
The Columbia

SCIENCE AND TECHNOLOGY LAW REVIEW

www.stlr.org

INTO THE FRYING PAN: STANDING AND PRIVACY IN TELECOMMUNICATIONS LAW

Richard A. Epstein*

[ABSTRACT]

I. INTRODUCTION: THE PLACE OF REGULATION AND ANTITRUST IN TELECOMMUNICATIONS LAW

The persistent problem of monopoly has brought two different sorts of state responses that coexist uneasily with each other. The first of these, exemplified by the Sherman Act, seeks to prevent monopolization by private firms. The second deals with direct regulation of what are often called natural monopolies. Occasionally, efforts are made to get the best of both worlds. Just that happened in February, 1996, when the United States Congress passed with great fanfare the Telecommunications Act of 1996, which was designed to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."¹ The Supreme Court has placed its benediction on the transformative power of the Act,² and its views have been echoed by the lower courts charged with the knotty duty of construing its complex provisions.³ Thus viewed from on high, it is easy to postulate some deep compatibility between the 1996 Act and the venerable 1890 Sherman Antitrust Act, which itself is read as the Magna Carta for competition over monopoly.⁴ The ostensible compatibility between these two regimes becomes still more explicit through a savings clause in the

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution.

¹ Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

² See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

³ See, e.g., *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

⁴ 15 U.S.C. § 2 (2002) (effective July 2, 1890).

Telecommunications Act which states that nothing in that statute "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."⁵

Unfortunately, this oft-repeated rhetoric is mischievous hype, whose shallowness is revealed by any detailed examination of the key operative provisions of the 1996 Act. These provisions do not, because they cannot, introduce any regime of pure competition into telecommunications. No statute can displace or evade the central dominant truth of the entire business: telecommunications is a network industry whose efficiency depends on an integrated system, which allows any customer of any provider to connect with any other customer of any other provider. That system-wide integration can be achieved only in a limited number of ways, none of which resembles a pure competitive solution of *independent* firms making separate quality and pricing judgments.

Historically, various systems of regulation have been used to restrain monopoly power over the network. One choice is the single provider, Ma Bell, where the "system is the solution." This approach concedes from the get-go that telecommunications cannot be molded a competitive system, and then imposes some imperfect system of rate regulation as the quid pro quo for Ma Bell's end-to-end statutory monopoly. The second "solution" came with the 1982 break-up Ma Bell under the Modified Final Judgment⁶ (MFJ) into Regional Bell Companies and a flock of long distance carriers. Now rate regulation was required for each of the Regional Bells. In addition, the competitive long-distance market required state oversight and regulation over the interconnection agreements with the local exchange carriers, or LECs, in order to overcome the holdout position of the LECs. The mixed success under the MFJ led to the 1996 Telecommunications Act, with its distinctive form of regulation that called for interconnection agreements between the LECs (now rechristened incumbent LECs or ILECs) and the new upstarts, the CLECs, or competitive exchange carriers in order to facilitate competition for customers in local exchange markets. To broker these agreements, the FCC and the state regulatory commissions were given regulatory authority under sections 251 and 252 of the 1996 Act.⁷ Yet regulation cannot be avoided here either, for these interconnection rates can only be established with reference to some appropriate rate base, based either on historical or forward looking costs, an issue on which the Supreme Court has yet to rule.

This overpromotion of the ends has powerful legal consequences. At its inception, it was commonly thought that battles under the 1996 Act would take place exclusively or largely in the administrative arena. Putting aside the extravagant claims that the Act has introduced a competitive system, a new player has been injected into the system: a spate of private actions against the LECs on an amalgam of theories that rest on the combined impact of the Sherman Act and the 1996 Act. The three most notable suits in this genre all represent important variations on the basic theme. The first of these three suits, *Goldwasser v. Ameritech*,⁸ was a class action brought against Ameritech by its own customers. The gist of the action was that

⁵ 47 U.S.C. § 152(b)(1) (2003).

⁶ See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983), (AT&T II).

⁷ §101(a), 110 Stat. at 61, codified at 47 U.S.C. § 251, 252. As an aside, I think that the regulations, as ratified by the Supreme Court, see *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), allowed the FCC to take too much power at the expense of the state commissions.

⁸ 222 F.3d 390 (7th Cir. 2000).

Ameritech used its monopoly power to delay the introduction of rival CLECs, which thus reduced the opportunities for Ameritech's customers to realize the competitive gains promised under the 1996 Act. The suit rested both on the Sherman Act and on the 1996 Act, most specifically the statutory duties contained in section 251(b), dealing with interconnections. The second of these suits was *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*,⁹ a class action brought by customers of AT&T, which as a CLEC had worked out section 251 interconnection agreements with Bell Atlantic. During those negotiations, AT&T alleged specific statutory violations that resulted in a consent decree under which Bell Atlantic paid \$10,000,000 to AT&T and \$3,000,000 to the United States. The complaint urged that Bell Atlantic's dilatory tactics with AT&T resulted in economic loss to the class of AT&T customers. The third is *Covad Communications Co. v. BellSouth Corp.*¹⁰ Unlike *Goldwasser* and *Trinko*, *Covad* was brought by a single firm that was in fact a customer of BellSouth. Its complaint alleged an amalgam of Sherman Act and Telecom violations by which BellSouth was alleged to use its monopoly power to block Covad's entry into the high speed DSL (Digital Subscriber Line) market.

