reduce production below the level consumers would desire and pay for. This result would only be possible because the State empowered the owner of these resources to determine how they were used, without input from consumers and rivals. Absent such exclusion, rivals could use the putative monopolist’s property to produce their own wares, wares they could sell in competition with the owner, driving prices toward the competitive level.

The traditional qualified right to exclude can also support the collective exercise of monopoly power. By establishing clear rights in productive resources and the output from them, property law can facilitate collective decisions on output by otherwise independent firms. The result, of course, could be an old-fashioned cartel, and output below what consumers would demand in the absence of bargaining costs.

Both of these results—cartel and monopoly—destroy wealth compared to the alternative. Absent a cartel agreement, rival firms would compete, thus increasing output and lowering prices to the competitive level. Moreover, no iron law of nature forces a monopolist to reduce its output and raise prices. Instead, such a firm altruistically could decide to enhance the public welfare by setting output higher than the profit-maximizing level. Such a decision would enhance wealth when compared to the monopolistic alternative.

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26, at 717-18 (a change in background rules can alter the content of transactions and thus impact the allocation of resources).

36 See Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules*, 11 J.L. & Econ. 67 (1968) (explaining that absent transaction costs, consumers would pay monopolists to increase output to competitive level).


38 See Barzel, * supra* note 9, at 9-10 (explaining how recognition and enforcement of property rights facilitates bargaining between individuals and within firms).


41 Cf. id. at 95-96.
None of the common law regimes mentioned in Part I can reliably prevent such misallocation. 42 By contrast, the Sherman Act creates a legal regime directed at cartels and monopolies, a regime designed to thwart harmful exercises of property rights. 43 By combating monopolies and cartels, then, the Sherman Act could implement the *sic utere* principle in the pricing and output context, combating monopolistic output reductions that divert resources from their highest valued use and thereby reduce society’s stock of wealth. 44

The police power account of the Sherman Act just sketched implies a simple and straightforward enforcement policy. First, enforcers should attack, and courts should condemn, any firm that possesses monopoly power. Second, courts and enforcers should attack agreements between rivals on price or output. Such regulation can eliminate externalities, just like a ban on late-night music or pollution. 45

Still, the simple policy just sketched is emphatically not the law, at least not in the United States. 46 For one thing, the law regularly allows rivals or potential rivals to agree on price or output. The classic example is the agreement of merger or partnership, whereby otherwise independent entities or individuals agree to combine their talents and resources, which they then operate in common as a single entity. Such transactions and the entities they create quite obviously involve price fixing, and they may also reduce output, at least under some metrics. 47 Nonetheless, courts analyze the creation of such entities under a forgiving rule of

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42 To be sure, common law courts decline to enforce contracts in restraint of trade. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 279–82 (6th Cir. 1898) (summarizing common law). However, mere non-enforcement does not always prevent cartel pricing. Nor can such non-enforcement prevent monopoly pricing if there are non-contractual barriers to entry.


45 See Calabresi, *supra* note 36, at 70.

46 See Treaty Establishing the European Community, March 25, 1957, art. 82 (ex. art. 86), 37 I.L.M. 56, 94 (forbidding “abuse ... of a dominant position” including “imposing unfair purchase or selling prices” or “limiting production ... to the prejudice of consumers”).

47 See Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 9 (1979) (explaining that partnerships quite literally involve price fixing); id. at 23 (explaining that mergers extinguish competition and involve price fixing); see also NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 106–08 (1984) (defining output as raw number of games broadcast, without regard to quality).
reason." Moreover, coordination on price and output within extant firms is lawful per se, even if such coordination facilitates monopoly pricing. More recently, courts have held that price fixing and output restrictions between separate firms are properly analyzed under the rule of reason, so long as such conduct is ancillary to some larger, legitimate venture or might otherwise produce benefits that courts deem cognizable. The rationale for such counterintuitive holdings is simple: While such restrictions reduce rivalry on price or output, they may at the same time overcome market failures that unbridled competition would produce. In many instances, such restraints overcome these failures by creating contract rights that are the economic equivalent of property rights, inducing parties to internalize the results of their actions and, thus, leading to a more efficient allocation of resources. Like all property, these restraints reduce "competition" in one sense, but all may

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48 See, e.g., U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), available at http://www.ftc.gov/bc/docs/horizmer.htm (articulating standards that enforcement agencies apply when deciding whether to challenge horizontal mergers). Among other things, these Guidelines require a plaintiff to define a relevant market and show that the defendant's share is such that the challenged transaction can create market power. See id. §§ 1.1, 1.2 (market definition); §§ 1.4, 1.5 (articulating concentration thresholds); FTC v. Tenet Health Care, 186 F.3d 1045, 1051-54 (8th Cir. 1999) (holding that plaintiff must establish that merger will produce harm in relevant market to make out prima facie case against transaction); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 (6th Cir. 1898) (explaining how restrictions in the articles of partnership upon the business activities of the members "were to be encouraged") (emphasis added).

49 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (holding that intraenterprise agreements cannot offend § 1 of the Sherman Act); see also Arizona v. Maricopa Med. Soc'y, 457 U.S. 392 (1982) (declaring horizontal "maximum" price fixing between independent entities unlawful per se); id. at 357 (noting price fixing between members of a single partnership would be "perfectly proper"); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1985) (stating antitrust law does not regulate prices set by a monopolist); Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 598 (7th Cir. 1990) (explaining that, under current law, "the producers of Star Trek, may decide to release two episodes a week and grant exclusive licenses to show them, even though this reduces the number of times episodes appear on TV"); Illinois Corp. Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) (holding agreement between airline and travel agents setting price latter can charge is lawful per se).

50 See NCAA, 468 U.S. at 99-105; Chicago Prof'l Sports, 95 F.3d at 598 (declaring output limitations subject to relaxed rule of reason analysis given extent of integration between the parties); United States v. Brown Univ., 5 F.3d 658, 678-82 (3d Cir. 1993); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 223-30 (D.C. Cir. 1986) (Bork, J.); Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 188-91 (7th Cir. 1985) (Easterbrook, J.). But see United States v. Topco Assocs., 405 U.S. 596 (1972) (holding that division of territories ancillary to a legitimate joint venture was unlawful per se).

51 See Polk Bros., 776 F.2d at 188 ("Cooperation is the basis of productivity.").

52 See generally Alan J. Meese, Property Rights and IntraBrand Restraints, 89 CORNELL L. REV. 553 (2004) (explaining how intrabrand restraints, such as minimum resale price maintenance and exclusive territories, can create the economic equivalent of property rights and thus overcome market failures).
enhance rivalry by facilitating production, promotion, and distribution.\textsuperscript{53} Only “naked” restraints, that is, restrictions that reduce rivalry without plausibly combating market failure or otherwise enhancing efficiency, are outright unlawful.\textsuperscript{54}

The law shows similar ambivalence toward pricing by monopolists. Under current law—and over a century of unbroken precedent—firms, including monopolists, may charge whatever the market will bear.\textsuperscript{55} This rule holds even though monopoly pricing harms consumers and distorts the allocation of resources.\textsuperscript{56} Instead, monopolists only offend the Sherman Act if they obtain or maintain their monopoly through tactics that courts deem to be “exclusionary.”\textsuperscript{57}

Of course, just about any successful tactic a monopolist employs can be labeled exclusionary. A firm that builds a better mousetrap, or builds an average mousetrap at lower cost, excludes its rivals from the market. Ditto for a firm that comes up with a superior system of distribution. Nothing excludes rivals more surely than high-quality products sold at a low price.\textsuperscript{58}

As a result, courts have articulated a more precise, and more narrow, definition of exclusion applicable under Section 2. That is, courts have held that a monopolist’s practices are only exclusionary for antitrust purposes if the tactics drive rivals from the market on some basis other


\textsuperscript{54} See Thomas G. Krattenmaker, Per Se Violations in Antitrust Law: Confusing Offenses with Defenses, 77 GEO. L.J. 165, 172-73 (1988) (explaining how the application of per se rule depends upon possible presence of redeeming virtues); see also Polk Bros., 776 F.2d at 189 (holding an agreement is ancillary and thus analyzed under the rule of reason if it arguably “promoted enterprise and productivity at the time it was adopted”).