There are two different lines of attack that might be advanced in order to resist this complaint. The first of these applies to all of these cases indifferently and reaches the conclusion, as was done in *Goldwasser*, that the detailed statutory scheme under the 1996 Act was so comprehensive that it largely displaced the application of the antitrust laws in all three kinds of cases. The upshot was that the sole remedies for the allegedly wrongful conduct of the ILECs were the statutory and administrative remedies under the Telecommunications Act. The second way to attack the claims raised in *Goldwasser*¹¹ and *Trinko*,¹² but not *Covad*, involves the question of whether the individual plaintiffs have *standing* to maintain their antitrust claims, which in at least some cases turns on the further question of whether they are in *privity* with the defendants. In this short paper I wish to examine these procedural issues as they apply to telecommunications, with special reference to *Goldwasser* and *Trinko*. In order to see how these arguments play out in this particular context, it is necessary to give some brief overview of how both of these concepts do and should work in general.

II. THE GENERAL LAW OF STANDING AND PRIVACY

A. *Standing*

The idea of standing, as is now generally recognized, has both a constitutional and a pragmatic component.¹³ At the constitutional level it is said that individual plaintiffs are entitled

⁹ 305 F.3d 89 (2d Cir. 2002), *rev'g* 123 F. Supp.2d 738 (S.D.N.Y. 2000) (Bell Atlantic later merged with GTE Corporation to form Verizon Communications).

¹⁰ 299 F.3d 1272 (11th Cir. 2002).

¹¹ 222 F.3d at 398--399.

¹² 306 F.3d at 98--101.

¹³ For the general law, *see, e.g.*, *Allen v. Wright*, 468 U.S. 737 (1984) (noting that "generalized grievances" are not grounds for federal jurisdiction). For a more detailed examination of my argument here, see Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1 (2001); for a shorter

to bring actions in federal court only if they can show that they have "standing" to proceed. That standing requirement is not explicit in the United States Constitution, for the language of Article III, section 2 only states that the "judicial power shall extend to all cases in law and equity" that fall into the three familiar heads of diversity jurisdiction, federal question jurisdiction, and suits involving the United States as a party. The ostensible standing limitation is said to derive from the use of the word "case," a term that sensibly excludes advisory opinions which involves a suit with only one party, but which does not in my view cover any litigation where the plaintiff wishes to gain some legal advantage—money, injunctions, declarations, etc.—that the defendant wishes to restrict. The current law seems to require that the plaintiff therefore show some form of a pocketbook interest above and beyond that which is shared by the general population. In many cases, of course, that claim is routinely satisfied, but in an important class of cases where the plaintiff protests against some structural injustice—the appointment of a federal bishop in Washington D.C., the concealment of the activities of the CIA—a wrong which is suffered by all is said to be a wrong for which no individual is entitled to a remedy. In my view, these cases represent a partial repeal of the general principle of judicial review that has been a staple of our law since *Marbury v. Madison*¹⁴ insofar as it makes it impossible for the Courts to rectify government abuses of power.

In my view, the correct way to think of these cases is as suits in equity, by analogy to derivative action where one individual citizen, like one individual shareholder, is entitled to bring a suit to enjoin the conduct that is beyond the power of the United States. At this point, the only standing limitations that make sense are those that are internal to the basic logic of the rule. Just as nonshareholders are not in a position to bring derivative actions, so too noncitizens are not in a position to bring actions that challenge the distribution of power under the United States Constitution. In practice, of course, that limitation is of no consequence at all. It is difficult to think of any internal matter of governance for which shareholders or citizens would be indifferent, but which outsiders would be prepared to challenge.

From what has just been said, it might appear that I should be strongly sympathetic to the view that the class members in both *Goldwasser* and *Trinko* should have standing to bring claims under both the Sherman and the Telecommunications Act. But my argument so far only goes to the issue of whether there is federal jurisdiction over these cases. It bears no relationship to the question of whether the plaintiffs in these cases have standing in the second, or *prudential*, sense. To see how the prudential side of the standing doctrine works, it is best to disentangle these cases from the context of federal courts, and to think of them as lawsuits that are brought within a unitary legal system such as England, or within courts of general jurisdiction in the states. Both of these are cases in which the special language of Article III of the United States Constitution has no relevance at all, and yet they are cases where the doctrine of standing plays an enormously important role.

In order to see how that doctrine functions, it is necessary to understand both the uses and the limitations of the equitable standing doctrines that are invoked in both shareholder derivative suits and citizen suits. In both these cases, an individual shareholder and citizen is entitled to step up *precisely because* there is no single shareholder or citizen that has a distinctive interest that stands out from all the others. The amalgamation of the individual suits under the class action works so well because all shareholders and all citizens are in precisely the same position

version of the argument see, Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 Green Bag 2d 17 (2002).

¹⁴ 5 U.S. 137 (1803).

when it comes to enjoining acts that are beyond the powers of the officers (or directors) of the corporation, or the officers (or legislators) of the state.

Frequently, however, that assumption of parity is not true. Thus in the ordinary tort case, the obvious victim is the individual who suffers physical injuries as a result of the defendant's action. For these purposes, it does not matter whether the harm in question is the direct result of a trespass, or the indirect result of the creation of some dangerous condition. Indeed it hardly matters for these purposes whether the alleged harm is too remote to allow any recovery, or whether the cause of action fails on the merits for other substantive reasons: the want of proof of negligence or intention, the availability of affirmative defenses, such as assumption of risk or contributory negligence, or even a simple factual denial of some critical allegation in the basic complaint. No matter which of these eventualities comes to pass, the person who remains in the best position to press the complaint is the person whose nose has been bloodied or whose car has been totaled.