\textsuperscript{55} See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004); United States v. United States Steel Corp., 251 U.S. 417, 450-51 (1920) (mere size cannot offend § 2); see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1985) (stating that the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition, on the other).

\textsuperscript{56} See supra notes 36-40 and accompanying text (explaining how monopoly pricing can distort the allocation of resources).

\textsuperscript{57} See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480 (1992) (holding plaintiff must show that the defendant both possesses monopoly power and used that power to foreclose competition and thus protect its monopoly); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

\textsuperscript{58} See Herbert Hovenkamp, Federal Antitrust Policy 553 (2d ed. 1999) (“Nothing is a more effective barrier to entry than a firm’s capacity to produce a high quality product at a low price, or to provide improved service to its customers.”).
than efficiency.\textsuperscript{59} So, while a monopolist may exclude its rivals from the market by producing a better or cheaper mousetrap, it may not exclude rivals by, for instance, entering an exclusive contract that deprives rivals of important inputs, without any plausible efficiency justification.\textsuperscript{60} Courts treat the former—building a better mousetrap and the like—as "competition on the merits" and, therefore, not worthy of judicial scrutiny.\textsuperscript{61} By contrast, agreements that exclude rivals from a significant source of inputs are presumptively unlawful, and current law makes it quite difficult to rebut this presumption once it arises.\textsuperscript{62}

As defined by the courts, competition on the merits is technological in nature and involves activities that take place within individual firms, without contractual cooperation with other actors. Classic examples of such rivalry include efforts to manipulate technology so as to create a new product (innovation) and efforts to employ existing technology to realize economies of scale.\textsuperscript{63} At one time, the law's hands-off approach to this sort of rivalry rested upon a belief that such conduct—which did not interfere with similar efforts by rivals—could not create or maintain a monopoly, at least for long.\textsuperscript{64} So long as everyone was free to employ

\textsuperscript{59} Aspen, 472 U.S. at 600 ("The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors."); see also United States v. Grinnell Corp., 384 U.S. 563 (1966) (holding that Sherman Act does not forbid monopoly obtained or maintained by superior skill or business acumen); United States v. United Shoe Mach. Co., 110 F. Supp. 295, 344-45 (D. Mass. 1953) (holding that conduct that simply conforms to uniform economic laws cannot violate § 2).

\textsuperscript{60} See Kodak, 504 U.S. at 483-84; United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

\textsuperscript{61} See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (holding § 2 does not forbid above-cost pricing that preserves a monopoly); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-40 (1990) (noting maximum resale price maintenance only creates antitrust injury if it causes dealers to price below cost); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75, 281-82 (2d Cir. 1979) (holding realization of economies of scale and resulting maintenance of monopoly power cannot offend § 2); see also Aspen, 472 U.S. at 600 (firms must seek new profits through internal expansion and not cooperation with others); United Shoe, 110 F. Supp. at 344-45 (distinguishing between "competition based on pure merit," on the one hand, and contracts, policies and arrangements designed to further the dominance of a particular firm).

\textsuperscript{62} See Kodak, 504 U.S. at 482-86; Microsoft, 253 F.3d at 68-71.


\textsuperscript{64} See Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (concluding that absence of prohibition against "monopoly in the concrete" rested upon assumption that "the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.").
such tactics, it was said, a level playing field would ensure significant consumer-friendly rivalry.65

More recently, neoclassical price theory and welfare economics have suggested another rationale for this hands-off approach to merits-based rivalry. Even if such tactics lead to or maintain a monopoly and produce a deadweight loss, the resulting monopoly may still be necessary to realize efficiencies that a less concentrated industry would not produce.66 Assume for a moment that a firm takes advantage of current technology and grows to monopoly by realizing economies of scale and thereby underprices rivals.67 So long as these economies produce non-trivial cost savings, the resulting monopoly will produce more wealth than it destroys and thus be “reasonable” under a “total welfare” approach to the statute.68 Courts have uniformly held that the mere realization of such economies cannot give rise to a violation of Section 2 of the Sherman Act, even if monopoly results.69

65 See Alan J. Meese, supra note 44, at 15-18 (outlining classical paradigm’s approach to regulation); see also Standard Oil, 221 U.S. at 62 (noting that absent state imposition of monopoly, so-called “normal” competitive practices could not lead to permanent monopoly); Thomas M. Cooley, Limits of State Control of Private Business, 1 PRINCETON REV. 233, 259–60 (1878) (contending that, absent state aid, firms could not price above competitive level unless they departed from “regular business” method, and resorted to “violence and terror”). Indeed, this rationale protected more than mere technological rivalry, but also protected any “normal” business practice, i.e., any practice that parties would adopt regardless of an expectation of market power. See United States v. United Shoe Mach. Co., 247 U.S. 32, 65–66 (1918) (holding § 2 does not forbid agreements that parties would adopt absent expectation of market power).

66 See JOE S. BAIN, PRICING, DISTRIBUTION, AND EMPLOYMENT 84 (1948) (“In most industries a very small firm is quite inefficient; as the firm becomes larger it tends to become more efficient, reaching a minimum cost per unit of output at some particular scale.”); GEORGE J. STIGLER, THE THEORY OF COMPETITIVE PRICE 132–42 (1942).

67 See Hovenkamp, supra note 58, at 27–36 (describing concept of economies of scale and natural monopolies).

68 See Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Tradeoffs, 58 AM. ECON. REV. 18 (1968) (explaining how merger to monopoly that produces non-trivial efficiencies will enhance overall welfare despite misallocation of resources resulting from exercise of market power); Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7 (1966) (contending that Sherman Act only bans those arrangements that distort the allocation of resources without any offsetting efficiencies). But see Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L.J. 65 (1982) (contending that Congress designed Sherman Act to ban all restraints that exercise market power to the detriment of purchasers in the relevant market, regardless of associated efficiency gains).

Price theory's static welfare framework does not tell the whole story, however. After all, this framework assumes that technology and the resulting production function is given, and all firms in a given industry are subject to the same technological laws. In the "real world," however, technology is not constant or exogenous but, instead, is subject to manipulation and improvement by actual or potential market participants. At the same time, the pace and nature of such manipulation depends, at least in part, upon background legal rules, including antitrust rules. The most typical background rule takes the form of patent law, which confers upon inventors the exclusive property right to practice and employ a particular innovation for a fixed term of years. In this way, it is said, patent law confers a sort of bounty upon inventors, allowing them to reap the reward from their investments in innovation. Such rights do not always confer monopoly or market power; they may simply allow the inventor to recoup his costs, including a reasonable rate of return. In those cases where they do confer such power, however, the resulting profits act as a reward for innovative efforts, efforts that often

TRUST ACT AND THE SUPREME COURT 124 (1914) (explaining that the Sherman Act is not designed to "destroy the larger businesses whose capital and large plants enable them to produce goods cheaply, in order that small plants that cannot produce them as cheaply may live."); id. at 126 ("It is possible for the owners of a business of manufacturing and selling useful articles of merchandise so to conduct their business as not to violate the inhibitions of the anti-trust law and yet to secure to themselves the benefit of the economies of management and of production due to the concentration under one control of large capital and many plants. If they use no other inducement than the constant low price of their product and its good quality to attract custom, and their business is a profitable one, they violate no law.").