It would, however, be a grave mischaracterization of the factual record to assume that only the direct victim has suffered adverse consequences from the action in question. No man is an Island onto himself, and each therefore has a full range of familial, social and business connections with a wide range of individuals whose own opportunities are necessarily constrained by the plaintiff's personal injury or property. Thus it is impossible to develop any coherent theory of proximate causation that leads to the conclusion that the wife has not been hurt by the injury or death of her husband, even if she herself is unscratched by the actions that maimed or killed him. The same can be said about children as well; and so too distant relatives. Likewise, business associates may well have to scramble to fill the void brought about by the injury or death of one of their key employees. The relevance of these losses does not depend on the theory of causation brought to bear on the problem. The harms here are "direct" in the sense that there are no deliberate and willful actions of third parties, and no natural events that sever causal connection. The harms are eminently "foreseeable" in the sense that these causal chains are so commonplace that only the socially blind could ignore them. It therefore takes some *noncausal* explanation as to why the indirect victims of these harms are *not* allowed to maintain actions for their admitted losses.

The persuasive reasons behind these social judgments are not tied to the vagaries of federal jurisdiction but to the social objectives of any system of tort (or as will become clear, statutory) liability. The usual point of tort is not solely to supply compensation to injured parties, although that is surely an essential part of the mix. It is also to secure deterrence against future repetitions of the wrongful actions, and to accomplish both of these objectives at some administratively acceptable cost. At this point we must take note of the common features when these various harms are arrayed side by side. The greatest harm comes to the person who is injured or killed. The derivative harms strike a broader class and are smaller in extent and more easily mitigated. In some cases, as with the injuries to spouses, that conclusion could easily be contested, which is why the American system generally allows both husbands and wives actions for the loss of consortium.¹⁵ But the English system, where these actions were pioneered at common law, now bars suits by both husbands and wives.¹⁶ Only a small minority of states allow children to bring suits for loss of consortium, and none to my knowledge extend the action

¹⁵ See *e.g.* *Hittaffer v. Argonne Co. Inc.*, 183 F. 2d 811 (D.C.C. 1950).

¹⁶ Administration of Justice Act, 30 & 31 Eliz. 2 § 2 (1982) (Eng.) (abolishing all actions for loss of consortium).

to cover distant relatives, friends and the like.¹⁷ The clear judgment in these cases is one based not on theories of causation, but on the economic law of diminishing returns to further action. The one prime suit against the tortfeasor is relatively easy to administer and it promises substantial damage awards. The plethora of actions that might be brought by family and associates are more numerous in number, are for smaller amounts of damages, and vary in their intensity given the ability of these distant parties to mitigate the losses in question. In a world of zero-transaction costs we might be prepared to allow all these individuals to sue for their losses in the name of optimal deterrence. But even that judgment is highly contestable. The underlying system is such that the dislocations that produce losses to some individuals also produce inadvertent gains to others. Think of the man who is lucky enough to marry the widow; or the junior employee who gets the opportunity to shine because his boss is no longer able to do the job. These can never be taken into account, so that full compensation for all losses results in systematic overdeterrence. To avoid these difficulties, the standing doctrine cuts off the second and more removed circle of harms that is inefficient for any legal system to remedy. It thus produces a smaller class of tractable lawsuits that do better to minimize the sum of accident, deterrence, and administrative costs in running the tort system.¹⁸ It also necessarily leaves a bad taste in the mouth because it means that individuals that do suffer real harms at the hands of the defendant do not get any form of direct relief.

The need for the doctrine of standing has, paradoxically, expanded as the legal system seeks to remedy an ever-larger class of harms. One illustration will have to suffice to make the basic point here. Environmental harms result from the spillage of pollution. These will damage the unowned fish that swim in the waters, and through them the fisherman who troll those waters, the processors who package the fish and the restaurants and supermarkets that wish to sell them to consumers in either their cooked or uncooked fashion. None of these harms count as causally remote, yet the doctrine of standing is routinely invoked to limit the new environmental tort to the fishermen, on the ground that the widely dispersed individuals in these other groups can mitigate their losses by looking, for example, to multiple sources of supply.¹⁹

B. *Privity*

Closely associated with the doctrine of standing is the doctrine of privity.²⁰ Here the origin of the term comes from the notion of privity of contract, which means, roughly speaking, that the only persons who are allowed to obtain benefits or to sustain burdens under a contract are the parties to it. Like the standing doctrine of which it is a part, the privity doctrine is designed to cut short the circle of individuals who can sue in the event of an ordinary breach of contract. Thus, in the usual case if Able sells goods to Baker that he plans to use in a party, his guests are not allowed to bring suit against Able for nondelivery of the goods which leaves them eating cold pizza on a festive occasion. The thought here is, as a first approximation, exactly

¹⁷ See *Borer v. American Airlines, Inc.*, 563 P.2d 858 (Cal. 1977) (case against) and *Villareal v. Arizona*, 774 P.2d 213 (Ariz. 1989) (allowing children and parents to bring the action).

¹⁸ See generally, Guido Calabresi, *The Costs of Accidents* (1970).

¹⁹ See, e.g., *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975 (E.D. Va. 1981).