70 See CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 7-8 (1965).

71 See id. at 83-86 (treating entrepreneurial innovation and related technological progress as an unalloyed good).

72 While all economists and antitrust scholars would agree with this assumption, there has always been significant disagreement regarding which antitrust rules will result in the most innovation. Exemplars of the debate include: Michael A. Carrier, Unraveling the Patent-Antitrust Paradox, 150 U. PA. L. Rev. 761 (2002); KAYSEN & TURNER, supra note 70, at 82-89 (examining link between concentration and innovation and entrepreneurship); JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).


74 See WARD J. BOWMAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 2 (1973) ("A patent is a legal device to ensure that there can be a property right in certain ideas. Thus the temporary right of a patentee to exclude others is a means of preventing 'free riding' so that the employment of useful private resources may be remunerated. Without a patent system, prevention of free riding would be severely limited.").

75 See Frank H. Easterbrook, Intellectual Property Is Still Property, 13 Harv. J.L. & PUB. POL'Y 108 (1990); see also Einer Elhauge, Defining Better Monopolization Standards, 56 Stan. L. Rev. 253, 304 (2003) ("Patent rights do not preclude competition or guarantee monopolistic evils. They merely provide a right to exclude others from a particular innovation .... Whether a patent confers monopoly power depends entirely on how much value the patent has compared to other market options.").
pay zero or negative returns.\textsuperscript{76} Without the prospect of such occasional bounties, firms would lack the necessary incentives to incur the sunk costs of research and development.\textsuperscript{77}

These considerations are not limited to intellectual property. Many improvements cannot be patented, and one cannot patent managerial skill or a well-deserved reputation for high quality. Nonetheless, these improvements enhance society's welfare and may, in some cases, lead to or protect a monopoly.\textsuperscript{78} They also require significant investments, investments that do not always pay off. Ordinary property law, as well as the law of trademark and unfair competition, help ensure that firms can realize the fruits of these efforts, when there are in fact fruits to realize.\textsuperscript{79} A hands-off attitude toward such competition on the merits under the Sherman Act bolsters these rights, or at least does not undermine them, and therefore assures that firms will be able to reap the rewards of their efforts.\textsuperscript{80} To be sure, recognition and enforcement of these property rights makes entry by rivals more difficult, but courts have recognized that such difficulty is the necessary byproduct of legitimate competitive activity.\textsuperscript{81}


\textsuperscript{77} See Bowman, supra note 74, at 2 ("Ability to keep secrets and to enforce private 'know-how' contracts would, without patent law, provide inventors very limited protection from rapid and widespread copying by others. Central to the economic justification of a patent system is the presumption that without the patent right, too few resources would be devoted to invention.").

\textsuperscript{78} See Hovenvkamp, supra note 58, at 553 (the production of high-quality products at a low price serves as a "barrier to entry").


\textsuperscript{80} See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407–08 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."); United States v. United Shoe Mach. Co., 110 F. Supp. 295, 332–33, 343–45 (D. Mass. 1953) (research and resulting patents that interfered with competition did not offend § 2 of the Sherman Act). See also Elhauge, supra note 75, at 295–305; Fred S. McChesney, Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law, 52 Emory L.J. 1401, 1418–20 (2002) (explaining how protection of ordinary property rights can facilitate innovation and enhance welfare).

\textsuperscript{81} See United States v. Waste Mgmt., Inc., 743 F.2d 976, 984 (2d Cir. 1984) ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition."); see also Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 531 (5th Cir. 1999); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547–49 (9th Cir. 1991) (explaining why the Sherman Act does not
III. REFUSALS TO DEAL

The Sherman Act’s safe harbor for technology-based competition on the merits would seem to imply a strong right to refuse to deal with rivals. Absent such a right, a firm that built and patented a better mousetrap would have to share its know-how with rivals, thus thwarting its efforts to exploit its invention. 82 In the same way, without such a right, a firm that realized economies of scale and thereby could underprice rivals, would have to share its facilities with those rivals, or at least sell the rivals a portion of its output for a reasonable price. 83 So, for instance, if Ford could realize economies of scale on its pick-up assembly line and thus underprice its rivals, GM or other competitors would have the right to use Ford’s facilities during off-hours. 84 Rivals could even demand to purchase excess output from Ford at a reasonable price, i.e., Ford’s (lower) cost of production plus a reasonable rate of return. The recognition of competition on the merits as a category of conduct beyond antitrust scrutiny implies a right to refuse to deal in these circumstances and thus would require courts to reject such efforts to compel a monopolist to share its output, inventions, or facilities. 85

Yet, the right to refuse to deal is not absolute under the Sherman Act. Most importantly, a monopolist may not threaten such refusal to induce suppliers or customers to agree not to deal with its rivals. 86 In these cases, the gravamen of the violation is the underlying agreement and not the

82 See Elhauge, supra note 75, at 275–76 (noting that ability to realize the fruits of investment in a better product depends upon ability to exclude rivals who seek access to intellectual or other property necessary to produce the product); Glenn O. Robinson, On Refusing to Deal with Rivals, 87 CORNELL L. REV. 1177, 1192–93 (2002).

83 Robinson, supra note 82.

84 Cf. Demsetz, supra note 21, at 49 (explaining how property rights that empower firm to exclude rivals from its factory create barriers to entry by raising rising rivals’ costs of production); see also Wesley J. Liebeler, Exclusion and Efficiency, 11 REG. 34, 38 (1987) (“[E]xclusionary rights take the form of legal barriers to entry; their purpose and effect is to raise others’ (including rivals’) costs of using goods protected by the barriers. Ford Motor Company, for example, cannot, use a General Motors plant without incurring the cost of getting the latter’s permission.”).

85 See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187–89 (1st Cir. 1994) (monopolist may refuse to deal if such refusal is necessary to vindicate intellectual property rights); see also Meese, supra note 63, at 761–62 (explaining that competition on the merits is a property-based concept); Elhauge, supra note 75, at 294–305 (explaining how refusals to deal enhance competition by allowing firms to realize fruits of their investments).

86 See Eastman Kodak v. Image Technical Servs., 504 U.S. 451 (1992) (scrutinizing Eastman Kodak’s agreement to supply spare parts to customers on the condition that they not deal with rival independent service organizations); Lorain Journal Co. v. United
threatened refusal to deal that induced it. By its nature, all negotiation, and thus all contracts, entail at least a threatened refusal to deal.87

At the same time, and despite the safe harbor for competition on the merits, courts have condemned certain naked refusals to deal, that is, refusals not linked to any agreement with a supplier to disadvantage rivals. Aspen, of course, was such a case, as are any number of lower court decisions invoking the related essential facilities doctrine.88 These decisions all require monopolists to sell vital inputs to rivals at court-determined prices in certain narrowly defined circumstances.89 While the law on this point is not entirely clear, some have read these decisions as establishing a more general rule requiring a monopolist to justify to a court’s satisfaction any refusal to sell vital inputs to rivals.90

At first blush, any antitrust regulation of refusals to deal would appear inconsistent with the safe harbor for competition on the merits. After all, such regulation effectively preempts the State’s absolute right to exclude and replaces that right with a much weaker form of protection akin to that which citizens enjoy against governments that take their property for a public use.91 Put another way, these decisions grant a monopolist’s rivals the power to condemn the monopolist’s property,

87 See Barzel, supra note 9, at 9–10 (explaining how law’s creation and enforcement of property rights facilitates bargaining); Robinson, supra note 82, at 1178–79 (explaining that refusals to deal are generally “means to ends”); id. at 1188 (explaining that, in such cases, a refusal to deal is unlawful “only because it is a component of behavior that is illegal on its own terms, [so that] the refusal element is superfluous.”).

88 See, e.g., Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) (condemning prospective refusal by bidder for basketball team to allow rival bidder to use stadium).