²⁰ For a general discussion, see Richard A. Epstein, *Modern Products Liability Law* 9--24 (1980).

what it is in the standing cases. The immediate action by the buyer of the goods imposes a strong incentive on the seller to perform. The creation of a broad class of actions for all individuals who depend on the performance of that contract adds an immense amount of complexity to the legal system while supplying relatively little by way of marginal deterrence in the operation of the system. The fear was expressed by Judge Cardozo in a wide range of cases in which he sought to limit the scope of voluntary undertakings. His fear was this:

"every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together."²¹

His most famous rendition of the basic point has an eerie application to the suits that are involved in these cases, given his fear, expressed in cases of accountant's liability but applicable here: that of exposing a defendant "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."²²

The question then arises whether the principle of privity of contract should admit any exceptions analogous to those that are invoked to allow actions for loss of consortium. Two exceptions are important here. The first of these arises with goods that A sells to B, only to be resold to C, who then uses or consumes them. The goods in question could be poisons or other dangerous substances, from which B suffers no harm as an intermediate conduit, but from which C suffers major harm. The earliest case in which C sought to recover (in tort, if it matters) from A was *Winterbottom v. Wright*,²³ where the defective repairs of a coach resulted in physical injury to its driver who was not in privity with the repairman. In his final peroration for denying the action, Chief Baron Alderson struck a chord that echoes today in *Trinko* if the word "antitrust" is substituted for "tort". "By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to being ripped open by this action of tort being brought against him."²⁴

The implicit economic logic behind *Winterbottom* is to view the sequential arrangements between the various parties as being governed by two contracts. On this view, if the driver has a grievance against his employer, he can maintain his suit for satisfaction. Thereafter the employer can seek indemnity from the repairman under his contract. In some cases, these two actions will each allow for the recovery of the full level of personal injuries. But sometimes this might not prove to be the optimal solution. The driver himself may have been to some extent at fault in his behavior; or the two parties could have agreed (as happened in nineteenth century England) to participate in some kind of a voluntary workers' compensation system that expanded the scope of coverage by eliminating the need to prove that the carriage was defective, while

²¹ See *H.R. Moch Co., Inc. v. Rensselaer Water Co.*, 159 N.E. 896, 898--899 (N.Y. 1928).

²² See *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

²³ 152 Eng. Rep. 402 (Ex. 1842).

²⁴ *Id.* at 405.

limiting the damages that could be recovered therefore. Likewise, on the upstream leg of the relationship, the original repairman could have insisted on a complete release in advance for damages caused by the coach, after allowing the employer to inspect the vehicle to his own satisfaction. In principle, these more precise adjustments of risk between the parties should outperform any legal injunction that mandates in all cases that the injured party receive full tort damages from the repairman regardless of what the network of contracts said. In this regard, privity of contract is closely allied with the principle of freedom of contract.

The privity doctrine has not, as everyone knows, held the line in product liability cases. One disadvantage of the rule is that it always requires two actions when sometimes a single action could set matters in order. Another is that the middleman may prove insolvent, thereby insulating the original seller from suit. The upshot was in cases like *Thomas v. Winchester*,²⁵ that in certain cases where defective substances, e.g. poisons, in their original condition caused harm to a third party, then that party could sue the original manufacturer, without having to first go through the intermediate party who might well be an innocent conduit with no knowledge of, nor control over, the risks in question.

Yet even here it is vital to understand the constraint that operates in this action. Allowing the injured plaintiff in this case implies that the middle party drops out, so that one plaintiff is substituted in for another for the same injuries, without any increase in the overall burden of liability associated with the sale. Yet this formulation then raises again the freedom of contract issue. If the defendant could procure a limitation or release from liability from someone with whom he is in privity, then the same limitation or release should be allowed against the remote user. Indeed, once those limitations and releases are allowed, then the privity requirement becomes a strictly second order issue. The original seller will not rely on the vagaries of the law to protect itself in dealings with remote parties. Rather, it will actively seek to place themselves in privity with the actual users of the product, so as to impose the needed contractual restrictions. These moreover should not be dismissed as abuses of the legal position: the downstream users have large control over product use, and in many instances will be better cost avoiders than upstream suppliers. In one sense therefore, as the recent shrink and clickwrap cases suggest, freedom of contract becomes *the* issue in cases of sale.²⁶ The ostensible exceptions to the privity limitation are thus testaments to the importance of freedom of contract in this area. And the critical decisions of the early 1960s, *Henningsen v. Bloomfield Motors, Inc.*²⁷, and *Greenman v. Yuba Power Products, Inc.*,²⁸ ushered in the modern product liability era precisely because they rejected all efforts by the manufacturer to get into privity with its ultimate users in order to limit the scope of liability by contract. And just that position is ratified in Restatement 3rd, section 18, which says baldly: "Disclaimers and limitations of remedies by product sellers or other distributors, waivers by product purchasers, and other similar contractual exculpations, oral or written, do not bar or reduce otherwise valid products liability claims against sellers or other distributors of new products for harm to persons." The issue of property damage is left open.

²⁵ 6 N.Y. 397 (1852).

²⁶ See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

²⁷ 161 A.2d 69 (N.J. 1960).

²⁸ 377 P.2d 897 (Cal. 1963).

The interaction between privity and freedom of contract took a very different course with respect to financial losses. Recall that the original formulation of privity makes it impossible for a third party to sue on a contract even when both parties to the agreement have in so many words authorized that suit. One reason for that rule paralleled the observation of Chief Baron Alderson in *Winterbottom*. It would be anomalous for a third person to bring suit after the two original parties to the contract decided to modify or rescind their original deal to their mutual satisfaction. But this turns out in this context to be an incomplete answer, for the original agreement could, if it so chose, condition the right of action by the third party on the renegotiation of the original agreement. Or in many cases, there might be good and sufficient reasons why the parties choose to waive this protection. In any event, the early cases of third party beneficiary liability all involve the collection of debts by third parties that were originally owing to the promisee.²⁹ The logic of these cases therefore follows the exact pattern of the early exceptions to the privity limitation. The creation of third party liability may *shift* the person to whom the promisor owes and obligation, but it does not *increase* the obligation so imposed. The great concern in all these cases is that the potential liability of the promisor (or product seller) must be funded out of the receipts of sale: that becomes a difficult task with an infinite expansion of the scope of liability, which is why consequential damages are routinely limited by contract. It is therefore no surprise that the common law refuses generally to recognize third party beneficiary actions to large classes of "incidental" beneficiaries, given the vast expansion of liability that it entails.³⁰ But again the problem boils down to questions of freedom of contract: in most standard complex agreements, explicit language is introduced to negate the possibility of any third party action in the event of contract breach. The privity limitation is imposed by contract to bring potential liabilities in line with potential receipts.