90 See, e.g., Jonathan B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule, 7 GEO. MASON L. REV. 495, 500–03 (1999). Other scholars disagree with this characterization, arguing that the law properly requires a plaintiff to show an anticompetitive effect before courts will saddle defendants with a burden of justifying such a refusal. See Timothy J. Muris, The FTC and the Law of Monopolization, 67 ANTITRUST L.J. 693 (2000) (criticizing FTC’s approach to monopolization law as unduly hostile to conduct that is potentially procompetitive); see also Robinson, supra note 82, at 1201 & n.98 (characterizing doctrine regarding refusals to deal as “unguided” and “nebulous”).

91 See supra notes 27 and 33 and accompanying text (explaining how power of eminent domain interferes with absolute right to exclude).
so long as they pay reasonable compensation to the monopolist, that is, a reasonable price for the monopolist's product.  \(^{92}\)

Still, a requirement that monopolists justify all refusals to sell vital inputs to rivals would not necessarily contravene the safe harbor for competition on the merits.  \(^{93}\) No decision establishes a per se requirement that monopolists deal with rivals. Instead, these decisions allow monopolists to argue that dealing with rivals is not feasible, if such dealing imposes unreasonable costs on the monopolist.  \(^{94}\) Thus, a monopolist that had achieved its position by realizing economies of scale or investing in innovation could justify the exclusion of a rival from its factory or new technology by arguing that it, and not the rival, should be entitled to determine the output of the factory it constructed and, thereby, reap the rewards of its investment, which made the realization of technological efficiencies possible in the first place.  \(^{95}\) At the same time, none of these decisions purports to require a monopolist to sell its final product to rivals.  \(^{96}\) Any plausible construction of the law on refusals to deal leaves the right to engage in paradigmatic, technological competition on the merits entirely intact.

I do not mean to suggest that a rule requiring monopolists to justify any and all refusals to deal would produce optimal results. Defendants cannot always explain just why they must refuse to sell to rivals, and antitrust counsel may do a poor job translating those explanations to courts.  \(^{97}\) Even when such explanations are possible, the process of explanation consumes resources, and courts may in some cases wrongly refuse to credit valid explanations. Moreover, while judges and the enforcement

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\(^{92}\) See Delaware & Hudson Ry. Co., 902 F.2d at 179–80 (holding that 800% increase in price of input sold to rivals suggested that defendant was engaged in unlawful exclusionary conduct); see also Elhauge, supra note 75, at 303–05 (analogizing a requirement that a defendant deal with rivals to the imposition of a “liability rule”).

\(^{93}\) But see Trinka, 540 U.S. at 407–11 (without more, mere refusal to deal by a monopolist does not give rise to antitrust liability).

\(^{94}\) See, e.g., Delaware & Hudson Ry. Co., 902 F.2d at 179.

\(^{95}\) See Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187–89 (1st Cir. 1994) (holding monopolist may decline to license its intellectual property to reap the returns from its investments).

\(^{96}\) See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 377–78 (7th Cir. 1986) (explaining that a rival has “no right under the antitrust laws to take a free ride on its competitors’ sales force. You cannot conscript your competitor’s salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant.”). So, for instance, the law would not require Ford to sell its pick-up trucks to General Motors at a “reasonable price,” even if Ford was a monopolist.

agencies have come a long way from the “inhospitality era” of antitrust, they are still unduly hostile to arguments that conduct is lawful because it produces significant benefits.98 For instance, even if a defendant shows that conduct produces benefits, courts will still condemn the arrangement if the plaintiff can show that the defendant could achieve the same benefits in another, less anticompetitive, manner.99 This result may occur even though proof that conduct produces benefits often undermines the logical basis for any presumption that the conduct results in any anticompetitive harm in the first place.100 At the same time, to the extent that courts might require defendants to justify any refusal, they seem to be amenable to a showing, if made to the court’s satisfaction, that the restriction is necessary to further competition on the merits. Indeed, the Aspen Court itself opined that a refusal to deal that furthered competition on the merits would not offend Section 2, even if it impaired the opportunities of rivals.101

IV. REFUSALS TO DEAL, CONTRACTUAL COMPETITION, AND ASPEN

The Supreme Court’s Trinko decision seems to reject any general requirement that monopolists justify a refusal to deal, thereby providing dominant firms with significant leeway to reap the rewards from successful competition on the merits.102 At the same time, the decision may be limited to its particular context, that of a regulated industry where an expert agency was empowered to enforce a duty to deal.103 Moreover,

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98 See generally Meese, supra note 53, at 144–70 (explaining how current rule of reason methodology is unduly biased against restraints that overcome market failure).


100 See Meese, supra note 53, at 161–70 (explaining how proof that a restraint produces benefits undermines presumption that restriction produces harm and thus also undermines basis for application of less-restrictive alternative test).

101 See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (“Thus, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”) (quoting 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 78 (1978)).

102 See id. at 411 (“Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.”); see also Alan J. Meese, Regulation of Franchisor Opportunism and Production of the Institutional Framework: Federal Monopoly or Competition Between the States?, 23 HARV. J.L. & PUB. POL’Y 61 (1999) (arguing that background rules generated by state law can alter transaction costs and thus undermine the rationale for antitrust regulation of opportunism).
the *Trinko* Court reaffirmed the holding in *Aspen*, which sustained a jury’s condemnation of a monopolist’s refusal to deal with a former venture partner because that refusal did not further competition on the merits.  

In so doing the Court opined that *Aspen* is at or near the outer boundary of Section 2 liability.”

Any conclusion that all is well with the law governing refusals to deal would be premature, however. All useful competition does not fit within the paradigm of technological rivalry that courts describe as competition on the merits. Much “competition” is of a contractual nature, as firms rely upon agreements with others to facilitate productive cooperation and, thus, rivalry with other ventures. As noted earlier, such contracts can create the functional equivalent of property rights, internalize externalities, and, thus, overcome market failures. A classic example is an exclusive territory ancillary to a joint venture between rivals that manufactures a product that the rivals distribute in turn. By assigning each rival to a particular territory, such a contractual restriction can ensure that firms internalize the full benefits of promotional expenditures by preventing other venture members from free riding on the firm’s efforts. Like actual property, then, such agreements can ensure that firms “reap what they sow” and facilitate the production of useful information. Indeed, modern economic theory concludes that the firm itself is a type of non-standard contract, distinguished by the presence of a single, residual claimant who holds a property right in the net product of the nexus of contracts. Much unilateral competition on the merits depends upon the recognition and enforcement of such agreements.

The realization that useful competition can take a contractual form implies a broader right to refuse to deal with rivals—including venture

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104 See *Trinko*, 540 U.S. at 408–11; *Aspen*, 472 U.S. at 605 (defining unlawful exclusion as conduct that harms rivals without furthering competition on the merits).

105 See *Trinko*, 540 U.S. at 409.

106 See Meese, supra note 53, at 134–41 (describing so called “contractual competition”).

107 See supra note 17 and accompanying text.


109 See Meese, supra note 52; see also McChesney, supra note 80, at 1418–22 (explaining how contracts can create the economic equivalent of property rights that overcome market failure).

110 See supra notes 9–11 and accompanying text (explaining how property can facilitate productive activity in this manner).

111 See Alchian & Demsetz, supra note 15, at 782–83 (explaining that firms are distinguished by presence of residual claimant with authority to contract with various team members that supply inputs).

112 See Meese, supra note 63, at 837–38.
partners—than a safe harbor for refusals to deal incidental to merits-based competition. After all, such contractual competition takes place within a given technological framework and does not purport to realize or produce technological efficiencies analogous to economies of scale. Nor does such competition directly produce technological innovations or new products. Still, in some cases, the realization of such contractual efficiencies may require a monopolist to decline to deal with a rival or at least to deal on terms that courts may deem “unreasonable.” Aspen may well have been just such a case.