The few judicial efforts to go beyond this result have generally met with stiff resistance and ultimate reversal. At one point in time, there were some judicial stirrings that persons who suffered workplace accidents could bring a tort action against the insurer of the workers' compensation carrier for its negligent inspection of the premises.³¹ But these actions were shut down by statute.³² In another development, buyers of individual units sought to bring tort actions for defective construction against the lenders to the project builder.³³ But again these actions tended to wither away in the face of a general rule that economic damages are not subject to the basic product liability rules.³⁴

III. STANDING AND PRIVACY IN THE REGULATORY STATE

²⁹ See, e.g., *Lawrence v. Fox*, 20 N.Y. 268 (1859).

³⁰ Restatement (Second) of Contract, § 302.

³¹ See *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769 (Ill. 1964).

³² Ill. Rev. Stat 1969, ch. 48, ¶ 138.5(a).

³³ *Connor v. Great Western Savings & Loan Assn*, 447 P.2d 609 (Cal. 1968) (recovery barred under Calif. Civil Code. § 3434).

³⁴ See, e.g., *Case Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 1244 (Fla. 1993).

The principles of standing and privity carry over to the modern apparatus of the regulatory state, both generally and in connection with the antitrust laws. At this point we switch from a vaguely contractual to a highly regulatory regime, so that the implicit movement toward freedom of contract noted above, does not carry over. But even within this regulatory framework one point does remain true. The systems of direct regulation and private rights of action cannot get blood from a stone: the regulated parties are restricted in the revenues that they can collect. There must be parallel adjustments in the charges that can be imposed to keep the system in equilibrium. That point takes on added urgency because all telecommunications companies are sitting ducks for antitrust actions since they have a statutory monopoly that eliminates one obstacle facing plaintiffs in cases of this sort. In light of the context, the limitations on standing and privity should be reflected in the regulatory arena and, as a general matter they are. I shall first review the general modern law on standing and privity and then apply that analysis to the telecommunications context.

A. *General Law of Standing*

The leading general decision on the modern law of standing and privity is *Holmes v. Securities Investor Protection Corp.*,³⁵ which refused to allow a customer of a broker-dealer to sue the defendant for a fraud committed on that broker-dealer. The decision incorporated by common law analogies a standing requirement into RICO actions, even though the basic statutory provision did not use the term, but in so many words covered “any person injured in his business or property.”³⁶ The case made explicit reliance on the antitrust precedents under Section 15 of the Clayton Act.³⁷ In this case, as well as others, the standing requirement was unfortunately conflated with the rules of proximate causation, even though, as noted earlier, the standing requirement develops precisely because the rules of proximate causation are not restrictive enough with respect to indirect harms.³⁸ But the “policy justifications” behind the Supreme Court’s standing rules track perfectly the generalized arguments for the prudential standing requirement set out above. The first of these factors notes that as other events intervene it becomes ever more difficult to determine the extent of loss that is attributable to the actions of the defendant. Knocking out remote parties from liability has, of course, the same effect that the privity limitation does in products liability cases. It places the risk of loss on the parties who are in possession of the relevant goods or in control of the relevant situation. The second concern noted in *Holmes* related to the need to avoid complex rules for apportioning losses among the multiple parties who form links in the causal chain. The last of *Holmes*’s relevant considerations is that it is not necessary to allow remote victims to bring suit against particular defendants when those parties who are in privity with them, and thus subject to immediate injury, can supply the

³⁵ 503 U.S. 258 (1992).

³⁶ 18 U.S.C. § 1964(c). The section begins: “Any person injured in his business or property by reason of a violation of section 1362 of this chapter may sue therefore in any appropriate United States district court. . . .”

³⁷ *Holmes*, 503 U.S. at 267--268.

³⁸ See *Holmes*, 503 U.S. at 268--269. See also *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999) (paraphrasing, and which contains the subheading: “Proximate Cause as an Element of Standing Under RICO”).

needed deterrence by bringing actions in their own right. Suits brought by remote victims were unnecessary when the needed incentive effects could be supplied by the parties who were subject to immediate injury.

B. *Antitrust Standing*

Similar issues have been important under the general antitrust laws. The most obvious application of standing and privity rules in antitrust is the well-known doctrine of *Illinois Brick Co. v. Illinois*.³⁹ The general language of the Clayton Act is a virtual duplicate of that found in RICO. Section 15 of the Clayton Act reads:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefore in any district court of the United States

On its face that provision does not distinguish between direct and indirect victims of the defendant's wrong, for both types of parties are indeed "injured" if the only questions at hand are the tests of proximate cause discussed above. Nonetheless in *Illinois Brick*, the Supreme Court drew the distinction between direct and indirect purchasers that is found nowhere on the face of the statute, in parallel with the background principles of standing that have developed in tort and contract actions at common law. The upshot was that in a horizontal price fixing case, only the direct purchaser from the wrongful defendant has standing under the antitrust laws, to the exclusion of its own customers who have suffered from indirect harm. In many of these cases, of course, the immediate buyer will be able to pass some or all of its overcharges on to its purchasers, some of whom may well be able to pass these overcharges further down the line. In an ideal administrative world, each of these persons should be able to sue for the full extent of its loss. But under *Illinois Brick*, two complementary deviations are made from this implicit norm. The first permits the immediate buyer to recover for the full amount of the overcharge, with no set offs allowed for any money it recouped on resale to its buyers.⁴⁰ The second invokes the privity limitation to bar the remote purchaser from maintaining any action at all against the Sherman Act wrongdoer, even though he may have a remedy under contract against his immediate seller. These dual adjustments cancel each other out insofar as the price-fixer bears the full extent of the overcharge either way. But it preserves the deterrent effect while simplifying the administrative costs of running the legal process. It follows therefore the common law rules of standing to a "T" and makes adjustments in the measure of recovery in order to get closer to optimal deterrence.

C. *The Telecommunications Trinity*

The question then is how this interplay of these two provisions play out in connection with the actions brought in *Goldwasser*, *Trinko*, and *Covad*. For these purposes, we can quickly

³⁹ 431 U.S. 720 (1977).

⁴⁰ *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

put *Covad* to one side because it involves a direct action by Covad against BellSouth for wrongs that arise out of their relationship.⁴¹ For these purposes it is best to consider *Trinko* first because it involves a suit by the *actual* customers of a CLEC against the ILEC. Once that situation is understood, we can then turn to the second variation in *Goldwasser*, which involves a suit by *direct* customers of the ILEC who are *potential* customers of the CLEC.

1. Trinko

The key statutory provision of the Telecommunications Act is Section 206 which provides that any common carrier who commits a wrong “shall be liable to the person or persons injured thereby,”⁴² The analogous provision of Section 207 in turn provides that “[a]ny person claiming to be damaged by any common carrier” may bring suit.⁴³ The general phrases in both statutes parallel those found in the Clayton Act and RICO. Nonetheless Judge Katzmann refused to import any distinctive standing requirement into the section, reasoning as follows:

Bell Atlantic contends that the plaintiff cannot bring suit because its injury is wholly derivative of the injury suffered by AT&T. In the RICO context, it is well-established that a plaintiff must establish that the defendant's conduct was a proximate cause of its injury in order to have standing to bring a RICO action. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267-70, (1992); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir. 1999). We have noted that “to plead a direct injury is a key element for establishing proximate causation. ...” *Laborers Local*, 191 F.3d at 235. But we

⁴¹ Briefly, however, I should add that I think that the case is profoundly misguided in that the regulatory scheme alone should govern these disputes. It is quite inconceivable that an ILEC could bargain with a CLEC if any opposition within the administrative arena sets up an antitrust action. It is in cases like this that myth of a competitive telecommunications market upsets the proper judgment on the interaction between antitrust and regulatory rules. The antitrust rules should be sharply limited, as to cases where rival CLECs enter into combinations with each other.

⁴² The full section reads:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206.

⁴³ The full section reads:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

have not held that sections 206 and 207 of the Communications Act contain a requirement of proximate cause. We need not resolve the difficult issue of whether there is such a requirement, however, because on this record the plaintiff sufficiently alleges that it suffered a direct injury. In discussing the question of antitrust standing, the district court found that "the harm that these customers are alleging -- damages resulting from poorer service than they would otherwise have received had Bell Atlantic acted lawfully -- is wholly distinct from the harm suffered by the competitors." *Trinko*, 123 F. Supp. 2d at 741. The plaintiff alleges that it suffered a direct harm, poor phone service, as a result of the defendant's misconduct. While the district court may find otherwise after discovery and a motion for summary judgment, it is too early to conclude on this record that the plaintiff only suffered a wholly derivative injury.⁴⁴

This analysis misses the boat on all counts. Although the decision makes passing reference to the key decisions in *Holmes* and *Laborers Local 17*, it honors them in the breach and not in the observance. Those cases did not allow the plaintiff to escape the prudential standing requirement by the simple expedient of pleading that the harms in question were direct. It required a clear showing of that directness in light of the factors outlined in *Holmes*. In this case, the chain of causation implicit in the plaintiff's allegation was that Bell Atlantic had engaged in wrongful conduct toward AT&T, which compromised the quality of the service that was in turn received by the members of the *Trinko* class. The three relevant considerations introduced in *Holmes* thus block the action. Ignoring for the moment the class action elements in this case, it is clear that any degradation in telephone service that *Trinko* suffered could be attributable to a minimum of three separate parties: his own defective internal law office system, the mistakes that were made by AT&T, or the improper tactics of Bell Atlantic. It is unclear whether other parties were involved in the provision of that phone service, although such is surely likely given the interactive behavior of multiple parties who use the common network. Surely this counts as a case in which the injection of independent forces makes it difficult to ascertain the extent of the defendant's behavior. The issue is only compounded for the class action since each individual subscriber could make its own distinctive contribution to the harm: nor is it clear that the interaction between AT&T and Bell Atlantic is uniform across their entire business relationships. It goes without saying that the apportionment of causation required in this new regime will raise the fearsome complications that led the *Holmes* court to invoke the standing doctrine. And finally, AT&T, which in fact pursued its remedies against Bell Atlantic counts as exactly that sort of savvy intermediary who in asserting its own rights against Bell Atlantic will provide protection for its own customers. Nothing here prevents *Trinko* from suing AT&T if it so chooses, although in all likelihood it will be barred by contractual limitations against consequential damages. In the unlikely chance that such protection was not included, it is an open question whether AT&T should be able to defend itself in that action by alleging the deficient service of Bell Atlantic. But for these purposes, the decision on that point does not matter. If the defense is disallowed, then AT&T should be entitled to more substantial recovery against Bell Atlantic than would otherwise be the case.