A. Aspen

The facts of Aspen are straightforward. At one time, three separate firms owned and operated one mountain apiece in the Aspen region. Originally, each company offered skiers half-day or full-day tickets for the use of its own mountain. In 1962 the otherwise independent firms entered a joint venture of sorts, agreeing to offer a joint, six-day, all-Aspen ticket. For a flat fee, skiers purchased the option to ski all three mountains during the six-day period, without tying themselves down to any particular mountain in advance. Those who purchased the ticket received six coupons, each good for a day of skiing on any of the mountains in question. The parties divided the revenues from the joint ticket proportionately, according to the number of coupons collected at each mountain. Many skiers found the package convenient because it allowed them to purchase a single ticket, without having to determine in advance which mountain or mountains they planned to ski over the next six days. Thus, the package sale economized on the search costs that consumers might otherwise have incurred before choosing which mountains to ski.

Two years later, in 1964, a merger reduced the number of independent firms to two—Aspen Highlands Corp. (Highlands) and Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 588–89 (1985). See id. at 589.

113 See Meese, supra note 53, at 134–41; see also Oliver E. Williamson, Markets and Hierarchies 83–84 (1975) (concluding that technological considerations cannot explain vertical integration or the boundaries of firms).

114 But see Meese, supra note 53, at 166 (explaining how contractual restrictions can facilitate process of bringing innovations to the market).


116 Id. at 589.

117 Id.

118 Id.

119 See id.

120 Id. at 588–89.

Co. (Ski Co.)—and the two remaining firms continued the joint ticket arrangement. At the same time, the firms discontinued the coupon book; substituting an “around the neck” single ticket good for the entire week at either company’s slopes or combination thereof. Employees at Highlands recorded the ticket numbers of skiers who used these tickets on its slopes, and the parties relied on this data to apportion the revenue produced by the tickets between them.

The parties discontinued the all-Aspen ticket during the 1972–1973 season because of concerns that the method of allocating revenues produced by the ticket was not sufficiently precise. After a one-year hiatus, the parties reintroduced the ticket, this time apportioning revenues according to the results of a random sample survey. The parties maintained this system for the next four years, that is, through the 1976–1977 ski season. During this period, Highlands’s share of the revenue derived from the all-Aspen ticket fell from 17.5 percent in 1973–1974 to 13.2 percent in 1976–1997. In 1977 multi-area tickets accounted for 35 percent of the total sales in the Aspen market.

In 1977 Ski Co. sought to change the manner of apportioning revenues from the joint ticket for the upcoming season. In particular, Ski Co. proposed that Highlands accept a flat percentage of the revenues generated by the joint ticket program. Initially, Ski Co. proposed that Highlands accept a 13.2 percent share of the joint ticket revenues, the same share that Highlands had received in the 1976–1977 ski season as a result of the random sample method of allocation. Highlands resisted this allocation, claiming that the 1976–1977 season was an anomaly because unfavorable weather had reduced the number of visiting skiers. Moreover, Highlands hoped to continue allocating revenues based on actual usage, so it could employ local advertising and promotion to lure skiers to its site after they had purchased the joint ticket. In the end, however, Highlands accepted a 15 percent share of the revenues attributable to

122 Aspen, 472 U.S. at 589.
123 Id. at 590. Moreover, in 1967 Ski Co. opened a second mountain, Snowmass. See id. at 588.
124 Id. at 590.
125 Id.
126 Id.
128 Id. at 591.
129 Id.
130 Id.
131 Id. at 591–92.
the joint ticket, a figure higher than what it had received the previous year but slightly below the average figure for the previous four seasons.\textsuperscript{132}

The next year Ski Co. made Highlands a less generous offer, namely, to pay the latter 12.5 percent of the revenues generated by the ticket package.\textsuperscript{133} Highlands declined this offer, thus ending the joint ticket package.\textsuperscript{134} Highlands then sought to replicate the package, by purchasing lift tickets from Ski Co. and bundling them with Highlands's own tickets to create a new package offering.\textsuperscript{135} Ski Co. declined to sell such tickets to Highlands at wholesale or even retail prices, leading Highlands to offer an improvised package—"the Adventure Pack"—comprised of tickets to its own slopes and vouchers for tickets at slopes owned by Ski Co.\textsuperscript{136}

Highlands challenged Ski Co.'s conduct as a refusal to deal. A jury found that Ski Co. was a monopolist and its refusal to deal with Highlands contravened Section 2 of the Sherman Act. The Supreme Court affirmed, rejecting Ski Co.'s argument that it had no duty to cooperate with its rival and former venture partner.\textsuperscript{137} In so doing, the Court explained that a refusal that severely disadvantaged rivals could still survive Sherman Act scrutiny if it was necessary to further competition on the merits.\textsuperscript{138} Applying this test, the Court emphasized that Ski Co. had entered the joint ticketing arrangement voluntarily, and the arrangement apparently had served the interests of both parties and consumers for several years.\textsuperscript{139} By terminating the arrangement, the Court said, Ski Co. had disadvantaged Highlands severely and also had injured consumers who would have preferred the convenience of the all-Aspen ticket.\textsuperscript{140} The Court also rejected the firm's business justification, holding that Ski Co.'s refusal to deal was not justified by Highlands's purported low quality or a desire to properly apportion revenues from the joint ticketing arrangement.\textsuperscript{141} The Court found it noteworthy that Ski Co. relied upon a count by lift

\textsuperscript{132} Id. The average figure for the previous four seasons was 16.5%.
\textsuperscript{133} Id. at 592.
\textsuperscript{134} Id. at 593.
\textsuperscript{135} Id. at 592–94.
\textsuperscript{136} Id. at 594.
\textsuperscript{137} Id. at 600–11.
\textsuperscript{138} Id. at 605 n.32.
\textsuperscript{139} Id. at 603 ("[T]he monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.").
\textsuperscript{140} Id. at 605–08; see also id. at 603 ("[I]t seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.").
\textsuperscript{141} Id. at 608–10.
operators to monitor the usage of its own mountains, thereby implying that a similar method was appropriate for the joint ticket arrangement.\footnote{142 \textit{Id.} at 609.} The Court also found it relevant, though not dispositive, that Ski Co. had embarked subsequently upon an advertising campaign implying that its mountains were the only skiing destinations in the Aspen area.\footnote{143 \textit{Id.} at 611 n.43.} These considerations, the Court said, justified the jury’s conclusion that Ski Co.’s conduct had excluded Highlands on “some basis other than efficiency.”\footnote{144 \textit{Id.} at 605 (defining conduct as exclusionary for antitrust purposes if the “firm has been 'attempting to exclude rivals on some basis other than efficiency'”) (quoting Robert H. Bork, \textit{The Antitrust Paradox} 138 (1978)); \textit{Id.} at 604 (describing jury instruction distinguishing “between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other.”) (quoting 3 Phillip Areeda & Donald Turner, \textit{Antitrust} 78 (1978)).} Put another way, Ski Co.’s refusal to deal both injured Highlands severely and did not constitute competition on the merits.\footnote{145 \textit{Id.} at 605 n.32 (“[E]xclusionary [conduct] comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”) (quoting 3 Phillip Areeda & Donald Turner, \textit{Antitrust} 78 (1978)).}

B. Critique

The result in \textit{Aspen} could make sense if technological competition on the merits, based upon State-defined property rights, was the only legitimate form of economic activity. If this were the case, then it would seem proper to condemn the defendant because its refusal seems to have been unrelated to what courts deem to be merits-based competition. As noted earlier, however, legitimate competition can take many forms, not all of which constitute competition on the merits as traditionally understood.\footnote{146 See \textit{supra} notes 106–112 and accompanying text (explaining how some useful competition takes a “contractual” form).} It might therefore make sense to ask whether Ski Co.’s refusal to deal with Highlands was part of some effort to overcome a market failure, for instance, by relying upon the institution of contract to create the economic equivalent of a property right.\footnote{147 See \textit{supra} note 17 and accompanying text (explaining how contracts can create the economic equivalent of property rights).}

To answer this question, it is first necessary to specify with greater precision just what, exactly, Ski Co. did. While many commentators have characterized the firm’s actions as a refusal to cooperate with Highlands, the truth is a bit more complicated.\footnote{148 See, e.g., Warren S. Grimes, \textit{Antitrust and the Systemic Bias Against Small Business: Kodak, Strategic Conduct, and Leverage Theory}, 52 \textit{Case W. Res. L. Rev.} 231, 264 (2001) (characteriz-}
refuse to deal with Highlands. Instead, Ski Co. offered to continue participating in the all-Aspen ticket, without changing the package’s format. At the same time, the firm insisted upon a continuation of the revenue allocation method that the parties had adopted before the immediately preceding season.\textsuperscript{149} That is to say, the firm insisted that Highlands again receive only a fixed percentage share of the total revenues derived from the all-Aspen ticket. This time, however, Ski Co. insisted that Highlands accept only 12.5 percent of the total revenues, instead of the 15 percent Highlands had received in the previous season.

Ski Co.’s offer was backed by an implicit threat to cease dealing altogether. Still, all bargaining begins with each party owning its own property and labor, and such ownership entails the ability to exclude others.\textsuperscript{150} The mere fact that a proposed contract is backed by the existence and enforcement of property rights does not transform the proposed agreement into a refusal to deal. Highlands lost access to the all-Aspen ticket because it would not agree to Ski Co.’s terms.\textsuperscript{151} One might even say that it was Highlands that refused to deal with Ski Co.

Were the terms that Ski Co. offered Highlands anticompetitive or exclusionary? The Court did not address this question, and there is no indication that reducing Highlands’s share of the revenues from the joint ticket fortified whatever market power Ski Co. may have possessed. No doubt Highlands would have preferred a larger share of the revenues from the all-Aspen ticket, but the Court did not articulate any methodology for determining which proportion was the correct one. Instead, the Court chose to focus upon the outright refusal that followed the impasse, examining the impact of this refusal—and not Ski Co.’s preferred terms—on Highlands and consumers. At one level, the agreement that Ski Co. proposed reduced competition on the merits, by depriving Highlands of the incentive to compete for skiers who had purchased the all-Aspen ticket and thus already chosen Aspen over other possible skiing

\textsuperscript{149} See supra notes 18–26 and accompanying text; see also Robinson, supra note 82, at 1178–79 (explaining how refusals to deal are usually a means to some other end).

\textsuperscript{150} See Robinson, supra note 82, at 1199–200 (noting that the Aspen decision rested in part on the Court’s disapproval of bargaining terms offered by Ski Co.).
venues. Such an analysis is incomplete, however, because it assumes a fixed stock of purchasers for such tickets, for which the two firms would then compete. But, of course, the number of such purchasers is not exogenous, but instead depends upon advertising and other promotional efforts that lured customers to the Aspen area in the first place. Such promotional efforts seemed particularly important in this case, given that so many skiers came from out of state and apparently had numerous other skiing options.

Theory suggests that the quantity of such advertising was itself not exogenous, but was instead a function of background institutions, including the contractual relationship between the parties. Under the approach to allocating revenues praised by the Court, a party that advertised skiing in Aspen and/or the all-Aspen ticket would have no guarantee of recapturing that investment. For, instance, if advertising by Ski Co. lured a skier to Aspen, he then could decide to ski only Highlands’s mountain, even if he had purchased an all-Aspen ticket. If so, under a revenue allocation scheme based on actual usage—even usage perfectly recorded and calculated—Ski Co. would receive no revenue whatsoever from the all-Aspen ticket, even if its advertising and reputation were but for causes of the skier’s trip to Aspen and resulting purchase of the all-Aspen ticket. Put another way, the arrangement that was in place for most of the 1960s and 1970s left Ski Co. vulnerable to free riding by Highlands, free riding that could deter Ski Co. from investing in advertising in the first place.

A concern over possible free riding makes sense out of Ski Co.’s insistence on changing the formula for allocating revenue derived from the all-Aspen ticket. By capping Highlands’s proportion of the revenues generated by the joint ticket, the new arrangement ensured that Ski Co. could internalize a large proportion of the fruits of its advertising. In

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152 *Aspen*, 472 U.S. at 591–92.
153 The Court, however, apparently took this approach.
154 *Aspen*, 472 U.S. at 593.
156 See Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975–76 (1986) (contending that Highlands was free riding on Ski Co.’s creation and maintenance of an attractive skiing destination).
157 Cf. id. at 976 (“The demand that Highlands accept 12.5% of the proceeds, even if in an average year skiers spent 16% of their time on Highlands’ slopes, could have been a way to compensate Skiing for producing the customers.”).
this way, the new arrangement employed the institution of contract to create a partial property right in the fruits of Ski Co.’s promotional investments. The right was neither perfect nor complete, insofar as some benefits of Ski Co.’s advertising would still spill over to Highlands. Still, such a spillover was a necessary incident to the existence of any joint ticketing arrangement. Few property rights are perfect, as the costs of creating and enforcing such perfection often outweigh the benefits.

If Ski Co.’s insistence upon a changed allocation formula was in fact an effort to create a contractual property right, then the subsequent refusal to deal may be irrelevant from an antitrust standpoint. After all, contractual negotiations generally begin with the assumption that either side can refuse to deal with the other. By itself, hard bargaining should not violate the Sherman Act. Moreover the prospect of legal condemnation of a post-negotiation refusal to deal and resulting treble damages would cast a long shadow over the antecedent bargaining process. For, at the outset of such bargaining, both parties would know that, if Ski Co. offered Highlands a less generous proportion of revenues than it had previously received, a court applying the Aspen rule faithfully would treat such new terms as a refusal to deal. Highlands could thus walk away from the table and punish Ski Co. for its subsequent and resulting refusal to deal. With this arrow in its quiver, Highlands could convince Ski Co. to offer it unduly generous terms, perhaps even to the point of exploiting investments that Ski Co. had made specific to the joint ticket arrangement. The prospect of such opportunism could deter Ski Co. from making such specific investments in the first place, thus depriving

158 Cf. Meese, supra note 52 (explaining how exclusive territories and minimum resale price maintenance can function as contractual property rights); see also Easterbrook, supra note 156, at 976.

159 See Barzel, supra note 9, at 92–94 (explaining that owners will sometimes decline to enforce aspects of their property rights when doing so would be unduly expensive). Of course, Ski Co. could have created a perfect property right by purchasing Highlands and thus offering a joint ticket itself. The company did exactly that some years later, and the enforcement agencies chose not to challenge the transaction, apparently because they did not consider skiing in Aspen a relevant market. See Grimes, supra note 149, at 264. However, if “skiing in or near Aspen” had been deemed a relevant market, then such a merger may have offended § 7 of the Clayton Act or even § 2 itself, as the jury found, despite the resulting efficiencies. Whether such a merger should, in fact, offend the antitrust laws is a separate question. However, current merger law and the policies of the enforcement agencies barely recognize non-technological efficiencies as justifications for mergers to monopoly. See Alan J. Meese, Raising Rivals’ Costs: Can the Agencies Do More Harm than Good?, 12 GEO. MASON L. REV. 241 (2003).

the skiing public of the benefits of specialization that such investments foster. ¹⁶¹ By banning refusals to deal in this context, then, antitrust law could deter useful economic activity ex ante and distort the ex post process of adjusting contractual terms in light of developments not anticipated at the time of contracting. ¹⁶²

Proponents of the Aspen decision might respond by claiming that Ski Co. could have furthered its objective in a different manner. For, after negotiations between the parties had broken down, Highlands offered to purchase tickets to Ski Co.’s slopes at retail prices, tickets that Highlands would have included in its own version of an all-Aspen ticket. ¹⁶³ Presumably this retail price reflected the costs of Ski Co.’s advertising, including the costs of advertising and distributing the ticket package itself. Thus, conceding that the traditional allocation formula was flawed, one might nonetheless argue that Ski Co. could have accomplished its legitimate objective to prevent Highlands from free riding simply by selling Highlands its tickets at the same price it charged retail customers, thereby inducing Highlands to pay for the cost of the advertising that convinced skiers to travel to Aspen in the first place. Ski Co.’s failure to follow this course, and its decision instead to offer its rival less generous terms than it offered ultimate consumers, might therefore suggest that the refusal was exclusionary and not simply incidental to an effort to bargain for a legitimate contractual property right. ¹⁶⁴

This argument does not withstand analysis, however. Ski Co. discriminated against Highlands, charging it a different price (i.e., an infinitely


¹⁶² See Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089, 1090–91 (1981) (explaining how unanticipated circumstances can require adjustment in parties’ respective obligations); id. at 1101–02 (explaining that a party may be vulnerable to opportunism when it makes specialized investments that yield deferred returns).