Nor is it persuasive in this context to note that Sections 206 and 207 do not contain any explicit mention of the standing requirement. Such is true with respect to both the Clayton Act and RICO as well. Both of those statutes imported for good and sufficient reasons the common

⁴⁴ *Trinko*, 306 F.3d at 100.

standing requirement into their jurisprudence, and the same should be done here as well. Judge Katzmann noted in passing that no one could find any case of suits by indirect purchasers under the Communications Act before the passage of the 1996 Act, but he thought the matter was of little importance:

To support its argument for dismissal, the defendant points to the absence of published cases involving actions by indirect purchasers allegedly injured by railroad rates that were regulated by the now repealed Interstate Commerce Act ("ICA"). Because "sections 206 and 207 of the Communications Act were expressly modeled on the enforcement provisions of the ICA," this Court has "held that decisions construing the ICA are persuasive in establishing the meaning of the Communications Act. ..." *Conboy*, 241 F.3d at 250; see also *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, (1998); H.R. Rep. No. 73-1850, at 6 (1934).

Although we have found no indirect purchaser case brought under the ICA, the defendant does not point to any authority barring such a suit. In light of the unambiguous language of sections 206 and 207, the absence of such a case is insufficient to establish that such an action is not permitted.⁴⁵

The passage illustrates the enormous pitfalls to any large-scale program of statutory reform. The 1996 Act did not alter one word of either section 206 and 207, so that one should have thought the provisions had the same meaning before and after those reforms. But instead the "unambiguous meaning" of a section is allowed to triumph over the uniform interpretation of this provision and every analogous common law and statutory exemplar.

In this regard, moreover, it hardly matters that this case differs in small detail from *Illinois Brick* in that the consequential damages here were independent losses and not simply a pass through of some general overcharge. The claims for indirect losses by the health insurers of smokers in *Laborers Local 17*, did not involve any pass through losses either. Yet nothing there prevented the application of the general *Holmes* analysis, which should govern precisely because the case is outside the scope of *Illinois Brick*.

Trinko then is manifestly wrong in its treatment of the standing and privity issue. The analysis is far more difficult in dealing with the *potential* customers of the ILECs that preoccupied Judge Wood in her much more thoughtful analysis in *Goldwasser*, which proceeds as follows:

With these principles in mind, we turn to the question whether the Goldwasser plaintiffs had standing under the antitrust laws to bring their suit. We conclude that the answer is yes, no matter which branch of antitrust standing doctrine one considers. First, as we noted above, the plaintiffs were direct purchasers from Ameritech, and their complaint asserts that a variety of practices in which Ameritech has engaged and is engaging in have led prices for those services to be anticompetitively high, in violation of Section 2. As direct purchasers, they have no *Illinois Brick* problem. As people forced to pay an alleged monopolistic overcharge, they have described the kind of injury the antitrust laws are designed to redress, which is to say they have satisfied the

⁴⁵ *Id.* at 100.

"antitrust injury" requirement of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, (1977). They are consumers, not shareholders, or unions, or others whose injury is too remote to satisfy Clayton Act § 4; thus, they have standing. . . as the term is defined in *Associated General Contractors, [v. California State Council of Carpenters]*, 459 U.S. 519, 539-41 (1983) (general definition of "person injured" within the meaning of Clayton Act § 4, 15 U.S.C § 15).⁴⁶

I have no question that this decision is correct insofar as it contends that if the plaintiffs in *Goldwasser* are direct purchasers as that term is used in *Illinois Brick*. But if for that reason *Illinois Brick* does not apply, then Judge Wood should refer to *Holmes* to resolve the more generalized standing question. In order to see how *Holmes* plays out in the current context, it is critical to look at the substantive allegations raised against Ameritech, which in this passage were elided to refer to those activities "in which Ameritech has engaged and is engaging in have led prices for those services to be anticompetitively high, in violation of Section 2." But that version eliminates all reference to the competitors of Ameritech that Judge Wood noted were critical to the twenty basic allegations in Goldwasser's complaint. These followed the basic pattern claiming that Ameritech has not provided to its competitors certain services that it is obligated to do under the 1996 Telecommunications Act.⁴⁷ Two examples illustrate the basic theme:

(1) Ameritech is not providing the same quality of service to its competitors as it provides to itself, in violation of § 251.

(2) Again in violation of § 251, Ameritech has not given its competitors nondiscriminatory access to its operational support systems, nor has it given them access to unbundled elements of its system on terms equivalent to those Ameritech enjoys.⁴⁸

At this point it is critical to note that the chain of causation differs from that found in the ordinary case of price fixing overcharges to the immediate purchaser. Rather in the litany of charges raised in *Goldwasser*, the plaintiffs chief objection is that they have suffered as *potential* customers of some unidentified CLEC rival. Any charge that Ameritech simply used its statutory monopoly to charge too much money is defeated by the "filed rate" doctrine, which holds that rates approved by a regulator cannot be challenged under the antitrust law.⁴⁹ The reason that this doctrine does not apply here is because the complaint alleges multiple harms that Ameritech's illegal practices have done to its competitors, in consequence of which their telecommunications options were circumscribed.

At this point, the case bears scant resemblance to the kinds of proof that are needed to make out the claim of causation and direct loss under *Illinois Brick*. Indeed in this case it is not clear that the direct customers of Ameritech have suffered at all from any of the alleged

⁴⁶ *Id.*

⁴⁷ *Goldwasser* at 394--95.

⁴⁸ *Id.* at 394.

⁴⁹ *Id.* at 402. The filed rate doctrine "bars courts from re-examining the reasonableness of rates that have been filed with regulatory commissions."

misconduct toward rival suppliers. To be sure, if each and every member of the class would have switched away from Ameritech if it had behaved properly towards ILECs, as the plaintiffs see it toward the nameless competitors, then one could posit a loss to them. That loss is not simply a result of the passing down of the overcharge to a direct customer, which was the situation in *Illinois Brick*. But by the same token, a competitive telephone market allows more than one firm to keep market share. Some unknown subgroup of Ameritech's customers would in all likelihood have decided to stay with Ameritech, in which case they could well have benefited from any effort that Ameritech might have made to overload the costs of running the network on its incipient competitors. At this point, the ostensible unity of this class of plaintiffs breaks down. It therefore becomes apparent that the proper party to press claims against Ameritech for its alleged misconduct is some unnamed CLEC who is the direct victim of these specified wrongs. Its losses, if any, need not be reduced by any recoupment that it might receive from its customer base, present, or future.

At this point, it becomes critical to stress yet again that the standing requirement, rightly understood, is *not* a part of any general test of proximate causation. Rather it is designed to make sure that the single defendant who is in the best position to press claims occupies the field to the exclusion of others. The direct relationship between Ameritech and its customers is not the source of this grievance. Their actions are multiple and disparate. What matters is how Ameritech treated its CLECs. A single cause of action based on contract, breach of regulatory duty, and, perhaps, even the antitrust laws, displaces the massive proliferation involved in this case. The point here is important because if the general standing requirements of *Holmes* apply, then Ameritech's own customers would not be the right plaintiffs even if the Telecommunications Act of 1996 were repealed tomorrow. So long as the harm to these customers comes through the actions that Ameritech engaged in relationship to its prospective competitors, then it has standing and the customer base does not.

Judge Wood also insists that the plaintiffs are not blocked from suit by the doctrine of *ius tertii*. Again her words are worth quoting in full:

Finally, we think Ameritech is wrong to claim that the plaintiffs lack standing because they are attempting to raise third-party rights--the rights of the competitors. It is true that the reason the plaintiffs have been injured (allegedly, of course) implicates the rights of the competitors not to be excluded from the local markets through anticompetitive actions of Ameritech, but that does not make this a *jus tertii* case. These plaintiffs want lower prices and more choice, and they claim that Ameritech (a monopolist) is doing things to prevent that from happening. Their theory is a classic exclusionary acts theory, and in all such cases, the monopolist's alleged sin is the exclusion of other competitors from the market. One assumes that those other competitors are grateful for the help from the consumer litigation, but that is incidental. The Goldwasser plaintiffs do not care in principle which competitors enter their markets; they just want a competitively structured local telephone market that will prevent Ameritech from inflicting antitrust injury on them. We are satisfied that they are asserting their own rights, and thus that they have standing.⁵⁰

⁵⁰ *Id.* at 398--399.

This argument is correct in my view insofar as it holds that the doctrine of *ius tertii* is not part of this case. But the objection to the plaintiff's standing does not rest on that ground. Rather, the argument is that the plaintiff does not have standing under the general rules of the subject even if the injuries to it *are* distinctive from those of the CLECs. In the generalized discussion of standing above, claims for loss of business profits through the death or injury of a key employee are not efforts to recover a second time the losses that were sustained to the employee. They were efforts to vindicate the separate *relational* interest that the plaintiffs had on their own account. The standing requirement snuffed these actions out because of the importance of channeling legal activity into the individual or small group of individuals who could vindicate the policies of the law at the lowest administrative cost. No one doubts that some customers may have been hurt (just as some may have been helped) by Ameritech's policies. But the overall analysis remains the same. What is critical is *not* the direct relationship that the plaintiffs have with Ameritech. Rather what matters is the causal path set out in the complaint which runs straight through third parties who themselves have direct rights of action Ameritech.

IV. CONCLUSION

The doctrines of standing and privity have a long and rich history as part of the common law and as part of multiple statutory schemes. These background understandings were always part of the antitrust and telecommunications law before the adoption of the 1996 Act and they remain part of that understanding afterwards. The key to understanding the Act begins with a fundamental appreciation of its basic mode of operation. The statute did not usher in the age of competitive markets in telecommunications. It substituted one scheme of regulation for another. That system is one that tightly limits the charges that incumbents can make for various kinds of interconnection, and subjects them to a variety of administrative limitations that curb their ability to garner in monopoly profits while exposing them to serious risks of confiscation through regulation. The potential liabilities that are imposed on the ILECs for the discharge of their duties must come from their future revenue streams if they are to remain in business. That simple truth has long led courts and legislatures in a wide range of contexts to limit both the number of potential plaintiffs and the damages that they can recover. The first of these objectives is achieved by a combination of standing and privity rules that are designed to identify a *subclass* of harmed individuals who are entitled to maintain legal actions against the ILECs for breach of their statutory duty. Yet somehow in the confused interaction between the Sherman Act and the 1996 Communications Act that fundamental constraint has disappeared from view. The old fear of Judge Cardozo was that no industry could survive the prospect of indeterminate liability to an indeterminate class. That lesson seems to have been lost today.