¹⁶³ Aspen, 472 U.S. at 595–94.

¹⁶⁴ See Elhauge, supra note 75, at 308 (arguing that “an antitrust rule preventing [Ski Co.’s refusal to sell tickets at retail] does not deprive the defendant of any right to set the rate of reimbursement for its investments, past or current.”). Professor Elhauge contends that a monopolist’s discrimination against rivals raises a presumption that the refusal is unlawful exclusion. At the same time, he contends that defendants should be able to rebut the presumption by establishing an efficiency justification for such discrimination. See id. at 305–14 (contending that such discrimination should be a necessary but not
high price) than it charged ordinary retail customers. But, if Highlands was a free rider, then there was good reason for this discrimination. For, charging Highlands the same price for Ski Co. tickets as Ski Co. charged the general public would not, in fact, compensate Ski Co. for the benefits that its advertising conferred on Highlands. Presumably the advertising component of Ski Co.'s retail price reflects the cost of enticing a particular skier to Ski Co.'s slopes for a given day. In other words, assuming that the cost of enticing a given skier to the Aspen region is fixed, and assuming that a person skis at Aspen for several days, then presumably a daily ticket price would reflect only the pro-rated cost of the advertising necessary to attract the skier to the region. If, by contrast, Ski Co. were to include the entire fixed cost of advertising in the price of a daily retail ticket, it would end up overcharging any skier who purchased more than one such ticket and, thus, unduly deter skiers from visiting its slopes.

If one assumes that Ski Co. priced its tickets by pro-rating the cost of advertising in this manner, then simply selling tickets to Highlands at retail would not, in fact, induce Highlands to internalize the full cost of the promotional investment that lured skiers to the Aspen region. For instance, Highlands might sell its version of the all-Aspen ticket to a skier who, after arriving in Aspen, decided to spend most of her time skiing at Highlands, while only spending a day or two at Ski Co.'s mountains. In such a case, Highlands would end up paying for only a portion of the cost of the advertising that drew the skier to Aspen in the first place. Indeed, the whole point of Highlands's alternative all-Aspen ticket was to attract consumers who would spend only a portion of their time skiing on Ski Co.'s three mountains. If free riding by Highlands was a true threat, then Ski Co.'s refusal to deal, or credible threat to do so, may have been the only plausible way to induce Highlands to negotiate in good faith for the creation of a contractual property right.

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165 See Aspen, 472 U.S. at 594 (reporting that Highlands developed an alternative adventure pack, which included a three-day pass at Highlands and three vouchers equal to the price of a daily ticket at Ski Co.'s mountains). It is not clear from the decision whether the daily lift tickets that Highlands sought to purchase from Ski Co. were refundable. If they were, then a customer could have purchased Highlands's proposed package, skied on Highlands's mountain for three days, turned in its Ski Co. ticket for a refund, and then purchased an additional three-day pass from Highlands. Under such an admittedly rare scenario, Highlands's free ride would be complete.

166 See supra notes 157–160 and accompanying text (explaining how proposed fixed allocation of revenues from all-Aspen ticket could function as imperfect contractual property right).
It does not appear that Ski Co. raised the claim that its refusal to deal or proposed allocation scheme had the effect of combating free riding.\(^{167}\) Hence, the record of the decision is not developed on this point. Still, the opinion refers to some evidence that is consistent with an assertion that Highlands was, in fact, free riding upon Ski Co.'s promotional investments. For instance, Highlands expressly argued that it preferred the traditional method of allocating revenue from the joint ticket because this method allowed it to compete with Ski Co. for customers \textit{once they arrived in Aspen}.\(^{168}\) Moreover, after Ski Co. severed its relationship with Highlands, Ski Co. embarked upon an aggressive nationwide advertising campaign. Indeed, the Court even accused Ski Co. of tailoring its advertising so as to "strongly imply" that Aspen contained only three mountains—the ones owned by Ski Co.\(^{169}\) For instance, an advertisement in a national magazine showed four mountains, but only named those owned by Ski Co.\(^{170}\) Also, Ski Co. installed a new sign in the Aspen airport which depicted all four mountains but again only named those owned by Ski Co.\(^{171}\) Ironically, the Court treated these steps as evidence that Ski Co. was engaged in unlawful exclusion.\(^{172}\) But in the end Ski Co. simply may have been attempting to ensure that it was advertising only its own product and not that of a rival.\(^{173}\) Thus, far from suggesting some form of predation, these steps, as well as Ski Co.'s efforts to alter the allocational formula, are all at least equally consistent with a claim that Highlands was free riding upon Ski Co.'s creation and promotion of three mountains that constituted an attractive skiing destination.\(^{174}\)

Of course, it may be that the benefits of any contractual property right were illusory. Or, it may be that there was a less-restrictive means

\(^{167}\) While this oversight might seem strange to modern eyes, it should be recalled that the litigation began in 1979, just two years after the Supreme Court first recognized, in a decision under § 1, that non-standard contracts could prevent free riding. \textit{See} Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55-56 (1977). It is not surprising, then, that lawyers did not immediately extend the logic of this decision to the § 2 context, particularly in light of the fact that Highlands focused its challenge on Ski Co.'s refusal to deal and not upon the new allocation scheme that it enforced in one year and sought to alter slightly in the next.

\(^{168}\) \textit{Aspen}, 472 U.S. at 591–92.

\(^{169}\) \textit{Id.} at 593 n.12.

\(^{170}\) \textit{Id.}

\(^{171}\) \textit{Id.} at 593.

\(^{172}\) \textit{Id.} at 611 n.43.

\(^{173}\) \textit{See} Howard P. Marvel, \textit{Exclusive Dealing}, 25 J.L. & Econ. 1, 6–11 (1982) (explaining how exclusive dealing contracts can create the equivalent of property rights by ensuring that dealers do not steer customers to products sold by non-advertising manufacturers); \textit{see also} Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 377 (7th Cir. 1986) (holding § 2 does not require a monopolist to advertise the products of its rivals).

\(^{174}\) \textit{See} Easterbrook, \textit{supra} note 156, at 975–76.
of achieving the very same benefits. Still, by characterizing Ski Co.'s bargaining conduct as a refusal to deal and ignoring Ski Co.'s effort to bargain for a contractual property right, the Court ensured that courts would ignore such factual questions in future cases and endorsed an approach to Section 2 analysis that neglects the possibility that refusals to deal are part of larger efforts to create or enforce contractual property rights.\footnote{The Court thus repeated the mistake of those who would treat "group boycotts" as distinct antitrust offenses, without regard to the purpose of the boycott. As some have argued, however, such boycotts are generally efforts to enforce, by self-help, some underlying agreement, which must itself be analyzed to determine the true impact of the boycott. See Summit Health v. Pinhas, 500 U.S. 322, 338 (Scalia, J., dissenting) ("Such boycotts rarely exist in a vacuum.").}

\section*{C. Farewell to Aspen}

As noted earlier, the Supreme Court's recent Trinko decision seems to reject any general requirement that a monopolist justify its refusal to deal with rivals.\footnote{See supra notes 102--105 and accompanying text.} At the same time, the Court declined to immunize all such refusals, choosing instead to endorse the result and reasoning of Aspen. To be precise, the Court opined that the particular facts of Aspen had properly given rise to an inference that Ski Co. had "forsake[n] short-term profits to achieve an anticompetitive end."\footnote{See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004) (citing Aspen, 472 U.S. at 608, 610--11).} In so doing, the Court echoed the federal enforcement agencies, which endorsed Aspen's reasoning on this score in an amicus curiae brief filed in Trinko.\footnote{See Brief Amicus Curiae for the United States & FTC in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682 at 16--17 (May 23, 2003).} The Court also echoed lower courts and scholars who have read Aspen to ban refusals to deal in similar circumstances.\footnote{See Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1211 (9th Cir. 1997) ("Like the Supreme Court in Aspen Skiing, we are faced with a situation in which a monopolist made a conscious choice to change an established pattern of distribution to the detriment of competitors."); Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1188 (1st Cir. 1994) (noting that "the rich soil of competition had produced the all-mountain ticket in Aspen and other multimountain areas" and that "Ski Co.'s decision to eliminate the ticket in later years was a sign that the weeds of monopoly had begun to take hold."); see also Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook 116 (2000) (endorsing the reasoning of the Aspen decision on this score).} Alive and well despite Trinko, then, Aspen serves as a paradigm that courts and the enforcement agencies apply to evaluate refusal to deal claims.\footnote{See Kuhn, supra note 3, at 22--24 (explaining how scientific community embraces paradigms that purportedly solve salient problems and then apply those paradigms to problems deemed analogous); id. at 23 (analogizing scientific paradigms to "accepted judicial decisions in the common law").} The realization that Ski
Co. may have been bargaining for a contractual property right also contravenes the *Aspen* Court’s assertion that certain facts made Ski Co.’s refusal to deal especially problematic. Recall here that the Court emphasized that the parties entered and adhered to the joint ticketing arrangement “voluntarily,” in a “competitive market,” and these factors rendered the initial arrangement and its allocational formula presumptively efficient.\(^{181}\) Recall also the Court’s claim that consumers derived benefits from the all-Aspen ticket, and they suffered when Ski Co. refused to cooperate with Highlands after the bargaining impasse.\(^{182}\) These facts, the Court said, enhanced the possibility that Ski Co.’s refusal to deal was predatory and thus helped support the jury’s verdict.\(^{183}\)

Far from suggesting anything sinister, the facts invoked by the Court were equally consistent with an effort to create and enforce contractual property rights. While the parties initially had embraced the allocational scheme endorsed by the Court, Ski Co., at least, had second thoughts as early as 1972.\(^{184}\) This re-thinking should be no surprise: parties often find, after trial and error, that an organizational form once deemed efficient no longer serves their needs.\(^{185}\) Indeed, one year before their impasse, the parties had agreed to alter fundamentally the method of allocating revenue from the joint ticket, creating a contractual property right by capping Highlands’s proportion of the revenues attributable to the joint ticket.\(^{186}\) Ski Co.’s refusal to deal stemmed from Highlands’s refusal to accept a seemingly small modification to the terms of the new allocation method Highlands had agreed to the previous year.\(^{187}\)

Ski Co. had presumably found the original method of allocation efficient in 1962, when the all-Aspen ticket was first introduced.\(^{188}\) Moreover, some consumers preferred the all-Aspen ticket to the alternatives. Still, neither of these facts suggests that Ski Co.’s efforts to alter the method of allocation were exclusionary in any relevant antitrust sense. A practice efficient in 1962 is not necessarily efficient in 1977. The process of

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181 See *supra* notes 139–140 and accompanying text.

182 See *supra* notes 138–140 and accompanying text.

183 See *supra* notes 137–145 and accompanying text.

184 *Aspen*, 472 U.S. at 593 (explaining that the parties did not employ the all-Aspen ticket during the 1972–1973 season due to concerns over allocation of revenues).


186 *Aspen*, 472 U.S. at 591–92.

187 Id. at 592–93.

188 Id. at 589.
finding the right organizational form involves trial and error. Perhaps the expansion in air travel since 1962 made interstate promotion and advertising more important in 1977 than it was in 1962. Or, perhaps Ski Co.’s significant advertising between 1962–1977 made free riding by Highlands more lucrative in 1977 than it was 15 years earlier. Ironically, the very longevity of the arrangement invoked by the Court may have been a factor that required the parties to change it. Perhaps both factors were at work simultaneously. In short, there is no reason to presume that a practice selected by the parties in 1962 was still efficient 16 years later.

Nor did it matter that some consumers preferred the all-Aspen ticket to other options. Consumers often prefer market results that are the product of a market failure, reflecting opportunism. For instance, if one dealer free rides on another dealer’s efforts, it will charge prices that do not reflect the cost of the promotional effort that informed consumers of the benefits of the product sold by the two dealers. Consumers will be perfectly happy to free ride—obtaining (free) information from one dealer and then purchasing the product at a relatively low price from a second dealer who does not provide such information. Moreover, any practice that eliminates such free riding, for instance, by assigning exclusive territories, will displease at least those consumers who had grown accustomed to free riding.

In any event, the Aspen Court’s invocation of consumer preferences is simply an alternate manifestation of its mischaracterization of Ski Co.’s conduct as a refusal to deal. After all, Ski Co. wished to continue with the all-Aspen ticket and thus continue dealing with Highlands. It simply wanted to alter (slightly) the terms of the new allocational formula the parties had adopted the previous year. Ski Co. refused to deal with Highlands (and vice versa) only because the parties could not agree upon what proportion of revenues Highlands should receive. There is no indication in the decision that consumers had expressed a preference for any particular method of revenue allocation. Thus, the Court’s focus on the harm that Ski Co.’s bargaining tactic visited upon consumers simply confirms that the Court improperly failed to consider the possibility that Ski Co. was refusing to deal with Highlands as part of an effort to negotiate an efficient contractual property right, an arrangement that may well have served consumer interests in the longer run.

189 See Easterbrook, supra note 97, at 5 (“It is useful for many purposes to think of market behavior as random. Firms try dozens of practices. Most of them are flops, and the firms must try something else or disappear.”).

190 Between 1960 and 1977, the number of passengers carried by U.S. carriers quadrupled. See Statistical Abstract of the United States 1978 at 671 tbl. no. 1134 (99th ed.).
In short, any effort to distinguish the refusal to deal in *Aspen* from other refusals does not withstand scrutiny. Ski Co.’s conduct was not a classic, property-based refusal designed to reap the rewards of technological innovation or economies of scale.191 Still, such competition on the merits is not the only form of useful economic conduct. Firms can also enhance welfare by relying upon contracts that create the economic equivalent of property rights.192 Each of the facts highlighted by the Court—either alone or viewed as a whole—seems at least equally consistent with a claim (not made by Ski Co.) that the firm’s refusal was part of an effort to negotiate a contractual property right. As a result, such facts simply cannot give rise to a presumption that an otherwise valid refusal to deal creates competitive harm.193 While such a presumption may have been justified based upon the state of economic theory in 1978, this logic simply cannot survive more recent economic developments.194 Courts should therefore redraw the outer boundaries of liability for refusals to deal.

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191 See *supra* notes 82–85 and accompanying text (describing law’s hands-off approach to such refusals).

192 See *supra* notes 17, 106–112 and accompanying text.
